STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0978

In the Matter of the Welfare of the Children of: A. D. B. f/k/a A. D. H. (Mother) and D. M. D. (Father), Parents.

Filed February 14, 2022
Reversed and remanded
Bryan, Judge

Stearns County District Court
File No. 73-JV-21-441

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Considered and decided by Jesson, Presiding Judge; Bryan, Judge; and John Smith, Judge.*

SYLLABUS

A district court abuses its discretion by making a posttrial determination that efforts to reunite the parent and child would be futile when: (1) the parent was incarcerated but scheduled for release in the near future; (2) the agency failed to develop a case plan for the parent, failed to engage with the parent prior to termination, and failed to otherwise identify any potential services that might be suitable and available to the parent; and (3) the agency

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

did not request a prima facie determination of futility based on the facts contained in its petition.

OPINION

BRYAN, Judge

Appellant appeals from a termination of his parental rights, challenging the district court's after-the-fact determination that future reunification efforts would be futile. We conclude that, given the uncontested facts of this case, the district court abused its discretion when it made a determination of futility after trial.[1] Accordingly, we reverse and remand.

FACTS

Appellant, D.D. (father), and respondent A.B. (mother) are the parents of one child, T.M.D., born in May 2015 (the child). In March 2020, respondent Stearns County Human Services (the agency) began child protection proceedings against mother after she gave birth to the child's half-sibling, who tested positive for three controlled substances and for alcohol. The child and three of his half-siblings were placed into emergency relative foster care, where they remained throughout the proceedings. Father was a participant in those child protection proceedings but was never made a party to those proceedings and no case plan was developed for him.

[1] Appellant alternatively argues that the record does not contain clear and convincing evidence to support a statutory basis for termination. Given our decision regarding reasonable efforts, we need not address this alternative argument.

In January 2021, the agency began termination proceedings against both mother and father. The termination petition does not distinguish between father and mother, requesting termination of "[a]ll rights of the parents to the children" on each of the following three statutory bases: (1) palpable unfitness, pursuant to Minnesota Statutes section 260C.301, subdivision 1(b)(4) (2020); (2) failure to correct the conditions leading to placement, pursuant to section 260C.301, subdivision 1(b)(5) (2020); and (3) neglect, pursuant to section 260C.301, subdivision 1(b)(8) (2020). The affidavit accompanying the petition focuses overwhelmingly on mother's conduct. The affidavit does include some allegations regarding father, such as a description of his criminal history and a statement that father is currently incarcerated for a felony stalking conviction involving mother,[2] that he will be released on October 24, 2022, and that an ex parte protective order prohibits father from contacting mother and the child until its expiration in November 2021. The affidavit contains no statements about any efforts to reunite the child with father and instead describes efforts and services related to the child and to mother. This description of the agency's efforts to reunite mother and the child occupies more than 10 pages and 90 paragraphs of the affidavit accompanying the agency's petition. The affidavit closes with a conclusory statement regarding the futility of provided services to the parents, but it does not distinguish between mother and father and does not request that the district court determine whether the facts in the affidavit establish a prima facie case of futility.

[2] Father received a probationary sentence, but he subsequently violated the terms of probation when he contacted mother in November 2020. The affidavit states that father was incarcerated but does not contain statements explaining that father was incarcerated as a result of the probation violation.

The case proceeded to trial in June 2021. At no point prior to trial did the agency request that the district court issue an order relieving the agency of its statutory obligation to develop a case plan for father or its statutory obligation to make reasonable efforts to reunite father and the child. In addition, prior to trial, the district court did not make any determination regarding whether the termination petition or the affidavit accompanying it stated a prima facie case that reunification efforts would be futile.

As it relates to father, the evidence presented at trial indicates that the agency did not contact father, did not engage with him, did not provide any services to him, did not conduct any type of assessments, and did not develop a case plan for him. One social worker testified to "[n]ot really" working with father over the course of the case. The other social worker testified that she had "not been able to make contact with him" prior to trial. This social worker explained that she called the prison one week before trial but had not yet made any direct contact with father's case manager. The guardian ad litem testified that she had not had any contact with father. There is no evidence regarding what services might be available to father while incarcerated.

At the conclusion of the trial, the agency made written closing arguments and proposed findings of fact and conclusions of law. The overwhelming majority of arguments and proposed findings and conclusions relate to mother, not father. Importantly, the agency's posttrial submissions contain no argument that efforts to reunite the father and the child would have been futile. Nor do they include any proposed findings of fact or conclusions of law regarding the futility of reunification efforts. Instead, the agency argued

that clear and convincing evidence presented at trial established that it made actual reunification efforts, and that those efforts were reasonable.

After trial, the district court terminated the parental rights of both mother and father. Regarding mother, the district court determined that the agency presented clear and convincing evidence that reasonable efforts failed to correct the conditions leading to the child's placement out of the home pursuant to section 260C.301, subdivision 1(b)(5). Regarding father, the district court concluded that the agency presented clear and convincing evidence that the child was neglected and in foster care pursuant to section 260C.301, subdivision 1(b)(8).

The district court made extensive findings regarding mother but only devoted a few paragraphs to addressing father. Among other findings, the district court determined that father "is interested in parenting the child when he is released [from prison]" and that father "believes that he could be a loving, supportive father to the child." The district court also analyzed the seven statutory factors regarding neglect, including the factors relating to "the use of rehabilitative services offered to the parent," "the appropriateness and adequacy of services provided or offered to the parent to facilitate a reunion," the likelihood that additional services could enable "a return of the child to the parent within an ascertainable period of time," whether these additional services "have been offered to the parent, or if services were not offered, the reasons they were not offered," and "the nature of the efforts made by [the agency] . . . and whether the efforts were reasonable." Minn. Stat. § 260C.163, subds. 9(2), (5), (6), (7) (2020). In its analysis of these factors, the district court concluded that the agency made no reunification efforts and provided no services to

father but determined that the agency's failure to do so was reasonable, given the existence of a protective order[3] and due to father's incarceration:

> The lack of services provided to [father] to facilitate reunification were appropriate given that [father] is currently incarcerated, where services are limited, and is ordered not to have contact with the child for the child's safety. [Father] is incarcerated until 2024 and while that cannot be the basis for termination, it does make the services offered to [father] reasonable.

The district court also concluded that because of father's "history of violating the protective orders protecting the child and the child's mother . . . additional services would not be likely to bring about lasting parental adjustment enabling the child's return." Father appeals.

ISSUE

Did the district court abuse its discretion when it made a posttrial determination that making reasonable efforts to reunite the father and the child would be futile?

ANALYSIS

Father challenges the district court's posttrial determination of futility, arguing that the district court abused its discretion.[4] We agree that the decision is against logic and

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[3] As noted above, the ex parte protective order was set to expire in November 2021, approximately five months after the trial occurred.

[4] Father also challenges the underlying findings of fact, which we review for clear error. *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 900 (Minn. App. 2011), *rev. denied* (Minn. Jan. 6, 2012). The district court based its futility determination on the following four factual findings: (1) father "is incarcerated until 2024;" (2) father "is ordered not to have contact with the child for the child's safety;" (3) father is "currently incarcerated for violation of the protective order protecting the child and [mother];" and (4) father has a "history of violating the protective orders protecting the child and the child's mother." In their arguments to this court, the parties agree that the district court erred when it incorrectly stated father's anticipated release date and when it described father's criminal

amounts to an abuse of discretion for the following three reasons: (1) father had an ascertainable date of release that was to occur in the near future; (2) the agency failed to identify potential services that might be suitable and available to father while incarcerated; and (3) the futility determination was not requested by the agency, was not limited to the facts in the agency's termination petition, and occurred after the agency had decided on its own to cease reunification efforts.

Generally, to terminate a person's parental rights, the district court must determine that clear and convincing evidence establishes each of the following three elements: (1) the existence of at least one statutory basis for termination; (2) termination is in the child's best interests; and (3) the social services agency made reasonable efforts to reunite the family. *In re Welfare of Children of T.A.A.*, 702 N.W.2d 703, 708 (Minn. 2005); *see also*, *In re Welfare of Child of A.M.C.*, 920 N.W.2d 648, 655 (Minn. App. 2018) (stating that, in the context of children who are not Indigenous Americans, "the petitioner must show clear and convincing evidence that reasonable efforts were made to reunite the parent with the child."). "Reasonable efforts are made upon the exercise of due diligence by the responsible social services agency to use culturally appropriate and available services to meet the needs of the child and the child's family." Minn. Stat. § 260.012(f) (2020). A

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history and current offense. The parties also agree that the ex parte order for protection was due to expire five months from the time of the termination trial. In this way, each of the district court's underlying factual determinations are erroneous or incomplete. The parties' agreement ends there, and they dispute whether these factual errors are harmless or compel reversal. We conclude that these errors are not harmless given the remaining evidence in the record. The undisputed evidence that the agency failed to contact father or his case manager and failed to consider what programs might have been available to father while incarcerated does not support the findings necessary for a determination of futility.

determination of reasonable efforts also requires the district court to consider whether services to the child and the family were relevant to the safety and protection of the child, available and accessible, consistent and timely, and realistic under the circumstances. *In re Welfare of S.Z.*, 547 N.W.2d 886, 891 (Minn. 1996).

Reasonable efforts are required absent a court order concluding that a petition, filed by the agency, states a prima facie case of futility: "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," in relevant part, "the provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances." Minn. Stat. § 260.012(a), (a)(7) (2020). To be clear, just as the agency must establish the reasonableness of its efforts by clear and convincing evidence, it also must establish the unreasonableness or futility of reunification efforts by clear and convincing evidence.

In addition to the statutory requirement that the social services agency make reasonable efforts, the agency is required by statute to develop a case plan with each parent. Minn. Stat. § 260C.212, subd. 1 (2020). We have tied these two statutory requirements together, concluding 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. *In re Welfare of Children of A.R.B.*, 906 N.W.2d 894, 900 (Minn. App. 2018) ("Because the county did not provide D.T.R. with a written case plan . . . or even attempt to determine whether any prison programming might

have been available to D.T.R. and suitable to include in a case plan . . ., the county failed to make reasonable efforts.").

We review the determination that reunification efforts would be futile for an abuse of discretion. *See A.M.C.*, 902 N.W.2d at 660 ("When statutes explicitly entrust the district court to determine what is appropriate, we review for an abuse of discretion"); *In re Welfare of Child of D.L.D.*, 865 N.W.2d 315, 322 (Minn. App. 2015), *rev. denied* (Minn. July 20, 2015) (concluding that appellate courts review a district court's decision that the social services agency made reasonable efforts for an abuse of discretion). In addition, we reverse only where there is no harmless error. *See In re Welfare of D.J.N.*, 568 N.W.2d 170, 176 (Minn. App. 1997) (refusing to reverse termination of parental rights for harmless error).

As a threshold matter, we construe the district court's decision as a determination that making reunification efforts would be futile. As noted above, the district court addressed the statutory neglect factors, including the second, fifth, sixth, and seventh factors, which relate to the services and efforts that an agency is required to provide to a parent. As part of its analysis of these factors, the district court found that the agency did not provide any services or make reunification efforts and determined that its failure to do so was reasonable.

Father contends that the district court determined that the agency made sufficient reunification efforts. Father then challenges this decision, arguing that the agency made no efforts to engage with him and that a failure to provide efforts can never satisfy the agency's statutory obligation to provide reasonable efforts. In response, the agency appears to characterize the district court's analysis of the statutory neglect factors as a

determination of futility, although the agency did not make a futility argument at trial and did not request a pretrial prima facie determination of futility. We observe that the statute contemplates a court relieving the agency of its obligation to make reasonable efforts when "the provision of services or further services for the purpose of reunification is futile *and therefore unreasonable* under the circumstances." Minn. Stat. § 260.012(a)(7) (emphasis added). Given this statutory language, we agree with the agency and construe the district court's determination not as merely analyzing the statutory neglect factors, but also as a determination of the futility of reunification efforts.

With this framework in mind, we turn to father's primary argument regarding reasonable efforts: that the district court abused its discretion when it determined that father's incarceration rendered reunification services effectively futile. In response, the agency contends that the failure to provide services in this case is justified based on two prior opinions from this court, both of which affirmed termination of parental rights in the absence of a case plan and reunification efforts: *In re Children of Vasquez*, 658 N.W.2d 249, 253 (Minn. App. 2003), and *In re Welfare of Udstuen*, 349 N.W.2d 300, 303-04 (Minn. App. 1984). We agree with father and do not find either case cited by the agency to be applicable.

First, father argues that the district court abused its discretion because the district court based its futility determination on a term of imprisonment that is nearly double the remaining length of father's actual period of incarceration. We agree. Because his anticipated release date was "an ascertainable period of time," Minn. Stat. § 260C.163,

subd. 9(6), and because it is to occur in the relatively near future, it is an abuse of discretion to conclude that the agency established futility by clear and convincing evidence.

Second, father argues that the district court's determination is erroneous in light of the agency's failure to develop a case plan, contact father or his case manager, and identify any potential services that might be suitable and available to the parent. The purpose of a case plan is to give parents written guidelines for correcting the conditions resulting in child protection proceedings. *E.g.*, *In re Welfare of Copus*, 356 N.W.2d 363, 366 (Minn. App. 1984). This is true even when a parent is incarcerated, and being imprisoned does not automatically relieve the agency of its obligation to engage with a parent and to develop a case plan:

> We recognize that D.T.R. was incarcerated and that this circumstance might change what qualifies as "reasonable" under the county's duty to make "reasonable efforts" to reunite father and child. But the statute nowhere excuses the county of making reasonable efforts in this situation, and it is well established that "[i]ncarceration alone does not necessarily preclude a person from acting in a parental role." *In re Welfare of Children of A.I.*, 779 N.W.2d 886, 892 (Minn. App. 2010) (citing cases). The county identifies nothing in this situation that prevented it from creating a case plan for D.T.R. and attempting to coordinate with prison officials about the availability of potentially suitable programming during D.T.R.'s incarceration period. . . . And at no point did the county ask the district court to dispense with the need for reasonable efforts because of futility.

A.R.B., 906 N.W.2d at 899 (rejecting the social service agency's argument that incarceration rendered reunification efforts futile and reversing the termination of parental rights because of the agency's failure to develop a case plan).

Pursuant to *A.R.B.*, the social service agency is required to identify potentially suitable programming during incarceration and to at least "attempt to determine whether any prison programming might have been available . . . and suitable to include in a case plan to correct the conditions that led to . . . out-of-home placement." *Id.* at 900. The record in this case shows that the agency made no effort to identify potentially suitable programming. In fact, the agency did not even contact father's case manager. Given the holding in *A.R.B.*, it is an abuse of discretion to determine that services would be futile without first identifying the services and programs available at the parent's correctional facility and determining the suitability of those services and programs.

Third, father challenges the timing and process surrounding the district court's futility determination. Typically, as directed by the pertinent statute, the agency affirmatively requests that the district court determine whether "a petition has been filed stating a prima facie case that . . . the provision of services or further services for the purpose of reunification is futile." Minn. Stat. § 260.012(a), (a)(7). The district court has the authority to allow the agency to cease its ongoing or interim efforts: "Under Minn. Stat. § 260.012(a) (2006), reasonable efforts 'for rehabilitation and reunification are always required' until the district court determines that the county has filed a petition stating a prima facie case . . . justifying cessation of such efforts." *In re Welfare of Children of T.R.*, 750 N.W.2d 656, 664 (Minn. 2008). This futility determination should occur prior to an agency's cessation of efforts and prior to the termination trial, because the alternative would allow a social services agency to decide for itself that ongoing efforts would be futile, something the supreme court has rejected:

> [T]he county may not, as it did here, decide for itself that further efforts are futile. Rather, if the county decides that further efforts to rehabilitate a parent and reunify parent and child would be futile, its remedy is to seek, as outlined in Minn. Stat. § 260.012(f) (2006), a court determination that reasonable efforts at reunification are no longer required. Until then, the statute requires the county to continue to provide services to the parent as outlined in the case plan or out-of-home placement plan.

Id. at 665-6. The statute governing the district court's futility determination, therefore, contemplates an affirmative request of the agency (as opposed to the sua sponte actions of a district court), requires a prima facie determination based on facts contained in the agency's petition (as opposed to a determination based on clear and convincing evidence offered at a trial), and relates to cessation of an agency's interim or ongoing efforts before a termination trial (as opposed to justifying the agency's overall efforts after the fact).[5]

In this case, father is correct that the agency did not follow this procedure. The agency never requested a prima facie determination based on the petition. Instead, the agency decided for itself, without a court determination, not to make reunification efforts. By making the posttrial determination of futility, the district court justified the agency's inaction and its unilateral decision to cease ongoing reunification efforts. The district court, however, did not confine itself to the agency's petition or accompanying affidavit. In

[5] We observe that the final paragraph of section 260.012(h) also references futility: "In the alternative, the court may determine that provision of services . . . is futile and therefore unreasonable under the circumstances or that reasonable efforts are not required as provided in paragraph (a)." The agency makes no argument regarding this portion of the statute or any argument that the requirements of section 260.012(a)(1)-(7) and (f)(4) do not apply. Absent any such argument, we decline to address whether the final paragraph of section 260.012(h) is in conflict with section 260.012(a)(1)-(7), section 260.012(f), or with the holding in *T.R.*, 750 N.W.2d at 664.

addition, it is also not clear what standard of proof the district court applied. Under a clear-and-convincing standard of proof, it would be an abuse of discretion to conclude that the agency established the futility of services and reunification efforts when the agency presented no evidence regarding any assessments undertaken to determine what services father might need and no evidence regarding whether any of these services are available at the correctional facility where father is imprisoned.

Finally, to the extent that the two cases from this court cited by the agency survive the Minnesota Supreme Court's subsequent decision in *T.R.*, we conclude that neither case applies here. In *Vasquez*, this court excused the agency's failure to develop a case plan and to make reunification efforts because the district court relied on the nature of the criminal conviction (Vasquez murdered the children's mother), the length of his prison sentence which made reunification impossible (Vasquez was not eligible for release until 2023, when the children would be between 27 and 33 years old), inappropriate communications that Vasquez had with his oldest child in violation of a court order, and additional behavior that Vasquez exhibited while incarcerated. 658 N.W.2d at 251, 253. None of the reasons for excusing the agency's failure to develop a case plan and to make reunification efforts in *Vasquez* is present in the instant case. In addition, unlike the circumstance of the instant case, the agency in *Vasquez* affirmatively requested a futility finding before the district court.

Udstuen is similarly inapplicable. In that case, the parent had been charged with attempted murder of the child, was then convicted of first-degree assault for physically abusing the child, and "as a result of the abusive treatment" by the parent, the child suffered

life-long injuries, including cerebral palsy, brain damage, seizures, trauma, and "night-screams." *Udstuen*, 349 N.W.2d at 302. The child was "unable to walk, crawl, hold things in his hands, or feed himself" and needed to use "[a]n orthokinetic wheelchair equipped with a halo to hold his head upright." *Id.* The abusive actions of the parent and the resulting special needs of the child are unique circumstances justifying the district court's decision in that case. *See, e.g.*, Minn. Stat. § 260.012(g) (2020) (noting that reunification efforts are not required if the parent has been convicted of homicide, attempted homicide, or assault against the child, among other listed offenses). Those circumstances are not present here.

DECISION

For the foregoing reasons, the district court abused its discretion in this case when it made a posttrial determination that efforts to reunite the father and child would be futile. We reverse the termination of father's parental rights and remand for further proceedings consistent with this opinion.

Reversed and remanded.