ORIGINAL

DA 18-0612

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 143N

IN THE MATTER OF:

A.A.G.G.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DN 17-014(A)
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Tracy Labin Rhodes, Attorney at Law, Missoula, Montana

For Appellee:

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

Travis R. Ahner, Flathead County Attorney, Kalispell, Montana

Submitted on Briefs: May 1, 2019

Decided: June 25, 2019

Filed:

Clerk

Justice Dirk M. Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, we decided this case by memorandum opinion which shall not be cited and does not serve as precedent. The title, cause number, and disposition of this case shall be included in our quarterly list of noncitable cases published in the Pacific and Montana Reporters.

¶2 S.A.G. (Father) appeals from the order of the Eleventh Judicial District Court, Flathead County, terminating his parental rights to his minor child A.A.G.G. We affirm.

¶3 Father and D.D.V.G. (Mother) are the natural birth parents of A.A.G.G., a minor born December 16, 2012.[1] Father last saw A.A.G.G. in 2013 when the child was eight months old. Father has had no relationship with A.A.G.G.—he does not know Father.

¶4 On January 21, 2016, Father pled guilty to Criminal Manufacture of Dangerous Drugs based on his admitted possession of 40 marijuana plants. Father subsequently received a five-year probationary sentence (deferred five-year commitment to the Montana Department of Corrections (DOC)).

¶5 On February 2, 2017, the Child and Family Services Division of the Montana Department of Public Health and Human Services (State) removed A.A.G.G. from Mother's custody based on actual or imminent risk of physical neglect resulting from Mother's illegal drug use and the child's exposure to domestic violence involving Mother and her boyfriend. Upon the State's subsequent petition and pursuant to §§ 41-3-427, -432,

[1] The District Court separately terminated Mother's parental rights based on treatment plan non-compliance or failure. Mother's parenting rights are not at issue on appeal in this matter.

-437, -438, and -443, MCA, the District Court adjudicated A.A.G.G. as a youth in need of care, granted the State temporary legal custody (TLC), and imposed preservation-oriented treatment plans on Mother and Father. Father stipulated to the adjudication, grant of TLC, and imposition of his treatment plan.

¶6 In early June 2017, while this matter was pending prior to adjudication, Father was arrested on alleged probation violations (methamphetamine use, new offenses, et al.) in his criminal case. Following service of process in jail on June 5, 2017, Father appeared at the subsequent show cause hearing in custody, with counsel, and stipulated to adjudication of A.A.G.G. as a youth in need of care. On June 27, 2017, the District Court[2] released Father on bail pending a revocation hearing conditioned upon his compliance with the State's proposed treatment plan in this matter[3] and abstaining from further use of methamphetamine or other illegal drug.

¶7 On July 14, 2017, while out on bail, Father signed the State's proposed treatment plan. Father's counsel also co-signed the plan. After Father failed to appear for his scheduled criminal revocation hearing, the District Court issued a warrant for his arrest. Following his apprehension, Father appeared in custody for his criminal case revocation hearing on August 24, 2017. At the close of hearing, the District Court adjudicated the probation violation allegations as true, revoked Father's previously imposed sentence, and

[2] The same judge presided over this matter and Father's parallel-pending criminal case.

[3] The chemical dependency requirements of the plan required Father to maintain sobriety, submit to random drug testing, obtain a chemical dependency evaluation, and complete any recommended chemical dependency treatment.

resentenced him to serve an unsuspended five-year term of commitment to DOC for placement in an appropriate correctional facility or program. The court recommended that DOC place him in the Connections Corrections program.[4] At a subsequent hearing in this matter on September 8, 2017, the District Court approved and imposed Father's previously stipulated treatment plan without objection or exception.

¶8 As recommended by the District Court, DOC placed Father in Connections Corrections, but he did not complete the program as contemplated. On October 29, 2017, Father absconded from custody at Connections Corrections. Upon his subsequent apprehension, DOC placed Father in a high security unit at the Montana State Prison (MSP) with only limited availability of an otherwise wide array of inmate services and programming. In 2018, following two extensions of the original six-month grant of TLC, the State petitioned for termination of both parents' parental rights pursuant to § 41-3-609(1)(f), MCA (treatment plan failure or non-compliance). Upon duly served prior notice, the petition came on for hearing on September 17, 2018.

¶9 Based on prior arrangement, Father appeared at the termination hearing through counsel and personally via telephone from MSP.[5] At the outset of hearing, without

[4] Connections Corrections is a secure "60-day residential chemical dependency treatment program" administered in Butte by DOC through a private provider which provides in-patient alcohol and drug treatment to DOC inmates as a prelude to parole or conditional release. *See* Cmty., Counseling & Corr. Servs., Inc., *Connections Corrections Program*, www.cccscorp.com/programs/ccp/pdfs/statistics.pdf [https://perma.cc/T6QC-9YEN]; Dep't of Corrs., *Probation and Parole Bureau Standard Operating Procedures* (Mar. 15, 2010), http://corrections.mt.gov/Portals/104/ProbationParole/P&PProcedures/150-1-1.pdf.

[5] It is unclear on the record who made the arrangements for Father to appear telephonically.

assertion of any justification for not sooner seeking relief, Father moved for a continuance for additional time to seek a transport order allowing him to personally appear and participate in the termination hearing. With reference to § 41-3-110, MCA (discretionary allowance of telephonic testimony), the District Court denied the untimely motion.

¶10 During the hearing, the State presented various witnesses and other evidence in support of its petition. Father testified telephonically in opposition and during the hearing did not request to confer privately with counsel. At the close of hearing, the District Court terminated Father's parental rights pursuant to § 41-3-609(1)(f), MCA.

¶11 The District Court made comprehensive oral and written findings of fact and conclusions of law under § 41-3-609(1)(f), MCA. As a preliminary matter, the court found Father's previously imposed treatment plan "appropriate" under the circumstances of this case. The court found that, but for his decision to abscond, Father had the opportunity to satisfy the plan's chemical dependency treatment requirement through completion of the Connections Corrections program. Though he was later able to obtain a chemical dependency evaluation at MSP, the resulting recommendation was for Level 3.5 treatment, a level of treatment available to DOC inmates only in prison. The court further noted that Father had since been granted parole but would still not be eligible for release until he completed chemical dependency treatment in prison. At the time of hearing, Father was number 77 on the MSP waiting list for treatment with no estimated time for entry, completion, and ensuing release on parole.

¶12 The District Court made no finding, and the record is devoid of any evidence, that Father successfully completed *any* of the major requirements of his treatment plan. The court specifically found, *inter alia*, that he had yet to obtain a required psychological evaluation or complete required domestic violence counseling. He was then on the waiting list for parenting classes at MSP and was still participating in cognitive behavioral programming at MSP. The court further found that he had not availed himself of available group sessions (narcotics anonymous) at MSP.

¶13 As to his prior lack of contact and interest in A.A.G.G., Father testified that he did not know where to find A.A.G.G. and further asserted that he "never really had [any] money" for a parenting plan and had been "locked up" for over a year. In the absence of a firm date for Father's release from prison, the assigned State social worker testified that it would be impossible for Father to make sufficient treatment plan progress for the State to even consider placing A.A.G.G. with him until at least a year after his release from prison.

¶14 The District Court found that Father's pre- and post-petition conduct clearly indicated "an unwillingness or an inability to exercise his [parental] rights in a responsible manner." In concluding that continuation of the parent-child relationship would likely result in continued abuse or neglect and that Father's condition of unfitness or inability to adequately parent was unlikely to change within a reasonable time, the court noted Father's prior lack of interest and involvement with A.A.G.G., "excessive use of dangerous drugs" when not incarcerated, inability to complete his treatment plan "within 12 months, and his current long-term incarceration. . . ."

¶15 In support of its finding that termination of Father's rights was in A.A.G.G.'s best interests, the District Court found that the child had been in protective out-of-home foster care for 19 of the last 22 months, thus triggering the presumption that termination is in the best interests of the child. *See* § 41-3-604(1), MCA. The court further noted that A.A.G.G. did not know his father and required a permanent, stable, and healthy home environment without being held "hostage while waiting for the good behavior of [his] parents." Based on various cited particulars, the court found that the State had made "reasonable reunification efforts" to avoid termination of the parents' respective rights. Father timely appeals.

¶16 The standard of review of lower court rulings on motions to continue is whether the court abused its discretion. *In re Adoption of A.W.S.*, 2016 MT 194, ¶ 14, 384 Mont. 278, 377 P.3d 1201. The standard of review for terminations of parental rights is whether the court terminated parental rights based on a clearly erroneous finding of material fact or erroneous conclusion or application of law, or otherwise exercised discretion arbitrarily, "without employment of conscientious judgment" or in excess of the bounds of reason, thereby "resulting in substantial injustice." *In re D.E.*, 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586 (citing *In re D.B.*, 2007 MT 246, ¶ 16, 339 Mont. 240, 168 P.3d 691). We review district court findings of fact only for clear error within the framework of the applicable burden of proof. Findings of fact are clearly erroneous only if not supported by substantial evidence, "the court misapprehended the effect of the evidence," or we have a definite and firm conviction that the lower court was nonetheless mistaken. *See In re D.E.*,

¶ 21 (citing *In re D.H.*, 2001 MT 200, ¶ 14, 306 Mont. 278, 33 P.3d 616). We review district court conclusions and applications of law de novo for correctness. *In re D.E.*, ¶ 21 (citing *In re M.W.*, 2004 MT 301, ¶ 16, 323 Mont. 433, 102 P.3d 6).

¶17 Father first asserts that § 41-3-110, MCA (discretionary allowance of telephonic testimony) is facially unconstitutional in violation of the due process and equal protection guarantees of the United States and Montana Constitutions. Father raises this issue for the first time on appeal. Absent plain error, we generally will not address issues raised for the first time on appeal. *In re Declaring A.N.W.*, 2006 MT 42, ¶ 41, 331 Mont. 208, 130 P.3d 619; *In re A.S.*, 2006 MT 281, ¶ 35, 334 Mont. 280, 146 P.3d 778. This fundamental rule applies equally to constitutional and non-constitutional questions. *See A.W.S.*, ¶ 21; *Pengra v. State*, 2000 MT 291, ¶¶ 12-13, 302 Mont. 276, 14 P.3d 499. As a narrow exception to the general rule, we may, in our discretion, review an issue raised for the first time on appeal if a constitutional or other substantial right is at issue, the error is plain (i.e., "obvious"), and we are "firmly convinced" that failure to review the issue will compromise the fundamental fairness or integrity of the proceeding, thereby resulting in a "manifest miscarriage of justice." *In re H.T.*, 2015 MT 41, ¶¶ 14, 21, 378 Mont. 206, 343 P.3d 159; *In re J.S.W.*, 2013 MT 34, ¶¶ 15-16, 369 Mont. 12, 303 P.3d 741.

¶18 Termination of parental rights implicates fundamental federal and state constitutional rights. However, statutes are presumed constitutional. *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 6, 392 Mont. 1, 420 P.3d 528. The presumption is overcome only upon a showing that the statute can have no constitutional application under any "set of

circumstances." *In re S.M.*, 2017 MT 244, ¶ 10, 389 Mont. 28, 403 P.3d 324. Here, Father has not demonstrated that § 41-3-110, MCA, has no constitutional application under any set of circumstances.

¶19 Moreover, the record reflects that Father had due notice of the termination hearing and was present and testified telephonically. Father has not demonstrated how his personal absence from the termination hearing materially prejudiced his fundamental due process rights to fair notice and opportunity to be heard or otherwise unlawfully subjected him to disparate treatment under constitutional equal protection standards. Beyond cursory assertion, Father has not shown that § 41-3-110, MCA, is plainly or obviously unconstitutional on its face or that its application has compromised the fundamental fairness or integrity of this proceeding or otherwise resulted in a manifest miscarriage of justice. We decline to exercise plain error review of Father's facial constitutional challenge of § 41-3-110, MCA.

¶20 Father next asserts that, even if § 41-3-110, MCA, is constitutional, the denial of his motion to continue the termination hearing nonetheless violated his federal and state constitutional rights to due process and equal protection by impairing his right and opportunity to confront and effectively cross-examine adverse witnesses, effectively manifest to the finder of fact his credible demeanor as a party-witness, and otherwise effectively assist in his defense. Father raises these issues for the first time on appeal.

¶21 While his fundamental constitutional right to parent A.A.G.G. was at issue, it is beyond genuine material dispute that Father had due notice of the termination hearing, due

notice of the issues and evidence that would be at issue in the hearing, the assistance of counsel at hearing, and ample opportunity to seek a transport order on motion in advance of the hearing. Father made no showing to the District Court of good cause for not sooner requesting a continuance or transport order prior to the start of the termination hearing. During the hearing, he did not request to consult privately with counsel. He made no showing or assertion that he did not have full and fair opportunity to consult with counsel in advance of hearing. He has made no showing on appeal that that his personal absence impaired or likely impaired his defense or was otherwise prejudicial in any material regard. Father has similarly failed to show that any of the District Court's comprehensive findings of fact were clearly erroneous or that the court arbitrarily denied the untimely request for continuance without conscientious judgment or rational basis. We decline to exercise plain error review of Father's assertion that the denial of a continuance violated his constitutional rights to due process and equal protection of the law.

¶22 Father last asserts that the District Court abused its discretion in terminating his parental rights pursuant to § 41-3-609(1)(f), MCA. Citing *In re A.T.*, 2003 MT 154, ¶ 24, 316 Mont. 255, 70 P.3d 1247 (termination based on unsuccessful treatment plan imposed with knowledge of long-term incarceration not "good faith effort by DPHHS" to preserve "family unit" and "parent-child relationship" thus precluding reasonable efforts finding), Father asserts that his treatment plan was inadequate because he was incarcerated throughout the pendency of this matter and therefore unable to successfully complete the plan. Father raises this issue for the first time on appeal.

¶23 Unlike here, the father in *A.T.* was not seeking plain error review. Here, Father not only stipulated to the imposition of his treatment plan but further did not object or challenge its adequacy at the termination hearing. *A.T.* is further distinguishable because, unlike here, the incarcerated father in *A.T.* substantially completed his treatment plan (i.e., five of six requirements). *A.T.*, ¶ 20. Most significantly, unlike in *A.T.*, neither the District Court, nor either party, contemplated that Father's incarceration would preclude him from completing his treatment plan. Unlike in *A.T.*, the record clearly manifests that the court and parties contemplated that Father would enter and successfully complete Connections Corrections as a prelude to parole or conditional release. But for Father's reasonably unforeseeable decision to abscond, substantial services and programming would have been available to Father in DOC custody to facilitate or aid in completion of his treatment plan requirements prior to parole or conditional release. His decision to abscond further unquestionably delayed and prolonged his release date, impairing his opportunity to timely avail himself of additional outstanding services upon release. In the clear absence of circumstances analogous to those in *A.T.*, we decline to exercise plain error review of the adequacy of Father's treatment plan.

¶24 We hold that Father waived his assertions of error and has failed to show sufficient cause for plain error or other exceptional review. We thus hold that the District Court correctly terminated Father's parental rights to A.A.G.G.

¶25 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 new constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶26 Affirmed.

Justice

We concur:

Chief Justice

Justices