

DA 17-0701

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 215N

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IN THE MATTER OF:

R.W.,

A Youth in Need of Care.

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APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. ADN 2016-13  
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Julie Brown, Montana Legal Justice, PLLC, Missoula, Montana

For Appellee:

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Submitted on Briefs: June 6, 2018

Decided: September 4, 2018

Filed:



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Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, we decide this case by memorandum opinion, which shall not be cited and does not serve as precedent. In the opinion of the Court, the case presents a question controlled by settled law and by the clear application of applicable standards of review. The 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 D.W. (Mother) appeals the judgment of the Montana First Judicial District Court, Lewis and Clark County, terminating her parental rights to R.W. For the following reasons, we affirm.

¶3 On February 16, 2016, the Montana Department of Public Health and Human Services, Child and Family Services Division (Department), removed four-year-old R.W. from Mother's care based on risk of neglect resulting from concerns about Mother's mental health and Mother frequently leaving the child alone or with an inappropriate caregiver incident to her frequent need for emergency medical care. At the time, Mother often required emergency medical care to address severe and debilitating pain and associated bouts of intense nausea and vomiting of unknown cause.

¶4 On February 22, 2016, the Department petitioned for Emergency Protective Services (EPS), Temporary Investigative Authority (TIA), Temporary Legal Custody (TLC), and the ultimate adjudication of R.W. as a youth in need of care, as defined by § 41-3-102(34), MCA. By *ex parte* order filed February 24, 2016, the District Court granted EPS to the Department and set a show cause hearing pursuant to §§ 41-3-427 and

-432, MCA. Mother objected to the Department's petition by written notice on March 7, 2016, before appearing at the show cause hearing on March 9th. At the close of hearing, the District Court granted the Department a 90-day TIA, declaring that "this is one of the more difficult cases, if not the most difficult case, that I've had in terms of the narrow legal issue as to whether or not to grant temporary investigative authority and emergency protective services." On March 21, 2016, the court's written findings stated, *inter alia*, that:

[t]he facts providing the basis for the Department's involvement are: The youth has a history, two prior removals in Montana and Arizona, for the same issues, of being placed at risk when the mother goes to the hospital and has no one to care for the child. No one is certain what is creating the issues for [Mother] but without emergency plans in place an unsafe situation is created for [R.W.] when [Mother] falls ill.

¶5 In May 2016, Mother submitted to a psychological evaluation by Dr. Christa Smelko, a licensed clinical psychologist, who conducted a personality assessment inventory, parental stress index, child abuse potential inventory, and parent/child inventory. Dr. Smelko also obtained and reviewed Mother's extensive medical records from St. Peters Hospital, including behavioral health records. Dr. Smelko found that Mother suffered from clinical depression and anxiety, resulting in difficulty regulating her erratic and irresponsible behavior. *Inter alia*, Dr. Smelko recommended that Mother consistently attend individual therapy, obtain a chemical dependency evaluation and follow any resulting recommendations, explore other forms of pain management as an alternative to Mother's ongoing cannabis use, maintain safe and stable housing, complete a parenting education course (to assist with coping, appropriate discipline, and attending to R.W.'s

special developmental needs and delayed speech), and participate in case management services (consisting of mental health treatment, monitoring of psychiatric symptoms and medication therapy compliance, housing assistance, financial support, and identification of a support network for R.W.).

¶6 On May 10, 2016, the Department relocated R.W. from his third foster placement to a new foster home. Prior to the expiration of the TIA, the Department petitioned the District Court for continued EPS, YINC adjudication, and TLC on the basis that Mother continued to experience severe pain episodes that frequently required emergency medical services. By order filed June 7, 2016, the District Court adjudicated R.W. a youth in need of care pursuant to § 41-3-437, MCA, and granted TLC for six months. On June 10, 2016, the District Court imposed a stipulated treatment plan that required Mother to complete specified mental health counseling, submit to a medical health evaluation, maintain weekly contact with her Department case worker, complete a Department-approved parenting course, attend all scheduled supervised visits with R.W., allow the Department to enter her home for scheduled and unscheduled visits, and follow through with Dr. Smelko's recommendations.

¶7 After a gastroenterologist discovered precancerous cells and endometriosis in her uterus in July 2016, Mother underwent a complete hysterectomy. Endometriosis is a condition that commonly causes chronic pelvic inflammation, cramping, heavy menstrual bleeding, and at times nausea and vomiting.<sup>1</sup> The symptoms typically exacerbate during

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<sup>1</sup> Endometriosis is caused when endometrial cells, which normally line the interior of the uterus, migrate into the peritoneal cavity by way of the fallopian tubes. Once released into the abdomen,

menstruation, and the pain tends to intensify over time as the disorder progresses. Mother testified that she first experienced symptoms of what was later diagnosed as endometriosis in 2003. A subsequent gallbladder removal surgery did not remedy Mother's condition and her symptoms worsened significantly over time. Mother testified that, since her recovery from the June 2016 hysterectomy, her primary medical issues have fully resolved, eliminating her excruciating chronic pain and repeated need for emergency medical care.

¶8 At a hearing on November 16, 2016, the District Court extended the Department's TLC to afford Mother additional time to successfully complete her treatment plan. Mother eventually submitted to a chemical dependency evaluation and completed a Department-prescribed parenting class. Nonetheless, on April 28, 2017, the Department filed a petition to terminate her parental rights due to treatment plan failure or non-compliance. Following a two-day contested hearing on September 18 and October 3, 2017, the District Court issued findings of fact, conclusions of law, and judgment terminating Mother's parental rights pursuant to § 41-3-609(1)(f), MCA.

¶9 A natural parent's right to the "care and custody of a child is a fundamental liberty interest which must be protected by fundamentally fair procedures." *In re A.T.*, 2003 MT 154, ¶ 10, 316 Mont. 255, 70 P.3d 1247. We review a district court's decision

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endometrial cells may adhere to other tissues, such as the exterior wall of the uterus, ovaries, intestines, bowel, bladder, and other organs. Within the abdomen, the endometrial tissue continues to function normally by bleeding and sloughing cells during each menstrual cycle. Endometrial bleeding within the abdominal cavity presents a significant danger of sepsis. Over time, the endometrial tissues adhere to internal abdominal organs causing extremely painful adhesions and possibly destroying urogenital and gastrointestinal tissues and organs. C.L. Hughes, W.G. Foster & S.K. Agarwal, *The Impact of Endometriosis across the Lifespan of Women: Foreseeable Research and Therapeutic Prospects*, BioMed Research Int'l (2015), <http://dx.doi.org/10.1155/2015/158490>.

to terminate parental rights for an abuse of discretion. *In re K.A.*, 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478. A district court abuses its discretion when it exercises its discretion based on a mistake of law, clearly erroneous finding of fact, or otherwise acts arbitrarily without employment of conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice. *See K.A.*, ¶ 19. In terminating parental rights, district courts must make specific factual findings in accordance with termination criteria specified by § 41-3-609, MCA. *In re F.M.*, 2001 MT 93, ¶ 5, 305 Mont. 189, 24 P.3d 208. We review a district court's factual findings to determine if they are clearly erroneous, and review conclusions of law de novo for correctness. *In re L.N.*, 2014 MT 187, ¶ 12, 375 Mont. 480, 329 P.3d 598. A finding of fact is clearly erroneous if not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if our review of the record convinces us that the court was mistaken. *In re N.R.A.*, 2017 MT 253, ¶ 10, 389 Mont. 83, 403 P.3d 1256. A district court may terminate parental rights if it previously adjudicated the child a youth in need of care, imposed an appropriate reunification-oriented treatment plan, the parent failed to comply with the treatment plan or the plan otherwise failed, and the conduct or condition that rendered the parent unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA.

¶10 As a threshold matter, Mother does not contest on appeal the sufficiency of the District Court's adjudication of R.W. as a youth in need of care. Mother similarly does not contest the remedial appropriateness of her court-imposed treatment plan at the time of imposition. Mother primarily contests the sufficiency of the District Court's findings of

fact under § 41-3-609(1)(f), MCA (treatment plan failure or non-compliance and conduct or condition of unfitness unlikely to change within reasonable time), as clearly erroneous.

¶11 Mother asserts that she substantially complied with all treatment plan requirements except for Dr. Smelko's recommendation that she seek alternative pain management. Mother asserts that alternative pain management was no longer necessary after her July 2016 hysterectomy resolved the chronic debilitating pain and nausea which created the conditions necessitating her frequent need for emergency care—the root cause of the Department's need to intervene in the first place. It is beyond genuine material dispute on the record that Mother had not been to the emergency room for any reason after August 2016, that she eventually completed a parenting education course, and that she submitted to a chemical dependency evaluation.

¶12 The District Court nonetheless found that Mother: (1) ultimately failed to demonstrate the willingness or ability to prioritize R.W.'s emotional needs over her own; (2) "is flooded with emotions from past trauma," is "unable to regulate her emotions and thus unable to meet [R.W.'s] needs;" (3) "remains resistant to the idea that [R.W.] needs constant, routine, and predictable caregiving;" (4) apparently completed some degree of individual counseling and submitted to third-party case management supervision but did not cooperate sufficiently with her caseworker to allow the Department to confirm the extent of completion or satisfactory supervision; (5) failed to arrange for a capable and reliable secondary caregiver for R.W. when necessary; and (6) "continues to describe physical ailments which prevent her from [regularly] attending scheduled visits" with R.W. The court further noted the testimony of a treating child and family therapist who

characterized R.W. in Mother's care as a child of "dysregulated emotions," manifesting "distrust of adults," exhibiting "tantrums" stemming from "guardedness" and "inability to tolerate" frustration, and who "needs consistency in his life and daily routine . . . from adult caregivers entrusted to meet his basic needs." The District Court further found that, after living in four separate foster placements and having been in foster care for 24 of the past 34 months, and 20 of the past 22 months prior to termination, R.W. is for the first time "thriving" in his current foster care placement, largely due to the critical "emotional stability" it has provided him. The District Court's findings are supported by substantial evidence and we are not convinced that the court misapprehended the effect of the evidence or was otherwise mistaken.

¶13 Partial compliance with treatment plan requirements is insufficient to preclude termination under § 41-3-609(1)(f), MCA. *In re D.A.*, 2008 MT 247, ¶ 22, 344 Mont. 513, 189 P.3d 631. Moreover, in determining whether the conduct or condition that rendered a parent unfit is unlikely to change within a reasonable time, the court "shall give primary consideration to the physical, mental, and emotional conditions and needs of the child." Section 41-3-609(1)(f)(ii), 2(a), (3), MCA. Absent some other more compelling or countervailing evidence, the most relevant indicator of whether a parent's conduct or condition of unfitness is unlikely to change is the progress and effort, or lack thereof, made by the parent over the course of a reasonable time afforded to complete remedial treatment plan requirements. *See In re E.K.*, 2001 MT 279, ¶ 47, 307 Mont. 328, 37 P.3d 690. The record reflects that Mother had ample opportunity to comply with all requirements of her treatment plan and, just as importantly, to affirmatively demonstrate a



substantially-improved ability to responsibly parent R.W. and attend to his needs. Regarding § 41-3-609(1)(f), MCA, the District Court ultimately found that under the totality of the circumstances Mother's treatment plan failed to accomplish its remedial purpose and that the conduct or condition that rendered her unfit was unlikely to change within a reasonable time. Despite arguably conflicting evidence as to whether Mother's conduct or condition of unfitness was unlikely to change within a reasonable time, the court's findings are not clearly erroneous. We hold that the District Court did not abuse its discretion in terminating Mother's right to parent R.W. pursuant to § 41-3-609(1)(f), MCA.

¶14 We 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.

¶15 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ JAMES JEREMIAH SHEA  
/S/ INGRID GUSTAFSON  
/S/ LAURIE McKINNON  
/S/ JIM RICE