

DA 17-0688

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 167N

IN THE MATTER OF:

B.S.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Butte-Silver Bow, Cause No. DN-16-30-BN
Honorable Brad Newman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Kelly M. Driscoll, Montana Legal Justice, PLLC, Missoula, Montana

For Appellee:

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

Eileen Joyce, Butte-Silver County Attorney, Mark Vucurovich, Deputy
County Attorney, Butte, Montana

Submitted on Briefs: June 20, 2018

Decided: July 10, 2018

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 Appellant B.M. (Father) appeals from the October 31, 2017 Findings of Fact, Conclusions of Law and Order Terminating Parental Rights, Re: Birth Father (Order) issued by the Second Judicial District Court, Butte-Silver Bow County. We affirm.

¶3 B.S. was born in March 2016. At the time of birth, B.S.'s umbilical cord tested positive for methamphetamine. The Department of Public Health and Human Services, Child and Family Services Division (Department), filed a Petition for Emergency Protective Services, Adjudication of Child as Youth in Need of Care (YINC), and Temporary Legal Custody (TLC) based on imminent danger of neglect related to parents' drug use. Father stipulated to the adjudication of B.S. as a YINC on April 20, 2016. At hearing on May 25, 2016, the District Court ordered a first treatment plan for Father. In November 2016, Father was arrested for parole violations. On December 2, 2016, the Department filed a petition to extend TLC and hearing was held December 21, 2016. Due to incarceration, Father was not present but stipulated to the extension of TLC. Father's counsel also indicated it was unknown how long Father would be incarcerated and thus amendment of a second treatment plan might be necessary in the future. Following this

hearing, the Department offered Father a second treatment plan identical to his first treatment plan. Hearing on this second treatment plan was held January 11, 2017. Father was not present but his attorney reported Father had signed the second treatment plan and provided it to his parole officer. The District Court approved the second treatment plan on January 13, 2017. Father did not object to the second treatment plan or file any request to amend or modify it based on his incarceration status.

¶4 On June 14, 2017, the Department filed its third petition for extension of TLC. The Department alleged Father was not in compliance with his treatment plan and indicated it intended to reunify B.S. with the birthmother (Mother) and seek termination of Father's parental rights. On August 10, 2017, the Department petitioned to terminate Father's parental rights to B.S. Following hearing on October 25, 2017, from the bench the District Court terminated Father's parental rights. On October 31, 2017, the District Court issued the written Order from which Father appeals.

¶5 We review a district court's decision to terminate parental rights for an abuse of discretion. We review findings of fact for clear error. A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces us a mistake was made. *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715 (citations omitted). We review conclusions of law to determine whether the district court interpreted the law correctly. *J.B.*, ¶ 9 (citation omitted).

¶6 This Court reviews a district court's evidentiary rulings for an abuse of discretion. To reverse a district court's evidentiary ruling for an abuse of discretion, this Court must

determine the court either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *In re O.A.W.*, 2007 MT 13, ¶ 32, 335 Mont. 304, 153 P.3d 6 (citations and quotations omitted).

¶7 Father asserts the District Court abused its discretion in terminating his parental rights due to his failure to complete a treatment plan because his second treatment plan was not appropriate in light of his incarceration. Father argues the Department failed to make reasonable efforts designed to reunify him with his child and no clear and convincing evidence demonstrates his conduct was unlikely to change within a reasonable period of time. Father further asserts the District Court abused its discretion when it determined it was in B.S.'s best interest to terminate Father's parental rights. Finally, Father argues the District Court erred when it concluded Father abandoned B.S.

¶8 The State argues the District Court did not abuse its discretion by terminating Father's parental rights, as he did not object to the approval of the second treatment plan and substantial evidence supports the District Court's determination that Father failed to complete his treatment plans. The State further argues the Department made reasonable efforts designed to reunify Father with B.S. and evidence supports the District Court's finding that Father's conduct was unlikely to change within a reasonable period of time. The State also asserts the District Court did not err when it concluded Father had abandoned B.S.

¶9 It is well-established a natural parent's right to care and custody of a child is a fundamental liberty interest which courts must protect with fundamentally fair procedures at all stages of termination proceedings. *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219,

237 P.3d 1282. The best interests of the children are of paramount concern, however, and take precedence over parental rights. *In re A.H.D.*, 2008 MT 57, ¶ 13, 341 Mont. 494, 178 P.3d 131. A district court may order termination of the parent-child relationship if “the child is an adjudicated youth in need of care” and (1) “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 (2) “the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.” Section 41-3-609(1)(f), MCA.

¶10 A treatment plan is an agreement or court order that specifies the actions a parent must take to resolve the conditions that resulted in the need for protective services for the child. Section 41-3-102(30), MCA. Partial or even substantial compliance with a treatment plan is insufficient to preclude termination of parental rights. *In re D.F.*, 2007 MT 147, ¶ 30, 337 Mont. 461, 161 P.3d 825.

¶11 In general, when the parent does not object to the treatment plan, the parent waives his appeal that the treatment plan was not appropriate. *In re D.S.B.*, 2013 MT 112, ¶ 10, 370 Mont. 37, 300 P.3d 702. Father agreed to the second treatment plan, signed the plan, and provided the original to his parole officer. The District Court approved and ordered the plan. While Father’s counsel mentioned his second treatment plan may need to be amended as Father did not know how long he would be incarcerated, Father did not seek to amend or modify the plan once he knew his incarceration status. Father now raises this issue for the first time, but did not preserve this issue for appeal. It is insufficient for Father’s counsel to merely mention amendment may be necessary at some future time depending on an unknown length of incarceration, but take no formal action to amend the

plan when Father believed it was no longer appropriate. Father was in the best position to determine when he believed the second treatment plan became inappropriate based on his incarceration. In this circumstance, plain error review is not warranted. Substantial evidence in the record establishes that Father failed to comply with his approved treatment plan prior to his incarceration. For example, he missed 89 urinalyses (UAs), did not secure appropriate housing, refused some mental health counseling, failed to complete a parenting course, missed visits with his child, and missed appointments with the social worker. This is not a situation where Father was adequately progressing with his treatment plan until incarceration interfered with his ability to complete it. Father was not successfully completing his treatment plan prior to his incarceration and then did nothing to amend or modify the plan based on his incarceration. Therefore, the District Court did not abuse its discretion in finding Father did not complete his approved treatment plans.

¶12 Review of the record supports the District Court's findings that reasonable efforts were made to reunify Father with B.S., including such things as providing: UAs; visitations including in-home visits; coordination of Father's psychological evaluation and SMART counseling; referral for services such as providing options for parenting courses; opportunity to attend the child's doctor/provider appointments; educational videos regarding the effects of methamphetamine on newborns; meetings with the social worker; monthly evaluation letters outlining his progress or lack thereof; and providing Father pictures of his child. Therefore, the District Court did not abuse its discretion in finding the Department made reasonable efforts to reunify Father with his child.

¶13 Review of the record also supports the District Court’s finding of clear and convincing evidence Father’s conduct was unlikely to change within a reasonable period of time. This finding is only partially related to Father’s apparent longer-term incarceration. Prior to incarceration, Father did not make substantial progress to address his parenting deficiencies. It was not an abuse of discretion for the District Court to consider Father’s lack of meaningful engagement prior to incarceration, together with his apparent longer-term incarceration, to conclude the conduct or condition making him unfit to parent was not likely to change within a reasonable period of time.

¶14 Father asserts B.S. is not at risk of continued abuse or neglect, and termination is not necessary to effectuate permanency for B.S., because B.S. has been reunified with Mother. Thus, terminating Father’s parental rights is not in B.S.’s best interest. This case is somewhat unusual in that during the pendency of this case, Mother and Father had another child in May 2017. At the time of that child’s birth, Father was incarcerated at the Crossroads Detention facility. The Department did not intervene with regard to that child. Like B.S., that child resides with Mother. However, Father retains his parental rights to that child. In this case, the District Court had opportunity to consider this unique situation together with the history of the parties, Father’s failure to successfully complete his treatment plans, the relationship between Father and Mother, Mother’s needs and protective capacities, and Father’s longer-term incarceration. Upon review, we do not substitute our judgment for that of the District Court, but instead determine whether the District Court abused its discretion. Given the totality of the circumstances, while this

situation is unusual, we cannot conclude the District Court abused its discretion when it determined termination of Father's parental rights was in B.S.'s best interest.

¶15 Finally, we turn to the issue of abandonment. A district court's determination of whether a parent's actions during the relevant time period constitute abandonment is a factual one which we will uphold unless clearly erroneous. The State must present clear and convincing evidence to demonstrate abandonment during the relevant period. *In re W.Z.*, 285 Mont. 16, 26-27, 946 P.2d 125, 132 (1997) (citations omitted). The District Court determined Father abandoned his child based on his being in custody for an undetermined period. This finding is not supported by the record. Long-term incarceration does not establish a parent has left his child under circumstances that make reasonable the belief that he does not intend to resume care of the child and therefore does not establish abandonment. *In re Adoption of Doe*, 277 Mont. 251, 258, 921 P.2d 875, 879-80 (1996). As we have determined termination of Father's parental rights is appropriate on other grounds, we consider this error harmless.

¶16 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.

¶17 Affirmed.

/S/ INGRID GUSTAFSON

We Concur:

/S/ MIKE McGRATH

/S/ BETH BAKER

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA