

DA 17-0671

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 181N

IN THE MATTER OF:

C.E.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Silver Bow, Cause No. DN 16-51-BN
Honorable Brad Newman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Michael P. Sinks, Attorney at Law, Bozeman, Montana
(for Mother)

Shannon Hathaway, Montana Legal Justice, PLLC, Missoula, Montana
(for Father)

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant
Attorney General, Helena, Montana

Eileen Joyce, Silver Bow County Attorney, Butte, Montana

Ross Richardson, Henningsen, Vucurovich & Richardson, P.C., Butte,
Montana

Submitted on Briefs: June 27, 2018

Decided: July 17, 2018

Filed:



Clerk

Justice Jim Rice 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 non-citable cases published in the Pacific Reporter and Montana Reports.

¶2 R.J.M. (Mother) and J.E. (Father) (jointly, parents) appeal the Order entered by the Second Judicial District Court, Silver Bow County, which terminated their parental rights to C.E., a minor child.

¶3 Mother and Fathers' rights were previously terminated to two other children because of their drug use and the resulting neglect of the children. In 2010, the Department of Public Health and Human Services, Child and Family Services Division (Department) obtained temporary legal custody (TLC) of C.E., but returned him to the care of his parents after they made improvements. In 2016, after receiving a report that the parents were again using drugs and neglecting C.E., the Department commenced an investigation and found then-six-year-old C.E. unsupervised at a skate park across town from his home. The Department was initially unable to locate C.E.'s parents and, once located, neither knew C.E.'s whereabouts and both refused a urinalysis (UA). C.E. was placed in protective care. Mother admitted that she and Father were actively using methamphetamine. C.E. was adjudicated a youth in need of care in August 2016, and the District Court granted TLC of

C.E. to the Department. The Court approved treatment plans for both parents in September 2016.

¶4 At a March 2017 hearing for extension of TLC, Child Protection Specialist (CPS) AmyJo Kibler testified that neither parent had provided a chemical dependency evaluation, completed a single UA test, completed psychological evaluations, obtained a residence, or maintained contact with the Department, all required by the treatment plan. Further, while Mother and Father attended their visits with C.E., neither demonstrated appropriate parenting skills, and had argued in front of C.E. during a co-parenting visit. CPS Kibler also explained that the Department had not set up mental health assessments because neither parent had demonstrated sobriety, explaining the Department requires three months of clean UAs before scheduling the assessments to ensure sobriety during the evaluation process.

¶5 In May 2017, C.E. expressed an unwillingness to visit his parents and a fear of Mother, hiding from her when she visited. When a visit was cancelled, Mother attempted to visit C.E. at his foster home and assaulted a visitation specialist, necessitating issuance of a protective order against Mother. Father was charged with a misdemeanor for attempting to give C.E. a set of brass knuckles. Mother was later charged with felony burglary and incarcerated. The Department determined to pursue termination of parents' rights and so notified parents.

¶6 In June 2017, Father submitted to his first UA testing since the treatment plan was approved, and provided clean UAs starting June 20. He also obtained a chemical

dependency evaluation. In July 2017, the Department filed a petition to terminate Mother and Father's parental rights, and a hearing was set for August 9. Mother moved to continue the hearing, and the District Court granted the request, re-scheduling the hearing for October 11.

¶7 In August 2017, Mother, having been released from jail, completed a chemical dependency evaluation and began submitting to UA testing, providing clean test results. Around this time, the parents requested the Department pay for mental health evaluations, which the Department denied. CPS Kibler explained that the denial was because neither parent had satisfied the requirement to demonstrate three months of sobriety. CPS Kibler also testified that she did not approve payment because termination proceedings had already been initiated. In September 2017, Mother and Father were married and obtained an apartment. In early October, Mother was incarcerated on a felony robbery charge.

¶8 On October 10, 2017, one day before the termination hearing, Mother requested another continuance. The District Court denied the motion, both as untimely and because Mother had already been granted a two-month continuance that gave her adequate time to prepare her case with her attorney.

¶9 At the hearing, CPS Kibler testified that, despite the last-minute attempts by Mother and Father to address some of the treatment plan tasks, it was in C.E.'s best interest to terminate their parental rights. CPS Kibler testified that she sent monthly non-compliance letters to the parents, and that C.E. had been placed out of the home for fifteen months. C.E.'s guardian ad litem concurred with the Department's recommendation to terminate

parental rights, noting that Father had essentially made no efforts to comply with his treatment plan for eleven months, and Mother for thirteen months.

¶10 We review a district court’s decision to terminate parental rights for abuse of discretion. *In re D.B.*, 2004 MT 371, ¶ 29, 325 Mont. 13, 103 P.3d 1026 (citations omitted).

We review a district court’s decision to deny a motion to continue for abuse of discretion. *In re Matter of R.F.*, 2001 MT 199, ¶ 21, 306 Mont. 270, 32 P.3d 1257 (citations omitted).

¶11 Both parents argue that, once the Department decided to pursue termination, it improperly ended reunification efforts, a violation of their due process rights. Specifically, they complain that the Department denied payment of their mental health evaluations. Father adds that the Department denied his request to attend a co-parenting class. The Department responds that it continued to provide those services for which the parents qualified.

¶12 “[A] natural parent’s right to care and custody of a child is a fundamental liberty interest, which must be protected by fundamentally fair procedures.” *In re E.W.*, 1998 MT 135, ¶ 12, 289 Mont. 190, 959 P.2d 951 (citations omitted). First, we note that neither parent raised the due process concern before the District Court, and thus, the issue was not preserved. *See Kingman v. Weightman*, 2017 MT 224, ¶ 15, 388 Mont. 481, 402 P.3d 1196 (“It is well-established, with a few exceptions, that we will not address issues raised for the first time on appeal as it would be fundamentally unfair to the trial court.”) (citations omitted). Even if preserved, the Department denied payment of the mental health evaluations because neither parent had established three months of sobriety. A

co-parenting counselor willing to work with Mother and Father could not be found, apparently due to the parents' behavior during prior visitations. The Department continued providing other services after its decision to pursue termination, including UAs, supervised visitation, and chemical dependency evaluations. Thus, we conclude there was no fundamental unfairness that resulted in a denial of due process under these circumstances.

¶13 Father argues that, based on the Department's alleged failure to continue reunification efforts, the District Court erred in determining that he failed his treatment plan. He also argues that, given the improvements he made shortly before the termination hearing, the District Court erroneously determined he would be unable to parent in a reasonable amount of time. However, we cannot conclude that the District Court erred in these determinations, given his undisputed noncompliance for eleven months, his belated partial compliance with the plan, and his history with the Department. Father also argues that district courts should review the Department's efforts to reunify as a criterion for termination. However, such review is not required by Montana law. *In re M.V.R.*, 2016 MT 309, ¶ 41, 385 Mont. 448, 384 P.3d 1058 (citations omitted).

¶14 Mother argues the District Court improperly denied her second motion to continue the termination hearing, because it denied her and her attorney the ability to adequately prepare for the hearing. Given that the District Court granted Mother's first motion to continue, which gave her an additional two months to prepare, we find this argument unpersuasive and cannot conclude the District Court abused its discretion by denying the request.

¶15 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. The District Court's holding was not an abuse of discretion.

¶16 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR