DA 19-0105

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 15

IN THE MATTER OF:

C.M.G.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Twelfth Judicial District,
In and For the County of Hill, Cause No. DN 16-041
Honorable Daniel A. Boucher, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Michael P. Sinks, Attorney at Law, Bozeman, Montana

For Appellee:

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

Karen Alley, Hill County Attorney, Havre, Montana

Submitted on Briefs: November 20, 2019

Decided: January 28, 2020

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 G.G. (Father) appeals from the termination of his parental rights to his son, C.M.G., by the Twelfth Judicial District Court, Hill County.[1] We affirm, and restate the issues as follows:

1. *Did Father waive his right to argue that the Department failed to make reasonable efforts to reunite him with C.M.G.?*

2. *Did the District Court err by finding the Department made reasonable efforts to reunite Father and C.M.G.?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In September of 2016, C.M.G. and his siblings, A.G. and C.J.G., were removed from Father's home after the Department of Health and Human Services (Department) received a report that Father had physically assaulted A.G. by grabbing her, pushing her against a wall, and throwing her to the ground. Father was arrested for partner or family member assault, during which police found a methamphetamine pipe in his pocket.

¶3 The following day, a Department child services worker interviewed the children. A.G., age 16, explained this was not the first time Father had physically assaulted her and related that lately he had been "flying off the handle." A.G. stated Father frequently hit her brothers on their legs as a form of discipline, resulting in bruising, and had once grabbed C.M.G. by the arm and drug him around like a toy. C.M.G., age 12, stated that, the day

[1] In a related proceeding, Father previously appealed the termination of his parental rights to C.M.G.'s sibling, C.J.G. This Court affirmed. *In re C.J.G.*, 2019 MT 65N, 395 Mont. 524, 436 P.3d 723.

before, Father had thrown his sister up against a door, squeezed her shoulders and wrists, and yelled profanities at her. He said when his dad got angry, he would run and hide. C.M.G. acknowledged Father had injured him on two occasions, once when his dad intended to hit a counter but "caught [C.M.G.] on the arm," and once when Father had something sharp in his hand and tried to punch C.M.G., resulting in an injury to C.M.G.'s finger. C.J.G., age 7, also said that when Father yelled, he got scared and would hide until Father calmed down.

¶4 The children also reported behaviors consistent with drug use by Father. A.G. had seen Father's friends using drugs in the garage and had seen him smoking from a "little vase" made of glass. Father denied this as drug use, contending he had a glass blowing hobby. C.M.G. had recently found a pipe in Father's truck that was "not a weed pipe," and had seen syringes in the trash along with a rubber strap in Father's drawer he believed was for going around a person's arm. Father ultimately admitted to using methamphetamines but stated he did not use in the children's presence and that his last use was two months prior.

¶5 The Department filed a petition for emergency protective services, adjudication of youth in need of care, and temporary legal custody. Following a show cause hearing in October of 2016, the District Court concluded the State had established probable cause to believe C.M.G. was abused or neglected. Later, the District Court determined C.M.G. was a Youth in Need of Care and granted the State temporary legal custody. The District Court

extended temporary legal custody two times before the State petitioned for termination of Father's rights to C.M.G. and C.J.G. in February of 2018.[2]

¶6 At the termination hearing on May 3, 2018, the Department offered testimony that Father had not completed several tasks on his treatment plan, including that he had not attended anger management or parenting classes, completed drug treatment, participated in urinalysis drug testing on 55 occasions, and refused two hair follicle tests. The Department acknowledged Father had participated in a drug evaluation, almost one year after it had been ordered by the District Court, but that he had been discharged from treatment due to noncompliance. Father presented evidence that, in the weeks leading up to the termination hearing, he had begun treatment again and had twice tested negative for drugs. He also presented evidence he had completed a mental health evaluation, although it had not been provided to the Department. The District Court addressed Father at the conclusion of the hearing, stating, "[i]t seems to me that you have a way of blaming everybody else for your problems. . . . You are blaming me, the Department, [the caseworker] in particular for your problems. You need to accept your goal in this." At the conclusion of the hearing, the District Court terminated Father's parental rights to C.J.G., but not to C.M.G., and instead extended temporary legal custody of C.M.G. to the State for another six months. It further ordered Father to comply with the Department's treatment plan.

[2] A.G. reached the age of majority while in the State's custody, and was therefore not subject to the termination proceedings.

¶7 Almost five months later, the Department filed a second petition to terminate Father's parental rights to C.M.G., and the District Court held a second termination hearing on November 1, 2018. The Department offered testimony that Father had made no further progress on completing his treatment plan: he had continued to refuse drug tests, been discharged again from drug treatment due to noncompliance, and continued to be combative with the Department. When questioned about what reasonable efforts the Department had provided to Father, the case supervisor stated referrals for all of the services Father needed to complete his treatment plan had been provided, and follow-up with Father had been conducted, including advising him that reunification with his child required his efforts on the treatment plan.

¶8 During his two years in the State's care, C.M.G. was relocated to twelve different placements by the Department. C.M.G. testified he had suffered abuse during several of these placements. Later in the proceeding, C.M.G. was placed at Shodair Children's Hospital and multiple group homes to obtain treatment addressing his mental health issues, including ongoing suicidal ideations, auditory hallucinations, attention deficit disorder, depression, and anxiety. On two occasions prior to these placements, C.M.G. was placed with Father's Mother (Grandmother). However, the Department removed C.M.G. from Grandmother's home because Father had free access to C.M.G. there, based on reports that Father might be living in the residence and was seen taking the children to school on multiple occasions. Grandmother testified she had undergone multiple surgeries, and had allowed Father to take care of the children. The Department contended Father's access

posed safety concerns for the children because, as the case supervisor testified, "all the issues that led to the removal continued to be a heightened concern when the children were placed with [Grandmother]. . . . [Father] was to the best of our knowledge using methamphetamine. He did not go to anger management or parenting classes. . . . And to be honest, there were active safety concerns because [F]ather was in the home with no Department oversights."

¶9 On conclusion of the second termination hearing, the District Court terminated Father's rights to C.M.G., reasoning:

> I will find that [Father], that his child has been adjudicated a youth in need of care. And that the appropriate treatment plan was approved by this Court and not complied with by [Father] or not successful any way. Furthermore, by his own testimony, I will find by his own statements that the conduct on [sic] the condition has not changed. It is apparent to me that [Father] does not want to change. . . . I will find that the Department was acting appropriately when they determined that the child has been in the system for the last 15 months. And further, permanency for this child is something I must take into consideration because it is very important that we move on with this child. He has been in the system for two years. So I will find that I will terminate the parental rights of [Father].

The Court informed Grandmother she was free to work with the Department to obtain custody or guardianship of C.M.G., and explained the situation was "brought about because of your son's behavior," which led Father to interject, asking "What did I do wrong? . . . What did I do wrong to get my children removed in the first place?" The District Court then concluded the proceeding, and issued findings of fact, conclusions of law, and an order terminating the parental rights of Father to C.M.G.

STANDARD OF REVIEW

¶10 This Court reviews a district court's factual findings in parental termination orders for clear error and its conclusions of law for correctness. *In re C.M.*, 2019 MT 227, ¶ 13, 397 Mont. 275, 449 P.3d 806 (citing *In re M.J.*, 2013 MT 60, ¶ 16, 369 Mont. 247, 296 P.3d 1197). We review the district court's ultimate decision in a parental termination action for abuse of discretion. *In re M.J.*, ¶ 16.

DISCUSSION

¶11 Citing *In re R.J.F.*, 2019 MT 113, 395 Mont. 454, 443 P.3d 387, Father argues the Department did not make reasonable efforts to reunite him with C.M.G. because the children were removed from the placement with Grandmother "simply because it provided Father with 'ready access' to his children." The State responds, first, that Father waived the issue, but also, that the Department made reasonable efforts to reunite father with C.M.G., and Father refused to complete his treatment plan. We address the parties' arguments in turn.

¶12 *1. Did Father waive his right to argue that the Department failed to make reasonable efforts to reunite him with C.M.G.?*

¶13 Noting that the Department is required to engage in reasonable efforts to unify under several statutes governing a proceeding, the State argues Father waived his right to appeal the Department's reasonable efforts because (1) he did not challenge the Department's reasonable efforts *prior to* the termination hearing, and (2) he "offers no connection between C.M.G.'s placement (i.e., [the Department's] alleged lack of reasonable efforts)

and the court's evaluation of the TPR criteria" under § 41-3-609(1)(f)(ii), MCA, as is required under this Court's precedent in *C.M.* and *R.J.F.*[3]

¶14 Regarding the State's first waiver argument, we know of nothing in statute or common law that would require a parent to object to the sufficiency of the Department's reasonable efforts for purposes of termination prior to the termination hearing, in order to preserve the issue for appeal. The State is correct that a district court is required to find that the State is making reasonable efforts at various times in a child abuse and neglect proceeding. *See, e.g.*, § 41-3-432(5)(c), MCA (show cause); § 41-3-437(7)(a)(iii), MCA (adjudication); § 41-3-442(1)(b), MCA (temporary legal custody); § 41-3-445(6)(c), MCA (permanency plan). Further, the language of § 41-3-423(1), MCA, plainly contemplates that the department will make reasonable efforts to reunify families throughout the proceeding ("the department shall make reasonable efforts to prevent the necessity of a removal of a child from the child's home *and to reunify families that have been separated by the state*." (emphasis added)). Consistent therewith, this Court has held, "[t]o meet its requirements to provide reasonable efforts, the Department must in good faith *develop and implement* . . . treatment plans designed 'to preserve the parent-child relationship and the family unit,'" and that "the Department must, in good faith, assist a parent in completing

[3] Father argues that whether the Department made reasonable efforts is an issue that can be appealed independently from a termination of parental rights. However, whether the Department made reasonable efforts is not, itself, a required finding for termination under § 41-3-609(1)(f), MCA. Though not appealable on its own, the issue may be addressed as part of an appeal from the requisite statutory findings. *See In re C.M.*, ¶ 22; *In re R.J.F.*, ¶ 26; *In re D.B.*, 2007 MT 246, ¶ 25, 339 Mont. 240, 168 P.3d 691.

his or her . . . treatment plan." *In re R.J.F.*, ¶ 28 (quoting *In re D.B.*, ¶ 33) (emphasis added). However, the statutes governing reasonable efforts at earlier stages do not explicitly contemplate the Department's efforts to aid parents in completing his or her treatment plans, but are primarily directed toward other purposes.[4] Child abuse and neglect proceedings can continue for long periods, as here, and much time can pass between the earlier findings and the termination proceeding, during which a parent is expected to be working on his or her treatment plan. Therefore, upon the State's determination to seek termination, a parent must be able to challenge, at the time of the termination proceeding, the Department's reasonable efforts in helping the parent to achieve reunification. This is consistent with our holdings in *C.M.* and *R.J.F.*, wherein we concluded that a parent may challenge the State's contention that the conduct or condition rendering the parent unfit is unlikely to change within a reasonable time, by arguing that the department failed to make reasonable efforts. *In re C.M.*, ¶ 22; *In re R.J.F.*, ¶ 26. Finally, that a parent may challenge the Department's aid during the termination proceeding should come as no surprise to the State, especially given the interrelation of the issue to the findings that must be established for termination.

[4] Because these statutes do not explicitly govern the reasonable efforts inquiry at a termination proceeding, there is no concern the district court may have to re-examine its earlier findings made under a different burden of proof, as the State contends. Sections 41-3-432(5)(c) and 41-3-437(7)(a)(iii), MCA, require a district court in show cause and adjudication hearings to issue findings regarding "whether the department has made reasonable efforts to avoid protective placement of the child or to make it possible to safely return the child to the child's home." Section 41-3-445(6)(c), MCA, requires a district court to issue findings on whether the department "has made reasonable efforts to effectuate the permanency plan for the individual child."

¶15 Regarding the State's second waiver contention, which raises a lack of evidence presented by Father in this case as a routine failure to preserve the issue, it does appear from the record that Father's challenge to the Department's reasonable efforts at trial was not developed. Likewise, an argument on this issue is not emphasized in Father's appellate briefing. Rather, the thrust of Father's argument is that C.M.G.'s removal from Grandmother made his relationship with the Department "incredibly hostile," and that alternative placements hindered his visitation with C.M.G. In any case, there is ample evidence in the record to establish that the Department made reasonable efforts to reunite Father with C.M.G.

¶16 *2. Did the District Court err by finding the Department made reasonable efforts to reunite Father and C.M.G.?*

¶17 Although Father correctly argues that a child's placement is a factor to consider when determining whether the Department has made reasonable efforts under *R.J.F.*, "[w]hat constitutes reasonable efforts is not static or determined in a vacuum, but rather is dependent on the factual circumstances of each case—the totality of the circumstances—*including a parent's apathy and/or disregard for the Department's attempts to engage and assist the parent*." *In re R.L.*, 2019 MT 267, ¶ 22, 397 Mont. 507, 452 P.3d 890 (emphasis added). Thus, the analysis of reasonable efforts is "highly fact dependent." *In re R.J.F.*, ¶ 27. "[A] parent has an obligation to avail herself of services arranged or referred by the Department and engage with the Department to successfully complete her treatment plan." *In re C.M.*, ¶ 19 (quoting *In re R.J.F.*, ¶ 38) (citing *In re C.B.*, 2014 MT 4, ¶¶ 19, 23, 373

Mont. 204, 316 P.3d 177; *In re D.F.*, 2007 MT 147, ¶ 29, 337 Mont. 461, 161 P.3d 825; *In re T.R.*, 2004 MT 388, ¶ 26, 325 Mont. 125, 104 P.3d 439; *In re L.S.*, 2003 MT 12, ¶ 11, 314 Mont. 42, 63 P.3d 497). "The department must make reasonable efforts to reunite parents with their children, not herculean efforts." *In re R.L.*, ¶ 20 (citing *In re R.J.F.*, ¶ 38; *In re A.G.*, 2016 MT 203, ¶ 17, 384 Mont. 361, 378 P.3d 1177).

¶18 In *R.J.F.*, the Department removed an infant from her mother's care and placed the child nearly 300 miles from the mother's residence, without investigating any kinship placements closer to the mother. *In re R.J.F.*, ¶¶ 3-10. Mother sold her home and moved closer to the child on the Department's recommendation, but the Department failed to arrange accessible treatment for Mother, despite Mother's cooperation. *In re R.J.F.*, ¶¶ 11-16. Under these circumstances, this Court held the district court erred in terminating Mother's rights. *In re R.J.F.*, ¶ 37. Here, C.M.G.'s removal from Grandmother is distinguishable from the placement in *R.J.F.* First, the record reveals that the root of the Department's concern with Father's access to the children under Grandmother's care was that Father had failed to complete any of his treatment plan tasks, and was using drugs. These tasks were linked to the children's original removal from Father's care, including anger management and parenting classes to address reports Father had physically abused the children, and drug tests and treatment to address the concern that the children were being exposed to methamphetamines. Therefore, unlike in *R.J.F.*, there was solid justification for removal of C.M.G. from Grandmother. Secondly, C.M.G.'s later placements addressed his specific needs relating to his diagnosed mental health problems.

As we held in *C.M.*, a child's special needs are an important factor to consider when determining whether the child's placement deviates from the reasonable efforts standard. *In re C.M.*, ¶ 18.

¶19 Finally, examining the totality of the circumstances here, unlike the mother in *R.J.F.*, Father made almost no progress on his treatment plan, consistently refused to work with the Department, and remained adamant that he should have his children returned because he did nothing wrong. The Department made referrals for Father to complete the tasks on his treatment plan, including for drug evaluation, treatment, and testing, mental health evaluations, and parenting classes. Father did not attend anger management; did not take parenting classes; was discharged from drug treatment two times for noncompliance; and he failed to appear for 77 requested drug tests. Even after the District Court gave him a second chance to prove that he could complete the treatment plan and reunite with C.M.G., he refused to acknowledge that he had done anything wrong and continued to make no progress on his treatment plan.

¶20 The District Court did not err in concluding that Father failed to complete a court-approved treatment plan, his conduct or condition rendering him unfit to parent C.M.G. was unlikely to change within a reasonable time, and that his rights to C.M.G. should be terminated.

¶21 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON