

DA 19-0090

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 188N

IN THE MATTER OF:

B.N.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. BDN-18-109
Honorable Elizabeth Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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

For Appellee:

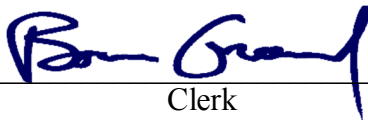
Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant
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Submitted on Briefs: July 24, 2019

Decided: August 6, 2019

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 J.N. (Father) appeals the Order of the Eighth Judicial District Court, Cascade County, dismissing the dependency and neglect matter involving his son, B.N., and granting full custody of B.N. to B.A.D. (Mother). We affirm in part and reverse in part.

¶3 In March of 2018, the Montana Department of Public Health and Human Services (Department) intervened on behalf of B.N. (born in 2010) and his halfsibling, B.D. (born in 2017) because of concerns that Mother and her boyfriend were using methamphetamine and exposing the children to domestic violence. The Department initiated an investigation and Mother and her boyfriend were arrested for violating conditions of their parole. The Department placed B.D. in foster care. B.N. was allowed to remain in Father's custody where, according to Mother, he had been living since January 2018. On April 6, 2018, the Department petitioned for emergency protective services (EPS) and for temporary legal custody (TLC) of B.D. and B.N.

¶4 On May 3, 2018, the District Court held a show cause hearing. The County Attorney described Father as the non-offending parent and informed the District Court that Father

had custody of B.N. Mother did not appear, but her counsel was present. Father appeared and did not state a position and did not move to dismiss the case. Father's counsel later explained that Father specifically asked counsel not to file a motion to dismiss because he wanted Mother to have access to services and receive the help she needed.

¶5 On June 7, 2018, the District Court held an adjudicatory hearing, at which it received evidence of Mother's recent Evaluation. Child Protection Specialists (CPSs) reported to the District Court that Mother was actively participating in all recommended treatment and maintaining good contact with the Department. The District Court also received testimony that B.N. continued to reside with Father. Hearing no objection, the District Court adjudicated both B.D. and B.N. as youths in need of care (YINC) and continued TLC. The District Court then set a dispositional hearing. In the interim, the Department prepared a treatment plan for Mother.

¶6 On June 28, 2018, the District Court held a dispositional hearing during which Mother stipulated to the proposed treatment plan and agreed that the District Court should grant TLC to the Department. Father was not present, but his counsel did not oppose the TLC request. The District Court approved Mother's treatment plan, granted TLC for a period of six months, and set a status hearing and a review hearing.

¶7 On July 24, 2018, following allegations of domestic violence and drug use in Father's home, CPS Deb Dreenan met with Father to obtain a hair sample from him and B.N. to test for exposure to dangerous drugs. In her affidavit, CPS Dreenan stated that Father did not initially comply. CPS Dreenan then called Father's parole officer, who

convinced him to cooperate. Father was on probation for several offenses, and B.N. was removed from Father's care and placed with Mother that same day. The hair follicle test results for B.N. were negative, but Father tested positive for methamphetamine. Both children remained with Mother for a trial home visit. The children's guardian ad litem reported to the District Court that Mother was in Drug Treatment Court, that Mother had "taken all the steps she needed to in order to get her children back [and was] following her Treatment Plan and living in a supportive and controlled environment," and Mother exhibited a "very positive attitude." During this time, Father continued to visit B.N.

¶8 On September 27, 2018, the District Court held a status hearing. Father did not appear, and his counsel stated that he had not heard from Father in some time. The Department informed the District Court that B.N. and B.D.'s reunification with their Mother was going well. The Department reported Mother was successfully participating in drug treatment, had obtained employment, and felt she was doing very well. The Department stated that it had given Father a treatment plan to review, and later the Department filed a motion to approve Father's treatment plan, but no proposed plan was attached to the motion. The Department's Motion in Support of Treatment Plan for Father stated that Father should be required to complete chemical dependency and mental health evaluations, an anger management assessment, and participate in the daily parenting of B.N. The Department began screening Father for substance use via his pre-release program, and all test results were negative. Father also received a mental health evaluation and started seeing a counselor at his own expense.

¶9 Over the next three months, Mother continued to successfully address the goals and tasks of her treatment plan, and B.D. and B.N. remained in her care. On January 10, 2019, the District Court held a review hearing, at which CPS Dreenan, Mother, and Mother’s counsel were present. Father was not present but was represented by counsel. Mother moved for dismissal of the case with full custody pursuant to § 41-3-424, MCA. The Department did not object. Father, through counsel, objected. Father’s counsel stated he had no notice of Mother’s plan to move for dismissal or for full custody and asked for additional time to determine Father’s position. The District Court indicated it would grant Mother’s Motion to Dismiss. CPS Dreenan testified and commended Mother on her progress and cooperation. CPS Dreenan also stated that Father had recently been arrested.

The District Court explained that:

From where I’m sitting on this particular case as to these particular kids, if I have a parent who is providing a safe and stable environment for these children, I don’t see based upon the reports and based upon the file before me, that I have a basis for continuing this in order to resolve what may end up being a custody dispute that’s a civil matter

. . . .

I’m not terminating [Father’s] rights, obviously.

. . . .

I am not deciding a civil case here.

¶10 On January 11, 2019, the District Court issued an Order granting Mother’s oral Motion to Dismiss with Full Custody pursuant to §§ 41-3-438(3)(d), -445(7),

(8)(b), MCA.¹ The District Court also ordered that the Department was “no longer obligated to provide services or work toward reunification between [Father] and [B.N.]” Father timely appealed the District Court’s Order.

¶11 A district court’s grant or denial of a motion to dismiss presents a conclusion of law, which this Court reviews de novo for correctness. *In re K.A.*, 2016 MT 27, ¶ 20, 382 Mont. 165, 365 P.3d 478 (citations omitted). This Court’s review of constitutional claims is plenary. *In re L.V.-B.*, 2014 MT 13, ¶ 12, 373 Mont. 344, 317 P.3d 191.

¶12 A district court shall dismiss an abuse and neglect petition on the motion of a party, or on its own motion, when all the following are met:

(1) a child who has been placed in foster care is reunited with the child’s parents and returned home;

(2) the child remains in the home for a minimum of [six] months with no additional confirmed reports of child abuse or neglect; and

(3) the department determines and informs the [district] court that the issues that lead to department intervention have been resolved and that no reason exists for further department intervention or monitoring.

Section 41-3-424, MCA.

¶13 Section 41-3-424, MCA, “applies to situations in which an abuse and neglect petition filed against an offending parent (a parent who has had a child removed from the home because of his or her conduct or condition) is dismissed because the offending parent satisfies the three conditions.” *In re L.V.-B.*, ¶ 19. Dismissal of an abuse and neglect case

¹ The District Court incorrectly stated Mother had moved for dismissal pursuant to § 41-3-438(3)(d), MCA, rather than § 41-3-424, MCA.

“represents the case’s final resolution and allows the parents, the Department, and the child to move on.” *In re K.B.*, 2019 MT 73, ¶ 17, 395 Mont. 213, 437 P.3d 1042.

¶14 Section 41-3-438(3)(d), MCA, provides:

If a child is found to be a youth in need of care under [§ 41-3-437, MCA,] the court may enter its judgment, making any of the following dispositions to protect the welfare of the child: . . . [including] order the placement of the child with the noncustodial parent, superseding any existing custodial order

Section 41-3-445(7), (8)(b), MCA, further provides that a district court may hold a permanency hearing and enter any order it determines to be in the best interests of the child and may permanently place a child with the noncustodial parent, superseding any existing custodial order.

¶15 A parent’s right to the care and custody of a child is a fundamental liberty interest under the Montana and United States Constitutions and must be protected by fundamentally fair procedures. *In re A.K.*, 2015 MT 116, ¶ 20, 379 Mont. 41, 347 P.3d 711 (citations omitted); *In re A.J.C.*, 2018 MT 234, ¶ 31, 393 Mont. 9, 427 P.3d 59. 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). However, “the process that is due in any given case varies according to the factual circumstances of the case and the nature of the interests involved.” *In re D.B.J.*, 2012 MT 220, ¶ 27, 366 Mont. 320, 286 P.3d 1201 (quoting *Sage v. Gamble*, 279 Mont. 459, 465, 929 P.2d 822, 825 (1996)). Pre-termination hearings “entitle the parent to less process than the actual termination proceedings.” *In re A.N.W.*, 2006 MT 42,

¶ 35, 331 Mont. 208, 130 P.3d 619. To support a due process claim, a parent must establish how the outcome would have been different had the alleged due process violation not occurred. *See In re A.N.W.*, ¶¶ 38, 47.

¶16 Father argues that his due process rights were violated when the District Court dismissed the dependency and neglect matter and granted full custody of B.N. to Mother at the hearing without sufficient notice to Father. Father argues he was further denied notice of the particular statute to respond to when Mother moved for dismissal of the matter and full custody pursuant to § 41-3-424, MCA, and the District Court orally and in its written Order granted Mother's Motion to Dismiss and full custody pursuant to §§ 41-3-438(3)(d), -445(7), (8)(b), MCA. The State responds that the District Court correctly dismissed the matter against Mother but takes no position as to the custody issue.

¶17 Father's due process rights were not violated. As the State correctly points out that, § 41-3-424, MCA, allows the District Court to dismiss an abuse and neglect petition, *sua sponte*, without notice. Further, Father was deemed the non-offending parent, and his right to parent B.N. was not the subject of the matter or proceedings. *See In re A.N.W.*, ¶ 35. Father also failed to attend either the September status hearing or the June review hearing. Father cannot show an outcome other than dismissal of the matter would have occurred had he received notice of Mother's intention to move for dismissal. *See In re A.N.W.*, ¶¶ 38, 47. We are satisfied Father's due process rights were not violated when the District Court dismissed the dependency and neglect matter against Mother, pursuant to § 41-3-424, MCA.

¶18 Additionally, Father does not challenge on appeal whether the three prongs of § 41-3-424, MCA, were met. Regardless, it is undisputed B.N. and B.D. were returned to Mother's care, that Mother successfully addressed the issues that led to the initial intervention by the Department and no additional reports of abuse or neglect by Mother were reported, and B.N. was returned to Mother's care on July 24, 2018.² We conclude that the District Court correctly dismissed the dependency and neglect matter against Mother, despite its reference to the incorrect statute. *See In re K.A.*, ¶ 20.

¶19 Despite the proper dismissal of the matter, the District Court erred when it granted full custody of B.N. to Mother. Section 41-3-424, MCA, grants a district court the authority to dismiss a dependency and neglect matter; however, following a dismissal, the custody arrangement returns to the original pre-Department intervention status. *See* § 41-3-424, MCA. Section 41-3-424, MCA, does not grant a district court the authority to issue an order of full custody to one parent. *See In re L.V.-B.*, ¶ 19. The authority to issue an order of full custody within a dependency and neglect matter is granted via §§ 41-3-438(3)(d), -445(7), (8)(b), MCA, but it only extends to order custody with a noncustodial (and typically non-offending) parent. *See In re K.B.*, 2016 MT 73, ¶¶ 21-22, 383 Mont. 85, 368 P.3d 722; *see also In re M.J.*, 2013 MT 60, ¶¶ 22-25, 369 Mont. 247,

² Presumably, the six-month benchmark of § 41-3-424(2), MCA, would have been reached on January 24, 2019—two weeks after the review hearing. However, no one raised this two-week shortcoming when the District Court granted Mother's oral motion. *See Timis v. Young*, 2001 MT 63, ¶¶ 8, 10-11, 305 Mont. 18, 22 P.3d 1122 (declining to address the merits of an argument not raised or ruled upon below and concluding the party waived its right to raise the argument on appeal).

296 P.3d 1197; *In re S.S.*, 2012 MT 78, ¶¶ 16-17, 364 Mont. 437, 276 P.3d 883. The record in this case is unclear as to who was deemed the custodial parent, but it appears Mother and the Department considered Mother to be the custodial parent by moving to dismiss pursuant to § 41-3-424, MCA. Accordingly, the District Court erred when it relied upon §§ 41-3-438(3)(d), -445(7), (8)(b), MCA, to grant Mother full custody of B.N. We therefore vacate the District Court's order to the extent that it granted full custody of B.N. to Mother.

¶20 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. We affirm the District Court's dismissal of the abuse and neglect petition pursuant to § 41-3-424, MCA. We reverse the District Court's Order to the extent that it granted Mother full custody pursuant to §§ 41-3-438(3)(d), -445(7), (8)(b), MCA.

/S/ JAMES JEREMIAH SHEA

We concur:

/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JIM RICE