

DA 18-0056

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 208N

IN THE MATTER OF:

K.F. and T.F. IV,

Youths in Need of Care.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Silver Bow, Cause No. DN 15-79
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, Katie F. Schulz, Assistant
Attorney General, Helena, Montana

Eileen Joyce, Silver Bow County Attorney, Mark Vucurovich, Special
Deputy County Attorney, Butte, Montana

Submitted on Briefs: August 1, 2018

Decided: August 28, 2018

Filed:



Clerk

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 T.F. III (Father) appeals the Silver Bow County District Court's January 5, 2018, Orders terminating his parental rights to his children (Children) K.F. (born in 2010), and T.F. IV (born in 2006). Although a separate cause number was assigned for each child's case, proceedings occurred simultaneously in the District Court with shared factual information and procedural histories. We consolidated these two cases for purposes of appeal. Father has also appealed the termination of his parental rights to half sibling P.F. in DA 18-0057 who, unlike K.F. and T.F. IV, may be an Indian child. A separate opinion is being issued in P.F.'s case to address the potential Indian Child Welfare Act issues not present here. We affirm.

¶3 On September 11, 2015, the Child and Family Services Division of the Montana Department of Public Health and Human Services (Department) filed a Petition for Emergency Protective Services (EPS), Adjudication of Child as Youth in Need of Care (YINC), and Temporary Legal Custody (TLC) regarding the Children due to concerns of domestic violence, drug use, Father absconding from conditional release, and inappropriate people in the home with the children. K.F. and T.F. IV's mother is deceased. Half-sibling

P.F.'s mother, C.F., married Father in September 2014. Upon removal, the Children were initially placed with paternal grandparents, then with Father's girlfriend Emily, then in the Watson Children's Shelter in Missoula.

¶4 At hearing October 21, 2015, Father stipulated to the court adjudicating the Children as YINC and granting the Department TLC for six months. TLC was extended several times and the last TLC order was granted on September 11, 2017. On November 17, 2015, the District Court approved Father's first Treatment Plan. On September 13, 2016, the Department filed a second Treatment Plan for Father which provided separate requirements if Father was incarcerated. On October 10, 2017, the Department petitioned to terminate Father's parental rights to Children based on § 41-3-609(1)(f), MCA, citing his failure to complete a treatment plan and asserting he was unlikely to change within a reasonable time.

¶5 On October 26, 2017, Father filed a motion to continue the hearing set for November 1, 2017, as his criminal trial was set for January 22, 2018, and he had yet to receive discovery. On October 30, 2017, the court ordered that the November 1, 2017 hearing be reset to December 6, 2017, to allow for completion of discovery. The court declined to delay trial based on Father's pending criminal matter:

The father's counsel seeks a continuance to January 24, 2018, following the father's trial . . . on an apparent criminal charge(s). A delay of approximately three months is unnecessary in this case, as disposition of the State's petition to terminate parental rights is not dependent on the outcome of a separate criminal proceeding in another jurisdiction.

Discovery was hand-delivered to Father's counsel on November 14, 2017.

¶6 At the termination hearing on December 6, 2017, Father presented exhibits to support his progress on his treatment plan. On January 5, 2018, the District Court issued orders for each child terminating Father’s parental rights for failure to complete his treatment plan and finding the conduct or condition rendering him unfit or unable to parent was not likely to change within a reasonable period of time. The orders found that “throughout the majority of the child’s life, the birth father has either been incarcerated or under State supervision.” Father appeals.

¶7 This Court reviews 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. We view the evidence in the light most favorable to the prevailing party when determining whether substantial credible evidence supports the district court’s findings. *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715.

¶8 A court may terminate parental rights when there is clear and convincing evidence: (1) a child has been adjudicated as a YINC; (2) an appropriate treatment plan that has been approved by the court has not been complied with by the parent or has not been successful; and (3) the conduct or condition of the parent rendering him or her unfit is unlikely to change within a reasonable time. Section 41-3-609(1), MCA.

¶9 Termination procedures must meet the requisites of the Due Process Clause of the Fourteenth Amendment. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24-32, 101 S. Ct. 2153, 2158-2162 (1981). Although “due process” cannot be precisely defined, the phrase requires “fundamental fairness,” and fundamental fairness requires fair procedures. *Lassiter*, 452 U.S. at 24-32, 101 S. Ct. at 2158-2162. While the concept of due process remains fluid, we have held that a parent in a termination proceeding has the right to be heard at a meaningful time and in a meaningful manner. *In re B.P.*, 2001 MT 219, ¶ 31, 306 Mont. 430, 35 P.3d 291.

¶10 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.

¶11 Father argues the District Court did not demonstrate by clear and convincing evidence that the conduct or condition rendering him unfit to parent was unlikely to change within a reasonable time. Father asserts the only evidence presented at the termination

hearing showed Father was likely to change and provide adequate care to the Children in a reasonable time, and that over the course of the case Father actively worked his treatment plan and achieved a home visit in June 2017. The termination hearing was held before his criminal trial, so Father argues there was no way for the judge to know how long he would be incarcerated and therefore unable to parent as a result.

¶12 In this case, we agree with the District Court that the timing of Father's criminal trial in January 2018 does not meaningfully affect the result in his December 2017 termination case as the record supports termination of Father's parental rights even if he had not been facing additional incarceration. When Father had the trial home visit with Children in June 2017, Father absconded from probation, used methamphetamine, and left his children in the care of his girlfriend (with whom he also has two children) to reunite with C.F., who was also using methamphetamine.

¶13 Father further argues the District Court abused its discretion when it found termination of Father's parental rights was in the Children's best interests because, at the termination hearing, Father presented substantial and un rebutted evidence that he provided not only parenting, but also emotional, physical, and financial support for his children. Further, he asserts the Department did not present sufficient evidence of the Children's needs to show termination of Father's parental rights was in their best interests. This assertion is inconsistent with Father's pattern of instability, demonstrated intentional drug use, and criminal conduct over an extended period of time which prevented him from maintaining safe and consistent contact with his Children. Father's ongoing failure to

remain drug-free, failure to abide by the law and conditions of his community supervision for any significant period, and his inability to put the needs of his Children first provided sufficient evidence that continuation of the parent-child legal relationship would likely result in continued abuse or neglect.

¶14 Finally, Father argues the District Court should have appointed a guardian pursuant to § 41-3-444, MCA, rather than terminating his rights to the Children, especially since their mother is deceased and termination therefore severed the last remaining parental relationship for the Children. At the termination hearing Father argued in favor of a guardianship rather than a termination of parental rights and asserted a guardianship would allow him to maintain his bond with his children and financially support them.

¶15 Under the plain language of § 41-3-609, MCA, there is no statutory requirement specifically requiring a court to consider guardianship or other options prior to TPR.¹ While we encourage courts to consider and weigh alternatives to termination of parental rights, “[n]o limitation is placed upon a court which requires consideration of other options, such as a guardianship, prior to terminating parental rights.” *In re E.A.T.*, 1999 MT 281, ¶ 33, 296 Mont. 535, 989 P.2d 860.

¹ Given the over-arching policy of Title 41, Chapter 3, MCA, to preserve the unity and welfare of the family whenever possible, we encourage district courts to conduct frequent and continuing status conferences to review parent progress throughout the litigation and consider ordering settlement conferences and/or mediations prior to TLC hearings as well as to consider possible alternatives to termination, including guardianship, before making a termination decision.

¶16 Viewing the evidence in the light most favorable to the prevailing party, substantial credible evidence supports the District Court's termination of Father's parental rights to the Children.

¶17 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.

¶18 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR