

DA 18-0138

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 233N

IN THE MATTER OF:

K.M.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DN 16-36AX
Honorable Rienne McElyea, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant
Attorney General, Helena, Montana

Marty Lambert, Gallatin County Attorney, Bozeman, Montana

Submitted on Briefs: September 5, 2018

Decided: September 18, 2018

Filed:



Clerk

Justice James Jeremiah Shea 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 V.W. (Mother) appeals the Findings of Fact, Conclusions of Law, and Order of the Eighteenth Judicial District Court, Gallatin County, terminating her parental rights to her son, K.M. We affirm.

¶3 On October 11, 2016, the Montana Department of Public Health and Human Services (Department) petitioned for emergency protective services (EPS) and temporary investigative authority (TIA) over K.M. K.M. is a two-year-old boy who was born with cerebral palsy and requires specialized care and monitoring. K.M. has been in an out-of-home placement for almost all his life.

¶4 On November 3, 2016, the District Court granted the Department EPS and TIA for K.M. On January 31, 2017, the Department petitioned for adjudication of K.M. as a youth in need of care and for temporary legal custody. On February 22, 2017, the District Court held a hearing on the Department's petition. Mother stipulated to K.M. being adjudicated a youth in need of care during the hearing. On March 10, 2017, the Department was granted temporary legal custody.

¶5 On March 21, 2017, the District Court approved an appropriate treatment plan for Mother following a dispositional hearing. Mother and her counsel both signed the

treatment plan. On August 15, 2017, the Department petitioned to terminate Mother's parental rights to K.M. based on Mother's failure to sufficiently complete her treatment plan. The Department alleged that Mother had failed to show up to behavioral therapy appointments, failed to complete parenting classes, failed to engage in individual counseling, failed to find safe and appropriate housing, failed to secure a stable job, and failed to submit to consistent urinalysis testing. The Department further alleged that the conduct rendering Mother unfit was unlikely to change.

¶6 On January 3, 2018, the District Court conducted a two-day termination hearing, wherein K.M.'s foster parent Wendy Houghton, Licensed Clinical Professional Counselor Jenny McCune, Dr. Susan Day, Dr. Bowman Smelko, Child Protective Specialist Jeni Kamps, and Mother testified. Houghton testified that K.M. attends multiple therapy and medical appointments weekly, including physical therapy, occupational therapy, and speech therapy, and she detailed the necessary home therapies K.M. requires daily. Houghton testified that K.M. will most likely need these therapies into his teenage years and possibly for his entire life. McCune testified to seeing Mother for counseling for eight visits from January to May 2017, but that Mother did not attend nine other scheduled appointments during that time, and that Mother was inconsistent in her attendance once they reengaged counseling in September 2017. McCune testified that Mother presented with a lot of anxiety and difficulty in focusing and completing tasks due to distractibility symptoms associated with attention deficit hyperactivity disorder and bipolar disorder. Both Dr. Day and Dr. Smelko testified that given Mother's failure to follow treatment recommendations, the issues that made Mother unable to parent were unlikely to change

in a reasonable period of time. Dr. Smelko testified that Mother's historic and current issues with consistently engaging in services would be concerning for a child without K.M.'s challenges, but were especially concerning for K.M. Kamps testified that Mother was "minimally compliant" with her treatment plan.

¶7 Mother testified as to her progress on aspects of her treatment plan, including her attendance at some appointments, and that she was making repairs on a home she purchased prior to the hearing that she believed would be suitable for K.M.

¶8 On February 7, 2018, the Department filed a report to the District Court in a companion case, involving K.M.'s brother, that contained text messages between Kamps and Mother in which Mother made inappropriate comments toward Kamps. On February 14, 2018, the District Court issued an Order terminating Mother's parental rights and granting the Department permanent legal custody with right to consent to K.M.'s adoption. The Order found K.M. to be a youth in need of care, that Mother had failed to complete an appropriate, court-ordered treatment plan, and that the conditions rendering Mother unfit to parent were unlikely to change in a reasonable time. Mother appeals.

¶9 We review a district court's decision to terminate parental rights for an abuse of discretion. *In re K.B.*, 2013 MT 133, ¶ 18, 370 Mont. 254, 301 P.3d 836. A district court's decision to terminate parental rights will not be disturbed on appeal unless "there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion." *In re A.S.*, 2016 MT 156, ¶ 11, 384 Mont. 41, 373 P.3d 848 (citations omitted). We review a district court's factual findings for clear error. *In re A.K.*, 2015 MT 116, ¶ 20, 379 Mont. 41, 347 P.3d 711. 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 this Court a mistake was made. *In re C.J.M.*, 2012 MT 137, ¶ 10, 365 Mont. 298, 280 P.3d 899. An appellant bears the burden of establishing the district court's findings were clearly erroneous. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825 (citation omitted). Whether an individual has been denied his or her right to due process "is a question of constitutional law, for which this Court's review is plenary." *In re M.V.R.*, 2016 MT 309, ¶ 24, 385 Mont. 448, 384 P.3d 1058 (citation omitted).

¶10 A district court may terminate a parent's rights on a finding by clear and convincing evidence that a child is a youth in need of care, an appropriate treatment plan has not been complied with, and the conduct of the parent rendering them unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA; *In re J.A.S.*, 2010 MT 47, ¶ 12, 355 Mont. 302, 288 P.3d 1119. Clear and convincing evidence requires 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 proof." *In re D.B.*, 2007 MT 246, ¶ 29, 339 Mont. 240, 168 P.3d 691 (citations omitted). "It does not call for unanswerable or conclusive evidence." *In re A.K.*, ¶ 22 (quoting *In re J.L.*, 277 Mont. 284, 289, 822 P.2d 459 (1996)). A parent's compliance with some requirements of the treatment plan cannot make up for lack of compliance with other requirements. *In re D.F.*, ¶ 30. "Well-intentioned efforts toward successful treatment plan compliance do not demonstrate either the completion or the success of the plan." *In re*

D.A. and M.A., 2008 MT 247, ¶ 22, 344 Mont. 513, 189 P.3d 631 (internal quotations and citation omitted).

¶11 When “determining whether the conduct or condition of a parent is unlikely to change within a reasonable time, the [district] 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 deciding the termination of a parent’s rights, “the [district] court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child.” Section 41-3-609(3), MCA. Consideration of a parent’s past conduct is appropriate in determining whether that parent’s conduct is likely to change or not. *In re R.M.T.*, 2011 MT 164, ¶ 38, 361 Mont. 159, 256 P.3d 935 (citation omitted). This may include conduct prior to any work or progress made in a treatment plan. *In re D.F.*, ¶ 44 (citation omitted).

¶12 Due process protects a parent from being placed at an “unfair disadvantage” during State proceedings to terminate the parent’s custody of a child. *In re M.V.R.*, ¶ 44 (citations omitted). “A 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.K.*, ¶ 20 (citation omitted). Although a parent’s right to the care and custody of a child is a fundamental liberty interest, “the best interests of the children are of paramount concern in a parental rights termination proceeding and take precedence over the parental rights.” *In re D.A. and M.A.*, ¶ 21 (quoting *In re J.W.*, 2001 MT 86, ¶ 8, 305 Mont. 149, 23 P.3d 916).

The “[k]ey components of a fair proceeding are notice and an opportunity to be heard.” *In re C.J.*, 2010 MT 179, ¶ 27, 357 Mont. 219, 237 P.3d 1282 (citation omitted).

¶13 Mother contends that the District Court abused its discretion in terminating her parental rights to K.M. because the Department did not demonstrate by clear and convincing evidence that the conduct rendering her unfit to parent was unlikely to change within a reasonable time. Additionally, Mother argues that her due process rights were violated by the Department improperly filing a post-hearing report to bolster its arguments before the District Court issued its Order. We disagree.

¶14 Mother stipulated to K.M. being adjudicated a youth in need of care. Mother does not dispute she failed to successfully complete her entire treatment plan or that the plan was appropriate. Mother failed to adequately engage in several of her treatment plan tasks and goals. *See In re D.F.*, ¶ 30; *In re D.A. and M.A.*, ¶ 22. The District Court record does not support Mother’s version of her progress on her mental health issues, that she demonstrated the ability to learn the skills necessary to parent, or that she had secured an appropriate residence and stable source of income. Although Mother is correct that McCune reported some engagement and effort in counseling, Mother fails to acknowledge her failure to fully and consistently engage in appointments with McCune. Additionally, Dr. Day and Dr. Smelko both testified that Mother needed to complete significant, intensive behavioral therapy before reunification should be considered, and that it would take at least a year to complete if Mother fully engaged. Mother’s significant history with the Department supports the District Court’s conclusion that the conduct that required

Department intervention for K.M. is the same as with Mother's previous children.¹ *See In re R.M.T.*, ¶ 38; *In re D.F.*, ¶ 44. Finally, Kamps previously inspected the home Mother purchased prior to the termination hearing and observed it was uninhabitable and an inappropriate home for a disabled child.

¶15 The District Court's findings are supported by clear and convincing evidence, and the District Court did not err when it found that the condition and conduct rendering Mother unfit to parent was unlikely change in a reasonable period of time. *See* Section 41-3-609(1)(f), MCA; *In re D.B.*, ¶ 29. Accordingly, the District Court did not abuse its discretion in terminating Mother's parental rights to K.M. *See In re K.B.*, ¶ 18.

¶16 Mother's claim on appeal that the filing of the post-hearing report was done by the Department to improperly bolster its argument is unavailing. Regardless of whether submitting the post-hearing report was proper, nothing in the District Court's Order indicates the District Court considered the report. More than sufficient evidence had already been presented to the District Court during the evidentiary hearing to support its Order terminating Mother's parental rights. Therefore, Mother was afforded fundamentally fair procedures during the termination hearing, and her due process rights

¹ Since 2009, Mother has had an extensive history of Department intervention with her seven other children, with five having previously been placed with their birth father due to Department involvement. Mother additionally has a significant past of mental health, substance abuse, homelessness, anger, and neglect issues. Mother has previously noted difficulties in basic parenting skills and making appropriate decisions in putting her children first. One of Mother's children, S.W., died while in the care of B.M., a man she was seeing. B.M. pled guilty to negligent homicide of S.W.

were not violated by the filing of the post-hearing report. *See In re A.K.*, ¶ 20; *In re M.V.R.*, ¶ 44.

¶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. The District Court's findings of fact are not clearly erroneous, its conclusions of law are correct, and its ruling was not an abuse of discretion. We affirm.

/S/ JAMES JEREMIAH SHEA

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON