

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1072**

In the Matter of the Welfare of the Child of:
J. A. K. and J. M. S., Parents.

**Filed January 26, 2018
Reversed and remanded
Johnson, Judge**

Anoka County District Court
File No. 02-JV-17-123

Dorothy M. Gause, Dorothy M. Gause, LLC, Stillwater, Minnesota (for appellant-mother J.A.K.)

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Gretchen Severin, Munstenteiger and Severin, P.A., Anoka, Minnesota (for respondent-father J.M.S.)

Pamela Boyer, Ramsey, Minnesota (guardian *ad litem*)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Johnson, Judge.

S Y L L A B U S

In a proceeding for the termination of parental rights, a parent may rebut the presumption of palpable unfitness set forth in section 260C.301, subdivision 1(b)(4), of the Minnesota Statutes by producing evidence that would be sufficient to justify a finding of fact that the parent is not palpably unfit. If a parent introduces evidence in an attempt to rebut the statutory presumption, a district court must determine whether the evidence is sufficient to raise a genuine issue of fact as to whether the parent is palpably unfit.

O P I N I O N

JOHNSON, Judge

The district court terminated a mother's parental rights to a newborn child on the ground that the mother is presumed to be palpably unfit because her parental rights to another child previously had been terminated. We conclude that the district court erred by applying the statutory presumption after the mother introduced sufficient evidence to rebut the presumption. Therefore, we reverse and remand.

F A C T S

J.A.K. is a 25-year-old woman who has given birth to three children, each of whom was fathered by J.M.S., with whom J.A.K. had a volatile, off-and-on relationship for six years. J.A.K.'s parental rights to the first child were involuntarily terminated. J.A.K.'s parental rights to the second child were voluntarily terminated. Her parental rights to the third child are at issue in this appeal.

In February 2015, Anoka County removed J.A.K.'s first child, a two-year-old girl, from her home after J.A.K. tested positive for methamphetamine while she was pregnant with her second child. J.A.K. agreed to a voluntary placement of the girl in J.A.K.'s brother's home. The girl later was returned to J.A.K.'s home.

Meanwhile, in May 2015, J.A.K. gave birth to her second child, a boy. Shortly after the birth, J.A.K. and J.M.S. agreed to a private adoption of the boy.

After J.A.K. failed to remain sober, her first child again was removed from her home and placed in her brother's care. In July 2015, the county petitioned for a declaration that the first child is a child in need of protection or services (CHIPS). In October 2015, the

district court granted the county's CHIPS petition. In July 2016, the county petitioned to terminate J.A.K.'s parental rights to the first child, as well as the parental rights of the child's father, J.M.S.

The case was tried on three days in early November 2016. J.M.S. failed to appear for trial, and his parental rights were terminated by default. The evidence at trial focused on J.A.K.'s mental health and chemical dependency, domestic violence between J.M.S. and J.A.K., and the instability of J.A.K.'s housing. In December 2016, the district court issued an order granting the county's termination petition and involuntarily terminating J.A.K.'s parental rights to the first child on the ground that she had failed to correct the conditions that led to the out-of-home placement. J.A.K. appealed, and this court affirmed. *See In re Welfare of J.A.K.*, No. A17-0021, 2017 WL 2333192 (Minn. App. May 30, 2017).

On November 25, 2016 (after the termination trial with respect to the first child but before the district court's decision), J.A.K. gave birth to her third child, a girl, K.J.K., the child at issue in this appeal. The county placed an immediate hold on the child while J.A.K. and K.J.K. were still at the hospital, removed K.J.K. from J.A.K.'s care, and placed K.J.K. in foster care. On November 30, 2016, the county filed a CHIPS petition. On December 1, 2016, K.J.K. was transferred to the care of the adoptive parents of J.A.K.'s second child.

In January 2017, the county petitioned to terminate the parental rights of J.A.K. and J.M.S. to K.J.K. The county alleged one ground for the termination of J.A.K.'s parental rights: that J.A.K. is palpably unfit to be a parent. The petition refers to a state statute that requires a county to immediately file a termination petition if "the child's parent has lost parental rights to another child through an order involuntarily terminating the parent's

rights.” See Minn. Stat. § 260C.503, subd. 2(a)(4) (2016). In February 2017, the district court granted the county’s motion to dismiss the CHIPS petition and proceed only on the termination petition. The district court also granted the county’s motion to cease reunification efforts with K.J.K. and to decrease J.A.K.’s visitation time from twice weekly to twice monthly.

The case was tried on two days in May 2017. In June 2017, the district court issued an order granting the county’s termination petition. The district court accepted J.M.S.’s voluntary termination of his parental rights to K.J.K. The district court terminated J.A.K.’s parental rights to K.J.K. on the ground that she failed to rebut the statutory presumption of palpable unfitness. J.A.K. appeals.

ISSUE

Did the district court err by determining that J.A.K. did not rebut the statutory presumption that she is palpably unfit to be a parent?

ANALYSIS

J.A.K. argues that the district court erred by terminating her parental rights to K.J.K. on the ground that she did not rebut the statutory presumption of palpable unfitness.

A.

The statute at issue provides:

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 or that the parent’s custodial rights to another child have been involuntarily transferred to a relative under Minnesota Statutes 2010, section 260C.201, subdivision 11,

paragraph (e), clause (1), section 260C.515, subdivision 4, or a similar law of another jurisdiction

Minn. Stat. § 260C.301, subd. 1(b)(4) (2016). This statutory presumption is superimposed on the pre-existing principle that “[a] natural parent is presumed to be suitable ‘to be entrusted with the care of his child’ and it is ‘in the best interest of a child to be in the custody of his natural parent.’” *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 134 (Minn. 2014) (quoting *In re Welfare of Clausen*, 289 N.W.2d 153, 156 (Minn. 1980)). The statutory presumption co-exists with the “‘fundamental liberty interest of natural parents in the care, custody, and management of their child,’” *id.* at 133 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95 (1982)), as well as a parent’s fundamental right “to make decisions concerning the care, custody, and control of his or her children,” *id.* (citing *SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007)). The statutory presumption is consistent with a parent’s constitutional rights because it “directly serves the compelling government interest of protecting children.” *Id.* at 134. Specifically, the government has a compelling interest in “promoting relationships among those in recognized family units in order to protect the general welfare of children, . . . identifying and protecting abused children, . . . and in safeguarding the physical and psychological well-being of children.” *Id.* (quotations and citations omitted). The statutory presumption serves this compelling government interest “because it facilitates the more expeditious resolution of cases involving children in need of protection.” *Id.*

The statutory presumption also is consistent with a parent’s constitutional rights because it is narrowly tailored to serve the compelling government interest. *Id.* at 135-38.

The statutory presumption is narrowly tailored in part because it “is easily rebuttable.”¹ *Id.* at 137. The statutory presumption imposes only a burden of production, which means that a parent may rebut the statutory presumption merely “by introducing evidence that would ‘justify a finding of fact that [the parent] is not palpably unfit.’” *Id.* (quoting *In re Welfare of Child of J.W.*, 807 N.W.2d 441, 445-46 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012)) (alteration in original) (internal quotations omitted). In other words, a parent seeking to rebut the statutory presumption “needs to produce only enough evidence to support a finding that the parent is suitable ‘to be entrusted with the care’ of the children.” *Id.* (quoting *Clausen*, 289 N.W.2d at 156).

“‘[W]hether the evidence satisfies the burden of production is determined on a case-by-case basis.’” *Id.* (quoting *J.W.*, 807 N.W.2d at 446). When reviewing the parent’s evidence, a district court must determine whether the evidence is sufficient to create a

¹This must be so because, “[f]or the statute to survive under a strict scrutiny analysis, the burden imposed by the presumption cannot be a heavy one.” *R.D.L.*, 853 N.W.2d at 137. The supreme court’s clarification in *R.D.L.* of the burden of production to rebut the statutory presumption casts significant doubt on prior opinions of this court that have described the parent’s burden differently, such as by stating that the burden “often is a difficult one.” See *In re Welfare of Child of J.W.*, 807 N.W.2d 441, 446 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012); see also *In re Welfare of Child of D.L.D.*, 771 N.W.2d 538, 544 (Minn. App. 2009); *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 710 (Minn. App. 2004); *In re Welfare of D.L.R.D.*, 656 N.W.2d 247, 250-51 (Minn. App. 2003). Similarly, the *R.D.L.* opinion stands in contrast to prior opinions of this court that, in one way or another, suggest that, to rebut the statutory presumption, “‘a parent must affirmatively and actively demonstrate her or his ability to successfully parent a child.’” See *J.W.*, 807 N.W.2d at 446 (quoting *D.L.R.D.*, 656 N.W.2d at 251); see also *In re Welfare of Child of J.L.L.*, 801 N.W.2d 405, 412 (Minn. App. 2011), *review denied* (Minn. July 28, 2011); *D.L.D.*, 771 N.W.2d at 544; *In re Welfare of Child of T.C.M.*, 758 N.W.2d 340, 343 (Minn. App. 2008); *In re Welfare of Child of T.D.*, 731 N.W.2d 548, 554-56 (Minn. App. 2007); *W.L.P.*, 678 N.W.2d at 710.

genuine issue of fact on the issue of palpable unfitness. *See id.* (citing *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 623 (Minn. 1988)). If a parent introduces such evidence, the statutory “presumption is rebutted and ‘has no further function at the trial.’” *J.W.*, 807 N.W.2d at 445 (quoting Minn. R. Evid. 301, 1977 comm. cmt.). If the statutory presumption has been rebutted, the district court shall “find the existence or nonexistence of” the alleged palpable unfitness “upon all the evidence exactly as if there never had been a presumption at all.” *See Donea v. Massachusetts Mut. Life Ins. Co.*, 220 Minn. 204, 213, 19 N.W.2d 377, 383 (1945).

This court applies a *de novo* standard of review to a district court’s determination as to whether a parent has rebutted the statutory presumption. *J.W.*, 807 N.W.2d at 446.

B.

In this case, the district court discussed the presumption and J.A.K.’s obligation to rebut the presumption. The district court noted that J.A.K.’s parental rights to her first child were terminated “because she did not protect the child, failed to adequately address her mental health and sobriety,” and “continued in an abusive relationship despite the impact it had on her and the child.” The district court stated that J.A.K. “continues to be deceptive regarding her relationship with [J.M.S.], her mental health, and her living situation”; “disregards any accountability for her actions”; “continues to be in denial regarding how her actions affect her child”; and “continues to be hostile and uncooperative with the process and service providers.” The district court concluded that J.A.K. “has failed to rebut the presumption that she is palpably unfit.”

J.A.K. contends that the district court erred in its analysis because she produced evidence that is sufficient to rebut the presumption. The record reveals that J.A.K. introduced considerable evidence that is inconsistent with the statutory presumption that she is palpably unfit to be a parent. The most pertinent evidence may be summarized as follows.

At the time of trial, J.A.K. had consulted with a psychiatrist and had begun taking medication for her depression and personality disorder. She had maintained her sobriety for more than a year, since January 2016. She had maintained consistent employment for two consecutive years. She was on a waiting list to move into a two-bedroom apartment that was to be available to her on July 1, 2017.

J.A.K. had completed a parenting assessment and had regularly attended supervised visits with K.J.K. The parenting assessment included an interview of J.A.K., two parent-child observations, and discussions with other persons. J.A.K.'s family therapist noted that she was a "really skilled mom" and was attentive to K.J.K.'s needs. The family therapist observed that K.J.K. reacted to J.A.K. in a positive way. The family therapist characterized the interaction between mother and child as "very positive."

J.A.K. was participating in individual therapy, group therapy, and dialectical behavioral therapy. A licensed mental-health therapist testified that J.A.K. had participated in holistic group therapy for abuse prevention on a weekly basis and had completed 12 weeks of the 21-week program. The group focuses on skills-based learning; the group therapy is tailored to persons "who have behaved abusively and are learning relationship skills, communication skills, and emotion regulation skills." The therapist testified that

J.A.K. was “doing great,” making progress, and engaging well in the program. The therapist stated that she saw J.A.K. “taking the information from the class and applying it into her life.” The therapist identified J.A.K. as “a leader in the group” and able to “teach the group in certain respects.” She explained that J.A.K. was making “progress” and demonstrating an “ability to articulate the skills she’s using both in and outside of the group.” The therapist testified that one of J.A.K.’s goals was to learn “appropriate modeling for her children.” The therapist agreed that J.A.K. demonstrated insight into the impact her prior abuse has had on her children.

J.A.K.’s brother testified that J.A.K. had demonstrated a change since the first termination trial in November 2016. He described J.A.K. as more “clear-headed” and “collected.” He stated that J.A.K. was gaining insight and improving her communication skills and had called him on the telephone to practice the skills she learned during therapy.

In her own testimony, J.A.K. acknowledged her volatile relationship with J.M.S., who was in prison at the time of trial, but stated that she had ended the relationship on March 20, 2017, and had sent a text message to the county social worker on April 9, 2017, requesting that the county seek termination of J.M.S.’s parental rights to K.J.K. She also stated that she would not allow J.M.S. to have any involvement with K.J.K. after his release from prison and that K.J.K. is more important to her than is J.M.S.

C.

The district court’s order does not acknowledge J.A.K.’s evidence that is inconsistent with the statutory presumption of unfitness. The district court’s order does not reflect that the district court made a determination as to whether J.A.K.’s evidence

would justify a finding of fact that she is not palpably unfit. *See R.D.L.*, 853 N.W.2d at 137 (citing *J.W.*, 807 N.W.2d at 445-46). In addition, the district court's order does not reflect that the district court made a determination as to whether J.A.K.'s evidence is sufficient to raise a genuine issue of fact as to whether she is palpably unfit. *See id.* (citing *Anderson*, 417 N.W.2d at 623).

After reviewing J.A.K.'s evidence according to the standard described in *R.D.L.*, we conclude that her evidence is sufficient to raise a genuine issue of fact as to whether she is palpably unfit. Accordingly, she introduced evidence sufficient to rebut the statutory presumption of palpable unfitness. "The presumption shall have no further role" in the case. *See J.W.*, 807 N.W.2d at 447. Consequently, the county must prove by clear and convincing evidence that J.A.K. is, in fact, palpably unfit to be a parent. *See R.D.L.*, 853 N.W.2d at 132.

Thus, the district court erred by terminating J.A.K.'s parental rights to K.J.K. based on the statutory presumption. Therefore, we reverse the district court's order and remand the matter to the district court for further proceedings. *See J.W.*, 807 N.W.2d at 447 (reversing and remanding for further proceedings). Because any termination of parental rights "must relate to 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," it will be necessary for the district court to reopen the record to allow the parties to introduce supplemental evidence. *See In re Welfare of P.L.R.*, 622 N.W.2d 538, 543 (Minn. 2001) (emphasis added).

D E C I S I O N

The district court erred by determining that J.A.K. did not rebut the statutory presumption of palpable unfitness and by terminating her parental rights solely on that basis. We reverse and remand for further proceedings.

Reversed and remanded.