STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0603

In re the Matter of the Welfare of the Children of:
B. M. P.-R., Mother.

Filed October 21, 2019
Reversed and remanded
Bratvold, Judge

Rice County District Court
File No. 66-JV-18-2917

Mallory K. Stoll, Blahnik, Prchal & Stoll, PLLC, Prior Lake, Minnesota (for appellant)

John Fossum, Rice County Attorney, Terence Swihart, Assistant County Attorney, Jennifer Nelson, Assistant County Attorney, Faribault, Minnesota (for respondent county)

Heather Feikema, Faribault, Minnesota (guardian ad litem)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Jesson, Judge.

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

BRATVOLD, Judge

Appellant B.M.P.-R. (mother) challenges the district court's termination of her parental rights. Because respondent Rice County Social Services (the county) failed to make reasonable efforts to reunite mother and her children, we reverse the decision terminating mother's parental rights, and remand for the district court to direct the county

to develop a case plan with mother, obtain court approval, and allow a reasonable period for mother to complete the case plan.

FACTS

The following summarizes the district court's written factual findings, prepared after the termination trial. Mother is the biological parent of B.A.M. (born in 2013) and L.E.P. (born in 2017) (the children).

Mother was incarcerated and returned to jail after giving birth to L.E.P., who was born prematurely on December 6, 2017. L.E.P. remained in the hospital's neonatal intensive care unit. In mid-December 2017, mother was released from jail. On December 23, mother was found in a public restroom unconscious and unresponsive as a result of an overdose. Mother was hospitalized and law enforcement placed the children on a 72-hour hold.

On December 28, 2017, the county filed a child-in-need-of-protection-or-services (CHIPS) petition, which described mother's substance abuse and stated that the children's maternal great-grandparents had cared for B.A.M. since he was a baby, that mother had little involvement in B.A.M.'s life, and that hospital staff was concerned that mother had spent little time with L.E.P. The district court later appointed a guardian ad litem (GAL) for the children. The county assigned Keri Butzer as the case manager for the children.

Although released from the hospital, mother failed to attend two court hearings. First, mother failed to attend the emergency protective-care hearing. The district court continued the county's physical and legal custody over the children; B.A.M. continued in his placement with his great-grandparents, and L.E.P. continued in his medical placement

until his discharge, when he was placed in foster care. Second, mother failed to attend the admit/deny hearing. The district court continued the hearing; mother attended the continued hearing and entered a denial. At the hearing, Butzer spoke with mother "about the types of things she would have to do for reunification with the [c]hildren to occur."

Police arrested mother in January 2018 for a probation violation. Mother participated in a chemical-dependency assessment and entered in-patient treatment voluntarily at Cranberry Acres with a diagnosis of "severe Opioid Use Disorder and severe Stimula[nt] Related Disorder, Amphetamine type."

In February 2018, mother did not attend court hearings or scheduled meetings, did not respond to social services, and did not request visitation with her children. Mother failed to attend a March hearing to adjudicate the CHIPS petition, and the county proceeded by default. The district court adjudicated the children CHIPS and continued their temporary out-of-home placements. Mother also failed to appear at the disposition hearing in April, after which the district court entered a written order for mother to "maintain safe and clean housing for the Children," avoid alcohol and drug use, submit to "random chemical testing," and "cooperate with [the county] for the purposes of case planning." The district court directed service of this order on mother and the county.

The district court found that Butzer's contact with mother was "minimal" and involved "several text messages." The district court also found that, sometime in February or March, Butzer developed a case plan for mother "without Mother's input." As described above, it appears that at the time Butzer prepared the case plan, mother was out of contact with the county. Mother also failed to attend a scheduled family meeting on April 11, 2018.

Butzer then learned that mother had been arrested because of a parole violation. At the violation hearing, mother executed her sentence.

Mother remained at the Hennepin County Workhouse (jail) from mid-April until September 26, 2018. While in jail, mother had a counselor, completed a 12-week chemical-dependency treatment program, and participated in a "read-to-me-program" for the children. Mother requested visitation with her children and did visit by video about once a week, beginning about halfway through her incarceration.

The district court found that Butzer "did not ever make a visit" to the jail. Mother tried to telephone Butzer several times while in jail. Butzer testified that she did not answer because she "didn't know how to take collect phone calls." Butzer spoke with mother's jail counselor in August or September 2018, and, about a week before mother's release, the jail counselor initiated a telephone conference with mother, Butzer, and the GAL to set up transition services for mother.

Also just before her release, mother attended a review hearing, where the district court continued the children's out-of-home placements and ordered mother to complete requirements for her treatment program, abstain from controlled substances, establish safe housing, and sign releases for the county to obtain information regarding her participation in services.

After mother was released from jail, she moved to Owatonna to live with the mother of B.A.M.'s alleged father and attended outpatient chemical-dependency treatment at Fountain Centers. Butzer later testified and agreed that mother's contact was "pretty good" at this time. The district court found that Butzer had a discussion with mother about "what

she needed to do" to be reunified with the children. Mother had some supervised visits with the children. Butzer also referred mother to parent education services, but Butzer later learned that mother "wasn't meeting with the [program] mentor."

Mother moved to Maple Grove to live with her mother in November 2018. Around this time, Alexandra Welsh became the case manager. During the termination trial, mother admitted she did not tell the county about her move. In mid-November, Fountain Centers informed Welsh that it had discharged mother after three weeks because of poor attendance. Welsh arranged mother's supervised visitations with the children, but suspended visits after mother failed to attend two consecutive visits and did not reply to Welsh's text messages. Welsh "unsuccessfully attempted to contact Mother multiple times at multiple phone numbers." Mother relapsed and failed to attend scheduled meetings with the county on November 9, 14, 21, and December 3. Mother also attended a hearing on December 13, but failed to provide a urinalysis sample.

On December 12, 2018, the county petitioned to terminate mother's parental rights under Minn. Stat. § 260C.301, subd. 1(b)(2), (4), (5), (7), and (8) (2018). The petition detailed mother's failure to cooperate with the county, her April 2018 arrest, her failure to complete treatment, and her failure to communicate with the case manager. Mother later entered a denial at her admit/deny hearing.

Mother requested another chemical-dependency assessment which led her to enter a Brooklyn Park treatment program in January 2019. Mother was still in treatment as of the trial. The district court found that mother credibly testified that "she feels the [m]ethadone is helping with her addiction."

The district court conducted mother's termination trial on February 25 and 26, 2019. On behalf of the county, the two case managers (Butzer and Welsh) and the GAL testified. In addition to the facts set out above, all three of the county's witnesses testified that a termination of mother's parental rights is in the children's best interests.

Mother testified, as did her mother. Mother testified about her history of drug use and stated that she relapsed before going to jail (February-April 2018), and again about a month after being released from jail. She stated that she would soon be starting a new job.

In a written order, the district court terminated mother's parental rights on March 28, 2019.[1] The district court stated that whether the county had made reasonable efforts is a "close" question because the county did not comply with the statutory requirements for a case plan. The district court found the case plan "was created several months late and was not filed with the court"; also, the case plan "was not created . . . with the cooperation of [mother]" because mother was not in contact with the agency. Finally, the case plan "was not offered as evidence in [the] trial" and it is "unknown whether the case plan was ever updated." The district court concluded that it "cannot find" that the county made reasonable efforts "in regards [to] the out-of-home placement plan."

The district court determined, however, that "[m]other's unavailability during the great majority of [the] case was a barrier" to the county providing services, and that it was "not reasonable to expect the agency to provide services to [m]other when she was not in contact and her whereabouts were unknown." Yet, the district court also found that it was

[1] An amended order provided minor corrections on the custodial status of the children.

unreasonable the case manager did not contact mother during her incarceration and that mother was unable to contact the county because it refused to accept collect calls. The district court determined that "multiple statutory bases support[ed] . . . termination," and that it is in the best interests of the children to terminate mother's parental rights. Mother appeals.

D E C I S I O N

Generally, appellate courts review a district court's order decision to terminate parental rights for an abuse of discretion. *See In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 136 (Minn. 2014). In doing so, appellate courts "closely inquire into the sufficiency of the evidence to determine whether it was clear and convincing[,]" and affirm a termination of parental rights if (1) at least one statutory ground for termination is supported by clear and convincing evidence, (2) termination is in the best interests of the child, and (3) 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). Mother's appeal focuses on one issue: whether the county made reasonable efforts to reunite the family. Specifically, mother argues that we must reverse the district court's termination of her parental rights because the county did not provide a court-approved case plan stating the steps she must take to correct the conditions leading to the out-of-home placement.[2]

[2] Mother also argues that the district court clearly erred in determining that the county made reasonable efforts to reunify the family under Minn. Stat. § 260C.301, subd. 1(b)(5). Because a court-approved case plan is typically a threshold requirement for termination, we do not separately address this argument.

If the county determines that a child should be removed from a parent, it "shall . . . prepare an out-of-home placement plan addressing the conditions that [the] parent must meet before the child can be in that parent's day-to-day care." *In re Welfare of A.R.B.*, 906 N.W.2d 894, 897 (Minn. App. 2018) (quoting Minn. Stat. § 260C.219(a)(2)(i) (2016)). The plan must be "a written document" prepared "jointly with the parent or parents or guardian of the child." Minn. Stat. § 260C.212, subd. 1(b) (2018). "The plan 'shall be' signed by the parent, submitted to the court for approval, and explained to all persons involved in its implementation." *A.R.B.*, 906 N.W.2d at 897 (quoting Minn. Stat. § 260C.212, subd. (1)(b)(1), 3(c)).

The case plan must describe "the specific reasons for the placement of the child in foster care, and when reunification is the plan, a description of the problems or conditions in the home of the parent or parents which necessitated removal of the child from home and the changes the parent or parents must make for the child to safely return home," as well as the "services offered and provided to prevent removal of the child from the home and to reunify the family." Minn. Stat. § 260C.212, subd. 1(c)(2), (3) (2018). Unless the district court conducts case-plan reviews, the county must conduct "an administrative review of the out-of-home placement plan of each child placed in foster care no later than 180 days after the initial placement of the child in foster care and at least every six months thereafter" if the child is not returned home. Minn. Stat. § 260C.203(a) (2018). The case plan "must be monitored and updated at each administrative review." *Id.*

In a proceeding to terminate parental rights, the district court must determine whether the county has provided reasonable efforts to rehabilitate the parent and reunite

the child and parent. *In re Children of T.R.*, 750 N.W.2d 656, 664 (Minn. 2008). "Reasonable efforts at rehabilitation are services that go beyond mere matters of form so as to include real, genuine assistance." *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 150 (Minn. App. 2007) (quotations omitted), *review denied* (Minn. Mar. 28, 2007). For efforts to be reasonable, the services the county offers must be: (1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances. Minn. Stat. § 260.012(h) (2018).

Here, the district court found that the county prepared a case plan without mother's input, did not obtain court approval, and never filed the case plan. In fact, the district court found that the county did not offer a case plan into evidence during mother's termination trial. The district court also found that it was "unknown" whether the county ever updated the case plan. While mother acknowledges in her brief that "Butzer did provide the case plan to [her] at [a] hearing," she argues that the county never completed the case plan, failed to update it, did not jointly prepare it with her, and did not file it in district court as required by statute.

The county acknowledges that it never filed a case plan with the district court, but argues that it made reasonable efforts under the circumstances because mother's "lack of cooperation prevented [the county] from effectively implementing the plan." A county's failure to provide a case plan "does not automatically warrant reversal if the circumstances render the lack of a case plan excusable." *A.R.B.*, 906 N.W.2d at 898. But "the lack of a case plan is excusable only in extreme circumstances, like when a parent repeatedly

abandons her child and states that she wishes to relinquish her parental rights . . . or when efforts to 'reunite' the family would be 'futile' because, for example, no parent-child relationship ever existed." *Id.*

Mother argues that this case is similar to *In re Welfare of A.R.B.*; there, father was arrested on an unrelated charge at the beginning of the CHIPS case and was incarcerated at the county jail throughout the CHIPS case and the associated termination proceedings. *Id.* at 896-97. Father initially resisted a case plan, but he later "expressly invited one." *Id.* at 898.[3] The county never developed a case plan for father, and the district court terminated his parental rights. On appeal, we reversed the termination because no "extreme circumstances" excused the county's failure. *Id.* at 898-99. We reasoned, in part, that the county identified "nothing" that prevented social services from creating a case plan with father "during his incarceration period." *Id.* at 899.

Here, the district court stated: "This court cannot find that the county made reasonable efforts in regards [to] the out-of-home placement plan." The district court also found, however, that mother's "unavailability during the great majority of this case" was a "barrier" to providing services. Specifically, the district court found that mother was "out of contact with the case manager during February and March 2018 and again from November 2018 through early February 2019," failed to notify the county of her whereabouts, and failed to attend court hearings. In short, the district court appears to have excused the county's failure to provide a case plan because mother failed to communicate

[3] In *A.R.B.*, the mother also sought to regain custody, but the county prepared a court-approved case plan with mother, which she failed to complete. *Id.* at 896.

with the county or to attend court hearings. Despite these findings about mother, the district court also found that whether the county made "reasonable efforts" is a "close" question. This is troubling because the county must prove it made reasonable efforts by clear and convincing evidence.

On this record, the district court's unavailability finding does not present either of the "extreme circumstances" that *A.R.B.* identified—abandonment and futility. The county did not request a finding of abandonment, and the district court did not find abandonment.[4] The county requested a futility-of-reasonable-efforts finding during the CHIPS case, but the district court concluded that it "will not make a finding that continued reasonable efforts to reunify would be futile."[5] And in its termination order, the district court noted that it had "never ruled in the course of the case that the provision of reasonable efforts could cease." Accordingly, the district court rejected the idea that reunification efforts would be futile.

In contrast to the "extreme circumstances" identified in *A.R.B.*, the district court's finding that mother was unavailable implies that mother had periods of contact, and the record supports this inference. While mother was incarcerated, she attempted to call

[4] The county later cites *In re Welfare of R.M.M.* to support its position that a case plan is not required. 316 N.W.2d 538, 542 (Minn. 1982). In *A.R.B.*, we cited *R.M.M.* as an example of "extreme circumstances." 906 N.W.2d at 898 (citing *R.M.M.*, 316 N.W.2d at 542). The parent in *R.M.M.* admitted abandoning her child and "on several occasions wanted to terminate her parental rights." *R.M.M.*, 316 N.W.2d at 541. Under these circumstances, the supreme court affirmed the district court's decision to terminate the parent's parental rights despite the lack of a case plan. *Id.* at 542. Here, the facts are distinguishable from *R.M.M.* because mother did not admit to abandoning her children or state that she wanted to terminate her parental rights.

[5] The district court stated that it did not make the finding because the county filed the permanency petition "so late that the court was unable to review [it]."

Butzer from jail, but Butzer did not communicate with mother until one week before her release from jail. As in *A.R.B.*, the county identifies nothing that prevented it from creating a case plan with mother while she was incarcerated. *Id.* at 899. Before mother went to jail, Butzer prepared a case plan without mother, but the district court did not find that Butzer ever updated the plan. Also, mother was in contact with the county after her release from jail in September 2018. On this record, and particularly in light of the county's rejection of mother's collect calls, the lack of communication between mother and the county does not present "extreme circumstances" excusing the county's failure to provide a court-approved case plan. *See A.R.B.*, 906 N.W.2d at 898.

Still, the county argues that the "failure to file a case plan does not warrant reversal" because mother was otherwise aware of what she needed to accomplish for reunification to occur. The county argues that both Butzer and the district court "conveyed the expectations" to mother for reunification.

We reject the county's argument for the same reason we rejected a similar argument in *A.R.B.*, where the county argued that father "knew the steps he needed to take to correct the conditions that led to his son's placement and therefore failing to complete a plan was a harmless error." *Id.* at 899. In *A.R.B.*, we concluded that "pointing to a deficient parent's personal awareness of his significant issues that triggered out-of-home placement is no substitute for the case-plan process, which includes the directive document required by statute." *Id.* The same reasoning applies to mother's awareness of the reasons for the out-of-home placement of her children.

The county also cites *In re Welfare of J.J.L.B.*, 394 N.W.2d 858, 859 (Minn. App. 1986). In *J.J.L.B.*, a mother sought to regain custody of her children after the county filed a CHIPS petition and placed her children in foster care. *Id.* The district court issued several orders with "guidelines for correcting her problems." *Id.* at 863. The mother lived a "transitory lifestyle" with a carnival, and when she "settled down" at one residence, she responded "with anger and threats" to social services. *Id.* at 860. The county petitioned to terminate the mother's parental rights, which the district court granted despite the county's failure to provide a timely case plan to the mother. *Id.* at 863.

We affirmed the district court in *J.J.L.B.* for two reasons. *Id.* First, we reasoned that the county's failure to provide a case plan was "in part a result of [the mother's] failure to cooperate and transitory lifestyle." *Id.* Second, we reasoned that the district court had provided guidelines for reunification to the parent. *Id.* We concluded the lack of a case plan was not reversible error under these circumstances. *Id.*

The county contends that, like in *J.J.L.B.*, the district court's orders in mother's CHIPS case established steps for reunification, such as ordering mother to abstain from using drugs and alcohol. The record establishes that mother was aware of these orders. We distinguish *J.J.L.B.*, however, because the county provides no reason for its failure to communicate with mother or to provide services and address conditions while mother was in jail. And the county also never filed a case plan in this case, whereas a case plan was filed in *J.J.L.B.*, albeit late.

The county's failure to prepare a court-approved case plan with mother's input and court approval disregards the statutory requirements. *See* Minn. Stat. § 260C.212,

subd. 1. On this record, the district court's orders that directed mother to take preliminary steps for reunification did not serve as a substitute for a court-approved case plan.[6] Therefore, we hold that the district court abused its discretion by terminating mother's parental rights because the county did not make reasonable efforts to reunite mother and her children by providing a case plan, and the district court did not make a finding of abandonment or futility excusing a case plan. *See S.E.P.*, 744 N.W.2d at 385 (county must always make reasonable efforts); *A.R.B.*, 906 N.W.2d at 898 (holding that the lack of a case plan may be excusable when the record supports a finding of abandonment or futility).

Although we conclude that the county did not make reasonable efforts at reunification, we do not suggest that the district court alter the children's out-of-home placements. We hold only that the county's failure to provide a case plan consistent with the statutory requirements requires reversal of the district court's order terminating mother's parental rights. We remand for the district court to allow the county to prepare a case plan jointly with mother, obtain court approval, and allow mother the opportunity to complete the case plan.

Reversed and remanded.

[6] The county also cites two unpublished opinions in support of its argument. But unpublished opinions are not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 582 n.2 (Minn. 2009) (stating that unpublished opinions do not constitute precedent).