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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1986**

In the Matter of the Welfare of the Child of:
V. N. M. and C. W. N., Parents.

**Filed July 22, 2019
Affirmed
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-JV-18-1770

C.W.N., Brooklyn Park, Minnesota (pro se appellant)

Michael O. Freeman, Hennepin County Attorney, Mary M. Lynch, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Georgina Paulick, Minneapolis, Minnesota (guardian ad litem)

Considered and decided by Reyes, Presiding Judge; Cleary, Chief Judge; and Bjorkman, Judge.

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

CLEARY, Chief Judge

On appeal from the termination of his parental rights, appellant C.W.N. (father) argues that (1) the hearing judge exhibited bias and should have recused, (2) the district court denied him due process by applying the presumption of palpable unfitness, and (3) the guardian ad litem acted improperly. We affirm.

FACTS

V.N.M. (mother) gave birth to N.N. on April 7, 2018. Mother was not married to father when N.N. was conceived, nor when N.N. was born. Father signed a recognition of parentage and was adjudicated the father of N.N.

Both mother and father have previous involvement with child protection. In 2008, father was awarded permanent sole legal and physical custody of a non-joint child. A few years later, Hennepin County Human Services and Public Health Department (the county) filed a child-in-need-of-protection-or-services petition (CHIPS) after receiving a report that father physically abused the child. In February 2012, the district court ordered the child into long-term foster care until he reached the age of majority. Father agreed to this disposition, admitting that he “had the ability to substantially comply with his case plan but did not use the services offered to correct the conditions that led to the out-of-home placement.”

In March 2016, the district court terminated mother’s parental rights to a non-joint child and ordered the involuntary transfer of legal and physical custody of another non-joint child from mother to the child’s biological father. The county again became involved with mother and father shortly after the birth of a joint child in July 2016 due to mother’s child-protection history. The county developed a case plan for father to address the following issues: (1) his child-protection history; (2) parenting issues; (3) his history of domestic violence and physical abuse of a child; (4) mental-health issues; and (5) a lack of stability.

While the county sought to terminate both mother's and father's parental rights, in March 2017, the district court only terminated mother's parental rights to the child. The district court concluded that the statutory bases for terminating father's parental rights to the joint child had been met, but that termination was not in the child's best interests. The matter was reverted to a CHIPS proceeding. But, in December 2017, the district court terminated father's parental rights to the child, finding that father only minimally engaged in his case plan. The district court also determined that the county proved the statutory bases for termination by clear and convincing evidence, and that termination was in the best interests of the child.¹

Shortly after the birth of N.N., in April 2018, the county filed a petition to terminate mother's and father's parental rights to N.N. due to their previous involvement with child protection. The county alleged three statutory bases for termination: (1) the parent has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship under Minn. Stat. § 260C.301, subd. 1(b)(2) (2018); (2) the parent is palpably unfit under Minn. Stat. § 260C.301, subd. 1(b)(4) (2018); and (3) the child is neglected and in foster care under Minn. Stat. § 260C.301, subd. 1(b)(8) (2018).

¹ Father appealed to this court, and this court dismissed the appeal because father failed to timely serve the guardian ad litem. *In re Welfare of Child of C.W.N.*, A18-0098 (Minn. App. Feb. 20, 2018) (order op.). Father filed a motion requesting that the supreme court accept a late petition for review of the decision of the court of appeals. The court denied father's motion. *In re Welfare of Child of C.W.N.*, A18-0098 (Minn. Mar. 20, 2018) (order op.).

After an emergency protective-care hearing, the district court ordered N.N. into interim custody of the county. The district court found that the termination petition established a prima facie case showing the existence of a juvenile-protection matter, and that reasonable efforts to reunify the family were not required because the rights of mother and father to other children have been terminated or transferred involuntarily.² Father filed a notice to remove the assigned judge, and a new trial judge was then assigned to the case.

On the same day, father filed a motion to inspect reports, dismiss the petition, and reestablish custody and parenting time. In his motion, father requested to examine and review records ranging in date from 1998 to 2016. But at the motion hearing, father instead argued that there was no basis for the county to take N.N. from the hospital after she was born.³ Father also claimed that he was not receiving a fair trial because the district court should have addressed his motion at the last court date. The hearing judge, who was different than the trial judge, denied father's motion, finding that because father's previous termination of parental rights is a valid order, it created a presumption that he is palpably unfit and served as a basis for the county to petition to terminate father's parental rights to N.N.

Prior to the start of trial, on October 8, 2018, the trial judge addressed mother's motion to bifurcate and continue the proceedings. Father supported mother's motion for a continuance, asserting that a continuance would give him additional time to address his

² The order was signed by a referee and the same district court judge who terminated mother's and father's parental rights to their other joint child in 2017.

³ The hearing judge was the trial judge in mother's 2016 child-protection case.

concerns that the hearing judge was biased, and to find an attorney. After the trial judge granted mother's motion to bifurcate, but denied the motion to continue, mother and father became disruptive, and father alleged that the trial judge was biased.

After a brief recess, trial proceeded with father's portion of the case. The county attempted to call father as a witness, but he refused to testify. Instead, the county called the assigned child-protection social worker, who testified that termination of father's parental rights would be in the best interests of the child. After father absented himself from the proceeding, the guardian ad litem also testified, recommending that the district court terminate father's parental rights, and that termination is in N.N.'s best interests.

On November 15, 2018, the trial judge terminated mother's and father's parental rights to N.N. The trial judge credited the testimony of the social worker and guardian ad litem. The trial judge found that the county proved by clear and convincing evidence each of the statutory grounds for termination, and that termination is in the best interests of the child. Father appeals.

D E C I S I O N

Upon review of a district court's decision to terminate parental rights, we "determine whether the district court's findings address the statutory criteria and whether the district court's findings are supported by substantial evidence and are not clearly erroneous." *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). The district court's ultimate decision to terminate parental rights is reviewed for an abuse of discretion. *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 136-37 (Minn. 2014). A district court may terminate parental rights if clear and convincing evidence establishes

that: (1) at least one statutory basis supports termination; (2) the county made reasonable efforts to reunite the family, unless reasonable efforts were not required; and (3) termination is in the child's best interests. *S.E.P.*, 744 N.W.2d at 385; Minn. Stat. § 260.012(a) (2018) (providing exceptions to the requirement that a county make reasonable reunification efforts in a termination proceeding).

I. The district court did not exhibit bias or prejudice.

Father argues that the hearing judge was biased against him and should have recused. Whether a judge should recuse from a case is discretionary with the district court, and we review that decision for an abuse of discretion. *Carlson v. Carlson*, 390 N.W.2d 780, 785 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). The Minnesota Rules of Juvenile Protection Procedure provide that “[n]o judge shall preside over any case if that judge is interested in its determination or if that judge might be excluded for bias from acting as a juror in the matter.” Minn. R. Juv. Prot. P. 7.07, subd. 2. The same rules provide that a party may remove a judge upon a motion filed within ten days after receiving notice of the presiding judge. *Id.*, subd. 3(a), (d). But a “judge who has presided at a motion or other proceeding may not be removed except upon an affirmative showing of prejudice on the part of the judge.” *Id.*, subd. 3(b). An affirmative showing of prejudice includes a showing that the judge might be excluded for bias from acting as a juror in the matter. *Id.*, subd. 3(c).

Father did not timely request removal of the hearing judge and must therefore make an affirmative showing of prejudice. *Id.*, subd. 3(b); *see also Uselman v. Uselman*, 464 N.W.2d 130, 139 (Minn. 1990) (“[A] party who fails to remove a judge before the start of

trial has lost its opportunity to do so unless it demonstrates prejudice or implied or actual bias.”). Father asserts that the hearing judge was biased because of his involvement in a prior case, and he cites *Williams v. Pennsylvania* in support of his argument that this involvement deprived him of due process. 136 S. Ct. 1899 (2016). In *Williams*, the Supreme Court concluded that there was an impermissible risk of actual bias where a judge earlier had significant involvement as a prosecutor in the decision to seek the death penalty against the appellant. *Id.* at 1903, 1908. But unlike *Williams*, the hearing judge was not involved in any of father’s prior cases. Instead, the hearing judge was the trial judge in one of mother’s previous termination-of-parental-rights cases.

The hearing judge’s involvement in mother’s prior case is not sufficient to demonstrate that the judge is prejudiced against father. While the advisory committee comment to Minn. R. Juv. Prot. P. 7.07 “recommends that courts implement the one-judge one-family concept to the greatest extent possible,” the committee further recognized that “a rule mandating implementation of the one-judge one-family concept may not be practical or enforceable in all situations.” Minn. R. Juv. Prot. P. 7.07, 2003 comm. cmt. It was therefore not required that the hearing judge recuse from additional involvement in father’s current case because of his previous involvement with mother’s prior case. And after mother and father filed a notice to remove the first district court judge, the trial judge was assigned to the case, not the hearing judge.

Father’s allegations of bias appear to reflect his dissatisfaction with the adverse rulings against him—namely, the hearing judge’s denials of his motion to inspect reports, dismiss the petition, and reestablish custody and parenting time. It is well-established that

adverse rulings do not constitute an affirmative showing of prejudice. *See, e.g., Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986). Because father has failed to demonstrate prejudice, the hearing judge was not required to recuse.

II. The district court did not err in applying the presumption of palpable unfitness.

Father asserts that he was “not given a fair trial base[d] on the same petition of [his] last parental termination of rights,” and that the petition in this case is barred under the doctrine of res judicata. To the extent that father raises a constitutional challenge to the petition, he cites no authority and does not engage in any constitutional analysis. Because father has failed to brief this argument adequately, we decline to consider it. *See State, Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address issue in absence of adequate briefing).

Moreover, the statutory presumption of palpable unfitness directs the district court to consider a parent’s prior termination of parental rights. *See* Minn. Stat. § 260C.301, subd. 1(b)(4) (providing that a presumption of palpable unfitness arises “upon a showing that the parent’s parental rights to one or more other children were involuntarily terminated”). And the palpable-unfitness presumption is consistent with a parent’s constitutional rights because it is narrowly tailored to serve the compelling government interest of protecting children. *R.D.L.*, 853 N.W.2d at 134.

Father next appears to argue that the petition to terminate his parental rights to N.N. is barred under the doctrine of res judicata as a result of the prior termination of his parental rights to his older joint child. Res judicata may bar a claim in a subsequent action when:

(1) a claim in an earlier action involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Sanvick v. Sanvick*, 850 N.W.2d 732, 737 (Minn. App. 2014). “Whether res judicata is available in a particular case is a question reviewed de novo.” *Id.*

Here, the earlier action does not involve the same set of factual circumstances. These actions involved different children and occurred at different times. Additionally, because of the prior termination of father’s parental rights, the burden shifted to father in this case to demonstrate that he was not palpably unfit to parent N.N. *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). Because the issue in the current case differs from the issue in father’s prior termination of parental rights and involves different factual circumstances, the doctrine of res judicata is inapplicable.

Father further failed to rebut the presumption of palpable unfitness. The presumption of unfitness imposes a burden of production on the parent to produce evidence to rebut the presumption. *In re Welfare of Child of J.A.K.*, 907 N.W.2d 241, 245-46 (Minn. App. 2018). “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.” *Id.* at 246 (quotations omitted). Father refused to testify at trial, presented no evidence of his ability to successfully parent a child, and absented himself from portions of the proceeding. “[A] party cannot complain about a district court’s failure to rule in [his] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow

the district court to fully address the question.” *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). The district court did not err in applying the presumption of palpable unfitness to father.

III. The guardian ad litem did not improperly represent the child.

Father broadly asserts that the guardian ad litem assigned to the case was unprofessional and represented her own interests, rather than the best interests of N.N., on the day of trial.

A guardian ad litem is required to, among other things:

[C]onduct an independent investigation to determine the facts relevant to the situation of the child and the family, which must include, unless specifically excluded by the court, reviewing relevant documents; meeting with and observing the child in the home setting and considering the child’s wishes, as appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case.

Minn. Stat. § 260C.163, subd. 5(b)(1) (2018).

In support of his argument, father cites to *In re Welfare of Children of D.F.B.*, 412 N.W.2d 406 (Minn. App. 1987), *review denied* (Minn. Nov. 18, 1987). There, this court determined that the guardian ad litem’s activity fell short of the prevalent standards where the guardian’s testimony failed to include any reference to her qualifications, she never saw the children, and she only met the appellant as a result of participation on a review team. *Id.* at 412. However, *D.F.B.* is unpersuasive here given that the court concluded that substantial evidence supported the termination of the appellant’s parental rights, despite any defect in the guardian’s conduct. *Id.*

Here, the guardian ad litem was assigned in September 2018 after the previously-assigned guardian, who was involved in mother's three prior child-protection cases, chose not to continue to work with the family due to her frustration with the parents' failure to correct the conditions that led to the prior terminations of their parental rights. In the interim period between the two assigned guardians, coverage guardians attended the proceedings. To prepare for trial, the newly-appointed guardian ad litem testified that she spoke with the previous guardian, reviewed the case file and the county's proposed trial exhibits and discovery, and met with the parents on the day of father's trial.

The district court acknowledged the guardian's limited investigation and found that she was "properly situated to make a recommendation on the child's best interests." The district court specifically found her testimony to be credible and "sincere and thoughtful." "Considerable deference is due to the district court's decision because a district court is in a superior position to assess the credibility of witnesses." *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996). The guardian's recommendation was also consistent with the social worker's recommendation for termination of father's parental rights. The conduct of the guardian ad litem does not warrant reversal.

Affirmed.