STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1540

In the Matter of the Welfare of the Child of:
C. A. E. and J. D. B., Parents.

Filed April 3, 2023
Affirmed
Frisch, Judge

Chippewa County District Court
File No. 12-JV-22-264

Douglas D. Kluver, Kluver Law Office and Mediation Center, P.L.L.C., Montevideo, Minnesota (for appellant-father J.D.B.)

Matthew Haugen, Chippewa County Attorney, Montevideo, Minnesota (for respondent Chippewa County Family Services)

Sheila Kosbab, Dawson, Minnesota (guardian ad litem)

Considered and decided by Bjorkman, Presiding Judge; Frisch, Judge; and Cleary, Judge.*

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant argues that the district court abused its discretion in terminating his parental rights because it erroneously concluded that the conditions that led to out-of-home

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

placement of the child had not been corrected. Because the record supports the district court's determination that the conditions had not been corrected, we affirm.

FACTS

In April 2022, respondent Chippewa County Family Services (the county) petitioned to terminate the parental rights of mother and appellant-father J.D.B. to S.B., the child.[1] The county asserted two bases in support of its petition to terminate parental rights: (1) reasonable efforts had failed to correct the conditions that led to out-of-home placement under what is now Minn. Stat. § 260C.301, subd. 1(b)(5) (2022); and (2) the child was neglected and in foster care under what is now Minn. Stat. § 260C.301, subd. 1(b)(8) (2022). The following facts were established at a hearing on the petition.

In late August 2021, the county received a report expressing concern that parents were using drugs and that the home was unsafe and unkept. A urinary analysis (UA) of father was positive for methamphetamine and amphetamine, and a UA of mother was positive for marijuana. The child and two older children were placed on law-enforcement hold. A hair-follicle test of the child showed positive results for methamphetamine and THC. A hair-follicle test of father returned a positive result for methamphetamine, amphetamine, and THC.

[1] Mother is not a party to this appeal but, because the termination proceeding involved mother and father, allegations related to mother are relevant to the issue on appeal. We refer to mother and father together as parents.

Parents indicated that they were not using controlled substances and were not aware of how the child was exposed to controlled substances. Father testified that he had not used methamphetamine since 2019, but that between June and August 2021, he traveled to work in a car with someone who would smoke methamphetamine in the vehicle. Father believed that the methamphetamine must have transferred to the child from father's clothing or sweat. Father also testified that mother has never used methamphetamine around the child and that the child was not present in the vehicle with the individual who was smoking methamphetamine.

The county filed a petition to adjudicate the child in need of protection or services (CHIPS). As part of that proceeding, the county developed a case plan to address chemical-health concerns. The county described the conditions leading to out-of-home placement in the case plan as "the continuous chemical health concerns for the parents." The county asked father to complete outpatient treatment and comply with chemical-use testing. The county also requested that parents refrain from non-prescribed mood-altering chemicals and that parents not allow others under the influence to be in the presence of the child or care for the child.

By January 2022, parents obtained prescriptions for medical marijuana in lozenge and vape form. Parents and the county agreed to a safety plan designed to address the safety of the child in light of the prescriptions. The safety-plan conditions provided that (1) the child would not have access to any mood-altering chemicals, (2) the child would not be exposed to any mood-altering chemicals, and (3) there would be one safe and sober

caregiver for the child at all times. Parents had unsupervised visits and overnights with the child when the safety plan was implemented.

In February, father completed outpatient treatment and a trial home visit began. The case plan was updated to address the trial home visit, account for father's completion of treatment, and address protections for the child in light of parents' medical marijuana prescriptions. The county was aware that the child had access to the entire home and discussed with parents that the vape could not be used any place that the child could access. The county told parents that if they used marijuana within the home, the child could never be in the same room where parents were or had been using.

The child's guardian ad litem received a report that parents were smoking marijuana in the presence of the child and were involved in an altercation in the child's presence. A March hair-follicle test of the child returned a positive result for THC. The positive test result coincided with periods when the child was living with parents during the trial home visit and when the child was having all-day and overnight visits with parents. The county ended the trial home visit. In April, the county filed a petition to terminate parental rights.

Parents denied using the vape in the child's presence. But they admitted that they used the vape in the basement of the home and that the child had access to the basement for baths. Father also admitted that he used the vape in the bedroom upstairs. Parents did not use the vape outside the home because they sought, but did not receive, permission to do so from law enforcement. Father denied that the child could have ingested a lozenge because the lozenges were stored on a high shelf out of the child's reach.

Father's UA results were negative for all substances from early September 2021 to early February 2022 and late April 2022 to early June 2022. Father also testified that he had taken tests since June 2022 but did not know of any positive results. Parents completed required couples' counseling. In couples' counseling, parents "came up with a solution to not use the vape and rather use lozenges, gummies, or pills for their medical marijuana." Father stopped meeting with his counselor in April 2022, and his counselor wrote a letter stating that father had "met and exceeded therapy goals" and that he "no longer needs psychotherapy at this time," but that they "would be happy to take him back as a client." Father is also involved in a sobriety program.

In October, the district court terminated father and mother's parental rights based on failure of reasonable efforts to correct a condition that led to out-of-home placement.

Father appeals.

DECISION

Father argues that the district court abused its discretion by determining that there was clear and convincing evidence that reasonable efforts failed to correct a condition that led to out-of-home placement. Father specifically argues that the district court erroneously focused primarily on his past history of chemical abuse instead of his current progress on the case plan and treatment.

"Parental rights are terminated only for grave and weighty reasons." *In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990). Whether to terminate parental rights is discretionary with the district court. *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 136 (Minn. 2014). A district court may order the termination of parental rights if it (1) finds

by clear and convincing evidence that a statutory condition exists to support termination, (2) determines that termination is in the child's best interests, and (3) finds that reasonable efforts toward reunification were either made or were not required. Minn. Stat. §§ 260C.301, subds. 1(b), 7, 8, .317, subd. 1 (2022); *see also In re Welfare of Child. of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008). Father challenges only whether a statutory ground exists to support termination.

Under Minn. Stat. § 260C.301, subd. 1(b)(5), a district court may terminate parental rights if it finds "that following the child's placement out of the home, reasonable efforts . . . have failed to correct the conditions leading to the child's placement." It is presumed that reasonable efforts have failed if (1) the child has resided out of the home under court order for 12 months within the preceding 22 months, (2) the court has approved the out-of-home placement plan, (3) conditions leading to the out-of-home placement have not been corrected, and (4) social services made reasonable efforts to rehabilitate the parent and reunite the family. Minn. Stat. § 260C.301, subd. 1(b)(5)(i)-(iv).

The evidence used as a basis for termination 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, indefinite period. *In re Welfare of P.R.L.*, 622 N.W.2d 538, 543 (Minn. 2001). "[T]he court relies not primarily on past history, but to a great extent upon the projected permanency of the parent's inability to care for his or her child." *In re Welfare of A.D.*, 535 N.W.2d 643, 649 (Minn. 1995) (quotations omitted).

On appeal, we "review the termination of parental rights to 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." *S.E.P.*, 744 N.W.2d at 385. In so doing, we "review the district court's findings of the underlying or basic facts for clear error, but we review its determination of whether a particular statutory basis for involuntarily terminating parental rights is present for an abuse of discretion." *In re Welfare of Child. of J.R.B.*, 805 N.W.2d 895, 901 (Minn. App. 2011), *rev. denied* (Minn. Jan. 6, 2012). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record." *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022) (quotation omitted). The district court concluded that reasonable efforts had failed to correct the conditions that led to the child's out-of-home placement because (1) parents did not substantially comply with the case plans and failed to protect the child from exposure to chemical substances, (2) parents continued to violate the plans despite "marginal improvement" with mental health and sobriety, and (3) parents' "extensive history" of addiction and child-protection involvement indicated that they could not parent without exposing the child to controlled substances.[2]

We specifically recognize and commend father's progress in treatment and in the management of his chemical use. And we are troubled by the volume of the district court's

[2] Father suggests that, without evidence otherwise, marijuana exposure is not a legitimate safety concern. We note that marijuana is a controlled substance. Minn. Stat. § 152.01, subd. 4 (2022) (defining "controlled substance" as "a drug, substance, or immediate precursor" appearing in schedules I through V of Minn. Stat. § 152.02 (2022)); Minn. Stat. § 152.02, subd. 2(h) (including "[m]arijuana, tetrahydrocannabinols, and synthetic cannabinoids" in schedule I). And we note that the child, who was two years old at the time of the termination proceeding, was not prescribed marijuana.

findings devoted to father's past chemical use and involvement with child-protection services. But we cannot agree that the district court abused its discretion here because the evidence in the record supports the district court's determination that there was clear and convincing evidence that father is unable to keep the child safe from exposure to controlled substances.

A September 2021 hair-follicle test of the child showed positive results for methamphetamine and THC. By January 2022, parents obtained medical marijuana prescriptions. In light of those prescriptions, parents and the county agreed to a safety plan that included provisions that (1) the child would not have access to any mood-altering chemicals, (2) the child would not be exposed to any mood-altering chemicals, and (3) there would be one safe and sober caregiver for the child at all times. Despite that safety plan, a March 2022 hair-follicle test of the child returned a positive result for THC, coinciding with the period of time during the child's trial home visit and the child's all-day and overnight visits with parents. Father denied that the child had access to the room where he used his vape pen or that he or mother vaped in the child's presence. But father also testified that he vaped one or two times in the basement or the bedroom upstairs and that the child accessed those areas of the residence. This is evidence of a deviation from the safety plan by father that placed the child at risk of exposure to a controlled substance. These facts support the district court's determination that clear and convincing evidence exists that father was unable to correct the conditions that led to out-of-home placement, even with the safety plan in place.

Father seemingly contends that it is unfair to consider mother's use of controlled substances in the determination to terminate his parental rights. We note that the termination proceeding involved both mother and father and, as such, the district court considered mother's use of controlled substances around the child. We cannot conclude, however, that the district court abused its discretion by considering this potential source of exposure in addition to other sources of exposure, including directly from father's admitted use in places within the home that the child accessed. The record supports the district court's findings that the child tested positive for controlled substances while in father's care and notwithstanding the safety-plan protocols, which in pertinent part required that the child not be exposed to mood-altering chemicals and there would be one safe and sober caregiver for the child at all times. We recognize that because father was working outside the home, he necessarily was required to entrust others to care for the child during working hours. But father was still responsible pursuant to the terms of the safety plan to ensure that the child's caregiver was not exposing the child to mood-altering chemicals and that at all times, the child was entrusted to the care of at least one safe and sober caregiver.

We acknowledge the particular challenges presented by these circumstances, and we believe that this is a close case. We emphasize that a district court's focus should be on a parent's future ability to care for their child. *A.D.*, 535 N.W.2d at 649. And we commend father's progress. But we are mindful of our limited standard of review, and we cannot reweigh the evidence on appeal. *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021); *In re Welfare of Child of J.H.*, 968 N.W.2d 593, 601 n.6 (Minn. App. 2021) (applying *Kenney* in a juvenile-protection appeal), *rev. denied* (Minn. Dec. 6,

2021). We conclude that the district court did not abuse its discretion because the record evidence supports the district court's determination that there was clear and convincing evidence that reasonable efforts had failed to correct the conditions that led to out-of-home placement.

Affirmed.