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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1781**

In re the Matter of the Welfare of the Child of:
S. D. T. and R. S., Parents.

**Filed May 13, 2019
Reversed and remanded
Ross, Judge**

Hennepin County District Court
File No. 27-JV-17-4447

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Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Florey, Judge.

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

ROSS, Judge

Hennepin County Human Services opened a case file for an infant born to a mother whose custody of or parental rights to nine other children were previously transferred or terminated. The county located the child over two years later, taking the child into its custody and seeking to terminate the rights of both mother and father. Father appeals, arguing, among other things, that the district court lacked clear and convincing evidence to

terminate his parental rights. Because the record does not contain clear and convincing evidence supporting termination, we reverse and remand.

FACTS

R.T.S. was born in February 2015 to mother S.D.T. and father R.S. R.T.S. is father R.S.'s first child, and the record does not indicate that R.S. has any prior history in child protection cases.

Mother S.D.T., on the other hand, had nine children before birthing R.T.S. S.D.T.'s history with child protective services is extensive. In successive child-protection proceedings, S.D.T. lost her parental rights to or custody of all nine of her children. It was mother S.D.T.'s adjudicated unfitness that prompted Hennepin County Human Services to open a file for R.T.S. and to obtain a district court order authorizing the county to take immediate protective custody of the child. The county failed to take immediate custody, however, and it did not locate R.T.S. for two and a half years.

The county finally located the child in September 2017 when Bloomington police encountered the family at a Walgreens, panhandling. The county took custody of R.T.S.

The county petitioned to terminate both S.D.T.'s and R.S.'s parental rights. It created a voluntary case plan for R.S. and learned from testing that his I.Q. score is substantially below average, "in the extremely low range of functioning." Both parents participated in supervised visits with the child, but the county suspended the visits after S.D.T. acted disruptively and threatened to harm a supervising worker.

In April 2018 the county drafted a new case plan for R.S. and the district court formalized the plan as an order the following month. R.S.'s two-day

termination-of-parental-rights trial was held in August 2018. The district court terminated his parental rights. R.S. moved for a new trial. The district court denied his motion and instead amended the termination order to add more findings.

R.S. appeals.

D E C I S I O N

R.S. raises two arguments on appeal. He argues first that the district court erred by finding that the county made reasonable accommodations for his disability as required by the Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Minnesota Human Rights Act. He argues second that clear and convincing evidence did not support termination of his parental rights as required by statute. We need not address his disability-related arguments because the lack of clear and convincing evidence as to each of the statutory bases for termination requires reversal and remand.

The district court can exercise the extraordinary power to terminate parental rights only if clear and convincing evidence supports at least one of the statutory termination grounds. Minn. Stat. § 260C.301, subd. 1(b)(1)–(9) (2018); *see also In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). The district court terminated R.S.’s parental rights on three of those grounds, concluding that he is palpably unfit to parent, Minn. Stat. § 260C.301, subd. 1(b)(4), that he failed to abide by the duties of the parent-child relationship, Minn. Stat. § 260C.301, subd. 1(b)(2), and that R.T.S. was neglected and in foster care, Minn. Stat. § 260C.301, subd. 1(b)(8). We must review whether any of these statutory bases is supported by clear and convincing evidence. On review of the termination of parental rights, we must determine whether the

district court's findings satisfied the statutory elements and whether they are supported by substantial evidence. *S.E.P.*, 744 N.W.2d at 385. In doing so, although we give significant deference to the district court's ultimate decision to terminate parental rights, we must first "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing." *Id.* We have carefully examined the evidence and reasons for each statutory basis for termination here.

Palpable Unfitness

A parent is palpably unfit if specific conditions exist that "directly relat[e] to the parent and child relationship" and are "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). The district court gave three reasons supporting its conclusion that R.S. is palpably unfit to parent. It reasoned that R.S. has parenting deficiencies, did not understand or appreciate R.T.S.'s needs, and is unable to protect R.T.S. from S.D.T. The district court found that R.S. "lacks the higher-level understanding of his child's needs, particularly with regard to . . . particular medical and special needs, including educational, speech, and therapeutic needs." The evidence and reasoning do not support the conclusion.

Regarding medical needs, the district court elaborated, saying that R.S. "does not understand his child's need for regular, local, medical care." The district court found, and the record supports, that R.S. did not have a primary-care physician for R.T.S. in the area before the county took custody of him. But the district court identifies no instance in which

R.T.S. went without necessary medical services or faced any harm from the lack of them, regular or otherwise, while under R.S.’s care.

Regarding educational needs, the district court found that R.S. “does not understand the benefit of preschool,” and this finding arises from R.S.’s testimony that he believes R.T.S. should begin school at age five. Preschool attendance is not compulsory in Minnesota. *See* Minn. Stat. § 120A.22, subd. 5(a) (2018) (requiring school attendance from age 7 to 17). The county removed R.T.S. from R.S.’s care when R.T.S. was only two years old, and, according to the National Center for Education Studies, preschool is not the choice of most parents of even *three-year olds*. *See* Nat’l Ctr. for Educ. Stat., *Preschool and Kindergarten Enrollment*, (last updated Feb. 2019), https://nces.ed.gov/programs/coe/indicator_cfa.asp. That R.S. “does not understand the benefit of preschool” is not a fact that supports termination.

The district court found that R.S. cannot properly respond to a real emergency because he “does not know how to respond to even minor emergencies—such as how to remove his child’s finger from Play-Dough.” Whether to remove a two-year-old child’s finger from Play-Dough is a parenting choice that does not demonstrate whether the parent will act appropriately in a real emergency. And given the county’s decision to suspend R.S.’s supervised parenting opportunities as an apparent penalty for the misconduct of S.D.T., not of R.S., the county’s emphasis on this single supervised incident seems overstated. In any event, the cited incident is not clear and convincing evidence that the parent will fail to protect R.T.S. in an emergency.

Regarding the child's special needs, the district court found that R.S. "has never attended his child's therapeutic appointments." This may show a lack of insight, but it adds little to establish palpable unfitness to parent. The district court did not identify how R.S.'s lack of insight due to his own low functional intelligence renders him unfit to parent. The district court did say that R.T.S.'s special needs include a "developmental delay, speech difficulties, and possible autism." But it made no findings on what specific services R.T.S. needs, nor did it identify any evidence that R.S. is unwilling or unable to ensure that his child gets those services.

The district court predicted that, "[a]s his child grows older, the complexities of parenting will only increase" and that "father's inability to adapt will be a particular problem considering the child's special needs." The district court here seems to reason that, because R.S. has a significantly lower than average intelligence, he will not be able to parent R.T.S. through challenges that R.T.S. will face. But conditions that have not yet occurred do not reasonably support a palpable unfitness determination. *In re Welfare of Children of B.M.*, 845 N.W.2d 558, 564 (Minn. App. 2014); *see also In re Children of T.R.*, 750 N.W.2d 656, 661 (Minn. 2008) (holding that specific conditions at the time of the hearing are the focus of palpable unfitness inquiry). And R.S.'s mental disability, like a parent's mental illness, is not in itself a basis for termination. *See In re Welfare of Kidd*, 261 N.W.2d 833, 835 (Minn. 1978) (observing need for connection between parent's mental illness and parenting conduct to support termination).

A central focus of the termination order was S.D.T. The district court put the greatest emphasis on R.S.'s failure to "protect the child from . . . mother," highlighting that

she “has repeatedly been deemed a palpably unfit parent.” It concluded that this failure “poses an ongoing safety risk to the child, and is a condition that is unlikely to change in the reasonably foreseeable future.” We recognize that a parent’s failure to keep a child from a dangerous adult is evidence that may support a finding of palpable unfitness to parent. *See In re Children of T.A.A.*, 702 N.W.2d 703, 708–09 (Minn. 2005) (noting that a parent’s failure to protect a child from abusive adults provided clear and convincing evidence that the parent was palpably unfit). But although the district court outlined abundant evidence proving that R.S. continued his relationship with S.D.T., it never explained why allowing S.D.T. near the child poses a safety risk. The county points to nothing in the record allowing us to hold that it presented clear and convincing evidence that S.D.T. poses a safety risk from which R.S. must, but will not, protect the child.

Adding to these findings, the district court says that R.S. “has apparent memory issues” and “has difficulty dealing with changes in routine.” These too do not show palpable unfitness. We hold that, taken together, the evidence relied on by the district court does not clearly and convincingly support its finding that R.S. is palpably unfit to parent.

Compliance with Parental Duties

The district court also held that clear and convincing evidence supported termination of R.S.’s parental rights because he failed to comply with parental duties. The district court may terminate parental rights if the parent “substantially, continuously, or repeatedly refuse[s] or neglect[s] to comply with the duties imposed upon that parent by the parent and child relationship” and reasonable efforts by the agency have not corrected the conditions leading to the initial removal of the child. Minn. Stat. § 260C.301, subd. 1(b)(2).

The district court reasoned that R.S.’s failure to meet R.T.S.’s daily medical, educational, and mental-health needs demonstrates his failure to comply with his parental duties. Its specific findings and analysis do not support the noncompliance-with-duties conclusion.

The district court rejected R.S.’s observation that he and S.D.T. met the child’s needs for the first two and a half years of the child’s life, reasoning that “the parents were not in contact with [child services], and it is not clear that they were the only ones caring for the child.” The district court therefore drew an unsupported negative inference; it inferred from the lack of evidence that R.S. and S.D.T. alone cared for the child that someone else must have helped them. First, the court’s assumption that other caregivers were involved is not clear and convincing evidence that they were. And second, that other caregivers were involved in helping provide care for R.T.S. while R.S. was obligated to ensure proper care tends to show that he has ensured the child’s proper care, not that he has not.

The district court acknowledged the child’s “relative [good] health at the time of the parents’ arrest” but similarly pointed out that both S.D.T. and R.S. together, not R.S. alone, may have been providing for the child’s care. This reasoning is conflicting; on one hand, the district court consistently rejected R.S.’s claim that he is a fit parent by assuming that S.D.T. is so dangerous that allowing her presence proves R.S.’s inability to protect the child. But on the other, the district court rejected R.S.’s claim that he has provided good care for the child by assuming that it was S.D.T. who provided that care. In any event, that the child’s needs were being met by R.S. with or without S.D.T.’s help is not evidence that

R.S. substantially, continuously, or repeatedly refused or neglected to comply with his parental duties.

The district court opined that the social worker and parenting educators believed that R.S. “lacks the ability to respond to higher-level needs of the child, including basic safety requirements like responding to emergencies and bringing the child to the hospital as necessary.” It added that R.S. did not seek “regular, consistent, medical care for the child prior to the child’s placement in foster care.” The district court does not identify, and the county does not cite, any circumstance when R.S. failed to take the child to the hospital when he should have. Nor did it identify any point when the child needed, but was not provided, proper medical care. A hypothetical failure to respond to a theoretical future emergency or medical need cannot constitute clear and convincing evidence that a parent has *previously* substantially, continuously, or repeatedly refused or neglected to comply with his parental duties.

The district court criticized R.S.’s disbelief that “the child needs special education or therapeutic services” after he was informed that an expert assessed the child as needing those services. But the county fails to identify evidence of any neglect or refusal by R.S., let alone his substantial, continual, or repeated neglect or refusal, to provide R.T.S. any of the services the district court implicitly found to be essential.

Neglected and in Foster Care

The termination order also cannot rest on the reasoning behind the conclusion that R.T.S. was neglected and in foster care. Minn. Stat. § 260C.301, subd. 1(b)(8). A child is neglected and in foster care if the child has been placed in foster care by court order, the

parent's circumstances are such that the child cannot be returned, and the parent has not made reasonable efforts to adjust his circumstances, condition, or conduct, despite the availability of rehabilitative services. Minn. Stat. § 260C.007, subd. 24 (2018); *see also* Minn. Stat. § 260C.163, subd. 9 (2018) (listing seven factors to consider when determining whether a child is neglected and in foster care). The district court did not find that R.S. failed to make reasonable *efforts* in his case plan. In fact, it expressly found that "father has made efforts to comply with his case plan." The record supports the finding. R.S. attended parenting classes, exhibited rudimentary parenting skills, demonstrated some improvement, worked with a psychotherapist, visited R.T.S. regularly, and maintained communication with the county. The district court did not focus on R.S.'s efforts, however, but on his lack of progress, finding, "Unfortunately, Respondent father has made little progress on his case plans" The court's cited support for this conclusion is, again, the undefined danger posed by R.S.'s decision to maintain his relationship with S.D.T.: "Even if . . . father had made remarkable progress, he has shown that he intends to remain in a relationship with . . . mother, whose parental rights have been terminated. His need to separate from her is essential for the protection of the child" And it also focused on R.S.'s low intelligence, observing that "he is not able to absorb and remember the educational tools he has been provided."

The district court's findings and analysis do not support its conclusion that clear and convincing evidence establishes R.T.S. is neglected in foster care.

Summary

We are mindful of the difficulty facing the district court in addressing a termination petition involving an indigent parent with a substantially low intelligence level. And our opinion does not suggest that the district court erred in finding that “[t]he child cannot be placed with Respondent father” because it is not clear, in light of the circumstances at the time of the trial, that “placement of the child with him would be safe.” Nor do we hold that the order protecting the child should be vacated. We conclude only that, despite the district court’s reasonable concerns, the county’s evidence supporting the elements of termination was not clear and convincing. We remand the case to the district court for any further proceedings to address custody and the child’s need for protection or services in light of current circumstances and R.S.’s continued parental rights.

Reversed and remanded.