STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2054

In the Matter of the Welfare of the Child of: K.A.T., Parent.

Filed June 17, 2013
Affirmed
Hudson, Judge

St. Louis County District Court
File No. 69DU-JV-12-84

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Clarissa L.C. McDonald, Assistant County Attorney, Duluth, Minnesota (for respondent county)

Terri Port Wright, Cloquet, Minnesota (for appellant mother)

Thomas Nolan, Minneapolis, Minnesota (for guardian ad litem Charlene Matheson)

Doug Osell, Duluth, Minnesota (guardian ad litem)

Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Willis, Judge.*

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from the termination of her parental rights, appellant-mother argues that the district court abused its discretion by concluding that the county demonstrated by

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

clear and convincing evidence that reasonable efforts were used to reunify appellant with her son because the county failed to adequately consider the recommendations of appellant's guardian ad litem and the extent of appellant's mental illness, and because the district court erred by admitting testimony and evidence into the record without appellant present at trial and without giving appellant's guardian ad litem an opportunity to testify or present evidence. We affirm.

FACTS

K.A.T. is the biological mother of J.T.T., who was born on April 14, 2008. Despite two attempts by St. Louis County to identify J.T.T.'s father, no father has been identified.

On June 12, 2011, J.T.T. was placed in emergency protective custody following a report by a motorist that K.A.T. was observed dangling J.T.T. over the edge of a bridge. The motorist was driving across the Blatnik Bridge, traveling from Duluth to Superior, when he observed a woman dangling a baby over the side of the bridge. The woman, later identified as K.A.T., had parked her vehicle in the middle of the bridge with the turn signal on. The bridge had only a slight shoulder, and the vehicle was occupying the right lane of traffic. The motorist called 911, and police responded to the scene. K.A.T. denied dangling J.T.T. over the bridge and told the police that "her son wanted to see the moon." K.A.T. agreed to be transported to the Miller Dwan Medical Center in Duluth for evaluation. While en route, K.A.T. began banging her head against the divider in the back of the squad car and had to be restrained. At the hospital, K.A.T. began kicking, punching, spitting at, and biting hospital personnel, and had to be physically restrained

and sedated. Her voice changed from "very quiet, soft-spoken" to "a guttural voice." She shouted curse words, "her eyes were bulging out," and she bit her tongue until it bled. J.T.T. was taken to the police station and placed in protective custody.

On June 16, 2011, St. Louis County filed a petition alleging that J.T.T. was a child in need of protection or services (CHIPS) and that he should be placed in emergency protective care. The court ordered J.T.T. to remain in the temporary legal custody of the county. On July 18, 2011, K.A.T. entered a limited admission to the CHIPS petition, resulting in a CHIPS adjudication. K.A.T. was ordered to comply with a reunification plan, which included, among other things, undergoing a psychological evaluation, undergoing a parenting assessment, attending supervised visits with J.T.T., demonstrating the ability to provide age-appropriate care for J.T.T., and maintaining safe and suitable housing.

K.A.T. complied with some elements of the reunification plan, but not others. K.A.T. submitted to a psychological evaluation, which was performed by Dr. Carolyn Phelps on August 18, 2011. The evaluation revealed that K.A.T. had been previously hospitalized eight times for psychiatric illnesses and that she has a "history of noncompliance with outpatient treatment, noncompliance with psychotropic medications, premature termination of services and failure to make adequate use of services." Dr. Phelps diagnosed K.A.T. with "Bipolar I Disorder" and "Personality Disorder, Not Otherwise Specified with Schizotypal Traits." Dr. Phelps observed that K.A.T. has "a well-established history of a serious and persistent mental illness, which has required many psychiatric hospitalizations, including commitment in 2006." She opined that

"[K.A.T.'s] infantilizing and overpathologizing of [J.T.T.] also have been highlighted concerns . . . to the degree that it would interfere with [J.J.T.]'s development." During the evaluation, K.A.T. admitted that she suffers from auditory hallucinations. In summary, Dr. Phelps stated:

> Historically, [K.A.T.'s] illness has included rapid, unpredictable decompensation even while purportedly compliant with treatment aimed towards limiting such. [K.A.T.'s] illness is accompanied by limited insight and an imperviousness to feedback. In fact, with respect to the latter, feedback has tended to result in emotional and behavioral dysregulation. As such, these collective factors suggest that returning [J.T.T.] to [K.A.T.'s] care would create a potential risk for [J.T.T.]. This risk is unquantifiable . . . . While treatment of [K.A.T.'s] mental illness could restore competency to stand trial, it appears unlikely to be able to restore a level of stability to insure her provision of safe, adequate and appropriate care to [J.T.T.].

J.T.T. was also evaluated by a psychologist, Dr. Jessica Schilling. Dr. Schilling diagnosed J.T.T. with "anxiety disorder not otherwise specified," and opined that his anxiety was caused by K.A.T.'s infantilizing of J.T.T. and downplaying his developmental progress. Specifically, Dr. Schilling noted that K.A.T. instructed J.T.T.'s daycare provider that he was physically unable to use playground equipment, that he needed speech therapy, and that he had food allergies that restricted his diet. But Dr. Schilling observed that J.T.T.'s speech was normal for his age. Moreover, J.T.T.'s daycare provider, Ann Ulvestad, testified at trial that, while J.T.T. was in K.A.T.'s care, he was only allowed to eat "crackers and cheese and water," and that he was afraid to play with the other children and would "sit on the bench and be rocked by a teacher . . . [a]nd he was always crying." Once J.T.T. was placed in foster care, Ulvestad observed

that he was a "[t]otally different kid." He began playing on the playground with the other children, he ate the food the other children ate, he began speaking more and laughing, and he became toilet trained.

K.A.T.'s social worker, Kathy Bergum, testified at trial regarding K.A.T.'s two other children from a prior marriage. Based on medical records and court records regarding those children, Bergum testified that K.A.T. violated a court order requiring her two minor children to remain in the care of their father and absconded with them for a period of 19 months. Although the children were generally healthy while in their father's care, after spending 19 months with K.A.T., the children were described as socially and developmentally delayed. According to Bergum, "[t]he children needed special education assessments, special therapies, and one of the children needed some corrective surgery for a problem with his legs" because the children were not engaging in normal walking and playing activities. The children also needed extensive dental surgeries because their teeth had not been properly cared for. Regarding J.T.T., Bergum testified, consistent with Dr. Schilling's assessment, that K.A.T. believed J.T.T. had a "number of developmental delays and described him as autistic and medically fragile" and that he could not "ambulate very well and he needed to be assisted on stairs." But Bergum observed that J.T.T. had none of these characteristics, that he was "very engaging," that he "spoke rather well," and that he was capable of running up and down stairs on his own. Bergum further testified that K.A.T.'s infantilizing of J.T.T. was a danger to J.T.T.'s normal development.

Although K.A.T. complied with the court's order to submit to a psychological evaluation, a parenting assessment, and to take her medications as prescribed, she refused county services and exhibited dangerous and threatening behaviors during the pendency of the CHIPS case. K.A.T. refused adult mental-health services and Intensive Family Based Services (IFBS) designed to provide parenting assistance. K.A.T. also did not comply with the terms of her supervised visits. Regarding these visits, Bergum testified that "she was argumentative at some visits, agitated at others, inattentive to [J.T.T.] at some, overly protective of him. She acted out in ways that visits actually had to be suspended . . . ." During her supervised visits with J.T.T., K.A.T. threw a container of Jello at an adult who was holding J.T.T., behaved "wildly," became "physically aggressive," resisted J.T.T.'s toilet training, and "gave [J.T.T.] a Pepto Bismol because [K.A.T.] said she, herself, had a stomachache so he must have one, too, since [J.T.T. and K.A.T. are] on the same wavelength." K.A.T. also threatened to have one of her case workers murdered and to take J.T.T. and flee with him, and that if J.T.T. was not returned to her, she would commit suicide.

A new social worker, Kathy Peterson, took over K.A.T.'s case in August 2011. Peterson later testified that, about nine months into the CHIPS case, K.A.T. began accepting adult mental-health treatment. Peterson also stated that she met with K.A.T. at least four times to discuss the reunification plan. She further testified that after 15 months, the county still believed it was unsafe to leave J.T.T. alone with K.A.T. and that she was still only permitted weekly supervised visits. Peterson also observed that K.A.T. continued to engage in dangerous behaviors. Two weeks before trial, K.A.T. was

observed driving in excess of 50 miles per hour down the wrong side of the road and was subsequently taken to a mental-health facility by the state patrol. Peterson testified that K.A.T. was offered all of the services that the county provided and that, in her opinion, termination of K.A.T.'s parental rights is in the best interests of the child.

At trial on September 13, 2012, the county presented numerous witnesses and exhibits. K.A.T. was present and represented by counsel. Also present were K.A.T's guardian ad litem, her attorney, and J.T.T.'s guardian ad litem. K.A.T.'s attorney gave an opening statement in which he indicated that K.A.T. would testify; however, subsequent events at trial resulted in K.A.T.'s removal from the proceedings. K.A.T.'s guardian ad litem, Doug Osell, did not testify, but stated on the record that he was comfortable going through with the trial and that "[K.A.T.] understands her rights and [her attorney] did explain all the ramifications of a finding of terminating her rights."

During the course of the trial, K.A.T. disrupted the proceedings numerous times. In the final incident, K.A.T. stood up, began shouting profanities, and kicked over the counsel table, destroying a microphone and a water pitcher and spilling water all over J.T.T.'s guardian ad litem and her attorney. She was tackled to the ground by three deputies and removed to a holding area. She was subsequently placed on a 72-hour psychiatric hold and was voluntarily committed on September 28, 2012. K.A.T. was medication compliant at the time of this outburst. K.A.T.'s attorney agreed with the court's characterization of the events and opposed a continuance, stating that his main concern was for the wellbeing of his client. Her attorney called no other witnesses and introduced no additional exhibits.

The district court issued its order terminating K.A.T.'s parental rights on October 5, 2012. The district court concluded that, under Minn. Stat. § 260C.301, subd. 1 (2012), K.A.T. failed to comply with the duties of the parent-child relationship; K.A.T. is palpably unfit as a parent; reasonable efforts failed to correct the conditions leading to out-of-home placement; no father was identified; and J.T.T. was neglected and remained in foster care. Furthermore, the district court concluded that the county proved by clear and convincing evidence that reasonable efforts were made to reunify K.A.T. with her child and that there is clear and convincing evidence that termination of K.A.T's parental rights is in the best interests of the child.

K.A.T. appealed the termination of her parental rights on November 8, 2012. Because the appeal was not timely filed, K.A.T. also moved for an extension of time to file the appeal. This court denied her request for an extension, and the supreme court granted review and remanded the case to this court, concluding that the interests of justice required review of her case. This appeal follows.

D E C I S I O N

Parental rights may be terminated only for "grave and weighty reasons." *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). Courts presume that a natural parent is a fit and suitable person to be entrusted with the care of the parent's child and that it is usually in the best interests of the child to be in the custody of a natural parent. *In re Welfare of Clausen*, 289 N.W.2d 153, 156 (Minn. 1980). This court reviews a district court's decision to terminate parental rights to determine whether the district court's findings address the statutory criteria and are supported by substantial evidence,

and whether its conclusions are clearly erroneous. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996).

A district court may not order the termination of parental rights unless it is proved by clear and convincing evidence that at least one statutory ground for termination exists. *In re Children of T.R.*, 750 N.W.2d 656, 661 (Minn. 2008). The court must make its decision based on evidence concerning the "conditions that exist at the time of termination and it must appear that the conditions giving rise to the termination will continue for a prolonged, indeterminate period." *In re Welfare of P.R.L.*, 622 N.W.2d 538, 543 (Minn. 2001). We "closely inquire[] into the sufficiency of the evidence to determine whether the evidence is clear and convincing." *In re Welfare of S.Z.*, 547 N.W.2d 886, 893 (Minn. 1996).

K.A.T. argues that the district court clearly erred by finding that the county made reasonable efforts at reuniting her with her son. If statutory grounds exist for termination of parental rights and termination is in a child's best interests, the county still must show by clear and convincing evidence that it made reasonable efforts to reunite the family. *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005) (citation omitted); *see also* Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(1); Minn. Stat. § 260.012(h) (2012). In determining whether reasonable efforts at reunification were made, the district court "shall consider whether services to the child and family were: (1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances." Minn. Stat. § 260.012(h). Moreover, a district

court "shall make specific findings . . . that reasonable efforts to finalize the permanency plan to reunify the child and the parent were made including individualized and explicit findings regarding the nature and extent of efforts made by the social services agency to rehabilitate the parent and reunite the family . . . ." Minn. Stat. § 260C.301, subd. 8(1) (2012). "Reasonable efforts at rehabilitation are services that go beyond mere matters of form so as to include real, genuine assistance." *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Mar. 28, 2007). "The quality and quantity of efforts to rehabilitate and reunify the family impact the reasonableness of those efforts." *Id.* (citation omitted).

K.A.T. argues that the county did not use reasonable efforts because the reunification plan was "not tailored" to her case. Specifically, she argues that the county failed to incorporate the recommendations of her guardian ad litem, citing as evidence the fact that the guardian did not testify or present evidence at trial. But K.A.T. cites no legal authority for the argument that her guardian was required to present testimony or evidence at trial or that a county's failure to consider a guardian's recommendations renders its efforts unreasonable. *Cf.* Minn. R. Gen. Pract. 905.02 (listing the obligations of a guardian ad litem in representing a parent); Minn. Stat. § 260.012(h) (listing statutory factors for determining whether the county's efforts were reasonable). Moreover, the record shows that, during the pendency of this matter, K.A.T.'s guardian presented several reports to the court, including one dated February 24, 2012, one dated April 17, 2012, and one dated May 15, 2012. In each report, the guardian recommended that K.A.T. follow the county's reunification plan. Her guardian was also present at trial

and stated his belief that K.A.T. was prepared to proceed through trial. In addition, nothing in the record suggests that the guardian requested to participate in the proceedings or that the district court refused to allow the guardian to be heard.

K.A.T. also argues that the reunification plan was not sufficiently tailored to her case because it did not take into account her serious mental-health problems. Specifically, K.A.T. asserts that the district court never ordered her to receive adult mental-health therapy and that the failure to do so shows the county's efforts were unreasonable. But K.A.T. was ordered to "undergo a psychological evaluation and follow all recommendations." The evaluation recommended that K.A.T. "work cooperatively with her psychiatric care providers." And, according to K.A.T.'s social worker, she was receiving individual therapy and psychiatric care, and the county supported K.A.T.'s continuation of these services. The county also repeatedly offered K.A.T. additional adult mental-health services, which she initially refused, but ultimately did accept about nine months into the case. Despite receiving individual therapy, psychiatric services, and remaining medication compliant, K.A.T. had a serious mental health episode two weeks before trial and a severe breakdown at trial, which resulted in her removal from the courtroom and her voluntary civil commitment. We observe that K.A.T.'s behavior is consistent with the opinion of Dr. Phelps, who stated in her evaluation that:

> Historically, participation in individual psychotherapy has not been helpful in improving [K.A.T.'s] insight regarding the effect her mental illness has on her functioning, or altering her behavior in a sustainable fashion. Mandating treatment to

> a person who exhibits [K.A.T.'s] level of resistance to feedback is unlikely to result in the desire[d] outcome.

We conclude that the county made all reasonable efforts. As the district court found, those efforts included

> significant and extensive psychological, developmental, and diagnostic evaluations and testing of both [K.A.T.] and the child, special education evaluation and services for the child, parenting assessments, parenting education, Intensive Family Based Services (IFBS), First Year Program, ongoing individual therapy, adult mental health case management services, dialectical behavioral therapy (DBT), supervised visitations with case management services, medication management, ongoing child protection case management, foster care placement and extensive mental health services.

We agree with the district court that further efforts under these circumstances would be futile. "'[R]easonable efforts,' by definition, does not include efforts that would be futile." *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 56 (Minn. 2004) (quotation omitted). Because the county provided K.A.T. with extensive services, including individual mental-health services, and received input from her guardian ad litem, the district court did not clearly err when it found that the county made reasonable efforts at reunifying K.A.T. with her son.

K.A.T. also argues that the district court erred by concluding that termination of her parental rights was warranted when the court did not take testimony from her guardian ad litem, her attorney did not cross-examine some witnesses or present additional evidence, and the court removed her from the courtroom during the trial. Respondent asserts that these arguments are not properly before this court on appeal because K.A.T. did not raise an objection to the district court. The failure to make a

proper objection or file a post-trial motion generally precludes review of that issue on appeal. *See* Minn. R. Civ. App. P. 103.04; Minn. R. Evid. 103(a)(1). This court generally declines to consider issues not raised before the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But we may consider "any other matter as the interest of justice may require." Minn. R. Civ. App. P. 103.04.

As previously explained, K.A.T. has cited no authority for the argument that the court was required to take testimony from her guardian. Moreover, the record indicates that her guardian participated in the case through his written reports and was present at trial. Therefore, the district court did not err by not taking testimony from K.A.T.'s guardian at trial.

K.A.T. also asserts that her attorney "asked no questions and called no witnesses" after she was removed from the courtroom, and therefore there was insufficient information from which the court could have concluded that termination of her parental rights was warranted. Assuming that K.A.T. is making an ineffective-assistance-of-counsel argument, she must show that "trial counsel was not reasonably effective and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See In re Welfare of L.B.*, 404 N.W.2d 341, 345 (Minn. App. 1987) (stating this standard in a juvenile delinquency proceeding) (quotation omitted); *see also Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) ("Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts."). In fact, K.A.T.'s attorney cross-examined six of the nine witnesses. Her attorney also gave an opening statement in which he suggested that he

would be calling K.A.T. as a witness, but K.A.T.'s outburst necessitated her removal from the proceedings. K.A.T.'s attorney gave a written closing statement in which he argued that the incident on the Blatnik Bridge was mischaracterized, that K.A.T. complied with the terms of her reunification plan, that she engaged in therapy and remained medication compliant, that she has safe and stable housing, and that she has participated in visits with her son. We conclude that K.A.T.'s attorney behaved professionally and that any errors on his part were not sufficient to require a new trial, given the overwhelming evidence in support of terminating K.A.T.'s parental rights.

Finally, K.A.T. requests a new trial so that she can be present at all stages of the proceedings. As a party to the proceeding, K.A.T. had a right to be present at trial. Minn. R. Juv. Prot. P. 27.02. But a party who "engages in conduct that disrupts the court" may be excluded from the proceeding. Minn. R. Juv. Prot. P. 27.04. Such exclusion must be "noted on the record and the reason for the exclusion given." *Id.* "The exclusion of any party or participant shall not prevent the court from proceeding with the hearing or issuing a decision." *Id.* In this case, the district court stated on the record the reason for removing K.A.T. from the proceeding—that she flew into a rage, was shouting obscenities and kicked over counsel table, and that she voluntarily absented herself from the proceedings thereby. K.A.T.'s attorney and guardian ad litem were present throughout the entire trial, and her attorney argued against ordering a continuance following K.A.T.'s removal. K.A.T. cites no legal authority for the argument that she was nevertheless entitled to be present for the entirety of the trial. For these reasons, we

conclude that the district court did not err by proceeding with the trial in K.A.T.'s absence.

Affirmed.