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effected." 6 Julius L. Sackman, Nichols on Eminent Domain § 24.14[2] at 24-236 (3d ed. 2009). Thus, the district court's finding that the Village engaged in good faith negotiations with Krupicka was not clearly erroneous, and it is affirmed.

AFFIRMED.

IN RE INTEREST OF ETHAN M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. THERESA S., APPELLEE, AND DANIEL M., APPELLANT.

809 N.W.2d 804

Filed October 11, 2011. No. A-11-203.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Time.** Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.
3. **Words and Phrases.** A substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover.
4. ____. A procedural right is simply the method by which an already existing right is exercised.
5. **Juvenile Courts: Parent and Child.** Except as provided in Neb. Rev. Stat. § 43-283.01(4) (Cum. Supp. 2010), reasonable efforts shall be made to preserve and reunify families prior to the placement of a juvenile in foster care to prevent or eliminate the need for removing the juvenile from the juvenile's home and to make it possible for a juvenile to safely return to the juvenile's home.
6. **Juvenile Courts: Parental Rights.** Once a plan of reunification has been ordered to correct the conditions underlying an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the plan must be reasonably related to the objective of reuniting the parents with the children.
7. **Juvenile Courts: Minors.** The purpose of the juvenile code is to serve the best interests of the juveniles who fall within it.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Reversed and remanded for further proceedings.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Joe Kelly, Lancaster County Attorney, and Jeremy Lavene for appellee State of Nebraska.

Jeri L. Grachek, Special Assistant Attorney General, of Department of Health and Human Services, for appellee State of Nebraska.

David P. Thompson, of Thompson Law, P.C., L.L.O., for appellee Theresa S.

Steffanie J. Garner Kotik, of Kotik & McClure Law, guardian ad litem.

IRWIN, CASSEL, and PIRTLE, Judges.

CASSEL, Judge.

INTRODUCTION

Daniel M. appeals from a dispositional order of the juvenile court which continued legal custody of Daniel's child with the Nebraska Department of Health and Human Services (DHHS), continued physical custody of the child with the child's mother, and provided no means to help Daniel reunify with the child. Because the case plan adopted by the court was not reasonably related to the objective of reuniting Daniel with his son, we reverse, and remand for further proceedings.

BACKGROUND

This juvenile case is before us for the fifth time. Ethan M., born in January 2000, is the child of Daniel and Theresa S. Following the dissolution of Daniel and Theresa's marriage in 2002, a California court awarded Daniel custody of Ethan. In January 2005, DHHS removed Ethan from Daniel's home in Nebraska and placed him into foster care. The county court for Sherman County, Nebraska, subsequently adjudicated Ethan as a result of allegations that other children residing within the home had suffered injuries. In January 2006, the court approved an immediate change of Ethan's placement from the home of his paternal grandparents to the home of Theresa in California. Daniel appealed, and in *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006), we found that the State must make reasonable efforts to reunify Ethan and Daniel.

We recognized that under the California divorce decree, Daniel was Ethan's custodial parent. We concluded that Ethan should not be placed in California with Theresa and that he should be placed in a situation in Nebraska that was conducive to reunification with Daniel. We observed that Daniel had complied with all tasks required by the case plan.

DHHS did not return Ethan's custody to Daniel. Rather, Ethan's physical custody remained with Theresa, who moved to Nebraska. In June 2007, Daniel began having weekly supervised visitation with Ethan. But in August, the visitation was changed to therapeutic visitation supervised by a mental health professional. In September, visitation ceased due to the unavailability of a mental health professional to supervise the visitation. DHHS arranged for telephone calls between Ethan and Daniel on Tuesdays and Thursdays, but Ethan often ended the calls quickly or refused to speak. In February 2009, the county court for Sherman County adopted DHHS' case plan which continued telephonic visitation only, found that reasonable efforts to reunify Ethan and Daniel were not necessary, placed custody of Ethan with Theresa, and dismissed the juvenile case. Upon Daniel's appeal, we found plain error in the court's order. In *In re Interest of Ethan M.*, 18 Neb. App. 63, 72, 774 N.W.2d 766, 773 (2009), we held that "where the only issue placed in front of the county court is whether a case plan is in the child's best interests, permanent child custody cannot be modified merely through the adoption of the case plan." We stated, however, that "a case plan could be used to place a child with a noncustodial parent as a dispositional order under the continuing supervision of the juvenile court." *Id.* We reversed the county court's order and remanded the cause for further proceedings.

In February 2010, the county court for Sherman County granted a motion to transfer the case to the separate juvenile court of Lancaster County, Nebraska, because Ethan was residing with Theresa in Lancaster County.

On April 22, 2010, the juvenile court held a hearing. It received a court report prepared April 21, which contained a section detailing the family's prior "service interventions." The report stated that Ethan was not having any contact with

Daniel. Ethan's therapist, Laurie Patton, reported that the last therapeutic telephone conversation between Ethan and Daniel occurred on February 10, 2009. According to the report, Patton did not recommend face-to-face visitation between Daniel and Ethan because of Ethan's "trauma and being 'safe from his dad'. Examples include Ethan's want for having a safety plan in case his father showed up at therapy and having to constantly check the locks on the doors and windows at night." The caseworker opined that "no statement on progress can be made at this time due to the circumstances of the re-opening of this case." The report recommended that Ethan's physical custody remain with Theresa and that his legal custody be returned to her. The case plan contained no goals for Daniel.

Ethan's guardian ad litem recommended in a report that Daniel, Theresa, and Ethan participate in updated evaluations in order to determine whether beginning contact between Daniel and Ethan was in Ethan's best interests.

Katie Adrian, the caseworker assigned to the case since February 26, 2010, had not met or attempted to communicate with Daniel prior to meeting him in the lobby the day of the instant hearing. DHHS had closed Ethan's case after entry of the February 2009 order purporting to transfer custody to Theresa and dismissing the case. Adrian believed that DHHS had made reasonable efforts since reopening Ethan's case on February 11, 2010, but she did not know why DHHS made no efforts following the October 13, 2009, release of this court's decision. She admitted that the current case plan did not recommend any services for Daniel.

Adrian was aware that Daniel had previously engaged in individual therapy, but she was not aware of his satisfactory completion of the therapy. The court received a discharge summary from Daniel's former therapist. According to the exhibit, on December 19, 2007, the therapist discharged Daniel from therapy because "Daniel has attained all of the goals outlined in his treatment plan." The document stated that Daniel

> made steady and consistent progress relative to the attainment of the following goals: 1. Identification and appropriate expression of emotions; 2. Acquisition of effective parenting skills; 3. Developing appropriate and

> effective response to any marital discord related to ongoing legal case; 4. Stress Management; 5. Development of effective coping skills.

It further stated that "[i]t was impossible to work with Daniel on parenting issues due to the fact that this therapist was only allowed to observe Ethan and Daniel interact during two visitations, one of which was Ethan's last visit with Daniel before being placed in California." Adrian believed that after Daniel was apparently successfully discharged by his former therapist, he continued to participate in individual therapy with a different therapist. Adrian did not see anything in the case file noting a successful discharge from that therapy.

Adrian testified that Ethan had not seen Patton since March 17, 2009. Adrian testified that DHHS believed that Ethan should participate in a pretreatment assessment to determine whether contact with Daniel would be appropriate. Adrian testified that DHHS recommended that Ethan's physical custody remain with Theresa because he had been in her care since 2006 and Theresa had shown that she can care for him well, both physically and financially. Adrian believed it was in Ethan's best interests to continue in Theresa's care. She testified that DHHS did not have a recommendation regarding Ethan's contact with Daniel because a pretreatment assessment needed to be done in order to determine what a therapist believed would be the best contact. DHHS was not recommending any contact between Ethan and Daniel until an evaluation was done. Adrian did not believe that Ethan's having contact with Daniel was in Ethan's best interests.

On June 7, 2010, the juvenile court held a further hearing to receive evidence. It received an addendum to a court report, which was prepared June 4. According to the addendum, Adrian performed a home visit on May 6 and met privately with Ethan. When Adrian asked Ethan how he felt about visiting Daniel, Ethan responded, "'He can drop dead.'" Adrian also communicated with Patton to determine whether a pretreatment assessment to determine visitation would be in Ethan's best interests. According to Adrian, Patton thought that "'there would be an increase in Ethan's negative behaviors if Ethan thought visits with his dad were pending'" and that "'the [pretreatment

assessment] could have a negative effect on Ethan based on the dr[e]dging up of past history of trauma and a possibility of increased behaviors.'" Thus, DHHS took the position that a pretreatment assessment for Ethan was not in his best interests. Adrian reported that Patton told her that it was not in Ethan's best interests to have contact with Daniel until Ethan was ready to do so.

The court also received as an exhibit testimony of Patton from a prior hearing held on January 22, 2009. According to that testimony, Patton had last spoken with Ethan 2 days prior to the hearing. Patton testified that Ethan was not interested in having visits with Daniel and that Ethan said it would "'make things worse. A lot, lot worse.'" Patton testified that Ethan said he did not want telephone calls because they would make things "a little worse" and that it made him uncomfortable to speak with Daniel. Ethan told Patton that "maybe a letter would be okay." At that hearing, Patton recommended that telephone calls between Daniel and Ethan "terminate for a period of time." Patton considered whether Theresa was alienating Ethan from Daniel. She testified that after the longest telephone conversation between Ethan and Daniel, "Ethan wanted to immediately run out and tell his mom that he had spoken to his dad. So I think that Ethan feels that he might be disloyal to his mom if he talks to his dad." Patton testified that Ethan seemed unable to move forward and that she felt he needed a break from his weekly contact with Daniel in order to address "those trauma issues that he reports having." Patton recommended that Ethan go 1 year without contact with Daniel so that "he can be at the point where he can have a[n] apology session and be able to deal with his feelings of being in the same room with Dan[iel]."

On July 2, 2010, the juvenile court held another hearing. Daniel testified that he was Ethan's primary caretaker from the time Ethan came home from the hospital after birth until the time DHHS removed him in 2005. Daniel described his "bonding relationship" with Ethan as "very strong." He explained that since his divorce from Theresa, when he was awarded custody of Ethan, Ethan "went everywhere with [Daniel]." Daniel testified that Theresa had one visit with

Ethan from the time of the divorce in 2001 or 2002 until the time that DHHS became involved in 2005. Daniel testified that when DHHS became involved, Ethan was initially placed with Daniel's parents for approximately 1 year to 18 months and that Daniel had supervised visits Monday through Friday which went well. In 2006, DHHS moved Ethan to live with Theresa in California and stopped all visits with Daniel. After a decision of this court, DHHS moved Theresa and Ethan to Lincoln, Nebraska. Daniel lives 165 miles away in Loup City, Nebraska, which is a 3-hour drive from Lincoln. After Ethan and Theresa returned to Nebraska, Ethan had one supervised visit with Daniel in Loup City and a session with a psychologist. Daniel testified that there were no more supervised visits "[b]ecause [D]HHS refused to allow them to happen. There was some sporadic telephone conversations, phone calls between me and Ethan while Ethan was at his therapist's office, but that was very sporadic." Daniel felt that Theresa was "turning [Ethan] against [Daniel] to not like [Daniel]." Daniel testified that Ethan had a good relationship with him when Ethan lived with him and that "[e]ven once he was removed from me we were having supervised visits from a neutral third party and it continued, our bond, our relationship, he wanted to see me, he wanted to come home and live with me again." He testified that no one from DHHS had been to his home nor had he had any telephone conversations with Adrian. Daniel testified that DHHS had told him that he cannot communicate with Theresa or Ethan.

Daniel's mother testified that Ethan had one visit with Theresa during the time that Ethan lived with Daniel's parents. She testified that Ethan had behavioral problems when he returned and that he said things such as "my mom says you guys are mean" and "my mom says that I'm better off with her because you guys don't love me."

Theresa testified that Ethan told her that he did not want to see Daniel. She denied saying things to Ethan in the nature of his not having a relationship with Daniel. Theresa believed that Ethan had some unresolved emotional conflict with Daniel. She believed it would be in Ethan's best interests to have contact with Daniel with the supervision of a therapist.

On July 7, 2010, the court held a continued hearing. Adrian testified that DHHS was not providing any services to Daniel. She acknowledged that Daniel had told her of his desire to have visitation with Ethan and to perform any services necessary to correct the conditions that led to the adjudication. She testified that Ethan had not been in therapy since March 2009 and that the only service being offered to him was a monthly home visit. Adrian testified that when she spoke with Ethan in early June 2010 about Daniel, Ethan was "very hostile about having any type of contact with his father at that time." Adrian testified that DHHS recommended no contact between Ethan and Daniel based on Patton's recommendation. She elaborated that if Ethan's feelings toward Daniel never change, then DHHS' position would be that those visitations never occur. Adrian testified that Patton stated Ethan should not be forced to see Daniel until Ethan was ready to do so. According to Adrian, DHHS was doing nothing to help prepare Ethan to see Daniel.

On February 9, 2011, the juvenile court entered an order of review which approved DHHS' case plan. The court found that Ethan's legal custody should continue with DHHS and that Ethan's physical custody should remain with Theresa. It found that reasonable efforts had been made to prevent or eliminate the need for removing Ethan from his home and that the primary permanency plan was family preservation with an alternative plan of reunification. The juvenile court stated that there had been no evidence to overcome the presumption that DHHS' recommendations were in Ethan's best interests.

Daniel timely appeals.

ASSIGNMENTS OF ERROR

Daniel alleges that the juvenile court erred in (1) finding that reasonable efforts have been made to prevent or eliminate the need for removing Ethan from Daniel's home and in failing to order services reasonable and necessary to rehabilitate Daniel, (2) finding that there was no evidence presented that would overcome the presumption that DHHS' recommendations were in Ethan's best interests, (3) failing to find that Daniel had completed all services recommended

to reunify him with Ethan, and (4) failing to allow visitation with Daniel.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

ANALYSIS

Amendment to Statute.

First, we observe that there has been a change in a statute within the Nebraska Juvenile Code since the time of the juvenile court's order. Neb. Rev. Stat. § 43-285(2) (Cum. Supp. 2010) granted a juvenile court discretionary power over a recommendation proposed by DHHS, but it granted preference in favor of such proposal, and in order for the juvenile court to disapprove of DHHS' proposed plan, a party had to prove by a preponderance of the evidence that DHHS' plan was not in the child's best interests. See *In re Interest of Sarah L. et al.*, 17 Neb. App. 203, 758 N.W.2d 48 (2008). On May 4, 2011, the Governor approved 2011 Neb. Laws, L.B. 648, which amended § 43-285(2) to strike the following sentence: "If any other party, including, but not limited to, the guardian ad litem, parents, county attorney, or custodian, proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan." The Legislature adjourned sine die on May 26, 2011, and L.B. 648 took effect 3 months later. See, L.B. 648; Neb. Const. art. III, § 27. In the juvenile court's order, it found that there had been no evidence to overcome the presumption that DHHS' recommendations were in Ethan's best interests. The guardian ad litem asserts that L.B. 648 removed the presumption that DHHS' plan was in the best interests of the child such that Daniel is no longer required to prove that the plan was not in Ethan's best interests.

[2-4] Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not. *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58

(2005). This is because a substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. *Id.* A procedural right is simply the method by which an already existing right is exercised. *Id.* The amendment here does not create a new right or remedy; rather, it alters the way an existing right is exercised. See *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001) (substantive law creates duties, rights, and obligations, whereas procedural law prescribes means and methods through and by which substantive laws are enforced and applied). We conclude the amendment was procedural and is thus applicable to this case. Under the amendment, the State has the burden of proving that a case plan is in the child's best interests.

Reasonable Efforts.

Daniel argues that the juvenile court erred in finding that reasonable efforts had been made to prevent or eliminate the need for removing Ethan from his home. We agree. DHHS' position, which the juvenile court's order adopted, essentially attempts to redefine Ethan's "home" to be that of Theresa. However, the home that Ethan was removed from was that of Daniel.

[5] Neb. Rev. Stat. § 43-283.01(2) (Cum. Supp. 2010) states:

> Except as provided in subsection (4) of this section, reasonable efforts shall be made to preserve and reunify families prior to the placement of a juvenile in foster care to prevent or eliminate the need for removing the juvenile from the juvenile's home and to make it possible for a juvenile to safely return to the juvenile's home.

Under § 43-283.01(4), reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that certain circumstances exist. Although the county court for Sherman County found that DHHS was not required to make reasonable efforts to reunify Ethan with Daniel, this court reversed that determination in *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006), noting that Daniel was not the parent of the other children in the home and that there was not clear and convincing evidence of

aggravated circumstances on Daniel's part. Upon remand, the county court for Sherman County again determined that reasonable efforts to reunify were no longer necessary, but in *In re Interest of Ethan M.*, 18 Neb. App. 63, 774 N.W.2d 766 (2009), we found plain error in the county court's order and therefore reversed the order. Thus, there is not a valid order from a court of competent jurisdiction which excuses reasonable efforts to preserve and reunify the family.

In contrast with the earlier appealed orders, the order at issue in this case did not find that reasonable efforts were excused. Rather, the separate juvenile court found that reasonable efforts were made to prevent or eliminate the need for removing Ethan from Theresa's home. We recognize that Theresa's right to custody of Ethan was not extinguished by the divorce decree. See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996) (placement of child in custody of one parent as opposed to other in divorce action does not extinguish noncustodial parent's right to custody, nor does it constitute adverse determination of fitness of noncustodial parent in that or other proceedings). And as we pondered in *In re Interest of Stephanie H. et al.*, 10 Neb. App. 908, 926, 639 N.W.2d 668, 682 (2002), "[W]hat better and more straightforward method of preserving families could there be, in circumstances such as this, than placement of the children with a fit and willing parent, even if that parent had previously been a noncustodial parent in a divorce."

[6] DHHS has not ended its responsibility in this case by placing Ethan's physical custody with Theresa. Although the primary permanency plan ordered by the juvenile court was family preservation, the juvenile court included an alternative plan of reunification. But there are no services or goals in place for Daniel to work toward reunification. In fact, as of the July 7, 2010, hearing, the only "service" being provided was Adrian's having monthly visits with Ethan. "Unless the provisions in a case plan 'tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained,' a court-ordered plan 'is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures.'" *In re Interest of Mainor T. & Estela T.*, 267 Neb.

232, 254, 674 N.W.2d 442, 461 (2004). Remembering that Ethan was removed from Daniel's home and not Theresa's, a case plan that has no goals or services for Daniel does not correct, eliminate, or ameliorate the situation that led to Ethan's adjudication and removal from Daniel's home. "Once a plan of reunification has been ordered to correct the conditions underlying the adjudication under § 43-247(3)(a), the plan must be reasonably related to the objective of reuniting the parents with the children." *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 163-64, 655 N.W.2d 672, 685 (2003). The case plan here does nothing to help Daniel be reunited with Ethan.

In *In re Interest of Mainor T. & Estela T., supra*, a trial court stated that reunification was contrary to the children's welfare and that reasonable efforts to reunite the family were not made because reasonable efforts were not possible, but the court's written order determined that reunification was the most appropriate permanency objection. The case plan did not contain any rehabilitative goals or tasks related to reunification or to contacting the children's mother. On appeal, the Nebraska Supreme Court determined that, among other problems, the trial court's approval of a permanency objective of reunification without any means for the mother to achieve that goal and without any requirement that DHHS make reasonable efforts to provide services toward that objective was fundamentally unfair. Similarly, in the instant case, the juvenile court ordered an alternative plan of reunification but there is no way for Daniel to achieve that goal when DHHS is not making any reasonable efforts to provide services or to even allow visitation. As the Nebraska Supreme Court has observed, "dispensing with reasonable efforts at reunification frequently amounts to a substantial step toward termination of parental rights." *In re Interest of Jac'Quez N.*, 266 Neb. 782, 789, 669 N.W.2d 429, 435 (2003). We conclude that we must once again reverse the juvenile court's order and remand the cause for further proceedings.

[7] We recognize the purpose of the juvenile code is to serve the best interests of the juveniles who fall within it. See *In re Interest of Tegan V.*, 18 Neb. App. 857, 794 N.W.2d 190 (2011). Although we conclude that DHHS should immediately obtain

updated assessments of Daniel and Ethan and devise rehabilitative goals to facilitate a future reunification between them, any such action must bear in mind Ethan's best interests.

CONCLUSION

We conclude that the juvenile court erred in adopting a case plan that provided an alternative permanency objective of reunification with Daniel where DHHS did not provide any rehabilitative goals or tasks for Daniel. Accordingly, we reverse the order and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT SCHNEIDER, APPELLEE, V. ALBERT LAMBERT, DOING BUSINESS AS LAMBERT INVESTMENTS, L.L.C., APPELLANT.

809 N.W.2d 515

Filed October 18, 2011. No. A-10-883.

1. **Justiciable Issues.** Justiciability issues that do not involve a factual dispute present a question of law.
2. **Appeal and Error.** An appellate court resolves questions of law independently of the determination reached by the court below.
3. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
4. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Courts: Jurisdiction.** Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.
6. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
7. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.