DA 17-0734

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 203N

IN THE MATTER OF:

L.N.D. and T.N.D., Jr.,

Youths in Need of Care.

APPEAL FROM: District Court of the Nineteenth Judicial District,
In and For the County of Lincoln, Cause Nos. DN 15-10 and DN 15-11
Honorable Matthew J. Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Briana E. Kottke, Stack & Kottke, PLLC, Missoula, Montana

For Appellee:

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

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Submitted on Briefs: August 8, 2018

Decided: August 21, 2018

Filed:

Clerk

Justice Laurie McKinnon 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 T.D. (Father) appeals from orders of the Nineteenth Judicial District Court, Lincoln County, terminating his parental rights to his minor children, L.N.D. and T.N.D. We affirm.

¶3 Father and W.L. (Mother) are the children's biological parents. In June 2015, the Department of Public Health and Human Services, Child and Family Services Division (the Department) removed the children from Mother's care due to development, hygiene, and safety concerns. More specifically, on numerous occasions spanning over a year-long period prior to removal, the Department observed the family home did not have running water or electricity, was filthy, had decaying food laying around, and had a bucket in the middle of the kitchen that served as the family's toilet. Additionally, both children were significantly developmentally delayed due, in part, to lack of parental stimulation. The Department attempted to remedy the problem by voluntarily working with Father and Mother, but the efforts were unsuccessful. When the Department removed the children, Father was incarcerated and was not the children's custodial parent. However, many of the conditions rendering the home unfit were present when Father lived in the home prior to his incarceration. The Department petitioned for

Emergency Protective Services (EPS), Adjudication as Youth in Need of Care (YINC), and Temporary Legal Custody (TLC), basing its petition on numerous reports of abuse and neglect. The District Court granted EPS and Father subsequently stipulated to adjudication of the children as YINC and to TLC for six months.

¶4 In December 2015, the District Court extended TLC for another six months. Father and the Department also agreed to Father's Phase I Treatment Plan, which the District Court approved. The Phase I Treatment Plan accounted for Father's incarceration—its main objective was for Father to successfully complete his incarceration and it also required Father to stay in contact with the Department. In June 2016, the District Court extended TLC for a second time.

¶5 On August 1, 2016, Father completed the pre-release portion of his incarceration. Four months later, in December 2016, the Department petitioned to terminate Father's and Mother's parental rights. Mother voluntarily relinquished her parental rights. The District Court held Father's termination hearing in February 2017. At the termination hearing, Father testified that, while incarcerated, he completed various parenting and victim impact classes. Father further testified that, following his August 2016 release, he completed frequent visits with the children; timely attended his parole appointments; passed all drug tests; and obtained appropriate housing. The District Court declined to terminate Father's parental rights and instead decided to extend TLC for a third time, asking the Department to develop a Phase II Treatment Plan for Father.

¶6 Father agreed to, and the District Court approved, Father's Phase II Treatment Plan. The plan contained tasks designed to help Father achieve various objectives,

including stabilizing his mental and emotional health; remaining drug and alcohol free; maintaining safe housing; improving his ability to meet the children's emotional and physical needs; and complying with parole conditions. The District Court held a review hearing in July 2017, at which the Department asked to continue TLC until September. Father did not object and the District Court extended TLC for a fourth time. Another review hearing occurred in September 2017, at which the Department advised the District Court that it planned to petition for termination of Father's parental rights, which it subsequently did.

¶7 In November 2017, the District Court held Father's second termination hearing. The Department and Father each presented multiple witnesses and Father testified on his own behalf. Ultimately, the District Court terminated Father's parental rights, finding Father failed to successfully complete his Phase II Treatment Plan and the conduct or condition rendering Father unfit was unlikely to change within a reasonable amount of time. The District Court further noted that the children had lived in foster care for more than twenty-nine months. Father appeals the District Court's termination of his parental rights.

¶8 We review a district court's decision to terminate parental rights for an abuse of discretion. *In re A.S.*, 2016 MT 156, ¶ 11, 384 Mont. 41, 373 P.3d 848. A district court abuses its discretion when it acts arbitrarily, without employing conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *In re K.A.*, 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478. We review findings of fact for clear error and conclusions of law for correctness. *In re E.Z.C.*, 2013 MT 123, ¶ 19,

370 Mont. 116, 300 P.3d 1174. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if this Court is left with a definite and firm conviction that the district court made a mistake. *In re T.W.F.*, 2009 MT 207, ¶ 17, 351 Mont. 233, 210 P.3d 174.

¶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. Accordingly, courts must follow specific guidelines when terminating parental rights. *See* §§ 41-3-601 to -612, MCA. A district court may terminate the parent-child relationship after adjudicating a child as a YINC and finding (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)(i)-(ii), MCA.

¶10 The Department must prove the statutory criteria for termination by clear and convincing evidence. Section 41-3-422(5)(a)(iv), MCA. Clear and convincing evidence is defined as "simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of the proof." *In re B.H.*, 2001 MT 288, ¶ 16, 307 Mont. 412, 37 P.3d 736 (quoting *In re J.L.*, 277 Mont. 284, 289, 922 P.2d 459, 462 (1996)). Notably, the "requirement does not call for unanswerable or conclusive evidence." *In re B.H.*, ¶ 16.

¶11 On appeal, Father first argues the District Court abused its discretion in determining that Father failed to complete his Phase II Treatment Plan. "A parent must completely comply with his treatment plan—partial or even substantial compliance is insufficient." *In re X.B.*, 2018 MT 153, ¶ 28, 392 Mont. 15, 420 P.3d 538 (citing *In re J.A.B.*, 2015 MT 28, ¶ 27, 378 Mont. 119, 342 P.3d 35). Even a parent's "[w]ell-intentioned efforts toward successful completion of a treatment plan do not demonstrate either the completion or the success of the plan." *In re J.W.*, 2001 MT 86, ¶ 17, 305 Mont. 149, 23 P.3d 916.

¶12 Father contends there is not substantial evidence to support the District Court's finding that he did not complete his Phase II Treatment Plan. We disagree, as there exists substantial evidence in the record to support the District Court's determination that Father failed to complete his Phase II Treatment Plan. Father's Phase II Treatment Plan required him to address his mental and emotional health issues by undergoing a mental health evaluation and following its recommendations. Father presented himself for the evaluation, but failed to meaningfully engage with the evaluator who, as a result, was not able to effectively diagnose Father beyond having an anti-social personality disorder. She recommended follow-up mental health therapy. Father denied having any symptoms, maintained that he did not need mental health care, and refused to meaningfully engage in therapy. The mental health therapy would have assisted Father, at a minimum, in understanding his children's developmental delays. Significantly, L.N.D. was diagnosed with autism spectrum and was nearly non-verbal at age 6.

¶13 Father's Phase II Treatment Plan also required him to improve his ability to meet his children's emotional and physical needs. Testimony at the termination hearing established Father was unwilling to learn safe, age-appropriate parenting techniques from parenting classes or coaches. Instead, Father was argumentative, threatening, and uninterested in changing or improving his parenting skills. The fact that Father refused to develop his parenting skills is particularly notable, considering the children's significant developmental delays requiring specialized knowledge and parenting skills. Father's Phase II Treatment Plan also required him to obtain and maintain a safe home and consistent income. Testimony at the hearing demonstrated that, while the conditions of Father's home improved, safety concerns remained. Father also failed to obtain gainful, full-time employment. Finally, Father's Phase II Treatment Plan required him to undergo random drug testing. While Father's urinalysis test results were clean, he failed to provide samples on multiple occasions, despite being on probation.

¶14 In this case, there is conflicting testimony, as Father perceived that he adequately completed his Phase II Treatment Plan, while other witnesses maintained that Father did not. The credibility of witnesses is exclusively within the fact finder's province. *In re M.F.B.*, 2001 MT 136, ¶ 19, 305 Mont. 481, 29 P.3d 480; *In re J.M.W.E.H.*, 1998 MT 18, ¶ 34, 287 Mont. 239, 954 P.2d 26 ("[I]n non-jury trials, the credibility of witnesses and the weight to be afforded their testimony is a matter left to the sound discretion of the district court."). The District Court specifically noted that there was contradictory testimony as to certain aspects of Father's compliance with his Phase II Treatment Plan, and nonetheless found that Father failed to successfully complete it. This Court may not

substitute its "evaluation of the evidence for that of the trial court, or pass upon the credibility of witnesses," *In re J.M.W.E.H.*, ¶ 34 (quoting *In re J.L.*, 277 Mont. 284, 290, 922 P.2d 459, 462 (1996)), and we accordingly conclude that the District Court did not abuse its discretion in finding Father failed to successfully complete his Phase II Treatment Plan because its decision is supported by substantial evidence.

¶15 Father also argues on appeal that the District Court erred by finding the conduct or condition rendering him unfit was unlikely to change within a reasonable amount of time. In determining whether the conduct or condition rendering a parent is unlikely to change within a reasonable time, the "court shall enter a 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 parents renders the parents unfit, unable, or unwilling to give the child adequate parental care." Section 41-3-609(2), MCA. In doing so, the court must consider a variety of factors, including "any emotional or mental illnesses that render the parent unable to care for the child, any history of violent behavior by the parent, excessive use of alcohol or drugs, the parent's incarceration if applicable, and any other relevant evidence." *In re R.M.T.*, 2011 MT 164, ¶ 31, 361 Mont. 159, 256 P.3d 935 (citing § 41-3-609(2)(a)-(d), MCA). While § 41-3-609(2), MCA, instructs the court to consider each factor, it "does not require the court to make specific findings regarding each factor." *In re R.M.T.*, ¶ 31.

¶16 The court assesses a parent's past and present conduct in determining whether the conduct or condition rendering him unfit will change in a reasonable time. *In re A.H.*, 2015 MT 75, ¶ 36, 378 Mont. 351, 344 P.3d 403. In making its determination, the court

must "give primary consideration to the physical, mental, and emotional conditions and needs of the child." Section 41-3-609(3), MCA. A child's best interests "are paramount in a termination of parental rights action and take precedence over parental rights," *In re D.H.*, 2001 MT 200, ¶ 32, 306 Mont. 278, 33 P.3d 616, and a child's need for a permanent, stable, and loving home supersedes a biological parent's right to parent, *In re D.A.*, 2008 MT 247, ¶ 21, 344 Mont. 513, 189 P.3d 631.

¶17 Here, the District Court made a specific finding, as required by § 41-3-609(2), MCA, that the conduct or condition rendering Father unfit was unlikely to change within a reasonable time. In so deciding, the court noted that the children had lived in foster care for over twenty-nine months and that it extended TLC four times to facilitate Father's work on his treatment plans. Further, Father refused to meaningfully engage in mental health therapy and also refused to learn new parenting techniques, demonstrating that he was unwilling to change the conditions rendering him unfit to parent.

¶18 Termination of the parent-child relationship is presumed to be in the child's best interest if the child has lived in foster care for fifteen of the most recent twenty-two months. Section 41-3-604(1), MCA. When the District Court issued its orders terminating Father's parental rights in November 2017, it noted that the children had lived in foster care for more than twenty-nine months. The District Court was therefore statutorily required to presume that termination of the parent-child relationship was in the children's best interest. Prioritizing the best interests of the children, we conclude that the District Court did not err when it found the conduct or condition rendering Father

unfit was unlikely to change within a reasonable amount of time. For the foregoing reasons, the District Court did not abuse its discretion when it terminated Father's parental rights and we accordingly affirm its decision.

¶19 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.

¶20 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ DIRK M. SANDEFUR
/S/ JIM RICE
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON