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

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0966

In the Matter of the Welfare of the Children of:
A. L. H. and J. A. T., Parents.

Filed February 18, 2022
Reversed and remanded
Johnson, Judge

Polk County District Court
File No. 60-JV-20-1265

Brian T. Hardwick, Grand Forks, North Dakota (for appellant J.A.T.)

Greg Widseth, Polk County Attorney, Larry D. Orvik, Assistant County Attorney, Crookston, Minnesota (for respondent Polk County Human Services)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

The district court terminated a man's parental rights to two children. We conclude that the district court erred by finding that the county made reasonable efforts to reunify him and the children. Therefore, we reverse and remand.

FACTS

J.A.T. is the biological father, and A.L.H. is the biological mother, of two minor children: N.L.T., who was born in May 2014, and L.M.T., who was born in February 2016.

At the time of the termination trial, J.A.T. had been incarcerated for approximately 11 of the past 13 years. A.L.H. served as the custodial parent of the children.

In March 2019, Crookston police received a report that A.L.H. had physically abused N.L.T. The following day, Polk County petitioned the district court for an order adjudicating N.L.T. as a child in need of protection or services (CHIPS). The district court promptly ordered that N.L.T. be removed from A.L.H.'s home and placed in the temporary custody of the county. In mid-April 2019, the county and A.L.H. agreed to an out-of-home placement plan. In late April 2019, the district court adjudicated N.L.T. as a child in need of protection or services.

Meanwhile, in early April 2019, J.A.T. was arrested for driving while impaired. The following day, a county social worker visited J.A.T. in jail. During their hour-long meeting, J.A.T. told the social worker that he wanted to be involved in the CHIPS proceedings and wanted to seek treatment for alcohol abuse. The social worker offered J.A.T. support in seeking treatment while the CHIPS case was pending. The record suggests that a county employee conducted a chemical-dependency assessment of J.A.T., perhaps for the purposes of a pending criminal case, but the record does not contain the results of the assessment. Otherwise, there is no evidence in the record that the social worker or any other county employee arranged for or provided the services that the social worker offered. In June 2019, N.L.T. returned to A.L.H.'s home for a two-month trial home visit.

In July 2019, J.A.T. was furloughed from jail for five days but did not voluntarily return. A warrant was issued for his arrest, and he was at large for nearly a year. While

J.A.T. was at large, it was reported that A.L.H. had physically abused both children. The county filed an amended CHIPS petition seeking an adjudication that both children were in need of protection or services, which was granted. In late September 2019, both children were removed from A.L.H.'s home and placed in foster care, where they have remained ever since. J.A.T. learned through a relative that the children had been removed from A.L.H.'s home due to physical abuse. But he did not attend any of the next seven CHIPS hearings. In June 2020, J.A.T was arrested and held in pre-trial detention.

In August 2020, the county petitioned the district court to terminate A.L.H.'s and J.A.T.'s parental rights. The petition focused primarily on A.L.H. The petition contained only three sentences that refer specifically to J.A.T.: "I [social worker] have had no contact with [J.A.T.]. I am not aware of his current address or telephone number. He has not attended any court hearings that I am aware of."

Shortly after the termination petition was filed, J.A.T., while still incarcerated, requested counsel, began to attend court hearings, and expressed his opposition to the termination of his parental rights. In December 2020, J.A.T. was contacted by a different county social worker. During a 15-minute telephone call, J.A.T. told the social worker that he did not want to voluntarily terminate his parental rights.

In May 2021, the district court conducted a one-day trial. At the outset of trial, A.L.H. stated that she would voluntarily terminate her parental rights if J.A.T.'s parental rights were involuntarily terminated. Accordingly, the district court bifurcated the trial and first received evidence only with respect to the county's allegations against J.A.T. At the

time of trial, J.A.T. was imprisoned at the correctional facility in Stillwater with an anticipated release date in October 2021.

The county first presented the testimony of the social worker who had talked to J.A.T. by telephone in December 2020. Based on his review of the county's file, the social worker testified about J.A.T.'s lack of involvement in the CHIPS proceedings. He testified that he was not aware of any attempt by J.A.T. to contact his children since March 2019. On cross-examination, the social worker acknowledged that the county's file relating to A.L.H. and J.A.T., which was approximately 1,500 pages in length, contained fewer than 10 pages in which J.A.T. was mentioned. He testified further that the file's lack of information relating to J.A.T. is unusual and that he would have expected more documentation relating to J.A.T.

The county also called A.L.H. as a witness. She testified that J.A.T. generally had been absent from the children's lives and had not provided financial support to the family. J.A.T. testified on his own behalf. He expressed a desire to be involved in the children's lives. He expressed a willingness to take parenting classes, enroll in chemical-dependency programming, submit to a mental-health evaluation, and engage in supervised visits with the children.

In July 2021, the district court filed an order in which it found that the county had proved six statutory grounds for termination with respect to J.A.T., that reasonable efforts had been made to reunify J.A.T. and the children, and that termination of his parental rights is in the children's best interests. Accordingly, the district court granted the county's petition and terminated J.A.T.'s parental rights to both children. J.A.T. appeals.

DECISION

J.A.T. challenges the district court's termination order on only one ground: he argues that the district court erred by finding that the county made reasonable efforts to reunify him and the children.

"In any proceeding" to terminate parental rights, a district court "shall make specific findings . . . that reasonable efforts to finalize the permanency plan to reunify the child and the parent were made including individualized and explicit findings regarding the nature and extent of efforts made by the social services agency to rehabilitate the parent and reunite the family." Minn. Stat. § 260C.301, subd. 8(1) (2020). Alternatively, a district court may find "that reasonable efforts for reunification are not required as provided under section 260.012." *Id.*, subd. 8(2). It appears that the cross-reference in section 260C.301, subdivision 8(2), refers specifically to subsection (a) of section 260.012. *See In re Welfare of Children of T.R.*, 750 N.W.2d 656, 664-66 (Minn. 2008).[1] That subsection states, "Reasonable efforts to prevent placement and for rehabilitation and reunification are always required except upon a determination by the court that a petition has been filed stating a prima facie case that" one of seven conditions exists. Minn. Stat. § 260.012(a) (2020). The seventh exception is that "the provision of services or further services for the

[1] *Cf. In re Welfare of Children of D.E.T.*, No. A13-1148, 2013 WL 6223574, at *13 (Minn. App. Nov. 27, 2013) (reasoning that second paragraph of subsection 260.012(h) refers "back to paragraph (a) of section 260.012"), *rev. denied* (Minn. Dec. 31, 2013); *id.* at *18 (Chutich, J., dissenting) (reasoning that district court's post-trial futility finding was authorized by second paragraph of subsection 260.012(h)).

purpose of reunification is futile and therefore unreasonable under the circumstances." *Id.*, (a)(7).

The supreme court has stated that "'the provision of reasonable efforts must be evaluated by the court in every case.'" *T.R.*, 750 N.W.2d at 664 (quoting *In re Welfare of S.Z.*, 547 N.W.2d 886, 892 (Minn. 1996)). Accordingly, a county may not unilaterally determine that reasonable efforts would be futile. *Id.* at 665-66. Rather, the county's "remedy is to seek . . . a court determination that reasonable efforts at reunification are no longer required." *Id.* at 666. Unless and until the district court determines that reasonable efforts are not required, the county is required "to continue to provide services to the parent as outlined in the case plan or out-of-home placement plan." *Id.* This court recently clarified that a district court's "futility determination should occur prior to an agency's cessation of efforts and prior to the termination trial." *In re Welfare of the Children of A.D.B.*, ___ N.W.2d ___, ___, 2022 WL 433246, at *6 (Minn. App. Feb. 14, 2022).[2]

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[2]We note that subsection (h) of section 260.012 provides that a district court "shall make findings and conclusions as to the provision of reasonable efforts" and that, "*[i]n the alternative*, the court may determine that provision of services or further services for the purpose of rehabilitation is futile and therefore unreasonable under the circumstances or that reasonable efforts are not required as provided in paragraph (a)." Minn. Stat. § 260.012(h) (emphasis added). Approximately 20 years ago, in *In re Children of Vasquez*, 658 N.W.2d 249 (Minn. App. 2003), this court interpreted section 260C.301, subdivision 8(2), and the language in subsection 260.012(h) to authorize a district court to make a futility finding *after* a termination trial, even though the district court had not made a pre-trial determination that reasonable efforts were not required. *Id.* at 253 (citing Minn. Stat. § 260.012(c) (2002), now codified at Minn. Stat. § 260.012(h) (2020)). In *Vasquez*, we also stated, "The statute is silent as to when during termination-of-parental-rights proceedings the district court must determine that reasonable efforts would have been futile and therefore unreasonable." *Id.* But we issued the *Vasquez* opinion before the supreme court's opinion in *T.R.*, which is the basis of this court's opinion in *A.D.B.*, in which we clarified that a district court may excuse a county from its duty to make reasonable efforts only

The reasonable efforts required of a county social service agency depend on the facts and circumstances of the case. *See In re Children of T.A.A.*, 702 N.W.2d 703, 709 (Minn. 2005); *In re Welfare of Child of A.M.C.*, 920 N.W.2d 648, 663 (Minn. App. 2018). In assessing whether a county has made reasonable efforts, a district court must consider certain statutory factors. *See* Minn. Stat. § 260.012(h). An agency's efforts must "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) (quotation omitted), *rev. denied* (Minn. Mar. 28, 2007). This court applies a clear-error standard of review to a district court's findings of the underlying facts relevant to whether a county has made the required reasonable efforts. *In re Welfare of Children of S.E.P.*, 744 N.W.2d 381, 387 (Minn. 2008); *In re Welfare of Child of D.L.D.*, 865 N.W.2d 315, 321-23 (Minn. App. 2015), *rev. denied* (Minn. July 20, 2015); *see also In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 899-902 (Minn. App. 2011), *rev. denied* (Minn. Jan. 6, 2012). We apply an abuse-of-discretion standard of review to a district court's ultimate finding as to whether a county has made the required reasonable efforts. *D.L.D.*, 865 N.W.2d at 321-23 (citing *J.R.B.*, 805 N.W.2d at 899-902).

In this case, the district court found that probation agencies and the department of corrections had provided programming to J.A.T. over a period of years and that, despite such programming, J.A.T. continued to abuse alcohol and engage in criminal activity. The district court also found that J.A.T. had not spent time with the children or established a

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before a termination trial, in the manner provided in subsection 260.012(a). *See A.D.B.*, 2022 WL 433246, at *6.

relationship with them and—of particular concern to the district court—had chosen to abscond from the law instead of participating in his children's CHIPS proceedings. Based on these predicate findings, the district court made the following ultimate finding:

> Reasonable and active efforts were made to reunify the Child with the Mother and the Father. *See* Minn. Stat. § 260C.301, subd. 8(1). There is no requirement to further pursue reunification. *See* Minn. Stat. § 260C.301, subds. 1(b)(2), 8(2); Minn. Stat. § 260.012. The provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances.

J.A.T. contends that the district court's finding that the county made reasonable efforts is erroneous on the ground that the county never developed a case plan for him and did not provide him with any rehabilitative services that might have enabled him to be reunified with the children.

J.A.T.'s contentions have merit. There is no case plan for J.A.T. in the record. A case plan is required for every parent of a child who has been adjudicated in need of protection or services. Minn. Stat. § 260C.219, subd. 1(c)(1) (2020); Minn. Stat. § 260C.007, subd. 3 (2020). The case plan must be in writing, be prepared in consultation with the parent, describe the services offered to reunify the family, be signed by the parent, and be submitted to the district court. Minn. Stat. § 260C.212, subd. 1(a), (b)(1), (b)(3), (c)(3) (2020). The caselaw makes clear "that an agency fails to make reasonable efforts when it fails to prepare a case plan with an incarcerated parent or otherwise identify any potentially suitable programming available to an incarcerated parent." *A.D.B.*, 2022 WL 433246, at *4; *see also In re Welfare of Children of A.R.B.*, 906 N.W.2d 894, 900 (Minn.

App. 2018). Because the county did not develop a case plan for J.A.T., the county failed to make reasonable efforts to reunify him and the children.

In addition, the record is devoid of evidence of any other efforts by the county to reunify J.A.T. and the children. The county did not provide J.A.T. with any rehabilitative services, such as chemical-dependency counseling, parenting-skills training, or mental-health care. During the 27-month period between the filing of the CHIPS petition and the termination trial, the county apparently made only two or three contacts with J.A.T. for purposes of the CHIPS proceeding: one in-person visit in April 2019, one 15-minute phone call in December 2020, and possibly a chemical-dependency assessment. The social worker testified only about the first and second contacts, and only briefly, and his testimony about the first contact was based solely on his review of the case file. There is no evidence in the record that the county attempted to contact J.A.T. on any other occasion. In the county's first contact with J.A.T., a different social worker offered to support J.A.T. if he pursued alcohol-dependency counseling, but the county did not follow-up on that offer. J.A.T. testified that, independent of any effort by the county, he attempted to participate in drug-and-alcohol counseling as well as parenting classes, but those programs were either suspended due to the COVID-19 pandemic or he did not qualify for them. The county's contacts with J.A.T. are not frequent enough or consequential enough to support the district court's ultimate finding that the county made the required reasonable efforts. *See S.E.P.*, 744 N.W.2d at 387 (affirming finding of reasonable efforts based on evidence of in-home parenting education, group therapy, and meetings with social worker); *A.M.C.*, 920 N.W.2d at 663 (affirming finding of reasonable efforts based on evidence of few contacts that were

reasonable but "imperfect"); *S.W.*, 727 N.W.2d at 150 (affirming finding of reasonable efforts based on evidence of individual therapy, parenting-technique instruction, and psychological- and parental-capacity evaluations).

We are mindful of the district court's finding that any efforts by the county to reunify J.A.T. and the children would be futile and, thus, unreasonable. But that finding was made after trial in the district court's termination order. The county did not make a pre-trial request to be relieved of its duty to make reasonable efforts, and the district court did not make a pre-trial determination that "the provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances." *See* Minn. Stat. § 260.012(a)(7). A district court's post-trial finding that reasonable efforts would be futile does not suffice if there was no pre-trial determination excusing the county from making reasonable efforts. *See A.D.B.*, 2022 WL 433246, at *6.

Thus, the district court erred by finding that the county made reasonable efforts to reunify J.A.T. and the children. Therefore, we reverse the district court's order terminating J.A.T.'s parental rights and remand for further proceedings consistent with this opinion. *See, e.g.*, *T.R.*, 750 N.W.2d at 666 & n.9; *A.D.B.*, 2022 WL 433246, at *7; *A.R.B.*, 906 N.W.2d at 900.

Reversed and remanded.