STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0018

In the Matter of the Welfare of the Child of: M. B. B., Parent.

Filed June 9, 2014
Affirmed
Huspeni, Judge[*]

Nicollet County District Court
File No. 52-JV-13-105

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Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Huspeni, Judge.

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

HUSPENI, Judge

Appellant-mother challenges the district court's order terminating her parental rights under Minnesota Statute section 260C.301, subdivisions 1(b)(4), (5) (2012). Because we conclude that clear and convincing evidence supports both statutory bases, we affirm.

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

FACTS

Appellant M.B.B. is the mother of three children. In 2008, parental rights to her first child, M.D.C.B, were involuntarily terminated in Oklahoma after M.D.C.B. tested positive for cocaine at birth. Mother gave birth to a second child, M.S.B, in April 2010. M.S.B. tested positive for cocaine at birth. Mother testified that she used cocaine throughout that pregnancy, and that she later voluntarily terminated her parental rights to M.S.B.

On March 9, 2012, mother gave birth to M.K.B in Mankato, Minnesota.[1] On March 28, 2012, a child-protection investigator met with mother and initiated a child-protection assessment due to a report that M.K.B.'s meconium[2] tested positive for cocaine. Mother admitted to using cocaine when she was five months pregnant with M.K.B. and also admitted to consuming alcohol during that pregnancy. When asked by an investigator to provide a urine sample, mother said she was unable to do so. M.K.B. was removed from mother's custody the same day because of concerns that mother might have been under the influence of cocaine.

Based on the positive cocaine test of M.K.B., on March 29, 2012, respondent Nicollet County Social Services (county) filed a child in need of protection or services (CHIPS) petition and motion for ex parte emergency protective care of M.K.B. On

[1] M.K.B.'s father is unknown, and the evidence does not suggest that any male has acquired parental rights. The district court ordered termination of any inchoate parental rights under Minnesota Statute section 260C.301, subdivision 1(b)(7) (2012).

[2] Meconium is the earliest stool of an infant and is composed of material ingested by the infant in utero.

April 6, April 13, and April 23, 2012, the county conducted urinalyses to monitor mother's sobriety. She tested positive for a metabolite of alcohol on all three occasions.

On May 8, 2012, mother responded to the CHIPS petition by admitting that M.K.B. was in need of protection or services. Mother also acknowledged that she was chemically dependent and that this dependency interfered with her ability to parent M.K.B. Mother subsequently entered an outpatient chemical dependency treatment program at New Beginnings. As part of the program, she completed a chemical dependency assessment and was diagnosed with cocaine and alcohol dependency. Under the program's treatment plan, she was to abstain from all mood-altering chemicals. Her counselor testified that she did very well in the program. As a result of mother's progress in the treatment program, M.K.B. returned to her custody on a trial-visit status in June 2012. On July 31, 2012, custody was returned to mother subject to the protective supervision of the county.

On August 1, 2012, mother violated her child protective services plan (case plan) by consuming alcohol. On August 1, police officers arrived at mother's residence after receiving an emergency call. Upon arrival, the officers observed that mother was "very intoxicated," unclothed, and that she almost dropped M.K.B. because of her intoxication. At this time, mother was able to retain custody of M.K.B. because of her acknowledgment of her mistake and her continued participation in treatment.

At the October 23, 2012 review hearing, the district court found that "[o]verall, Mother is doing well" but that if mother "had another relapse, [the county] would look at removing [M.K.B.] from Mother's care." The case plan required mother to "maintain

total abstinence from all mood-altering chemicals" and to "demonstrate that she is not using illegal drugs and alcohol."

On November 15, 2012, mother violated the terms of the case plan when she was arrested for driving while impaired (DWI) with an alcohol concentration of 0.19. She was later convicted of a DWI. After this relapse, mother began inpatient treatment for chemical dependency at Wellcome Manor, a treatment program that arranges for children to reside with their mothers while the mothers receive treatment. The county did not remove M.K.B. from mother's care at this time because of her admission into Wellcome Manor.

At the next review hearing, on January 15, 2013, a new case plan was adopted that required mother to "successfully complete her in-patient chemical dependency treatment program and follow all discharge recommendations," including individual therapy and "cooperate with random urinalysis testing." Mother was discharged from the Wellcome Manor program on February 1, 2013.

Review hearings were conducted on February 26, 2013 and May 21, 2013. Case plans were adopted at each hearing, and each plan required mother to remain law abiding and to demonstrate that she is not using illegal drugs or alcohol. During this time, mother was participating in a continuing care treatment program at New Beginnings that focused on relapse prevention. Mother did well in the program and was successfully discharged on April 15, 2013.

On June 9, 2013, mother was arrested and charged with third-degree DWI and fifth-degree assault after she backed into another car and punched the car's owner. As a

result of this incident, M.K.B. was placed into permanent foster care on June 13, 2013. The county filed a petition to terminate mother's parental rights on June 28, 2013. The district court terminated mother's parental rights to M.K.B. on December 17, 2013, relying on two statutory provisions. In its termination order, the district court noted:

> The evidence also establishes that efforts to "correct" the conditions causing placement of [M.K.B.] have not been successful. Given her multiple relapses, and the nature of those relapses, it is apparent that Mother remains actively chemically dependent. The only difference is that Mother has switched her chemical of choice from cocaine to alcohol. The Court cannot think of a service that has not already been attempted to address Mother's chemical use.

The district court concluded in its detailed findings that "it is not fair to [M.K.B.] to require that his stability and permanency be put on hold any longer, while Mother continues to attempt to deal with her chemical dependency issues." Thus, it found that a weighing of competing factors and the child's best interests supported termination of mother's parental rights.

D E C I S I O N

In termination of parental rights proceedings, the best interests of the child are the paramount consideration, and conflicts between the rights of the child and rights of a parent are resolved in favor of the child. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 902 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). "Parental rights are terminated only for grave and weighty reasons." *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). We review for an abuse of discretion whether a particular

statutory basis for involuntarily terminating parental rights is present. *In re Welfare of Children or J.R.B.*, 805 N.W.2d at 901.

On appeal, we examine the record to determine whether the district court applied the appropriate statutory criteria and made findings that are not clearly erroneous. *In re Welfare of D.L.R.D.*, 656 N.W.2d 247, 249 (Minn. App. 2003). "A finding is clearly erroneous if it is either manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660-61 (Minn. 2008). We give the district court's decision considerable deference, but "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008).

I.

Mother first argues that she successfully rebutted the statutory presumption of palpable unfitness. A party is palpably unfit to be a part of the parent-child relationship unless the parent is able to "care appropriately for the ongoing physical, mental, [and] emotional needs of the child" in the "reasonably foreseeable future." Minn. Stat. § 260C.301, subd. 1(b)(4). There is a presumption that a parent "is palpably unfit to be a party to the parent and child relationship upon a showing that the parent's parental rights to one or more other children were involuntarily terminated . . . [under] a similar law of another jurisdiction." *Id.* If the presumption is triggered, "the parent has the burden of rebutting the presumption of palpable unfitness." *In re Welfare of Child of J.L.L.*, 801 N.W.2d 405, 412 (Minn. App. 2011), *review denied* (Minn. July 28, 2011).

Because mother's parental rights to a previous child were involuntarily terminated, the district court correctly found that the presumption of palpable unfitness applies and that mother bore the burden of rebutting the presumption. In finding that mother did not rebut this presumption, the district court noted the "most significant aspect of Mother's three known relapses is the fact that is shows her chemical dependency remains unresolved."

"We apply a de novo standard of review to a district court's determination as to whether a parent's evidence is capable of justifying a finding in his or her favor at trial." *In re Welfare of J.W.*, 807 N.W.2d 441, 446 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). A parent satisfies the burden to produce evidence to rebut the palpable-unfitness presumption by "introduc[ing] evidence that would 'justify a finding of fact' that he or she is not palpably unfit." *Id.* at 445 (quoting Minn. R. Evid. 301, 1977 comm. cmt.). Whether the evidence satisfies the burden of production is determined on a case-by-case basis, and "[t]he burden often is a difficult one." *Id.* at 446. A parent must do more than engage in services. *Id.* Rather, the parent must "affirmatively and actively demonstrate her or his ability to successfully parent a child." *D.L.R.D.*, 656 N.W.2d at 251.

Mother provided the following evidence as proof of her fitness to parent: a seven-month period of sobriety followed by a four-month period of sobriety; successful completion of outpatient, inpatient, and aftercare chemical dependency treatment programs; participation in relapse prevention treatment, parenting classes, AA, and individual therapy.

In addition, mother relies on two cases from this court to support her assertion that she has rebutted the presumption of palpable unfitness. Neither case supports her position. First, in *In re Welfare of Child of J.L.L.*, 801 N.W.2d at 407-08, the child at issue was removed from the mother's care three days after birth due to the previous termination of mother's parental rights to her other three children. In affirming the district court's finding that mother had rebutted the presumption of unfitness, we gave appropriate deference to the decision of the district court and agreed that mother had maintained sobriety for more than two years, had attended AA meetings three times per week, had avoided the unhealthy relationships that had caused previous issues, had remained law abiding for almost three years, had sought services from the county, had attended parenting classes, had participated in individual therapy, had sought employment assistance, and had a stable living environment. *Id.* at 412. Thus, the evidence in the record substantially supported the mother's ability to successfully parent her child. *Id.* at 413. Mother's reliance on *J.L.L.* in this case is misplaced.

In *In re Welfare of J.W.* the second case relied upon by mother here, this court concluded that the mother rebutted the palpable-unfitness presumption by introducing testimony from 15 witnesses, including herself that demonstrated that she "made significant progress in her parenting skills through parenting classes and dialectical behavioral therapy," with one parenting-class instructor describing her as involved, active, and "learn[ing] much from the classes." 807 N.W.2d at 446–47. Moreover, the mother provided evidence of a stable living environment, the absence of which was a reason for her prior termination of parental rights. *Id.* at 443, 446. In remanding the case

to the district court for further findings, this court determined that the mother had introduced evidence that would justify a finding that she is not palpably unfit, and thus she had rebutted the statutory presumption. *Id.* at 447.

In the present case, unlike the evidence submitted in *J.L.L.* and *J.W.*, mother has not provided significant evidence proving her ability to maintain continuous sobriety. In the two-day trial held in September 2013, 15 witnesses, including mother, testified and 24 exhibits were entered into evidence. Testimony presented at trial indicated that mother is, indeed, a fit parent if she is sober. The majority of witnesses had concerns, however, that mother is unable to maintain sobriety and that her inability is detrimental to the welfare of M.K.B. Concerns expressed were substantiated and supported by the fact that she had completed multiple treatment programs yet continues to relapse.

As the district court recognized in its lengthy, detailed, and well-analyzed memorandum:

> While the evidence demonstrates that Mother has made an effort to acquire and implement the skills and ability to successfully parent [M.K.B.], the evidence also establishes that Mother has not succeeded in the area where the greatest deficiency existed, namely, her chemical dependency. While Mother has succeeded in stopping her use of cocaine, the use of which led to the termination of her parental rights in and to her first two children, she has not succeeded in avoiding other addictive chemicals, namely alcohol.

Our thorough review of the record convinces us of the soundness of the district court's conclusion that mother failed to provide evidence proving her ability to refrain from chemical abuse. Thus, we affirm the district court's determination that mother did not

rebut the statutory presumption of palpable unfitness triggered by the involuntary termination of her parental rights to another child.

II.

Even if we were to assume for the sake of further analysis that mother has rebutted the statutory presumption included in Minnesota Statute section 260C.301, subdivision 1(b)(4), we conclude that the second basis relied on by the district court for terminating mother's parental rights is satisfied. Mother argues that she has corrected the conditions leading to M.K.B.'s out-of-home placement and therefore the district court erred in terminating her parental rights under Minnesota Statute section 260C.301, subdivision 1(b)(5). We see no error. A basis exists for the termination of parental rights if "following the child's placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child's placement." Minn. Stat. § 260C.301, subd. 1(b)(5). Subdivision 1(b)(5) further provides that the social services agency must make reasonable efforts to assist a parent in correcting the conditions that led to the out-of-home placement. *Id.*

Mother attempts to distinguish the unstable conditions that resulted from her previous cocaine dependency from the resulting conditions of her subsequent alcohol dependency. Her attempt is not persuasive. Further, she claims that the only efforts made by the county since M.K.B.'s June 2013 removal are those made by herself "in continuing in individual therapy, attending AA, and seeking out a Rule 25 assessment

and relapse treatment."[3] These efforts are commendable, and we are not insensitive to the courage and perseverance evidenced in their pursuit. Despite these efforts by mother, however, concerns of the county and the district court arose from and centered upon reoccurring substance abuse by mother and her chemical dependency issues as a whole. Regarding mother's argument that county services were insufficient, the record strongly supports the opposite conclusion. County efforts were reasonable, substantial, and multitudinous. The district court summarized the nature of those services well in observing "[t]he court cannot think of a service that has not already been attempted to address Mother's chemical use," and in further observing, "Indeed, Mother's 'new' suggested plan for sobriety does not identify any services or components that have not already been attempted or utilized."

Between M.K.B.'s first removal from his mother's custody (March 29, 2012) and his final removal (June 11, 2013), a period of some 14 1/2 months, mother had been charged with two DWI offenses within a period of six months, had completed three chemical dependency treatment programs, had begun a fourth treatment program, and had attended individual therapy sessions (although attendance at these sessions had become inconsistent prior to her second DWI). As already noted, mother's efforts in treatment and follow-up programs are commendable. Unfortunately, her ability to maintain sobriety remains critically uncertain and at issue.

[3] We note that when a parent's rights are terminated under section 260C.301, subdivision 1(b)(4), the county is not required to provide services. Minn. Stat. § 260.012 (a)(2) (2012). Here, however, the county provided mother multiple services and made reasonable efforts to correct the conditions despite no requirement to do so.

In sum, our painstaking review of the record convinces us that although mother has satisfactorily complied with a majority of the case plan's treatment requirements, her compliance has not equated to maintaining sobriety—a critical goal of the case plan. She continues to relapse even when she is under the scrutiny and supervision of the court and after extensive treatment. She has not corrected her chemical dependency issues. Thus, substantial evidence supports the district court's decision to terminate mother's parental rights under Minnesota Statute section 260C.301, subdivision 1(b)(5), and that decision is affirmed.

Finally, the district court's conclusion that the best interests of M.K.B. are served by the termination of mother's parental rights is fully supported by the record, and we affirm that determination. During the first 18 months of life, the stability and security of M.K.B were disrupted on several occasions. We do not question the love of Mother for her child, nor the sincerity of her attempts to maintain sobriety. We cite with approval, nonetheless, the words of the district court: "[I]t is not fair to [M.K.B.] to require that his stability and permanency be put on hold any longer . . . ."

Affirmed.