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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1594**

In the Matter of the Welfare of the Child of: D. L. P. and J. A. P., Parents.

**Filed April 10, 2023
Reversed and remanded
Larson, Judge**

Chippewa County District Court
File No. 12-JV-22-341

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Considered and decided by Larson, Presiding Judge; Reilly, Judge; and Reyes,
Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

In this appeal, appellants D.L.P. (mother) and J.A.P. (father) (collectively, the
parents) challenge the district court's decision to terminate their parental rights to their
child, B.A.P., on the grounds that they failed to rebut the presumption that they were

palpably unfit to parent. The parents argue that they presented sufficient evidence to rebut the presumption and that the district court applied an incorrect standard when it determined they failed to rebut the presumption. Because we conclude that the district court applied an incorrect standard when analyzing whether the parents produced sufficient evidence to rebut the presumption, we reverse and remand.

FACTS

Respondent Chippewa County Family Services (CCFS) petitioned the district court to involuntarily terminate the parents' parental rights pursuant to Minn. Stat. § 260C.301, subd. 1(b)(4) (2022) (TPR petition). The TPR petition alleged that the parents were palpably unfit to be parties to the parent-child relationship because their parental rights to their first two children (the twins) had previously been involuntarily terminated.¹ See Minn. Stat. § 260C.301, subd. 1(b)(4). In the prior involuntary termination, the five-month-old twins suffered egregious harm caused by child abuse, including "rib fractures, facial bruising, and a subdural hematoma (brain bleeding)." See *In re Welfare of D.L.T.*, No. A19-0954, 2019 WL 7049938, at *2 (Minn. App. Dec. 23, 2019).²

At a pretrial hearing, the parties discussed the trial procedure given the statutory presumption that the parents were palpably unfit due to the prior involuntary termination. Mother's attorney suggested that CCFS must first offer evidence that the prior involuntary termination occurred, then the burden would shift to the parents to overcome the

¹ Mother also voluntarily terminated her rights to a third child.

² Since the involuntary termination, the parents wed. Mother now shares father's last initial.

presumption. Mother's attorney suggested that if the parents met their burden, CCFS would then put on its case. CCFS's attorney responded with his view that the burden would shift to the parents "relatively quickly" and CCFS only intended to call a CCFS social worker to establish jurisdiction, explain the reason for the current TPR petition, and offer the prior order terminating the parents' parental rights. CCFS's attorney did not comment on what would occur if the parents successfully overcame the presumption. The district court responded to this discussion, agreeing that to invoke the presumption, CCFS should provide "some background" and the certified copy of the prior order. The district court then stated that the parents would need to put on their case to overcome the presumption by "clear and convincing evidence." The district court did not establish what would occur if the parents overcame the presumption. The case proceeded to trial.

At the beginning of trial, CCFS called the social worker who explained the reasons for the current TPR petition. CCFS offered into evidence a certified copy of the prior termination and documentation regarding the parents' recent drug tests.³ After the social worker's testimony, CCFS's attorney stated, "I believe in this case it has been demonstrated that there is a presumption that the parent[s are] palpably unfit because of that prior involuntary termination, and now the burden would shift to the [parents] to demonstrate they are not palpably unfit."

³ Out of 11 randomly scheduled drug tests, the parents failed to show or complete tests on five occasions. On all occasions when the parents tested, one or both tested positive for marijuana or alcohol.

The parents then presented their case, beginning with mother's testimony. Mother testified, and offered three letters demonstrating, that she was diligently attending therapy with three different counselors each week. Mother testified, and her therapists agreed, that therapy was helping her with her anger issues and that couple's counseling had improved the parents' communication skills. Mother further testified that the parents have the necessities to care for B.A.P., such as stable and clean housing, clothes, diapers, toys, etc., and the parents have a strong support network. Mother described her alcohol and marijuana use, explaining she missed several random-drug-testing appointments because she had difficulty finding transportation. Mother also clarified that she had a prescription for medical marijuana, but was not currently using marijuana, and that she ceased her alcohol use as soon as she realized she would also be tested for alcohol. Concerningly, mother's testimony also indicated her view that her parental rights to the twins should not have been involuntarily terminated.⁴

The parents then called their roommate. The roommate testified that the parents currently live with her and her boyfriend. The roommate described that in her current Certified-Nursing-Assistant role she is a mandated reporter for child neglect or abuse. The roommate testified that: mother helps clean the apartment; the parents get along and treat each other respectfully; the parents are current on their bills and rent; the roommate would

⁴ Mother argued during the prior termination that the cause of the twins' injuries was not child abuse, but "*osteogenesis imperfecta* (O.I.)—a genetic disorder commonly known as brittle bone disease." *D.L.T.*, 2019 WL 7049938, at *2. We concluded that the county presented clear and convincing evidence from a child-abuse pediatrician that the twins do not suffer from O.I. *Id.* Yet, in this case, mother repeated her position that the twins suffered their injuries due to O.I.

have no problem with B.A.P. living in the apartment; the parents do not have a phone or car, and the community lacks public transportation, so the parents have difficulty meeting their drug-testing obligations.

The parents then called father. Father explained that he began attending individual therapy before the hearing. And prior to individual therapy, father attended couple's counseling which had helped the parents' communication. Father testified that he made mistakes in parenting the twins, that he had put his chemical-dependency issues behind him, and that he would prioritize B.A.P. "above and beyond" anything else. Father acknowledged that he faced difficulties attending drug tests because he could lose his job for being absent too often. But father indicated that he might get laid off, which would make him available to help with B.A.P.'s childcare.

After father testified, the parents indicated they had no more witnesses. CCFS then called the guardian ad litem (GAL). The GAL testified that B.A.P. was doing well, developing normally in foster care, and was without any known specialized-care needs. The GAL noted that the parents had missed visits with the child because the parents insist visits take place on weekends when they are not at work. The GAL expressed her view that it was not in B.A.P.'s best interests to return B.A.P. to the parents due to the parents' failure to complete drug testing and the parents' lack of transportation. The GAL also expressed concern about the parents' past and whether the parents would be able to care for B.A.P. around their work schedules.

The district court filed an order terminating the parents' parental rights to B.A.P. on the sole basis that the parents failed to rebut the presumption of palpable unfitness. In

doing so, the district court broadly indicated that palpable unfitness of the parents must be proven by “clear and convincing evidence,” without explaining which party bears that burden. And the district court generally described the statutory presumption that the parents are palpably unfit because of the prior involuntary termination, and the parents must rebut the presumption “by introducing evidence that would justify a finding of fact that the parent is not palpably unfit.” The district court supported its determination that the parents failed to rebut the presumption by weighing the parents’ evidence against CCFS’s evidence.

The parents appeal.

DECISION

The parents challenge the district court’s decision that they failed to rebut the presumption of palpable unfitness. The parents argue that they presented sufficient evidence to rebut the presumption of palpable unfitness and that the district court applied an incorrect standard. We agree that the district court applied an incorrect standard when analyzing whether the parents produced sufficient evidence to rebut the presumption.

“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). As relevant here, a district court may terminate a parent’s rights if it determines that the parent is “palpably unfit to be a party to the parent and child relationship.” Minn. Stat. § 260C.301, subd. 1(b)(4). Under the relevant statute, the district court must presume that a parent is palpably unfit if the parent’s rights to a different child were previously involuntarily terminated. *Id.*

But the statutory presumption is “easily rebuttable” if the parent introduces evidence that could support a finding that the parent is able to care for the child. *In re Welfare of Child of J.A.K.*, 907 N.W.2d 241, 245-46 (Minn. App. 2018) (first quoting *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 135-38 (Minn. 2014); and then quoting *In re Welfare of Child of J.W.*, 807 N.W.2d 441, 445-47 (Minn. App. 2011), *rev. denied* (Minn. Jan. 6, 2012)). The statute imposes “only a burden of production,” meaning the “parent may rebut the statutory presumption merely by introducing evidence that would justify a finding of fact that [the parent] is not palpably unfit.” *Id.* To analyze whether a parent rebutted the statutory presumption, the district court should consider the evidence without weighing it against any contrary evidence. *See J.W.*, 807 N.W.2d at 445-47 (concluding that the parent’s evidence, “if believed,” would support a finding that the parent was not palpably unfit and that the evidence was therefore sufficient to rebut the statutory presumption).

If a parent produces enough evidence to rebut the presumption, the county bears the burden to prove by clear and convincing evidence⁵ that the parent is palpably unfit or that another statutory basis for involuntary termination exists under Minn. Stat. § 260C.301, subd. 1(b) (2022). *See J.A.K.*, 907 N.W.2d at 247-48. With regard to palpable unfitness, the county carries its burden with evidence demonstrating a consistent pattern of specific conduct before the child or specific conditions that directly relate to the parent-child

⁵ A heightened standard applies to cases involving the Indian Child Welfare Act. *See* 25 U.S.C. § 1912(f) (2022) (“No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt . . .”); Minn. Stat. § 260.771, subd. 6(a) (2022) (“In a termination of parental rights proceeding, the court must determine by evidence beyond a reasonable doubt . . .”).

relationship. Minn. Stat. § 260C.301, subd. 1(b)(4). The county must show this conduct or these conditions are of a duration or nature rendering the parent unable to care appropriately for the child's needs for the reasonably foreseeable future. *Id.*

Thus, when a county files a TPR petition on the basis that a parent is palpably unfit because the parent's rights to a different child were previously involuntarily terminated under Minn. Stat. § 260C.301, subd. 1(b)(4), the appropriate procedure is: (1) the county presents evidence of the prior involuntary termination; (2) the burden shifts to the parent to meet their "burden of production" to rebut the statutory presumption by introducing evidence that, if believed, "would justify a finding that the parent is not palpably unfit"; and (3) if the parent meets that "easily rebuttable" presumption, the burden shifts back to the county to show by clear and convincing evidence that the parent is palpably unfit or that another statutory basis for involuntary termination exists under Minn. Stat. § 260C.301, subd. 1(b). *See J.A.K.*, 907 N.W.2d at 245-48.

Here, the parents attempted to meet their burden of production to rebut the palpable-unfitness presumption through the presentation of the following evidence. The parents both testified that they have made changes in their lives since the prior involuntary termination. Mother testified that she attends therapy three times a week and produced three letters corroborating her testimony and her progress. Mother also indicated that couple's counseling had improved the parents' communication, which the roommate's and father's testimonies corroborated. Mother testified, and the roommate corroborated, that the parents have safe and stable housing, and a strong support network. Further, mother explained that her drug-testing failures were due to excusable mistake or good-faith error.

Father testified that he had attended several sessions with an individual therapist, realized he had made mistakes in parenting the twins, had put his chemical-dependency issues behind him, and would prioritize B.A.P. “above and beyond” anything else. If believed, this evidence may be sufficient to rebut the statutory presumption.

In making the determination that the parents failed to rebut the presumption, the district court did not accurately articulate the statutory presumption. While the district court noted that the presumption could be rebutted if the parents produce “evidence that would justify a finding of fact that the parent is not palpably unfit,” the district court failed to discuss the “easily rebuttable” nature of the statutory presumption. *See J.A.K.*, 907 N.W.2d at 245-46 (first quoting *R.D.L.*, 853 N.W.2d at 135-38; and then quoting *J.W.*, 807 N.W.2d at 445-47). Moreover, the district court did not accept the parents’ evidence as true. *See J.W.*, 807 N.W.2d at 445-47. Instead, the district court improperly weighed the parents’ evidence against the evidence CCFS presented, improperly shifting the parents’ burden from a burden of production to a burden of proof. *Id.* We conclude the district court’s analysis misapplies the holdings in *R.D.L.*, 853 N.W.2d at 135-38, *J.A.K.*, 907 N.W.2d at 245-48, and *J.W.*, 807 N.W.2d at 445-47.

CCFS urges us to affirm the district court even if we conclude the district court applied an incorrect standard, reasoning that the record nevertheless shows that CCFS met its burden to prove by clear and convincing evidence that the parents remain palpably unfit. But the district court never made the finding that CCFS proved by clear and convincing evidence that the parents are palpably unfit to parent or otherwise meet the standard for

involuntary termination under Minn. Stat. § 260C.301, subd. 1(b). We see nothing in the district court's decision that would justify affirming on this suggested alternative ground.

For these reasons, we reverse and remand because the district court applied an incorrect standard when analyzing whether the parents produced sufficient evidence to rebut the palpable-unfitness presumption. *See J.A.K.*, 907 N.W.2d at 248. On remand, the district court must apply the correct standard, evaluate whether the parents met their burden of production to rebut the palpable-unfitness presumption, and, if so, evaluate whether CCFS proved by clear and convincing evidence that the parents are palpably unfit. In reversing and remanding, we offer no opinion about the quality of either the parents' or CCFS's evidence. "Because any termination of parental rights 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, indeterminate period, it will be necessary for the district court to reopen the record to allow the parties to introduce supplemental evidence." *Id.* (quotation omitted). Therefore, we direct the district court to reopen the record on remand.

Reversed and remanded.