

DA 14-0447

IN THE SUPREME COURT OF THE STATE OF MONTANA

2015 MT 63N

IN THE MATTER OF:
J.D. and S.D.,

Youths in Need of Care.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Silver Bow, Cause No. DN-11-43 and DN-11-44
Honorable Brad Newman, Presiding Judge

COUNSEL OF RECORD:

For Appellant B.D.:

Jeffry M. Foster, Davis, Hatley, Haffeman & Tighe, P.C.; Great Falls,
Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy A. Hinderman, Assistant
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Montana

Submitted on Briefs: January 14, 2015
Decided: February 24, 2015

Filed:



Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(d), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Birth father, B.D., appeals from an order of the Second Judicial District Court, Silver Bow County, terminating his parental rights with respect to J.D. and S.D. We affirm.

¶3 J.D. and S.D. are the biological children of B.D. (Father) and C.D. (Mother). Mother's parental rights were previously terminated. Only Father's rights are at issue on appeal. Father has a long history of polysubstance abuse and an extensive criminal history. Domestic violence issues have plagued the family.

¶4 In 2008, the Department of Public Health and Human Services (the Department) received a report regarding Mother's methamphetamine and alcohol abuse, the family's eviction from their home, and Father's inability to care for the children. The report was never substantiated because the family fled. In 2009, the Department received three unsubstantiated reports that Mother physically and verbally abused her children and used drugs. In 2010, the Department received four reports alleging substance abuse, domestic violence, and verbal abuse of the children. Father was on probation at the time and entered into a voluntary service plan to address his probation issues and domestic violence issues. In 2011, the Department received three more reports alleging domestic violence, verbal abuse of the children, substance abuse, and a lack of parental supervision.

¶5 In November 2011, J.D. and S.D. were removed from the family home after Mother and Father were physically and verbally abusive to each other all day in the presence of the children. Father alleged that Mother shocked him with a taser while he was holding S.D. The children were not permitted to attend school that day. Despite believing Mother was again using meth and was physically aggressive, Father left the children in her care. Father later called police and told them to alert the Department regarding Mother. When officers arrived at the home, it smelled of marijuana, there was dog feces on the floor, and S.D. was hiding behind a door, sobbing. Both children reported witnessing Mother and Father fighting all day. Mother admitted to using meth, and Father admitted to using marijuana in violation of his probation. Mother showed a child protection specialist a text from Father threatening to kill himself.

¶6 On November 17, 2011, the Department filed petitions for emergency protective services, adjudication of the children as youths in need of care, and temporary legal custody on grounds of physical neglect. On December 21, 2011, after a contested hearing, the District Court adjudicated J.D. and S.D. as youths in need of care and granted the Department temporary custody of the children.

¶7 The children remained in the custody of the Department for over two years. During that period, the children's providers noted that the children suffered from serious mental, emotional, and behavioral problems. It was determined that S.D. suffered from learning and speech disabilities, adjustment disorder with disturbance of emotions and conduct, and possibly posttraumatic stress disorder or oppositional defiant disorder. J.D. was found to suffer from intellectual dysfunction and an autism-spectrum disorder, as well as reactive

attachment disorder. While in state custody, J.D. was placed in an “inclusion” classroom and required multiple interventions by staff in order to function at even a minimal level. J.D. was physically aggressive, trying to bite, kick, and hit staff members. He punched through a glass window, and particularly ran through the hallways and had to be physically restrained. Such episodes occurred weekly, and J.D. twice had to be admitted to Shodair Children’s Hospital for acute psychiatric treatment.

¶8 In therapy, both S.D. and J.D. revealed they had been beaten with the buckle end of a belt, and Father admitted doing so. S.D. also claimed to have been locked out of the house by Mother while Father was home. J.D. at times expressed a desire not to stay with either Mother or Father.

¶9 Between November 2011, and September 2013, the District Court approved five successive treatment plans for Father. Father was unable to complete the first treatment plan because he was incarcerated on charges—later dismissed—that he claims resulted from Mother planting drugs on him. Despite Father’s belief to the contrary, he failed to complete the requirements for the following four treatment plans. Unlike the first treatment plan, Father suffered no impediment to his ability to complete the next four treatment plans. While he did complete a number of the requirements under each of the plans, the treatment professionals involved consistently characterized his efforts as half-hearted and largely superficial compliance.

¶10 The District Court was particularly concerned that, in light of Father’s history of alcohol and methamphetamine abuse, he was unable to abstain from drugs and alcohol, despite that being a condition of each of his parenting plans. Father also continually

minimized the children's special needs. The District Court found that despite extensive contact with the children's providers, Father "has consistently failed to recognize the nature and severity of the children's special needs." Father repeatedly asserted his belief that the children's problems arose only from their removal from the family home and that they would be fine once returned to his care.

¶11 Despite knowing Mother posed a threat to the children and despite having called the police regarding Mother's treatment of the children, Father allowed Mother to have contact with the children. Similarly, despite a history of conflict with Mother, and despite claiming that Mother planted the drugs on him that resulted in his incarceration on drug charges, Father nonetheless continued to have contact with Mother in violation of his treatment plans.

¶12 Father stipulated to the first four treatment plans but objected to the fifth. It is Father's fifth treatment plan that forms the basis of his argument on appeal. The fifth treatment plan contained what the parties and the District Court came to refer to as a "be nice" clause. The clause required father to conduct himself "in a reasonable manner when he disagrees with suggestions or recommendations," and to work in partnership with service providers to find reasonable solutions or alternatives. The Department proposed the clause because Father was consistently defiant, and would get upset, yell, and cuss when he disagreed with service providers. Some of the providers found him so aggressive, intimidating, and generally difficult to work with that they refused to work with him unless the Department acted as a buffer or mediator. The inclusion of the clause was meant to prod Father to learn to interact productively with service providers and authority so that he could

be an effective advocate for the children. In adopting the clause, the District Court concluded it was “important and would serve the children’s needs and best interests.”

¶13 The District Court noted the guardian ad litem’s support of termination of Father’s parental rights. The guardian indicated the Department made reasonable efforts to provide remedial and support services to Father for an extended period of time without meaningful progress by Father. The District Court found that continuation of the parent-child relationship with Father would likely result in further abuse and neglect, and that Father was unlikely to change within a reasonable time.

¶14 Father failed the fifth treatment plan, in part, because of his inability to meet the requirements of the “be nice” clause. On appeal, he argues that the District Court abused its discretion by including the “be nice” clause in the fifth treatment plan and by using the clause to determine Father did not complete the plan and was unlikely to change within a reasonable time. Father does not contest any of the District Court’s findings of fact.

¶15 We review for an abuse of discretion a district court’s termination of parental rights. A district court abuses its discretion when it “acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice.” *In re R.M.T.*, 2011 MT 164, ¶ 26, 361 Mont. 159, 256 P.3d 935.

¶16 The district court must protect a parent’s fundamental right to the care and custody of a child through fundamentally fair procedures. The State must present clear and convincing evidence that the statutory circumstances allowing the court to terminate parental rights exist. The district court must address adequately each applicable statutory requirement before terminating parental rights. *In re R.M.T.*, ¶ 27.

¶17 Since the children were adjudicated youths in need of care, § 41-3-609(1)(f), MCA, provides the necessary criteria for terminating the parent-child relationship in the instant case:

(1) The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence [that] . . . :

(f) the child is an adjudicated youth in need of care and both of the following exist:

(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and

(ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

In re D.B., 2007 MT 246, ¶ 20, 339 Mont. 240, 168 P.3d 691.

¶18 Father's argument that the "be nice" clause of the treatment plan was an abuse of discretion is unpersuasive. The Department requested the clause when it became apparent that Father needed to learn to interact productively with authorities and providers in order to effectively advocate for the children and ensure the children's special needs were met. The "be nice" clause was directly related to the best interests of the children and was within the District Court's discretion.

¶19 More importantly, Father's failure to abide by the "be nice" clause formed only a small part of the basis for his failure to complete five successive treatment plans. The District Court also found Father had unresolved substance abuse issues, was unwilling to protect the children from Mother, and obstinately refused to confront the reality of his children's special needs. Moreover, failing five treatment plans over two years supports the District Court's finding that Father's parenting deficiencies were unlikely to change within a reasonable time.

¶20 We hold the District Court relied on clear and convincing evidence in finding the children were adjudicated youths in need of care; in finding that an appropriate treatment plan was not complied with by the Father or was not successful; and in finding that the conduct or condition rendering Father unfit was unlikely to change within a reasonable time. The District Court did not abuse its discretion by including the “be nice” clause in the fifth treatment plan, and did not abuse its discretion by finding Father was unlikely to change within a reasonable time. Accordingly, the District Court did not abuse its discretion in terminating Father’s parental rights.

¶21 We have determined to decide this case pursuant to Section I, Paragraph 3(d) of our Internal Operating Rules, which provides for memorandum opinions. The issues in this case are ones of judicial discretion and there clearly was not an abuse of discretion. Affirmed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ MICHAEL E WHEAT
/S/ LAURIE McKINNON
/S/ JIM RICE