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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1775**

In the Matter of the Welfare of the Child of: J. M. L.,
a/k/a J. M. W. and R. A. L., Parents

**Filed April 17, 2017
Affirmed in part and remanded
Hooten, Judge**

Koochiching County District Court
File No. 36-JV-16-80

Robert C. Friday, Legal Aid Service of NE Minnesota, Virginia, Minnesota (for appellant J.M.L.)

Jeffrey S. Naglosky, Koochiching County Attorney, Molly J. French, Assistant County Attorney, International Falls, Minnesota (for respondent county)

Thomas J. Nolan, Jr., Minneapolis, Minnesota (for respondent GAL)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

On appeal from the termination of her parental rights, appellant mother argues that the district court (1) erroneously concluded that she failed to produce sufficient evidence to rebut the presumption of unfitness arising from a prior termination of her parental rights; (2) abused its discretion by determining that respondent county produced clear and convincing evidence that she is a palpably unfit parent; (3) erred by making a negative

inference based on her failure to call her therapist to testify; and (4) failed to explain its best interests finding. We conclude that the district court erroneously concluded that appellant failed to produce sufficient evidence to rebut the presumption. However, because the district court did not abuse its discretion by concluding that the county established by clear and convincing evidence that appellant is a palpably unfit parent and because any error in making an adverse inference against appellant was harmless, we affirm in part. Because the district court did not sufficiently explain its best interests finding, we remand to the district court.

FACTS

Appellant J.M.L. and R.A.L. are the parents of K.L., born in 2012. In February 2016, respondent Koochiching County filed a petition seeking to terminate J.M.L. and R.A.L.'s parental rights. Only J.M.L.'s parental rights are at issue in this appeal.¹ The following evidence was presented at the termination trial, which was held in August 2016.

J.M.L. stipulated at trial that her parental rights to three of her other children were involuntarily terminated by default in September 2006. In that case, J.M.L.'s parental rights were terminated because J.M.L. was chemically dependent, educationally neglected her children, was unable to provide stable and safe housing, failed to maintain any form of contact with her children when they were placed outside of the home, and failed to cooperate with the services offered by the county. Moreover, there was a history of domestic violence between J.M.L. and R.W., her husband at that time. Despite a court

¹ On the first day of trial, R.A.L. voluntarily terminated his parental rights, and he has not appealed from the termination.

order prohibiting R.W. from having contact with J.M.L. or her children, J.M.L. allowed R.W. in her home and permitted him to have access to her children, providing another reason for the termination.

Sometime in the summer of 2006, J.M.L. met R.A.L. In November 2006, J.M.L. moved to Koochiching County in order to continue her relationship with R.A.L. In October 2010, she married R.A.L, and K.L. was born to the couple in January 2012. While J.M.L. was pregnant with K.L., R.A.L. committed and was convicted of the offense of solicitation over the internet of a minor in the state of Virginia.²

Tammie Treat, a social worker with the county, began working with J.M.L. in January 2013 after receiving notice of the prior termination and learning of R.A.L.'s incarceration. The county filed a petition alleging that K.L. was a child in need of protection or services (CHIPS) due to J.M.L.'s prior termination and R.A.L.'s conviction of an offense that required his registration as a sex offender. J.M.L. admitted to the allegations contained in the CHIPS petition and began working on a case plan.

Initially, J.M.L. was fully compliant with all aspects of the case plan. J.M.L. provided random urine samples for urinalysis testing and never submitted a sample that was positive for drugs or alcohol. The district court determined that J.M.L. "actively

² The conviction arose from the following facts. Through the internet, R.A.L. was in contact at least three times with an individual who claimed to be 13 years old. At one point, R.A.L. masturbated on camera in front of that individual. A police officer was posing as a child as part of a sting operation, and R.L. was arrested and convicted of solicitation of a minor.

demonstrated that her chemical dependency issues . . . improved in [a] significant and material way since the prior [termination].”

R.A.L. was released from prison several months after the county began providing services to J.M.L. In order to comply with probation and the case plan in the CHIPS matter, R.A.L. was required to complete sex offender treatment. R.A.L. began treatment with Upper Mississippi Mental Health Center in April 2013. When R.A.L. returned to the marital home, the county created a safety plan for keeping K.L. safe. The plan contained rules regarding R.A.L.’s interactions with K.L. and provided that J.M.L. was to supervise R.A.L.’s interactions with K.L.

In January 2014, J.M.L. was dismissed from the CHIPS case because she was in full compliance with the case plan. Treat testified that she considered the marital home to be safe, secure, clean, and organized. She also stated that she had no educational concerns regarding K.L. However, the CHIPS case remained open regarding R.A.L. because he was on probation and had not completed sex offender treatment.

As a part of his treatment, R.A.L. was required to undergo polygraph testing regarding his sexual history. R.A.L. failed the first polygraph he took in July 2014 because he withheld information regarding his sexual history. After the polygraph, R.A.L. admitted to masturbating while watching children’s programming and sniffing the underwear of a minor family member, as well as other deviant sexual behavior.

R.A.L. also provided disclosures of his sexual history, including all of his charged or uncharged sexual offenses, as a part of his treatment. R.A.L.’s disclosures included the following history. R.A.L. forced a two-year-old female child to perform oral sex on him

and ejaculated in her mouth and on her face. When J.M.L. was pregnant with K.L., R.A.L. chatted with another person over the internet who advised R.A.L. to raise K.L. as a sex slave, and R.A.L. indicated that he might do so. R.A.L. was engaging in a sexually explicit internet chat with another adult when the person's nine-year-old niece entered the room and the "innocence" in the child's voice caused R.A.L. to ejaculate. R.A.L. used K.L.'s teddy bear bottle holder as a masturbation aid. R.A.L. also disclosed that he had "flash thoughts" of oral sex with K.L.

In early June 2015, given R.A.L.'s disclosures and his relatively poor treatment progress, R.A.L.'s probation agent ordered R.A.L. to leave the marital home. R.A.L. was diagnosed as a pedophile in early July 2015.

After learning of R.A.L.'s disclosures and his diagnosis, the county became concerned about K.L.'s safety. When Treat discussed the disclosures with J.M.L., J.M.L. indicated that she had known of the information in the disclosures for a period of time. J.M.L., however, had not informed the county of her knowledge of R.A.L.'s sexual behaviors and urges involving children. After the county confronted J.M.L. with R.A.L.'s disclosures, she became "very defensive" of R.A.L. and of her decision to stay in a relationship with him. J.M.L. was angry and repeatedly stated that she had processed the information, had forgiven R.A.L., and had moved on. Up to the time of trial, J.M.L. did not believe R.A.L. had solicited a minor with respect to the offense for which he was convicted, suggesting that any solicitation by R.A.L. was directed to a police officer rather than a minor.

The director of Upper Mississippi testified at trial that R.A.L. is a pedophile who is sexually attracted to three categories of females: adult, adolescent, and young children.³ The director testified that R.A.L. would have to be supervised by an individual trained to supervise sex offenders in order for him to have access to children. The district court credited this testimony. Although Upper Mississippi trains spouses or other responsible adults to be visitation supervisors for sex offenders, it denied J.M.L.'s request to be trained as a supervisor due to her denial of R.A.L.'s sexual issues and her unwillingness to work with the professionals at Upper Mississippi.

From the time that R.A.L. was removed from the marital home in June 2015 to late April 2016, J.M.L. failed to cooperate with the county. Sometime in August or September 2015, J.M.L. was added to the CHIPS petition. When the county asked J.M.L. to go to individual therapy after R.A.L.'s diagnosis, J.M.L. initially "[dragged] her feet" and later refused to sign releases allowing the county to access her therapy records or offered releases that both the county and the guardian ad litem (GAL) found to be inadequate. J.M.L. finally signed a release to her therapy records in April 2016. Upper Mississippi wanted J.M.L. to be part of R.A.L.'s therapy, but J.M.L. was not cooperative. J.M.L. also ceased communicating with the county. K.L. was removed from the marital home on June 22, 2016.

The county and a district court judge who did not preside over the termination trial warned J.M.L. to separate herself from R.A.L. in late 2015 and early 2016. J.M.L. began

³ The director explained that young children for the purposes of the instrument used to measure an individual's sexual template are children between the ages of 6 and 13.

the process of dissolving her marriage in March 2016, but did not file a dissolution action until late June 2016, a week after K.L. was removed from her care. At trial, J.M.L. testified that “I have told [R.A.L.] from day one I did not want to get a divorce, but now I don’t have a choice.”

J.M.L. and R.A.L. have engaged in consensual sexual activities together with other adults throughout their relationship. As part of R.A.L.’s sex offender treatment, he was told that he needed to remain monogamous in order to avoid triggering any of his deviant sexual behaviors. However, J.M.L. and R.A.L. believed that they could continue to freely engage in sexual activities with other consenting adults despite his conviction and pedophilia diagnosis.

After the county filed the termination petition in February 2016, J.M.L. continued to socialize and interact with R.A.L. J.M.L. testified that she had most recently had sexual contact with R.A.L. in May 2016. J.M.L. claimed that on the day that K.L. was removed from her care, she spent the night with R.A.L. in order to derive strength and comfort from him. Later, after K.L. was removed from her care, J.M.L. was seen in the community socializing with R.A.L. on at least two known occasions. Additionally, less than two weeks before the termination trial began, J.M.L. went four-wheeling with R.A.L. At the time of trial, J.M.L. and R.A.L. were having face-to-face contact once or twice a week. Treat testified that J.M.L. had expressed a desire to move out of state and discussed the difficulty of R.A.L. getting his probation transferred to another state.

After K.L. was removed from J.M.L.’s care, the county arranged to have J.M.L. placed on a waiting list for a family services visitation facility near K.L.’s foster home.

About a week before the termination trial began, the facility became available for J.M.L.'s visitation for two hours each Sunday and Monday, but J.M.L. rejected those visitation opportunities.

The GAL testified that she believes that J.M.L. is not able to ensure the safety of K.L. because of her continued inability to understand and accept the dangers posed by her relationship with R.A.L. When questioned by the county attorney, the GAL agreed that J.M.L. has a history of choosing dangerous men over the welfare of her children and that her judgment has not changed since the prior termination. The GAL from the prior termination testified that J.M.L. failed to prioritize her children and exhibited a self-centered mentality. The district court credited Treat's testimony that J.M.L. has made her relationship with R.A.L. her priority over K.L.

After considering this evidence, the district court determined that J.M.L. had not met her burden of producing evidence to rebut the presumption that she was palpably unfit to be a parent based on the prior termination. The district court also concluded that the county had presented clear and convincing evidence that J.M.L. is palpably unfit to be a parent and that it was in K.L.'s best interests for J.M.L.'s parental rights to be terminated. This appeal followed.

D E C I S I O N

“[A]n involuntary termination of parental rights is proper only when at least one statutory ground for termination is supported by clear and convincing evidence *and* the termination is in the child's best interest.” *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 137 (Minn. 2014). The statutory grounds for termination include:

that a parent is palpably unfit to be a party to the parent and child relationship because of a consistent pattern of specific conduct before the child or of specific conditions directly relating to the parent and child relationship either of which are determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child.

Minn. Stat. § 260C.301, subd. 1(b)(4) (2016).

I. The district court erred in determining that J.M.L. failed to produce sufficient evidence to rebut the presumption of unfitness.

The county argued, and the district court concluded, that J.M.L. was presumptively an unfit parent due to her prior termination and that she had failed to produce sufficient evidence to rebut that presumption. We disagree with the district court's determination that J.M.L. failed to produce sufficient evidence to rebut the presumption that she is a palpably unfit parent.

“It is presumed 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.” Minn. Stat. § 260C.301, subd. 1(b)(4). “[T]he presumption is easily rebuttable.” *R.D.L.*, 853 N.W.2d at 137. “The statutory presumption does not shift to a parent the burden of proof in the sense of the risk of nonpersuasion,” but rather “shifts to a parent a burden of production.” *In re Welfare of Child of J.W.*, 807 N.W.2d 441, 445 (Minn. App. 2011) (alteration omitted) (quotation omitted), *review denied* (Minn. Jan. 6, 2012).

To satisfy this burden, “a parent must introduce evidence that would justify a finding of fact that he or she is not palpably unfit.” *Id.* (quotation omitted). In determining whether

a parent's evidence would support a finding that he or she is not palpably unfit, a court evaluates the evidence presented by the parent without considering any evidence to the contrary. *See id.* at 443–47 (concluding evidence presented by parent “would justify a finding contrary to the assumed fact” that parent was palpably unfit and concluding that parent rebutted presumption of palpable unfitness, even though county presented contrary evidence and cross-examined parent's witnesses “in ways that tended to limit the effect of their testimony” (quotation omitted)). If the parent produces such evidence, the presumption has “no further role” in the proceedings, and the county then has the burden of persuasion to prove by clear and convincing evidence “that specific conditions existing at the time of the hearing” make the parent palpably unfit. *Id.* at 447 (quotation omitted). We review de novo a district court's conclusion regarding whether a parent's evidence could justify a finding that he or she is not palpably unfit. *Id.* at 446.

J.M.L. introduced extensive evidence that she had remedied many of the issues underlying the prior termination, as she demonstrated that she had successfully addressed her chemical dependency issues, appropriately met K.L.'s educational needs, complied with the county's requirements regarding supervision of R.A.L.'s contact with K.L., and provided a suitable and clean home for K.L. We conclude that J.M.L. produced evidence that could justify a finding that she is not a palpably unfit parent and therefore that she produced sufficient evidence to rebut the “easily rebuttable” presumption that she is unfit.

J.M.L. argues that the district court “rested its decision on the statutory presumption of parental unfitness and the case must be reversed” if we conclude that the district court erred in determining that J.M.L. failed to produce sufficient evidence to rebut the

presumption. The district court, however, explicitly found that the county had produced clear and convincing evidence that J.M.L. was in fact palpably unfit to parent the child, made numerous findings related to this conclusion, and analyzed those findings in its memorandum. Therefore, we next must determine whether the district court properly concluded that J.M.L. is a palpably unfit parent, irrespective of the presumption.

II. The district court did not abuse its discretion by determining that the county presented clear and convincing evidence that J.M.L. was palpably unfit to be a parent.

J.M.L. argues that the district court abused its discretion by concluding that the county presented clear and convincing evidence that J.M.L. was palpably unfit to be a party to the parent and child relationship. We disagree.

The decision of whether to terminate parental rights is discretionary with the district court. *R.D.L.*, 853 N.W.2d at 136. “[O]n appeal from a district court’s decision to terminate parental rights, we will review the district court’s findings of the underlying or basic facts for clear error” *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). However, “we review its determination of whether a particular statutory basis for involuntarily terminating parental rights is present for an abuse of discretion.” *Id.*

A parent’s unfitness is based on either showing “a consistent pattern of specific conduct before the child” or “specific conditions directly relating to the parent and child relationship.” Minn. Stat. § 260C.301, subd. 1(b)(4). The pattern or condition must be “of a duration or nature that renders the parent unable, for the reasonably foreseeable future,

to care appropriately for the ongoing physical, mental, or emotional needs of the child.”
Id.

The district court made the following findings that are relevant to our determination of whether the district court abused its discretion by concluding that the county presented clear and convincing evidence that J.M.L. was palpably unfit to be a parent. J.M.L. learned of R.A.L.’s disclosures and sexual urges involving children, but failed to inform the county of the information until the county confronted her with the information. When R.A.L. was removed from the marital home, J.M.L. was angry, defended him, and minimized the risk of R.A.L. having access to K.L. Up to the time of trial, J.M.L. minimized R.A.L.’s conduct in soliciting a minor over the internet by rationalizing that, because he was caught in a sting operation, he only solicited a police officer, not a minor. After R.A.L. was removed from the marital home, J.M.L. failed to cooperate with the county and refused for a period of time to sign a release that would allow the county to access her therapy records. J.M.L. lacks impulse control, blames others for her situation, and prioritizes her own needs over those of K.L.

Although J.M.L. was warned to separate herself from R.A.L., she continued to socialize with him and only filed a dissolution action after K.L. was removed from her home. J.M.L. testified that she brought up the difficulty of transferring R.A.L.’s probation to show that he would not be joining J.M.L. in another state, but the district court was not persuaded and credited Treat’s testimony that J.M.L.’s discussion of the difficulty of transferring probation “belies any real separation of [J.M.L. and R.A.L.]” J.M.L. was aware of R.A.L.’s condition “long before she expressed a willingness to keep him away

from K.L.” Although J.M.L. was warned that R.A.L. needed to maintain a monogamous relationship in order to avoid aggravating R.A.L.’s deviant sexual behaviors, she believed it would be safe to continue to engage in sexual activities involving R.A.L. and other consenting adults as long as K.L. was not in the vicinity. J.M.L. relied on R.A.L. for comfort when K.L. was removed from her care. The district court was unconvinced that J.M.L.’s petition for dissolution was “anything but pre-textual in nature.” Though J.M.L. was offered in-person visitation with K.L. shortly before trial, she rejected the visitation for personal reasons.

These findings of the district court indicate that, although J.M.L.’s parenting skills have improved significantly in several respects, her impaired judgment and misplaced priorities remain a significant concern regarding her ability to ensure K.L.’s safety. J.M.L.’s actions demonstrate that she lacks insight into R.A.L.’s pedophilia and the danger that he poses to K.L. Any efforts of J.M.L. to separate herself from R.A.L. are superficial and pretextual, as she continued to prioritize her relationship with him, even after learning that R.A.L. had abused a two year old and had had sexual thoughts of K.L. Moreover, she failed to cooperate with the county after the county took actions that impeded her relationship with R.A.L. J.M.L. continues to have many of the same parenting deficits that led to her prior termination, namely, poor impulse control, impaired judgment, and blaming others for her situation, although she no longer has substance abuse issues. J.M.L.’s impaired insight and judgment render her unable to ensure the physical and emotional health of K.L. Because the county demonstrated that J.M.L. does not understand the danger of R.A.L.’s pedophilia and cannot remain apart from R.A.L. for any period of time, we

conclude that the district court did not abuse its discretion in determining that J.M.L. was palpably unfit to be a party to the parent-child relationship.

III. Any error in applying an adverse inference to the testimony of J.M.L. for failing to call her therapist as a witness was harmless.

J.M.L. argues that the district court erred in applying an adverse inference to her testimony for failing to call her therapist as a witness. The district court noted that J.M.L. testified about her therapy and the progress that she is making in moving through the stages of grief and toward acceptance of R.A.L.'s pedophilia. However, because J.M.L. failed to call her therapist as a witness to testify, the district court drew an adverse inference against J.M.L. regarding her progress in treatment.

Regardless of whether the adverse inference was erroneous, we conclude that any error in making the adverse inference was harmless. *See In re Welfare of Children of D.F.*, 752 N.W.2d 88, 98 (Minn. App. 2008) (ignoring harmless error). The adverse inference merely bolstered the district court's determination that J.M.L.'s testimony regarding her progress in accepting R.A.L.'s diagnosis was not credible, and therefore any error in its admission was harmless. *See In re Welfare of Child of J.L.L.*, 801 N.W.2d 405, 413 (Minn. App. 2011) ("We defer to the district court's determinations of witness credibility . . ."), *review denied* (Minn. July 28, 2011).

IV. The district court failed to explain its best interests finding.

Finally, J.M.L. argues that the district court erred by failing to explain its best interests finding and that the case must be remanded. We agree.

In a termination proceeding, the “paramount consideration” is the best interests of the child. *In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 545 (Minn. App. 2009). “Considering a child’s best interests is particularly important in a [termination] proceeding because a child’s best interests may preclude terminating parental rights even when a statutory basis for termination exists.” *Id.* (quotation omitted). In determining whether termination is in a child’s best interests, a court must weigh the following factors: “the child’s interest in maintaining the parent-child relationship, the parents’ interest in maintaining the parent-child relationship, and any competing interest of the child.” *In re Welfare of the Children of M.A.H.*, 839 N.W.2d 730, 744 (Minn. App. 2013); *see also* Minn. R. Juv. Prot. P. 39.05, subd. 3(b)(3). The district court must “explain why termination is in the best interests of the child.” *D.L.D.*, 771 N.W.2d at 545.

The district court made an explicit finding that termination is in K.L.’s best interests. However, the district court’s order does not contain any specific analysis relating to the reasoning underlying the best interests finding.⁴ The county notes that the district court stated at the beginning of its findings of fact that “[t]hese proceedings are to support the best interests of the child, [K.L.],” and argues that this language meant that the district court intended for all of its findings to support its best interests finding.

This argument essentially would require this court to infer a best interests analysis from the existing findings, which this court has declined to do on a number of occasions.

⁴ While the district court’s findings include a number of reasons why it is unsafe for K.L. to be under J.M.L.’s care, there are no findings regarding J.M.L.’s or K.L.’s interest in maintaining the parent-child relationship.

See id. at 545–46 (declining to infer findings regarding child’s best interests, stating that “an appellate court’s combing through the record to determine best interests is inappropriate because it involves credibility determinations” (quotation omitted)); *In re Tanghe*, 672 N.W.2d 623, 626 (Minn. App. 2003) (holding that district court “must consider a child’s best interests and explain its rationale in its findings and conclusions” because when findings fail to address best interests, “they are inadequate to facilitate effective appellate review, to provide insight into which facts or opinions were most persuasive of the ultimate decision, or to demonstrate the court’s comprehensive consideration of the statutory criteria” (quotation omitted)). Therefore, we remand for the district court to explain its best interests finding.⁵

Affirmed in part and remanded.

⁵ *See D.L.D.*, 771 N.W.2d at 547 (affirming statutory basis for termination but remanding for findings regarding the child’s best interests.)