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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A17-1513

A17-1514

In the Matter of the Welfare of the Children of:
B. K. (n/k/a B. K.), M. K. and R. D., Parents.

Filed March 5, 2018

Affirmed

Schellhas, Judge

Steele County District Court
File Nos. 74-JV-17-304, 74-JV-17-300

B. Steven Messick, J. Scott Braden, P.A., Faribault, Minnesota (for appellant B.K.)

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Considered and decided by Reyes, Presiding Judge; Schellhas, Judge; and Jesson,
Judge.

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

SCHELLHAS, Judge

In this consolidated juvenile-protection appeal, appellant-father argues that the district erred by terminating his parental rights because the record lacks clear and convincing evidence that he is a palpably unfit parent, that he failed to correct the conditions leading to the out-of-home placement, that he failed to satisfy his parental duties, and that termination

of his parental rights is not in the child's best interests. Appellant-mother argues that the district court abused its discretion by denying her motions for a new trial because she received ineffective assistance of counsel. She also argues that the district court clearly erred by finding that the county made reasonable efforts to place one of the children with a relative. We affirm.

FACTS

Appellant B.K. (mother) is the mother of N.A.D., born in April 2006, and B.I.K., born in July 2015. Appellant M.K. (father) is the father of B.I.K. R.D. is N.A.D.'s father. Mother and father were not married until after B.I.K. was born.

At the time of B.I.K.'s birth, both the child and mother tested positive for methamphetamine. B.I.K. demonstrated neonatal abstinence syndrome with jitteriness that was recognized by both Owatonna and Mayo hospitals. Although mother initially denied using methamphetamine, claiming that the positive test resulted from her use of Sudafed, mother later admitted to Dr. Arne Graff, who consulted on B.I.K. at the Mayo Clinic Hospital, that she had "used methamphetamines through the pregnancy." Dr. Graff's report, following his consultation on B.I.K., expressed concern for the child remaining with mother in light of her positive test for methamphetamine, and a previous determination of medical neglect regarding a child of mother's who died in her care.

On August 3, 2015, respondent Minnesota Prairie County Alliance (county) filed a petition alleging that B.I.K. was in need of protection or services (CHIPS) due to the unwillingness of mother and father to follow a safety plan for the child. The parents admitted to the CHIPS petition and agreed to follow the recommendations for mental-health and addiction treatment. Although mother did not complete her chemical-

dependency treatment and individual therapy as ordered, the parents provided several negative drug screens and were cooperative with the county in allowing them to visit the home on a safety plan. As a result, the district court allowed the county to dismiss the CHIPS petition on April 26, 2016.

On May 29, 2016, police stopped a vehicle driven by mother because the vehicle had expired license plates. In addition to mother, three male passengers and B.I.K. occupied the vehicle. The front-seat passenger had an outstanding arrest warrant, and a search of his person revealed methamphetamine and a scale. In the backseat of the vehicle near B.I.K., police discovered drug paraphernalia, a machete, and a sheathed knife.

On June 22, 2016, the county filed a CHIPS petition as to B.I.K. The county also filed a related CHIPS petition as to N.A.D., and the district court ordered that both children be placed in foster care. The court adjudicated the children CHIPS on August 3, 2016, at which time father and mother admitted that their behavior, condition, or environment is such to be injurious or dangerous to the children. The parents also agreed that their chemical-dependency and mental-health issues, contributed to the need for protection, and that services as to the chemical dependency and mental health must be followed as part of the CHIPS proceedings. The district court subsequently adopted an out-of-home placement plan, which required father and mother to (1) complete a rule-25 assessment and follow recommendations for treatment; (2) address their mental-health needs; and (3) not use or possess drugs or alcohol.

During the next few months, father and mother consistently either refused to provide urine samples; provided urine samples that were diluted, too small to test, or not human

urine; or provided samples that tested positive for methamphetamines. On February 10, 2017, the district court conducted a permanent-placement-determination hearing and thereafter ordered the county to file a petition to terminate mother and father's parental rights to B.I.K. The county complied with the district court's directives and filed the petition, along with a permanency petition regarding N.A.D.

Following a trial on the petition to terminate parental rights, the district court concluded, with respect to B.I.K., that the county had proved by clear and convincing evidence that (1) father and mother substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon them by the parent and child relationship; (2) father and mother were palpably unfit to be parties to the parent and child relationship; and (3) reasonable efforts by the county had failed to correct the conditions leading to the out-of-home placement. The district court also determined that the best interests of B.I.K. are served by the termination of mother and father's parental rights. The district court therefore granted the county's petition to terminate mother and father's parental right to B.I.K. under Minn. Stat. § 260C.301, subd. 1(b)(2), (4), and (5) (2016).

The district court also granted the county's petition to transfer legal and physical custody of N.A.D. to R.D.'s sister, K.H. The district court concluded that there is "clear and convincing evidence that [mother] is palpably unfit to be a party to the parent and child relationship and will continue for the reasonably foreseeable future to be unable to care appropriately for the ongoing physical, mental, and emotional needs of [N.A.D.]." The district court further determined that the "best interests of [N.A.D.] are served by transfer of legal and physical custody to [K.H.]."

Mother filed motions for a new trial under Minn. R. Juv. Prot. P. 45.06, in the cases involving B.I.K. and N.A.D. The district court denied the motions.

These consolidated appeals follow.¹ Mother and father challenge the order terminating their parental rights to B.I.K., and mother challenges the order transferring custody of N.A.D. to K.H.

D E C I S I O N

I. Termination of father’s parental rights

Father challenges the district court’s decision to terminate his parental rights, arguing that (A) the county did not prove by clear and convincing evidence that a statutory basis supports termination of his parental rights; and (B) termination of his parental rights is not in B.I.K.’s best interests.

A natural parent is presumptively a “fit and suitable person to be entrusted with the care of his or her child,” and “[o]rdinarily, it is in the best interest of a child to be in the custody of his or her natural parents.” *In re Welfare of A.D.*, 535 N.W.2d 643, 647 (Minn. 1995). As a result, 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).

On appeal from a district court’s decision to terminate parental rights, we review the court’s factual findings for clear error. *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 660 (Minn. 2008). But the ultimate termination decision is reviewed for an abuse of

¹ This court designated father a “co-appellant” after he filed a notice of related appeal challenging the order terminating his parental rights to B.I.K.

discretion. See *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 136–37 (Minn. 2014) (explaining that termination of parental rights is “always discretionary” with the district court).

A. Statutory basis to terminate

Parental rights may be terminated if at least one of nine statutory bases is proved by clear and convincing evidence, Minn. Stat. § 260C.301, subd. 1(b), and the district court determines that termination is in the children’s best interests, *R.D.L.*, 853 N.W.2d at 137. “If statutory grounds for termination exist and termination is in the best interests of the child, the appellate court then determines whether there is clear and convincing evidence that the county made reasonable efforts to reunite the family.” *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005).

Here, the district court concluded that clear and convincing evidence supports a termination of father’s parental rights under Minn. Stat. § 260C.301, subd. 1(b)(2), (4), and (5). Father challenges the conclusion, arguing that clear and convincing evidence does not support the termination of his parental rights under these three statutory bases.

A district court may terminate parental rights if it finds that “a parent is palpably unfit to be a party to the parent and child relationship.” Minn. Stat. § 260C.301, subd. 1(b)(4). To satisfy its burden of proving palpable unfitness, the county must prove “a consistent pattern of specific conduct or specific conditions existing at the time of the hearing that, it appears, will continue for a prolonged, indefinite period and that are permanently detrimental to the welfare of the child.” *T.R.*, 750 N.W.2d at 661.

The district court concluded that there “is clear and convincing evidence that [father is] palpably unfit to be a party to the parent and child relationship and will continue for the reasonably foreseeable future to be unable to care appropriately for the ongoing physical, mental, and emotional needs of the child.” The court reached this conclusion after finding that: father “suffers from a severe addiction to methamphetamine”; that his “chemical dependency issues create[] agitation, tension, and chaos in this family system”; and that although father has completed the rule-25 assessment and “is engaged in treatment,” he has “continued to use methamphetamine throughout the case,” including during his treatment program, which demonstrates his failure to address his methamphetamine addiction.

Father argues that the record lacks evidence of palpable unfitness because he demonstrated that he was “capable of providing food, clothing, and shelter for B.I.K.” Although acknowledging his abuse of controlled substances, father argues that he “was actively participating in outpatient treatment to address his chemical use.” Father further argues that: no causal connection exists between either parent’s drug use and his and her ability to care for B.I.K., that the record lacks evidence of how father’s drug use affected his ability to care for B.I.K. or how father was affected by drug use during his visits with B.I.K., and that the record lacks evidence of how his drug use affected his relationship with B.I.K. We are not persuaded.

Father admitted at trial that he has struggled with methamphetamine use for “20-some years.” And despite his argument to the contrary, the record indicates that father’s drug use has directly affected his ability to parent B.I.K. B.I.K. tested positive for methamphetamine when he was born, which reflects father’s inability to intervene in

mother's dependence on methamphetamine. And during visits with B.I.K., when mother often became agitated and frustrated, father did nothing to defuse the situation. Instead, father became withdrawn and succumbed to mother's directives. This evidence supports the district court's findings that father is "psychologically attached to [mother] to such a degree that he will do what [mother] wants him to do, even if it is not in the child's best interests." Father's willingness to put mother's wishes ahead of B.I.K.'s needs supports a finding of palpable unfitness. The record also shows that father's attachment to mother and continued substance abuse has placed B.I.K. in dangerous situations and placed the child's health and well-being at risk. The record reflects that several months after B.I.K. was born, B.I.K. was in a car driven by mother that was occupied by three males, one of whom had an outstanding arrest warrant. That male had methamphetamine and a scale on his person, and police discovered drug paraphernalia, a machete, and a sheathed knife in the back seat of the car near B.I.K.

Following the stop of the car that mother drove, a hair follicle from B.I.K. tested positive for methamphetamine. According to Dr. Graff, a positive test from a hair follicle taken from a child more than a year after the child's birth represents recent exposure to methamphetamine, not exposure to the drug during pregnancy. This evidence demonstrates B.I.K.'s exposure to methamphetamine while he was in father's care. Although father completed the rule-25 assessment and began treatment as ordered by the district court, he has continued to use methamphetamine throughout this case. In fact, father admitted at trial that he has relapsed during treatment and occasionally refused to provide test samples, knowing that his refusal would be "taken as a positive." Father clearly has a long-standing,

unresolved chemical-dependency problem that renders him unable to maintain a safe and stable home for B.I.K. for the reasonably foreseeable future. Accordingly, clear and convincing evidence supports the district court's determination that father is palpably unfit to be a party to the parent and child relationship under Minn. Stat. § 260C.301, subd. 1(b)(4). Because clear and convincing evidence supports one of the three statutory grounds on which father's parental rights were terminated, we decline to discuss the second and third statutory grounds. *See In re Welfare of M.H.*, 595 N.W.2d 223, 227 (Minn. App. 1999) ("Only one [statutory] criterion needs to be proven to support termination.").

B. Best interests

Whether termination of parental rights is in the children's best interests is "the paramount consideration." Minn. Stat. § 260C.301, subd. 7 (2016); *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 902 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012). In considering the best interests of a child, the district court must balance three factors: "(1) the child's interest in preserving the parent-child relationship; (2) the parent's interest in preserving the parent-child relationship; and (3) any competing interest of the child." *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). Competing interests may include "a stable environment [and] health considerations." *Id.* at 4. An abuse-of-discretion standard is applied to a district court's determination concerning the children's best interests. *J.R.B.*, 805 N.W.2d at 905.

Father argues that the district court erred by finding that clear and convincing evidence supports a determination that termination of father's parental rights is in B.I.K.'s best interests because there "was no testimony that B.I.K. had any long-term effects from

[father's] drug use," and father has "the ability to provide for [B.I.K.'s] physical, mental, and emotional needs at the present time and in the foreseeable future." But to support its determination that termination of father's parental rights is in B.I.K.'s best interests, the district court found that B.I.K. is one year old, that he has no "meaningful bond" with father, and that father cannot provide B.I.K. with the opportunity to "reach his full and complete physical well-being, emotional development, and educational potential." The district court also found that father has failed to provide, nor likely will provide, "a stable and safe home for [B.I.K.] free of illegal chemical use and crime." Finally, the district court found that father's "actions have not demonstrated a focused desire to be an adequate parent to the child."

The record supports the district court's findings. Despite claiming that he wants to be a part of the child's life, father has repeatedly failed to comply with the court-ordered case plan by continuing to use methamphetamine. Moreover, father's controlled-substance abuse has negatively affected the health of B.I.K., which is evidenced by the child's positive test for methamphetamine while in father's care. In light of father's continued methamphetamine abuse, and the activity connected to father and mother's drug use, the record supports the district court's finding that father is unable to provide a safe and stable home for B.I.K. that is free from chemical use and crime. In addition, the guardian ad litem testified that B.I.K. is growing and developing in his new home and that it would not be in B.I.K.'s best interests to be returned to father's care. The district court found this testimony to be credible and we defer to the district court's credibility determinations. *See In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996) (stating that this court gives

considerable deference to the district court’s decision to terminate a person’s parental rights because the “district court is in a superior position to assess the credibility of witnesses”). Because clear and convincing evidence supports the district court’s determination that termination of father’s parental rights is in B.I.K.’s best interests, the district court did not abuse its discretion by granting the county’s petition to terminate father’s parental rights.

II. Motions for a new trial

Minn. R. Juv. Prot. P. 45.04 provides several grounds on which a district court may grant a new trial in juvenile-protection proceedings. We review a district court’s denial of a motion for a new trial for an abuse of discretion. *See Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010). A district court abuses its discretion when it resolves the question in a manner “that is against both logic and the facts of record.” *Cisek v. Cisek*, 409 N.W.2d 233, 235 (Minn. App. 1987), *review denied* (Minn. Sept. 18, 1987).

Mother argues that the district court abused its discretion by denying her motions for a new trial because her trial counsel’s ineffectiveness deprived her of a fair trial. But mother’s ineffective-assistance-of-counsel argument was not raised in district court. It is well settled that appellate courts generally do not consider matters not properly argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because mother did not raise her ineffective-assistance-of-counsel claim in her posttrial motion, we decline to consider her argument.

III. Reasonable efforts to place B.I.K. with a relative

Minn. Stat. § 260C.221(a) (2016) requires a county to conduct a “comprehensive” search for suitable relatives with whom to place a child who has been removed from a

parent’s home. The search should encompass “maternal and paternal adult relatives of the child,” including grandparents, legal parents and guardians of the child’s siblings, and “any other adult relatives suggested by the child’s parents.” Minn. Stat. § 260C.221(b) (2016). This court reviews a district court’s decision whether a responsible county agency unreasonably failed to make an adoptive placement for an abuse of discretion. *See* Minn. Stat. § 260C.607, subd. 6(e) (2016) (stating that district court “may” order a relative adoptive placement if an agency unreasonably fails to make the placement); *see also In re Welfare of Children of L.L.P.*, 836 N.W.2d 563, 570–71 (Minn. App. 2013) (comparing motions for adoptive placement to motions for custody modification, and concluding that appellate court reviews district court’s determination of whether prima facie case has been established in motion for adoptive placement for abuse of discretion).

The district court found that the county

has engaged in a reasonable search for relatives for placement of the children and sending letters to potential relatives. [County social worker] testified that all suggestions made by the parents were investigated and were either not willing to take the children or had child protection matters of their own and were not appropriate.

Mother challenges this finding, arguing that it is “not supported by the evidence at trial.” She urges us to “reverse and remand the issue of whether [the county] made reasonable efforts to locate relative placement and to determine whether [mother’s sister] is a suitable relative for placement.” We are not persuaded.

Morton testified that the county sent out “close to ten” “relative search letters” in late January and early February 2017. She investigated some of the “follow-ups to those

letters,” and some were investigated by her predecessor. As part of her investigation, Morton talked with B.I.K.’s grandfathers, both of whom stated that “they were just not in a position where they would be able to provide a permanent home for [B.I.K.]” Morton also testified that she explored mother’s sister as a permanency option, but that she had “concerns” with mother’s sister due to her “child protection history.” As Morton explained, “[w]e’re not going to put a child into a home where there’s been—if there’s concerns in that home about child protection issues. We wouldn’t want to subject a child to any neglect or abuse again.”

Finally, Morton testified that her predecessor considered R.H., mother’s half-sister’s dad’s fiancé. If believed, this evidence supports the district court’s finding that the county engaged in a reasonable search for relatives for placement of B.I.K., including the exploration of mother’s sister as a placement option for B.I.K. The district court found Morton’s testimony to be credible and we defer to the district court’s credibility determinations. *See L.A.F.*, 554 N.W.2d at 396 (“Considerable deference is due to the district court’s decision [to terminate parental rights] because a district court is in a superior position to assess the credibility of witnesses.”). The district court therefore properly determined that transfer of permanent legal and physical custody of B.I.K. to a relative is not in the child’s best interests because the child has “no suitable relative willing to take the child.”

Affirmed.