DA 20-0371

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 30N

IN THE MATTER OF:

N.M.H.-S.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DN 18-37
Honorable Michael G. Moses, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Shannon Hathaway, Driscoll Hathaway Law Group, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Jonathan M. Krauss, Assistant Attorney General, Helena, Montana

Scott Twito, Yellowstone County Attorney, Scott Pederson, Deputy County Attorney, Billings, Montana

Submitted on Briefs: January 13, 2021

Decided: February 9, 2021

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), 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 S.S. (Mother) appeals from the January 23, 2020 Findings of Fact, Conclusions of Law, Order Terminating Parental Rights issued by the Thirteenth Judicial District Court, Yellowstone County, terminating Mother's parental rights to N.M.H.-S. (Child). We affirm.

¶3 This is the companion case to DA 20-0370 involving the termination of Mother's parental rights to her other child, A.J.S.[1] On April 5, 2018, Child was removed from Mother's care and placed in protective custody in kinship care with Child's maternal grandparents, an ICWA compliant placement, after allegations of physical neglect were reported; Child's sibling, A.J.S., showed unexplained bruising on her face and head; and concerns were raised about Child's potential failure to thrive secondary to breathing issues diagnosed at birth. On April 12, 2018, the Department of Public Health and Human Services, Child and Family Services Division (Department), petitioned for Emergency

[1] Although the proceedings as to both children were handled together, we have not consolidated these companion cases as A.J.S. is not an Indian child. As such, there are no implications under the Indian Child Welfare Act (ICWA); whereas N.M.H.-S. is an Indian child.

Protective Services (EPS), requested adjudication as a Youth in Need of Care (YINC), and Temporary Legal Custody (TLC). On May 2, 2018, the Department filed its Notice showing notice of the proceedings had been sent to and received by the Choctaw Nation of Oklahoma (Tribe) and the Bureau of Indian Affairs in Eastern Oklahoma. At hearing on May 2, 2018, Mother was present with her attorney and stipulated clear and convincing evidence existed to order EPS regarding Child and removal of Child from the home. The parties also agreed to forgo testimony by the ICWA Qualified Expert Witness (QEW) and instead made an offer of proof as to what the QEW's testimony would be.

¶4 On May 18, 2018, the Department filed a Notice of Tribal Determination, which included an attachment from the Tribe establishing Child was eligible for enrollment in the Tribe and indicated the Tribe's intention to intervene. The Tribe filed a Notice of Intervention on May 21, 2018. At hearing on June 27, 2018, Mother was again present with her counsel and stipulated to adjudication of Child as a YINC, to TLC to the Department, and that the Department had engaged in active efforts. The District Court then adjudicated Child to be a YINC, granted TLC to the Department, and determined the Department had engaged in active efforts. On June 27, 2018, Mother and the Department entered into a Court Ordered Treatment Plan—Phase I, which was approved by the District Court.[2] Prior to her appeal, Mother did not object to or contest her Treatment Plan.

[2] On June 27, 2018, Mother, CPS Goodman, and the District Court all signed the Treatment Plan, which was filed as an attachment to the Notice of Filing Phase I Court-Approved Treatment Plan on July 3, 2018.

¶5 Mother failed to appear for the status hearing on September 26, 2018, at which time her counsel advised he had not had communication with Mother and could not represent her situation to be better than it was before. On January 30, 2019, upon Mother's stipulation to extension of TLC, the court granted the Department's petition for extension of TLC. On September 5, 2019, the Department filed its petition to terminate Mother's parental rights, asserting that pursuant to § 41-3-609(1), MCA, termination was warranted as Mother had, beyond a reasonable doubt, abandoned Child. The Petition also alleged Mother failed to successfully complete her treatment plan and the conduct or condition rendering her unfit was not likely to change in a reasonable time. Mother did not attend the permanency hearing on September 11, 2019, where the Department presented its proposed permanency plan of placement with the birthfather or adoption by Child's paternal grandparents.

¶6 On November 20, 2019, Mother failed to appear at the termination hearing, but her counsel was present. As noted by the State, Mother's counsel, without explanation on the record, called no witnesses, questioned no witnesses, and made no objections on Mother's behalf. Following the hearing, the District Court issued its written Findings of Fact, Conclusions of Law, Order Terminating Parental Rights, in which it found and concluded termination of Mother's parental rights was proper under § 41-3-609(1)(b), MCA, as Mother had abandoned Child. The District Court also separately determined termination of Mother's parental rights was proper under § 41-3-609(1)(f), MCA, as Mother had failed

to successfully complete an appropriate treatment plan and the conduct or condition rendering her unfit was unlikely to change within a reasonable time.

¶7 We review a court's decision to terminate parental rights for abuse of discretion—whether the court acted arbitrarily, without conscientious judgment, or exceeded the bounds of reason, resulting in substantial injustice. *In re A.S.*, 2016 MT 156, ¶ 11, 384 Mont. 41, 373 P.3d 848. We review a district court's findings of fact for clear error and conclusions of law for correctness. *In re M.V.R.*, 2016 MT 309, ¶ 23, 385 Mont. 448, 384 P.3d 1058.

¶8 Mother asserts her treatment plan was not "appropriate" as required by § 41-3-609(1)(f)(i), MCA, and as such could not meet the active efforts standard required by ICWA. Mother asserts the District Court abused its discretion when it approved an inappropriate treatment plan for Mother. Specifically, Mother asserts the treatment plan was not appropriate as it was insufficient and missing required contents per § 41-3-443, MCA. Further, she asserts her treatment plan was insufficient as it failed to contain chemical dependency tasks even though chemical dependency was a concern raised by the Department and chemical dependency issues were used by the District Court as evidence of Mother's inability to safely parent. Mother asserts that the treatment plan was the vehicle for the Department to provide her active efforts in reunifying with Child and the deficiency of the treatment plan violated her right to active efforts. Finally, Mother argues the District Court failed to make the required findings under 25 U.S.C. § 1912(f) and thus violated ICWA.

¶9 Pursuant to § 41-3-609(1)(b), MCA, a court may order a termination of the parent-child legal relationship with regard to an Indian child upon a finding established by evidence beyond a reasonable doubt that the child has been abandoned by the parent. Abandonment means "leaving a child under circumstances that make reasonable the belief the parent does not intend to resume care of the child in the future." Section 41-3-102(1)(a)(i), MCA. Abandonment is a separate basis for termination of parental rights under § 41-3-609(1)(b), MCA. Here, the District Court found Mother abandoned Child. Mother did not appeal this finding. The District Court then concluded termination was warranted pursuant to § 41-3-609(1)(b), MCA. Mother did not appeal this conclusion of law. Although Mother does not appeal the District Court's finding or conclusion that Mother abandoned Child, from our review of the record, the District Court did not abuse its discretion as this finding is supported by evidence beyond a reasonable doubt and its conclusion of law is correct. Where a district court relies on more than one statutory basis in terminating a parent's rights, any one basis, if correctly relied upon, is sufficient to support termination and the alternate bases are then moot. *In re S.T.*, 2008 MT 19, ¶ 15, 341 Mont. 176, 176 P.3d 1054. While abandonment alone is dispositive, we conclude Mother has also waived appeal of the issues she now raises regarding her treatment plan.

¶10 One of the ways Mother asserts her treatment plan was not an "appropriate" plan is that it was not individualized to her as it was a preprinted form, which included the same generic goals for every parent. While the Treatment Objectives and Tasks section of her

treatment plan contained a list of tasks, not all of which were required of Mother, this does not mean Mother's treatment plan was not tailored to her needs. Indeed, not all of the plan tasks listed were required of Mother, indicating particular consideration based on Mother's situation. Additionally, other than to assert the goals stated in the plan to be generic, Mother does not assert the goals contained in the plan were not goals applicable to her situation. More importantly, Mother did not object to the treatment plan goals or tasks required of her, but instead agreed they were appropriate, tailored to her, and should be ordered. Although she now asserts the plan failed to include tasks necessary to address her chemical dependency issues, again, she did not object to the tasks required of her or request additional tasks be required of her. We have consistently held that a parent who does not object to a treatment plan's goals and tasks, waives the right to appeal the sufficiency or adequacy of that plan on appeal.[3] *In re X.B.*, 2018 MT 153, ¶ 24, 392 Mont. 15, 420 P.3d 538. Here, Mother was represented by experienced counsel at the time she entered into the treatment plan, she stipulated to the plan and signed it, and she was present in court when it was presented to the court and the court was asked to approve it. She had full opportunity at the District Court level to object and raise the issues she now asserts. Mother has waived her right to appeal the insufficiency or appropriateness of her treatment plan.

[3] When such is not a result of ineffective assistance of counsel. *See In re A.S.*, 2004 MT 62, ¶ 16, 320 Mont. 268, 87 P.3d 408. Mother has raised no issues of ineffective assistance of counsel on appeal.

¶11 We now turn to Mother's additional ICWA argument. Although Mother admits the District Court orally made the requisite finding on the record at the conclusion of the termination hearing, Mother asserts reversible error by the District Court for violating ICWA, as it did not in its written termination order find that continued custody of Child with Mother is likely to result in serious emotional or physical damage to Child. ICWA requires determination, supported by evidence beyond a reasonable doubt, including testimony of a QEW, that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f); § 41-3-609(5), MCA. Edith Adams, the QEW, testified at the termination hearing that the State and Department satisfied state and federal ICWA requirements, specifically testifying that if left in the custody of Mother, Child would be seriously damaged, emotionally or physically. The District Court specifically noted this testimony and made an oral finding consistent with it. The evidence establishing abandonment alone supports this finding. While it is a better practice to also include such a finding into the written termination order, failing to do so here was harmless error. *See In re H.T.*, 2015 MT 41, ¶ 11, 378 Mont. 206, 343 P.3d 159. The District Court did make the required finding on the record and given Mother's abandonment of Child, which she does not appeal, if Child continued in her care, Child would experience serious emotional or physical damage related to abandonment—no rational person could see it any other way.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the

Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶13 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE