

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1324**

In the Matter of the Welfare of the Children of: D. O., Parent.

**Filed April 5, 2021
Affirmed
Connolly, Judge**

Ramsey County District Court
File No. 62-JV-19-1284

Karla K. Valusek Strom, St. Paul, Minnesota (for appellant-father J.D.G.)

James Fleming, Second District Public Defender, Sharon L. Thompson, Amanda Weitekamp, Assistant Public Defenders, St. Paul, Minnesota (for respondent-child T.G.)

John J. Choi, Ramsey County Attorney, Robert Hamilton, Assistant County Attorney, St. Paul, Minnesota (for respondent Ramsey County Human Services)

Torrina Burns, St. Paul, Minnesota (guardian ad litem)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and
Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant-father challenges the termination of his parental rights, arguing that the record does not support determinations that he failed to satisfy his parental duties, that he is a palpably unfit parent, that respondent-county made reasonable but unsuccessful efforts to unify him with his daughter, and that it is in his daughter's best interest to terminate his parental rights; he also argues that the district court relied on misstatements of law. Because the record supports the district court's determinations and because appellant was not prejudiced by any misstatements of law, we affirm.

FACTS

D.O. is the mother of three children, denominated Child 1, born in 2006, Child 2, born in 2010, and Child 3, born in 2018. They were adjudicated Children in Need of Protection or Services (CHIPS) by respondent Ramsey County Human Services Division (RCHSD) in 2018 because D.O. was unable to care for them, and they were placed in foster care with a relative, T.G., with whom they remain.

Appellant J.D.G. is the father of Child 1, a girl. He lived with D.O. until Child 1 was about six months old and since that time, he has never lived with them or acted as a parent to Child 1. Following incidents of domestic violence, an order for protection (OFP) was issued in 2008 against appellant for D.O.; his visitation of Child 1 was reserved.

Appellant has two other children: a boy born in New York in 2010, who has always lived there with his mother, and another daughter in Minnesota, who lives with her mother, K.H. Appellant has never parented either child, although he has had sporadic contact with

K.H.'s daughter. In 2018, appellant moved to Chicago, where he now lives with his wife and her two children. K.H. took her daughter and Child 1 to Chicago, and they spent some time with appellant.

D.O. and appellant, who was then incarcerated in Minnesota, were both served with RCHSD's petitions to terminate their parental rights (TPR petitions) to Child 1; D.O. was also served with TPR petitions to terminate her rights to Child 2 and Child 3. She executed her consent to adopt as to Child 1 in 2020.

Appellant was contacted by a child protection worker (CPW) whom he told that he planned to relocate to Chicago when he was released in June 2019. The CPW explained to him that the services enabling him to parent Child 1 in Minnesota would not be available in Chicago, that building a relationship with Child 1 if he lived in a different state would be significantly more difficult than if he remained in Minnesota, and that he would need to commit to visiting Child 1 at least every other month. At the time his case plan was created in May and June 2019, appellant had never demonstrated the ability to provide a child with food, shelter, or medical and dental care, or to meet a child's educational and behavioral needs.

At the intermediate dispositional review hearings in October 2019, December 2019, and February 2020, appellant reported to the CPW that he was living in Chicago, had not yet obtained his own residence, was starting a new job, and continued to be on probation. No probation officer confirmed any of this information.

Following a trial on the TPR petition, the district court issued findings of fact and conclusions of law that: (1) appellant has refused and neglected to comply with his duties

as a parent of Child 1, (2) appellant is palpably unfit to be a party to the parent-child relationship, (3) reasonable efforts of RCHSD failed to correct the conditions leading to Child 1's out-of-home placement, and (4) Child 1 was neglected and had been in foster care for more than two years.¹ The district court terminated appellant's parental rights. Appellant challenges the termination.

DECISION

“[Appellate courts] affirm the district court's termination of parental rights when at least one statutory ground for termination is supported by clear and convincing evidence and termination is in the best interests of the child, provided that the county has made reasonable efforts to reunite the family.” *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008) (citation omitted). On appeal, “[c]onsiderable 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). A district court's conclusion that a ground for termination has been proven by clear and convincing evidence will not be overturned unless the appellant demonstrates that the district court abused its discretion. *In re Welfare of Children of J.R.B. & J.D.B.*, 805 N.W.2d 895, 900 (Minn. App. 2011), *review denied* (Minn. Jan. 6, 2012).

¹ Appellant does not oppose the fourth conclusion on appeal and has therefore waived the right to challenge it. *See Melina v. Chaplin*, 327 N.W.2d 19, 20-21 (Minn. 1982) (holding that issues not argued on appeal are waived). We note that this unopposed conclusion by itself would be sufficient to support the TPR. *See* Minn. Stat. § 260C.301, subd. 1(b) (2020) (providing that any one of the nine statutory grounds may be a basis for termination); *In re Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005).

1. Failure to comply with parental duties

A district court may terminate a parent's right to a child if it finds that:

[t]he parent has substantially, continuously, or repeatedly refused or neglected to comply with the duties imposed upon that parent by the parent and child relationship, including but not limited to providing the child with necessary food, clothing, shelter, education and other care and control necessary for the child's physical, mental, or emotional health and development.

Minn. Stat. § 260C.301, subd. 1(b)(1). The district court concluded that appellant

has not been present and fulfilling his parental responsibilities to Child 1 because he has not been present in the child's life on a day-to-day basis, developed a relationship with Child 1, nor [been] involved in Child 1's emotional and educational development essentially during the fourteen years of Child 1's life.

....

A child's interest in permanency typically requires that a parent is not only capable of limited visitation with the child but is also capable of providing for the child's welfare. *In re Welfare of Children of R.W.*, 678 N.W.2d 49, 57-58 (Minn. 2004). [Appellant] has failed to meet Child 1's permanency needs, visits Child 1 rarely, and has progressed to no more than having phone and text contact with the child.

....

... [He h]as substantially, continuously and repeatedly neglected to comply with his parental duties as to Child 1 throughout her lifetime. During the past [14] months, once he began to engage in the child protection proceedings, he has failed to make significant or substantial progress in demonstrating his capacity to be able to substantially, continuously and repeatedly fulfill his parental duties as to Child 1. While he has made progress in continuing to remain in contact with Child 1 via text and phone, he has failed to participate in Child 1's ongoing medical and dental care as well as [her] educational and behavioral needs.

Appellant argues that “his testimony at trial evidenced a father who is involved in his child’s life, able to stay connected despite geographical distance, and on whom his child relies for emotional support.” But at trial, appellant testified that phone contact enabled him to fulfill all his parental duties to Child 1, that he and Child 1 had an argument over the phone over her not wanting to come and stay with him, and that, after she hung up on him, they did not talk for three or four weeks.

D.O. gave up her parental rights in May 2018, and appellant was asked if, since then, Child 1 had to live without any parent to protect, serve, provide for, love, and care for her. He answered, “Well, I didn’t step up? I was coming to court. I was doing everything y’all asked me to do. I’m staying out of trouble. This is the longest I’ve been out of trouble and everything. I have rehabilitated myself and everything, like, what more can you ask for?” Thus, appellant’s testimony actually evidences a father who believes that phone contact and keeping his court dates are fulfilling his parental duties, not a father on whom a child can rely for emotional or any other support. The district court did not abuse its discretion in concluding that appellant failed to comply with his parental duties both before and after RCHSD became involved.

2. Palpable unfitness

A district court may terminate the rights of a parent to a child if it finds

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). The district court concluded that:

[appellant] has engaged in a consistent pattern of conduct towards Child 1 of deferring to others to meet all the basic and special needs of Child 1. [He] has continued that same pattern of conduct throughout the child protection proceedings that are ongoing and has taken only minimal steps towards having contact with Child 1 through phone calls and texts. . . . [H]e is unable for the reasonably foreseeable future to care for Child 1's ongoing physical, mental, and emotional needs. [He] has not prioritized the welfare of Child 1 over his own individual needs.

The record supports this conclusion. When the CPW was asked if she could “describe what [appellant’s] done in the area of parenting skills, what [Child 1] needs, and what has [appellant] done to meet those needs?” she answered, “[N]othing, and the reason is that [he] live[s] in Chicago.” She added that appellant did not inquire about Child 1’s physical and mental health or schooling, he was not in tune with Child 1’s emotional needs, and there was no real bonding between them. The CPW said she had encouraged appellant to meet Child 1 after he was released from custody and before he went to Chicago, but the meeting did not happen. When asked if appellant would be able to parent Child 1 in the reasonably foreseeable future, the CPW said “No” because Child 1 had been in foster care for about two years and he had never parented her before that happened or “demonstrated that he can be a full-time parent to Child 1.”

The guardian ad litem (GAL) stated that, from August 2019 to August 2020, appellant had the capacity to establish a bond with Child 1 but did not take advantage of the opportunity: “he was not as consistent as we would have liked him to be.” She stated

that, while Child 1 sometimes says she would like a bond with appellant, his lack of follow-through and inconsistency resulted in Child 1 giving up and saying she no longer cares whether she has a relationship with him. A recent month-long break in their contact led to her saying, “I don’t care anymore. I don’t want to speak with him. He hurt my feelings. He doesn’t care about my feelings. He hasn’t bothered to check about me and see how that conversation [i.e., their disagreement on the phone] impacted me.” When asked if she thought appellant “has the capacity in the reasonably foreseeable future to attain the ability to provide . . . all the caregiving for [Child 1],” the GAL answered, “I do not. [He] has had the ability to demonstrate his capacity to parent his child, and he has not demonstrated [it], so at this point I do not.” The district court found “compelling the opinion[s] of [the CPW and the GAL] that termination [of appellant’s parental rights] is in the best interests of Child 1.” The district court did not abuse its discretion in concluding that, because appellant will be unable for the reasonably foreseeable future to parent Child 1, he is palpably unfit to be a party to a parent-child relationship with her.

3. The reasonable efforts of RCHSD

A district court may terminate the rights of a parent to a child if it finds:

that following the child’s placement out of the home, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the child’s placement. It is presumed that reasonable efforts under this clause have failed upon a showing that:

. . . .

(iii) conditions leading to the out-of-home placement have not been corrected. . . .; and

(iv) reasonable efforts have been made by the social services agency to rehabilitate the parent and reunite the family.²

Minn. Stat. § 260C.301, subd. 1(b)(5). The district court concluded that:

RC[H]SD has made ongoing reasonable efforts to resolve the condition that led to [Child 1's] out-of-home placement. RC[H]SD has provided for all the child's needs since 2018, by supporting the child with services that meet the child's therapeutic needs and supporting the child with a caregiver [T.G.] that could meet the child's daily basic and special needs. RC[H]SD has made ongoing reasonable efforts to initially locate [appellant], engage him in rectifying and fostering his relationship with Child 1, monitoring and encouraging [him] to prioritize his relationship with Child 1, to visit [her] on a consistent basis and have phone and text contact with [her] when not visiting in person. . . .

. . . Reasonable efforts have failed to correct the conditions leading to Child 1's placement in relative foster care, [and] have failed to build a trusting parent/child relationship. [Nor has appellant] demonstrated that he has the capacity to provide for all the basic and special needs for Child 1 in a timely manner. [He] has had [14] months to build the relationship and take steps forward to become a father to Child 1, but he has failed to make any substantial or significant step in that direction.

Appellant argues that RCHSD should have located services for him *in Chicago* that would have enabled him to meet his case plan, but a significant item of the case plan was his returning to Minnesota to visit Child 1 every two months, which he did not do and which would have required no services. On two visits, June 2019 and December 2019, appellant did not see Child 1 while he was in Minnesota. His case plan also required phone

² We note that the term "reunify" is not strictly applicable here: appellant and Child 1 never lived together after she was about six months old, he never engaged in her care, and there was no relationship between them.

contact three times a week, but appellant did not meet that requirement either and had not contacted Child 1 for about a month at the time of trial.

Finally, appellant argues that he offered his Illinois home as an alternative placement for Child 1, but he knows that she needs stability, is now in a stable household, and has stable, close relationships with her siblings and caregiver in Minnesota. Moreover, he testified that he did not want Child 1 to be placed in his custody or “to take her away from her siblings or her mom,” so he knew his offer was unlikely to be accepted.

The district court did not abuse its discretion in concluding that RCHSD had made reasonable efforts that had failed to correct the conditions leading to Child 1’s out-of- home placement.

4. The Best Interests of Child 1

To determine the best interests of a child in a TPR case, the court must consider the child’s interest in preserving the parent-child relationship, the parent’s interest in preserving the parent-child relationship, and any competing interest of the child, such as a stable environment, appropriate parental care, and health concerns.³ *In re Welfare of R.T.B.*, 492 N.W.2d 1, 4 (Minn. App. 1992). “Where the interests of parent and child conflict, the interests of the child are paramount.” Minn. Stat. § 260C.301, subd. 7 (2020).

The district court found that, while Child 1 “loves and wants a relationship with” appellant, she “is not bonded or currently at a point of having a trusting relationship with [him].” It also found that, while appellant testified he loves Child 1 and wants to keep his

³ Again, the issue here is not preserving the relationship between appellant and Child 1; it is rather creating such a relationship.

parental rights, appellant did not express any desire to provide day-to-day care for Child 1 and chose to move to Illinois, although Child 1's home and all her close relationships are in Minnesota. Finally, it found that Child 1 has six competing interests: (a) permanency, because she has already been in foster care for over two years and should no longer be in an unsettled state with the possibility of another move; (b) consistent care, supplied by a caregiver who has Child 1's interests as the top priority; (c) a caregiver who can meet Child 1's basic and special needs, support her school life and her activities, and help her grow emotionally; (d) remaining with her two siblings (D.O.'s Child 2 and Child 3), because they are very closely bonded to her, and the relative foster parent with whom they all live is supportive of them and of Child 1's desire to have contact with appellant; (e) remaining in her current family and not moving to appellant's home in Chicago, where she knows no one except appellant and would be living with appellant's wife and her children; and (f) remaining in her current community, where she has an extensive extracurricular sports program that fosters friendships and social activity.

Particularly in light of the fact that the interests of the child, not the parent, are paramount, Minn. Stat. § 260C.301, subd. 7, the district court did not abuse its discretion in agreeing with the views of both the CPW and the GAL that terminating appellant's parental right is in Child 1's best interest.

5. The alleged error and misstatement of law⁴

For a judgment to be reversed due to a misstatement of law, the appealing party must show both that a misstatement was made and that the appealing party was prejudiced as a result. *Lewis v. Equitable Life Assur. Soc’y*, 389 N.W.2d 876, 885 (Minn. 1986) (holding that, when a jury instruction has misstated the law, “reversal is not required unless the error in the instructions was prejudicial” to the party seeking reversal).

Appellant claims there were two misstatements, one written and one oral. The oral misstatement was made at the end of trial by the GAL, who was recalled and questioned by RCHSD’s attorney.

Appellant argues that the GAL erroneously informed the district court that Northstar aid is available only for adoption, not for long-term foster care, and relied on that information to terminate appellant’s parental rights so Child 1 could be adopted and have access to it. Northstar aid is actually available to a permanent legal and physical custodian relative if, among other criteria, there has been a judicial determination that the arrangement is in the child’s best interest and adoption is not an appropriate permanency option. Minn. Stat. § 256N.22, subds. 1(a), 2(a) (2020). However, the district court was also informed that another source of aid was available, so the erroneous information would not have been significant, and appellant cannot show prejudice from this misstatement.

⁴ Although appellant did not object to these statements at trial or raise this issue in a motion for a new trial and therefore the issue is not properly before us because it is being raised for the first time on appeal, we address it in the interest of completeness. See Minn. R. Civ. App. P. 103.04 (providing that this court may review any matter as the interests of justice may require).

The written misstatement appeared in the “Closing Argument on Law” submitted by RCHSD. After explaining that Minnesota law prefers termination of parental rights when a child cannot return to the parental home and that terminating appellant’s parental rights would enable Child 1 to have a permanent home with her siblings and an adoptive relative, the closing argument said that “[t]ransfer of [p]ermanent [c]ustody to a [r]elative is not a dispositional option before the [c]ourt as no such petition is before the court.”

Under Minn. Stat. § 260C.513(a) (2020), a district court may order a transfer of custody absent a transfer-of-custody petition if such a transfer is in the child’s best interests. But it is equally true that a district court cannot transfer custody without reviewing the suitability of the prospective legal and physical custodian relative. Minn. Stat. § 260C.515, subd. 4(1) (2020). Here, there is no indication that T.G. or any other relative would agree to become Child 1’s permanent legal custodian. Again, appellant cannot show prejudice: the district court could not have ordered permanent custody with a relative absent any indication that there was a suitable relative willing to accept custody.

Affirmed.