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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0236

DA 18-0236

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 107N

IN RE PARENTING OF: T.P.D.C.,

A Minor Child.

TAMI DISNEY,

Petitioner and Appellant,

vs.

BRANDON STAAT,

Respondent, Appellee, and Cross-Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DR 15-27
Honorable Robert L. Deschamps, III, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Kathleen A. Molsberry, Matthew B. Lowy, Lowy Law, PLLC, Missoula, Montana

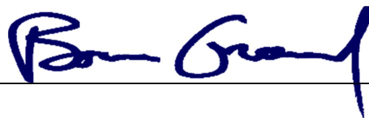
For Appellee:

André Gurr, Garden City Law, PLLC, Missoula, Montana

Submitted on Briefs: April 10, 2019

Decided: May 7, 2019

Filed: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Justice Beth Baker 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 Tami Disney ("Mother") and Brandon Staat ("Father") have one child together, T.P.D.C. Mother filed a petition to establish a parenting plan shortly after T.P.D.C.'s birth. After more than three years of litigation, Mother petitioned to terminate Father's parental rights under § 41-3-801(2)(b), MCA, alleging that the child was conceived from nonconsensual intercourse. After hearing testimony from both parents and other witnesses and taking additional evidence, the District Court denied Mother's petition. Mother appeals and Father cross-appeals.

¶3 Mother raises four issues on appeal: (1) whether the District Court failed to apply the proper definitions of "incapacity" and "consent" under the statute; (2) whether the District Court erroneously considered the termination petition in the same action as the custody matter; (3) whether the District Court failed to apply the rape shield statute; and (4) whether the District Court erroneously admitted copies of text messages between Mother and Father into evidence. Father argues on cross-appeal that the District Court should have dismissed Mother's petition.

¶4 We review a district court's findings of fact for clear error and its conclusions of law for correctness. *In re J.E.L.*, 2018 MT 50, ¶ 12, 390 Mont. 379, 414 P.3d 279. A finding of fact is clearly erroneous if it is 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 a mistake has been committed. *In re J.E.L.*, ¶ 12. We review evidentiary rulings for an abuse of discretion. *State v. Clemans*, 2018 MT 187, ¶ 4, 392 Mont. 214, 422 P.3d 1210.

¶5 Section 41-3-801(2)(b), MCA, allows a district court to terminate a parent-child legal relationship, if, after an evidentiary hearing, the court finds by clear and convincing evidence that the parent "committed an act of sexual intercourse without consent, sexual assault, or incest that caused the child to be conceived." Section 45-5-501(1)(b)(i), MCA, provides that a person is incapable of consent if the person is "mentally . . . incapacitated."[1] Under § 45-2-101(41), MCA, "'[m]entally incapacitated' means that a person is rendered temporarily incapable of appreciating or controlling the person's own conduct as a result of the influence of an intoxicating substance."

¶6 Mother argues that the District Court failed to apply the definition of "mentally incapacitated" from § 45-2-101(41), MCA. She asserts that her testimony established that she was unable to consent to intercourse with Father within the meaning of the statutory

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[1] The Legislature amended § 45-5-501, MCA, in 2017. *See* 2017 Mont. Laws ch. 279, § 2. The amendments did not change the language pertinent to this appeal, but simply moved it to a new subsection. Because the pertinent definitional language is the same, we cite the 2017 statute for the convenience of the reader without deciding which version of the statute applies to the acts in question.

definition because she was "blacked out." Whether a person is "mentally incapacitated" is largely a question of fact. *See State v. Gould*, 273 Mont. 207, 221, 902 P.2d 532, 541 (1995). The trier of fact—in this case the trial judge—determines the credibility of witnesses and decides how much weight to give their testimonies. *In re B.J.T.H.*, 2015 MT 6, ¶ 16, 378 Mont. 14, 340 P.3d 557. The trial court is in the best position to evaluate the credibility and demeanor of witnesses. *In re B.J.T.H.*, ¶ 16.

¶7 Mother's testimony was not the only evidence before the District Court. Mother and Father, as well as their additional witnesses, presented inconsistent evidence regarding T.P.D.C.'s conception. In addition, Father presented copies of text message conversations between himself and Mother from the pertinent time period. The District Court found that Mother's contemporaneous text messages and testimony from other people did not support Mother's contentions that she was "blacked out" on the night she alleges T.P.D.C. was conceived. Although the District Court did not cite the definition of "mentally incapacitated" from § 45-2-101(41), MCA, its findings that the evidence did not support Mother's contentions that she was "blacked out" plainly imply that the court did not find that Mother was "mentally incapacitated." The District Court found not only that the evidence before it was insufficient to support a finding by clear and convincing evidence that Father "committed an act of sexual intercourse without consent, sexual assault, or incest that caused T.P.D.C. to be conceived," but that the evidence "in fact establish[ed] by at least a preponderance of the evidence that the act of sexual intercourse that caused T.P.D.C. to be conceived was consensual on the part of both" Mother and Father. Giving

appropriate deference to the District Court's evaluation of the evidence, we hold that substantial evidence supported its findings, and the findings are not otherwise erroneous.

¶8 Mother next argues that we should reverse the District Court's denial of her petition because the District Court should not have heard the petition as part of the ongoing custody litigation, but rather as a separate proceeding. Mother maintains that the District Court should not have relied on the record from the parties' ongoing custody proceedings. Mother points to no language in the statute requiring separation of the matters and provides no citation to any other legal authority to support this argument. Further, Mother initiated both proceedings and chose to file the termination petition in the parenting plan case. Finally, even if the termination petition were considered as a wholly separate proceeding, the District Court would not have been in error to consider the record from the parenting case. *See* M. R. Evid. 202(b)(6).

¶9 Mother maintains that the District Court erred in not applying the rape shield statute, § 45-5-511(2), MCA, to preclude testimony and evidence of Mother and Father's subsequent relationship. Section 45-5-511(2), MCA, applies only to "prosecutions under this part"—that is, Title 45, chapter 5, part 5, MCA. Thus, by its plain language, § 45-5-511(2), MCA, has no application to a bench trial conducted under § 41-3-801, MCA. The District Court correctly determined that § 45-5-511(2), MCA, did not apply to these proceedings.

¶10 Finally, Mother argues that the District Court erroneously admitted copies of text message conversations between Mother and Father into evidence. Mother first argues that

there was insufficient foundation, because Mother stated she could not remember the texts. Second, she maintains that the printouts of the texts were not originals under M. R. Evid. 1001, and the court could not admit a duplicate because she had raised a question as to the authenticity of the original messages. Mother is mistaken that her testimony was required to authenticate the text messages. Father, as one party to the conversation, had firsthand knowledge of their authenticity and provided sufficient testimony that the printouts of the text messages were what he claimed them to be. *See* M. R. Evid. 901(b)(1). Any questions regarding Father's credibility would go to the weight of the evidence, not to its admissibility. Further, Mother has failed to raise "a genuine question . . . as to the authenticity of the original." *See* M. R. Evid. 1003(1). Although Mother could not attest that the printouts were true and accurate copies of the text message conversations between her and Father, she admitted that she and Father had texted during the time period in question and did "not deny[] that these messages are true." Counsel's argument that Father had an opportunity to alter the messages is not evidence that Father did alter the messages and does not raise a genuine question as to their authenticity. Mother offered no evidence that raised a genuine question of the authenticity of the text message printouts. The District Court did not abuse its discretion in admitting them into evidence.

¶11 Given our disposition of Mother's appeal, we decline to consider Father's cross-appeal.

¶12 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 is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JIM RICE
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR