DA 18-0425

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 123N

IN THE MATTER OF:

K.L.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDN 16-028(a)
Honorable Gregory G. Pinski, 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

Joshua A. Racki, Cascade County Attorney, Valerie Winfield, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: May 8, 2019

Decided: May 28, 2019

Filed:

Clerk

Justice 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 R.L. (Father) appeals the Cascade County District Court's June 22, 2018 Order terminating his parental rights to his child K.L. (Child). We affirm.

¶3 On February 4, 2016, the Department of Child and Family Services (Department) filed a petition for temporary investigative authority (TIA) regarding the Child. At that time, Mother was homeless, Father was in Prerelease, and Child was seven years old and had lived most of his life with his grandmother. Child is an Indian Child. Father, through counsel, stipulated to TIA. In July 2016, Father advised CPS Bass he intended to relinquish his parental rights to Child. At the August 12, 2016 review hearing, the Department indicated it would be filing a petition to adjudicate Child as a Youth in Need of Care (YINC) and Father, through counsel, indicated he intended to stipulate to the forthcoming petition.

¶4 Initially, the Department considered Father a non-offending parent and believed he would be able to parent upon his discharge from prerelease. At the adjudication hearing on November 4, 2016, however, CPS Bass testified that upon Father's release from prerelease, she advised him there was no legal reason Child could not be placed with him.

Father declined to have Child placed in his care as he was struggling with sobriety and stability and his wife did not desire Child to be in their home. Child was adjudicated a YINC on November 4, 2016, and the Department was granted temporary legal custody (TLC) for a period of six months. Thereafter, Father did not engage with the Department until February 2017.

¶5 In February 2017, Father requested a visit with Child. Following the visit, Father again stopped communication with the Department and did not follow through on additional visits. In April 2017, Father again contacted the Department to reinitiate visitation. CPS Bass expressed concern regarding Father's prior inconsistency and lack of commitment. As Father admitted he continued to struggle with sobriety and stability, the Department developed a treatment plan for Father. On June 9, 2017, Father stipulated to extension of TLC and to his proposed treatment plan.

¶6 In September 2017, Father advised CPS Bass he intended to leave the state, but then contacted CPS Bass in October 2017 to advise he wanted to attend treatment. In response, CPS Bass set a meeting with Father, but he did not show up to the meeting as he was incarcerated in tribal jail in Browning, where he remained until April 2018.

¶7 On February 6, 2018, the Department filed a petition to terminate Father's parental rights for failure to complete his treatment plan and abandonment. Shortly before the termination hearing set for April 16, 2018, Father sought a continuance to provide him an opportunity to participate in the District Court's drug treatment court. The District Court continued the termination hearing to June 20, 2018, and Father was released to go to

Cascade County. Thereafter, Father did not participate in drug court as he was re-arrested and charged with felony assault and misdemeanor partner or family member assault.

¶8 Following the June 20, 2018 termination hearing, the District Court terminated Father's parental rights. Father appeals asserting only that the Department failed to provide active efforts to prevent the breakup of Child's family.

¶9 Where the Indian Child Welfare Act (ICWA) applies, termination criteria must be established by evidence beyond a reasonable doubt. Section 41-3-422(5)(b), MCA; 25 U.S.C. § 1912(d), (f). Father's parental rights were terminated pursuant to § 41-3-609(1)(f), MCA, for both failing to successfully complete his treatment plan and the conduct or condition rendering him unfit or unable to parent was unlikely to change within a reasonable period of time. Under ICWA, the department must establish active efforts were made to prevent the breakup of the family but were not successful and the Indian child would likely suffer serious emotional or physical damage if the parent were to maintain custody. 25 U.S.C. § 1912(d), (f); *In re M.S.*, 2014 MT 265A, ¶ 24, 376 Mont. 394, 336 P.3d 930. Although determination of whether the Department made active efforts is not a separate requirement for termination, it is a predicate for finding that the conduct or condition rendering a parent unfit, unwilling, or unable to parent is unlikely to change within a reasonable time—one of the factors required for termination of a parent's rights. *See* § 41-3-609(1)(f)(ii), MCA; § 41-3-422(5)(b), MCA; 25 U.S.C. § 1912(d), (f).

¶10 The District Court concluded the Department met its burden under ICWA. We agree. Review of the record supports the District Court's findings that the Department

engaged in active efforts to prevent the breakup of the family. The Department provided active efforts to Mother in hopes of avoiding the breakup of the family such as arranging in-patient treatment bed dates, although Mother did not avail herself of any of them; providing transportation to treatment, visits, and the courthouse; locating, facilitating, and licensing kinship foster care placement; and counseling for Child. The Department provided additional active efforts to Father including personal meetings, repeated referrals for treatment at Gateway Recovery Center, repeated attempts to contact Father by phone and to meet with Father in person, visits, offered visits, and an offer to place Child in his care.

¶11 "Although the State cannot simply wait for the parent to complete a treatment plan under the ICWA, a court may consider the parent's failure to participate when determining whether the State had made 'active efforts.' Additionally, a parent's incarceration may limit the remedial and rehabilitative services that the State can make available to the parent to prevent the breakup of the Indian family." *In re D.S.B.*, 2013 MT 112, ¶ 15, 370 Mont. 37, 300 P.3d 702 (internal citation omitted). Further, in determining whether the Department engaged in active efforts, a court may also consider "a parent's demonstrated apathy and indifference to participating in treatment." *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556 (citing *E.A. v. Div. of Family & Youth Servs.*, 46 P.3d 986, 991, (Alaska 2002)). Although initially the Department considered Father a non-offending parent, he was not available to parent due to his placement in prerelease. Upon his release from prerelease, Father declined to have Child placed with him. Father instead indicated

he intended to relinquish his parental rights to Child. When he did not relinquish and requested visitation, visits were immediately set up by the Department. After two visits, Father stopped communicating with the Department and his whereabouts were unknown. When Father reinitiated contact with the Department and admitted struggling with substance use, the Department immediately referred him for a chemical dependency evaluation and established a treatment plan for him. Father's failure to engage and maintain contact with the Department when not incarcerated together with his repeated incarceration significantly interfered with his ability to complete his treatment plan and limited the department's ability to provide services. Substantial evidence supports the District Court's findings and support that, "a rational trier of fact could have concluded that the [Department] had made 'active efforts' to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful." *In re D.S.B.*, ¶ 17.

¶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.

¶13 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JIM RICE