DA 17-0680

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 136N

IN THE MATTER OF:

K.P.D. and G.E.D.,

Youths in Need of Care.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause Nos. DN 14-026(B)
and DN 14-027(B)
Honorable Robert B. Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Daniel V. Biddulph, Ferguson Law Office, PLLC, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant Attorney General, Helena, Montana

Edward J. Corrigan, Flathead County Attorney, Anne Lawrence, Deputy County Attorney, Kalispell, Montana

Submitted on Briefs: May 2, 2018

Decided: June 5, 2018

Filed:

Clerk

Justice Dirk Sandefur 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 J.M. (Mother) appeals the judgment of the Montana Eleventh Judicial District Court, Flathead County, terminating her parental rights to K.P.D., age ten, and G.E.D., age 6. We affirm.

¶3 Beginning in 2013, the Child and Family Services Division of the Montana Department of Public Health and Human Services (Department) became involved with Mother, birth father (Father), and the children when it received various reports of neglect, unstable housing, and domestic abuse. At one point, the family was living in a motel room with no food, and the children had bruises on their backs and chests. In response to these reports, the Department did not remove the children but filed a petition in March 2014 for emergency protective services and temporary investigative authority (TIA) pursuant to §§ 41-3-301, -422, -427, and -433, MCA.

¶4 During the pendency of the TIA, the Department continued to receive reports regarding Father's alcohol use and related arrests for Partner/Family Member Assault, Mother's drug and alcohol use and alleged prostitution, the parents' lack of involvement

in K.P.D.'s family therapy sessions at Turtle Bay,[1] and the children's frequent absences from school and daycare. However, as of mid-April 2014, Mother cooperated with the Department and voluntarily submitted to a Department-requested drug test, which came back negative. At that time, the family was renting a room partitioned from a garage in Somers, Montana. On April 21, 2014, based on Mother's apparent progress, the Department requested and ultimately obtained dismissal of the TIA petition pursuant to § 41-3-424, MCA.

¶5 In May 2014, the Department received additional reports of actual or potential neglect. These reports indicated that the family had been evicted from their home in Somers, that Mother left the children in the care of random people, and that K.P.D. had been absent from scheduled therapy sessions at Turtle Bay. On May 14th, the Department removed K.P.D. and G.E.D. pursuant to § 41-3-301, MCA, and placed them in protective custody. The Department subsequently filed a petition for immediate protection and emergency protective services, adjudication of the children as youths in need of care, and temporary legal custody (TLC) pursuant to §§ 41-3-422, -427, and -442, MCA. At an adjudicative hearing on June 20, 2014, the District Court adjudicated the children as youths in need of care as defined by § 41-3-102(34), MCA. Pursuant to the parties' stipulation, the District Court immediately proceeded to disposition, granted the State TLC for a period of up to six months, and continued disposition for consideration of an appropriate treatment

[1] K.P.D. attended Turtle Bay Outpatient Center in Lakeside where he received therapeutic services and prescribed medication for emotional and behavioral problems. Turtle Bay referred K.P.D. to Shodair Children's Hospital due to lack of progress and parental involvement with his treatment.

plan on a later date. Upon continuation of the dispositional hearing in July 2014, the Court imposed a stipulated reunification-oriented treatment plan and ordered Mother to comply with all requirements thereof.

¶6 The stipulated treatment plan included a mental health component that required Mother to submit to a mental health evaluation, attend bi-weekly individual counseling, and follow all treatment recommendations made by the evaluator. The treatment plan further required Mother to maintain scheduled visitation with the children, attend and successfully complete Department-specified parenting classes, attend and complete family counseling sessions in conjunction with K.P.D.'s continuing mental health treatment and care at Turtle Bay, establish and maintain stable housing and lifestyle as approved by the Department, cooperate and maintain regular contact with the assigned Department social worker, attend and actively participate in family group decision-making meetings, and remain law-abiding and in compliance with all probation conditions previously imposed in an unrelated criminal matter. Mother did not object to any aspect of the stipulated treatment plan.

¶7 In September 2014, the Department referred Mother to Dr. Angela Jez, a licensed clinical psychologist, for a mental health evaluation pursuant to the treatment plan. Consistent with a prior diagnosis by another treatment provider, Dr. Jez diagnosed Mother with Panic Disorder with Agoraphobia, Dependent Personality Traits with Depressive Features, and Bipolar II Disorder. *Inter alia*, Dr. Jez recommended traditional individual therapy and Dialectical Behavioral Therapy (DBT), a special type of therapy regimen that

combines individual and group therapy. However, the Kalispell area lacked a comprehensive DBT program that facilitated group therapy, and the Department did not ultimately refer Mother for the recommended DBT.[2]

¶8 Mother endeavored to engage but struggled to comply with her treatment plan requirements. She moved with the children between motel rooms and friends' homes until the Department referred her to low-income housing. Mother failed to consistently attend the traditional mental health counseling sessions provided by the Department. Domestic violence incidents continued to occur between Mother and Father. Due to Mother's lack of treatment plan compliance and inconsistent therapy attendance, the District Court extended the original grant of TLC four times at the Department's request to afford Mother additional time to successfully complete her treatment plan. Based on her partial progress and effort, the Department placed the children with Mother for a supervised reunification trial in September 2015, but later removed them in August 2016 due to Mother's failure to consistently attend individual and family therapy sessions as required under her treatment plan.

¶9 On September 30, 2016, the Department moved for approval of an unsigned treatment plan addendum for Mother referencing her failed trial reunification and addressing her continued non-compliance with her treatment plan requirements to attend

[2] In her November 2014 psychological evaluation report, Dr. Jez expressly recognized that all of her recommendations "may not be feasible." In her subsequent testimony at the termination hearing, she confirmed the Department's assertion that a comprehensive DBT program was not available from mental health providers in the Kalispell area at the relevant time in this case.

and complete traditional mental health counseling, establish and maintain a stable and safe home environment free from domestic violence, successfully demonstrate parenting skills, and maintain regular contact with the Department. The addendum made no reference to DBT. The District Court orally granted the motion from the bench and allowed Mother two weeks to file any objection. Mother did not object. On December 28, 2016, the court filed a written order formalizing its September 30th bench order and warned Mother that failure to comply with the treatment plan and addendum within six months may result in termination of her parental rights.

¶10 On March 30, 2017, following thirty-nine months of erratic treatment plan progress, including four extensions of TLC and an ultimately unsuccessful eleven-month trial reunification, the Department filed a petition to terminate Mother's parental rights pursuant to §§ 41-3-607 and -609(1)(f)(i)-(ii), MCA, based on treatment plan failure or non-compliance. Upon a contested hearing on August 31, 2017, the District Court issued written findings of fact, conclusions of law, and judgment terminating Mother's parental rights. Mother timely appealed. This Court consolidated K.P.D.'s and G.E.D.'s cases on appeal.

¶11 Mother challenges the District Court's termination on three grounds. She first contends that the District Court failed to impose an "appropriate treatment plan" as required by § 41-3-609(1)(f)(i), MCA, based on the Department's failure to provide her DBT as recommended by Dr. Jez. Acknowledging that she did not previously object to the

appropriateness of the treatment plan, Mother urges us to review this assertion as plain error.

¶12 The failure to contemporaneously object to the appropriateness of a treatment plan generally constitutes a waiver of the objection. *In re D.S.B.*, 2013 MT 112, ¶ 10, 370 Mont. 37, 300 P.3d 702; *In re H.R.*, 2012 MT 290, ¶ 10, 367 Mont. 338, 291 P.3d 583; *In re A.A.*, 2005 MT 119, ¶ 26, 327 Mont. 127, 112 P.3d 993 ("acquiescence in error" waives the right to object). As a narrow exception to this general rule, we will review an assertion of error raised for the first time on appeal only in exceptional circumstances where the failure to do so will "result in a manifest miscarriage of justice" undermining the "fundamental fairness" of the proceeding or "compromis[ing] the integrity of the judicial process." *State v. Favel*, 2015 MT 336, ¶ 13, 381 Mont. 472, 362 P.3d 1126 (citing *State v. Reim*, 2014 MT 108, ¶ 29, 374 Mont. 487, 323 P.3d 880).

¶13 For purposes of § 41-3-609(1)(f)(i), MCA (termination prerequisite for failure or non-compliance with "appropriate treatment plan"), whether a treatment plan is appropriate is a question of fact dependent upon the totality of the circumstances of each case. *In re A.N.*, 2000 MT 35, ¶ 26, 298 Mont. 237, 995 P.2d 427. Relevant considerations include, *inter alia*, whether the parent had the assistance of counsel, whether the parent stipulated to the treatment plan, and whether the treatment plan is reasonably tailored to remedially address the particular circumstances, conditions, problems, and needs of the parent and child that combined to cause the child to be abused, neglected, or in danger of abuse or neglect. *A.N.*, ¶¶ 26-27, *In re C.J.M.*, 2012 MT 137, ¶ 15, 365 Mont. 298, 280 P.3d 899.

See also §§ 41-3-102(34), -423(1), -443, and -609, MCA (youth in need of care defined, reasonable reunification efforts required, general treatment plan requirements, and criteria for termination).

¶14 Here, by and through the assistance of counsel, Mother stipulated to the adjudication of her children as youths in need of care based on the circumstances of neglect or risk of neglect set forth in detail in the Department's petition. Mother similarly stipulated to the treatment plan through counsel without question or objection. On its face, Mother's treatment plan was manifestly tailored to address the particular circumstances, conditions, problems, and needs of Mother and the children as referenced in the Department's petition and the record at the time of disposition.

¶15 Though it did not expressly reference DBT, the treatment plan contingently provided for DBT upon recommendation of a qualified Department-provided mental health provider, which is exactly what happened. The secondary question of whether the Department failed to provide DBT *in accordance with* the treatment plan has no bearing on the threshold appropriateness of a treatment plan that contingently provided for DBT upon recommendation of a qualified mental health provider.[3] Mother waived any objection to the threshold appropriateness of the treatment plan by failing to contemporaneously object and has further failed to demonstrate plain error on appeal. We hold that the District

[3] The treatment plan addendum similarly has no bearing on the threshold appropriateness of the treatment plan because it did not alter or affect the original treatment plan provision from which the DBT recommendation derived.

Court did *not* fail to impose an "appropriate treatment plan" as required by § 41-3-609(1)(f)(i), MCA.

¶16 Mother next asserts that the District Court erroneously found that her condition of unfitness was unlikely to change within a reasonable time in light of the treatment plan progress that she made and the asserted likelihood that she would have successfully completed the treatment plan but for the Department's failure to provide DBT. As a prerequisite for termination of parental rights, a district court must find, *inter alia*, that "the conduct or condition" that rendered a parent "unfit is *unlikely to change within a reasonable time*." Section 41-3-609(1)(f)(ii), MCA (emphasis added). In conjunction with that finding, the court must make a related finding that "continuation of the parent-child legal relationship will likely result in continued abuse or neglect, or that the conduct or the condition" of the parent renders the parent "unfit, unable, or unwilling to give the child adequate parental care." Section 41-3-609(2), MCA. In pertinent part, the court must base its finding on whether the parent has a history of violent behavior, whether the excessive use of alcohol or drugs "affects the parent's ability to care and provide for the child," or whether the parent has an "emotional illness, mental illness, or mental deficiency" of such "duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time." Section 41-3-609(2)(a), MCA. We review a district court's factual findings to determine if they are clearly erroneous. A finding of fact is clearly erroneous only if "it is not supported by substantial evidence, the

district court misapprehended the effect of the evidence, or a review of the record leaves us with the definite and firm conviction that the court" was otherwise mistaken. *A.N.*, ¶ 22.

¶17 Here, the record clearly indicates that, despite some notable progress, Mother struggled to comply with, and ultimately did not fully complete or comply with numerous treatment plan requirements despite a thirty-nine month opportunity to do so. Particularly notable among those shortcomings were her manifest failures to consistently attend and successfully complete traditional individual mental health counseling, regularly attend and complete family counseling at Turtle Bay, establish and maintain a stable and safe home environment for her children, and regularly attend and successfully complete specified parenting classes.

¶18 Ignoring these failures, Mother narrowly focuses on the Department's failure to provide her with DBT, a specialized mental health therapy regimen. She asserts that she likely would have succeeded but for the Department's failure to provide DBT or that she could still have likely succeeded in a reasonable time in the future with the assistance of DBT. Though the record manifests that DBT would likely have been beneficial to Mother, the balance of her assertions are not only unsupported by substantial record evidence, but highly speculative in light of her demonstrated inability or unwillingness to regularly attend and complete traditional individual counseling, family counseling at Turtle Bay, specified parenting classes, and other treatment plan requirements over a thirty-nine-month period with her parental rights hanging in the balance. The District Court's findings under § 41-3-609(1)(f)(ii) and (2), MCA, are supported by substantial evidence without

misapprehension or other mistake. We hold that the District Court did not err in finding that Mother's condition of unfitness was unlikely to change within a reasonable time.

¶19 Mother finally argues that the Department failed to make "reasonable efforts . . . to reunify [the family]" as required by § 41-3-423(i), MCA, by failing to provide DBT as recommended by Dr. Jez. Mother asserts that the Department's failure to provide her DBT "left out the most key and critical piece of the equation" and was thus fatal to the success of her treatment plan.

¶20 Upon removal of a child, the Department has an express statutory duty to "make reasonable efforts" to reunify the family "separated by" the removal. Section 41-3-423(1), MCA. "Reasonable efforts include but are not limited to voluntary protective services agreements, development of individual written case plans specifying state efforts to reunify families, placement in the least disruptive setting possible, provision of services pursuant to a case plan, and periodic review of each case to ensure timely progress toward reunification or permanent placement." Section 41-3-423(1), MCA. The "health and safety" of the child "are of paramount concern" in determining the "preservation or reunification services to be provided" and whether those services constitute reasonable reunification efforts. Section 41-3-423(1), MCA. Whether the Department has made reasonable efforts to facilitate reunification is a question of fact dependent upon the totality of the circumstances of each case. *See* § 41-3-423(1), MCA.

¶21 Here, the District Court made express findings and conclusions concerning the Department's "reasonable efforts" which included a treatment plan providing for sixteen

recommended treatments and services (e.g. treatment team meetings, permanency planning, present danger assessment and planning, drug testing, domestic violence and mental health counseling, and family engagement meetings). Mother has made no record-based showing that the reunification efforts made by the Department were themselves unreasonable. Rather, Mother simply asserts that the Department did not do enough because it failed to provide DBT.

¶22 The duty to make reasonable reunification efforts does not require the Department to make every conceivable effort, or provide every conceivable or available manner of care or service that might be of beneficial assistance to remediate the problem, circumstance, or condition that warranted protective removal of an abused, neglected, or at-risk child. *In re J.O.*, 2015 MT 229, ¶ 25, 380 Mont. 263, 354 P.3d 1242. Consistent with the District Court's findings and conclusions, the record clearly manifests that the principal, if not exclusive, causes of Mother's failed treatment plan were Mother's own choices and conduct, not the Department's failure to provide DBT. In addition to its other relevant findings, the District Court specifically found that "the Department could not provide additional services to prevent removal or to safely return the children to either parent's care, and additional services would have likely been unproductive." In addition to ample evidence of Mother's inability or unwillingness to consistently attend and ultimately complete traditional individual and family counseling and parenting class requirements, Dr. Jez's uncontradicted testimony squarely supports the District Court's finding that a comprehensive DBT program, as recommended, was not then available in the Kalispell

area. We hold that the District Court's finding that the Department made reasonable reunification efforts as required by § 41-3-423(1), MCA, was not clearly erroneous.

¶23 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶24 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ LAURIE McKINNON