STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1497

In the Matter of the Welfare of the Child of: B. H. and T. D. K., Parents.

Filed May 2, 2022
Remanded
Segal, Chief Judge

Otter Tail County District Court
File No. 56-JV-21-457

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Considered and decided by Segal, Chief Judge; Smith, Tracy M., Judge; and Hooten, Judge.*

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this appeal from the termination of his parental rights, father challenges, among other things, the district court's posttrial finding that the provision of services or further services to reunify father and child would be futile and, therefore, unreasonable under

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

Minn. Stat. § 260.012(a)(7) (2020). After the district court issued its order, this court filed *In re Welfare of Child. of A.D.B.*, 970 N.W.2d 725 (Minn. App. 2022), which held that under certain circumstances a finding of futility under Minn. Stat. § 260.012(a)(7) is improper. We conclude that remand of this case to the district court is necessary to allow the court to clarify its reasonable-efforts findings in light of *A.D.B.*

FACTS

Appellant T.D.K. is the father of a child born in August 2020 (the child). Father and mother never married, but they jointly prepared an announcement of mother's pregnancy and shared it with family and friends. Due to multiple drug offenses, father was incarcerated at the time of the child's birth and remained incarcerated through the date of trial.

B.H., the child's mother, struggled with drug use, and her two older children (with a different father) were subject to an ongoing child-in-need-of-protection-or-services (CHIPS) action. Because of mother's ongoing drug use, the child was removed from mother's care immediately following the child's birth. The child was placed with mother's sister, where the two older siblings had already been placed. Respondent Otter Tail County Department of Human Services (the county) filed a CHIPS petition, and the child was adjudicated as CHIPS several days later. The child has been living with her maternal aunt and her two older siblings since she was removed from mother's care. The county later identified the maternal aunt as a permanency placement for the child.

When the CHIPS petition for the child was initially filed, father was identified as one of two potential fathers. A county social worker spoke with father in October 2020

and asked him about the availability of services for him in prison. Father advised that there were none, and that he "didn't want to put too much into the case" until he knew whether he was the child's father. A Minnesota Department of Corrections case manager—who was also present during the October call with father and the county social worker—confirmed at trial that few services were available in correctional facilities at the time due to the COVID-19 pandemic. With the assistance of a corrections case manager, however, father applied for and was admitted to the one chemical-dependency treatment program that he was eligible for and was still being offered during the pandemic—a bootcamp-type program called the Challenge Incarceration Program. The program has three mandatory six-month components. If father was successful in completing all three phases of the program, he could obtain an early release from prison.

In February 2021, after the DNA test results showed that the child was father's biological child, the county social worker provided father with a case plan. When the social worker contacted father regarding the plan, father confirmed that he had received it, but stated that he wanted to speak with an attorney before signing it. The case plan was approved by the court in March 2021.

The county filed a petition at the end of February 2021 for the termination of parental rights (TPR) of both mother and father. Mother agreed to voluntarily terminate her parental rights in March 2021. Based on mother's voluntary relinquishment of her parental rights to the child and the fact that father had not been adjudicated as the child's father, the district court ordered the termination not only of mother's parental rights, but

those "of any unknown father." Father later moved to vacate that order, and the county agreed and filed an amended TPR petition that identified father as the presumed father.

As of the date of trial in September 2021, father had never personally met or spent any time with the child, aside from a single video visit.[1] Father was scheduled to complete the first phase of the Challenge Incarceration Program in November 2021, but he had yet to begin the second and third six-month phases of the program, which were community-based with intensive supervision.

Following trial, the district court issued an order terminating father's parental rights. The order included a finding that "the provision of services or further services for the purpose of reunification would be futile in this matter" and, therefore, unreasonable under Minn. Stat. § 260.012(a)(7). The district court found that the county had established five statutory grounds supporting termination: (1) father had abandoned the child, (2) father was palpably unfit to parent the child, (3) reasonable efforts had failed to correct the conditions leading to the child's out-of-home placement, (4) father had failed to register in the fathers' adoption registry, and (5) the child was neglected and in foster care. *See* Minn. Stat. § 260C.301, subd. 1(b)(1), (4), (5), (7), (8) (2020). The district court determined that the county had failed to prove a sixth statutory ground, refusal or neglect in complying

[1] The record reflects that there were no in-person visits at correctional facilities during the COVID-19 pandemic and that the county's first application for a video visit between father and child was denied because of defects in the application. While the county social workers testified about later efforts to arrange video visits, it is undisputed that there was only one video visit where the child was present.

with parental duties. *See id.*, subd. 1(b)(2) (2020). The district court also determined that termination was in the child's best interests. Father appeals.

DECISION

To terminate parental rights, a district court must, in addition to other elements, find by clear and convincing evidence "(1) that reasonable efforts to finalize the permanency plan to reunify the child and the parent were made . . . or (2) that reasonable efforts for reunification are not required." Minn. Stat. § 260C.301, subd. 8 (2020); *see In re Welfare of Child. of S.E.P.*, 744 N.W.2d 381, 385 (Minn. 2008) (addressing prerequisites for terminating parental rights). Under Minn. Stat. § 260.012(a)(7), a county may petition the district court to be excused from making reasonable efforts for reunification. The petition is to be granted if the district court determines that it states a prima facie case that "the provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances." *Id.* Here, father challenges, among other things, the district court's findings regarding the county's efforts to reunite the family.

A district court's determination of whether a county's reunification efforts were reasonable is reviewed for an abuse of discretion. *A.D.B.*, 970 N.W.2d at 730. A district court abuses its discretion if it misapplies the law, makes findings that are unsupported by the record, or resolves the discretionary question in a manner that is contrary to logic and the facts on record. *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022); *Honke v. Honke*, 960 N.W.2d 261, 265 (Minn. 2021) (same); *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (same). A district court's factual findings concerning reasonable efforts are reviewed for clear error. *A.D.B.*, 970 N.W.2d at 729 n.4.

Here, the district court's reasonable-efforts findings summarize the county's interactions with father. The district court also made two other findings—one addressing the county's efforts to set up video visits between the child and father, and the other addressing the county's efforts to offer services to father—in which the court found that the county's reunification efforts were "minimal." The district court also noted that "the services provided by the [county] and potentially available to [father] were heavily limited by the COVID-19 pandemic" and that "the provision of services to [father] do[es] not change his incarcerated status nor his unwillingness to participate in the case until he was determined to be the genetic father of the child." The district court stressed that even "if everything goes well for [father], . . . [the] earliest [father] would be available to meaningfully parent the child would not occur prior to November 2022."

The district court did not, however, explicitly address whether the efforts that the county had previously made to reunify the family were reasonable under the circumstances of this case. Instead, in its conclusions of law, the district court stated that "due to the aggravating factors of the COVID-19 pandemic and [father's] incarcerated status," "the provision of services or further services for the purpose of reunification would be futile in this matter" under Minn. Stat. § 260.012(a)(7). It is not clear from this finding whether the district court concluded that the county failed to make reasonable efforts prior to trial, such that the district court was making a posttrial finding of futility that we held was improper in *A.D.B.* Or, in the alternative, whether the district court intended by its conclusion that the provision of "further services" would be futile because, even "if everything goes well for [father], . . . [the] earliest [father] would be available to meaningfully parent the child

would not occur prior to November 2022." Either way, remand for clarification is appropriate in light of *A.D.B.* *See, e.g.*, *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221-22 (Minn. 2021) (noting that "clear-error review does not permit an appellate court to weigh the evidence as if trying the matter *de novo*" or "to engage in fact-finding anew" (quotations omitted)).

In *A.D.B.*, this court reversed and remanded the TPR of an incarcerated father that was based, in part, on a posttrial finding by the district court that reunification efforts were futile under Minn. Stat. § 260.012(a)(7). 970 N.W.2d at 729-30. In *A.D.B.*, the social services agency never contacted the incarcerated father, never developed a case plan for the father, and ceased reunification efforts without first obtaining the district court's permission to do so, even though the father was to be released from prison in the near future. *Id.* at 728, 729. Based on those facts, we held that it was improper for the district court to make a posttrial finding of futility under Minn. Stat. § 260.012(a)(7). We observed that section 260.012(a)(7) requires the social services agency to petition for such a finding before the agency ceases reunification efforts. *Id.* at 733.

Here, the county argues that *A.D.B.* is distinguishable from this case because the county never ceased reunification efforts, and because the county's efforts were reasonable given father's incarceration, the limits on available services imposed by the COVID-19 pandemic, and the fact that father was a noncustodial parent.[2] While there are factual differences between *A.D.B.* and this case, *A.D.B.* forecloses a district court from making a

[2] While *A.D.B.* was released after briefing was completed in this appeal, both father and the county addressed the impact of *A.D.B.* at oral argument.

posttrial finding of futility under Minn. Stat. § 260.012(a)(7) to excuse a county's failure to make reasonable efforts toward reunification.

Nevertheless, while a district court cannot retroactively excuse a social services agency's failure to make reasonable efforts, it is also true that "reasonable efforts, by definition, does not include efforts that would be futile." *In re Welfare of Child. of R.W.*, 678 N.W.2d 49, 56 (Minn. 2004) (discussing the statutory ground for termination that reasonable efforts have failed under Minn. Stat. § 260C.301, subd. 1(b)(5)). We therefore remand for the district court to make specific findings on whether the county's efforts were reasonable under the circumstances. On remand, the district court may, based on any revised findings on the reasonableness of the county's efforts, revisit the statutory grounds for termination.[3] Whether to reopen the record on remand shall be discretionary with the district court.

Remanded.

[3] We express no opinion on father's substantive challenges to the district court's determinations concerning the statutory grounds for termination.