DA 19-0263

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 12N

IN THE MATTER OF:

W.W.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Butte-Silver Bow, Cause No. DN 16-08-BN
Honorable Ed McLean, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Abigail Rogers, Abigail Rogers Law, PLLC, Missoula, Montana

For Appellee:

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

Eileen Joyce, Butte-Silver Bow County Attorney, Butte, Montana

Submitted on Briefs: December 18, 2019

Decided: January 21, 2020

Filed:

Clerk

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 Father J.W. (Father) appeals the Second Judicial District Court's order terminating his parental rights to his daughter W.W. Finding no abuse of discretion, we affirm.

¶3 W.W. was born in May 2013 to Father and her birth mother K.K. (Mother). Mother's parental rights were previously terminated and are not the subject of this appeal. Throughout 2014 and 2015, the Department of Public Health and Human Services (DPHHS) received multiple reports of neglect of W.W. Most, if not all, of these reports were closed as unsubstantiated. On December 16, 2015, Child Protection Specialist (CPS) Doyle received a report of possible domestic violence between Father and Mother. Doyle scheduled a meeting with Father for December 21, 2015, but Father did not show up. Father did meet with Doyle two days later. Doyle instructed Father to take W.W. to see a doctor because she was not up-to-date on her immunizations. Doyle scheduled a follow-up meeting for December 30. Father did not follow up with medical providers and was a "no show no call" at the December 30 meeting.

¶4 On January 23, 2016, DPHHS received a report concerning neglect of W.W.—specifically, that drugs were being used in the presence of W.W. and that W.W. had a

severe diaper rash and was malnourished. On February 1, 2016, CPS Mehring contacted law enforcement to request assistance during his visit to the home of Father and Mother. Dispatch informed Mehring that police officers already were at the residence responding to a domestic disturbance. Dispatch further informed Mehring that W.W. was sick and required medical attention. Two police officers took Father and W.W. to the hospital. Mehring and CPS Burk met them there.

¶5 When Mehring and Burk arrived, Father was trying to leave with W.W. against the advice of hospital staff and law enforcement. According to Mehring's report, Father's behavior visibly upset W.W. Law enforcement intervened, separating Father from his daughter to allow hospital staff to examine W.W. The examination determined that she was dehydrated, running a high fever, and suffering from strep throat and a double ear infection.

¶6 DPHHS removed W.W. from the home on February 1, 2016. On February 9, DPHHS filed—and the District Court granted—a petition for emergency protective services and placed W.W. into foster care.

¶7 At a contested hearing in March 2016, the District Court adjudicated W.W. a youth in need of care pursuant to § 41-3-102, MCA, and granted DPHHS temporary legal custody for a period of six months. Father was present with his court-appointed attorney. Mother was not present, but her court-appointed attorney was. The court directed DPHHS to work with Father to develop an appropriate treatment plan aimed at reunification with W.W. The treatment plan, which the court ordered the following month, required Father to

complete a psychological evaluation; attend parenting classes; submit to random urine analysis; attend scheduled supervised visits with W.W.; maintain regular communication with DPHHS; and secure safe and stable housing for W.W.

¶8 Over the following year, the court approved a second treatment plan for Father and twice extended DPHHS's temporary legal custody of W.W., finding that "[a]dditional time is necessary for the birth father to complete his treatment plan that was court-ordered[,]" and that doing so "is in [W.W.'s] best interests." During this time, Father attended parenting classes, anger management classes, and individual therapy; secured housing; and maintained consistent contact with DPHHS when he had a working phone. He attended supervised visits with W.W., for a time graduating to in-home supervised visits, but resumed visits at DPHHS when his CPS worker concluded that in-home visits made W.W. exhibit regressive behaviors.

¶9 On August 31, 2017, DPHHS petitioned the District Court to terminate Father's parental rights to W.W. The supporting affidavit by CPS Olson detailed Father's progress with his treatment plan. Olson concluded that Father was "in compliance" with the chemical dependency component of his treatment plan; in "superficial compliance" with the mental health component; in either "superficial compliance" or "non-compliance" with the parenting and visitation components; and in "non-compliance" with the contact with Department and safe and stable housing components. Olson noted that Father was dismissed from Parent Child Interaction Therapy (PCIT) because he was "unable to gain the skills required to move on to the second stage. [Father] was on week 17 and was still

in stage one. Stage one is usually conquered between weeks 6-8." Olson further observed that Father was "unable to understand that [W.W.'s] behaviors and issues are related to him and his behaviors" or "to put [W.W.'s] needs and development in front of his feelings, needs, and thoughts." She recommended termination of Father's parental rights.

¶10 After numerous motions by both parties and several rescheduling orders, the court held a hearing on November 26, 2018. At the conclusion of the hearing, following testimony from Father and numerous witnesses, the District Court terminated Father's parental rights. The District Court entered its Findings of Fact and Conclusions of Law on April 5, 2019. Relevant here, the District Court found that: (1) Father "has not demonstrated sufficient compliance in his treatment plan that would establish a thorough understanding regarding the needs of his daughter and the ability to understand and address" her behaviors and issues; (2) the "conduct or condition of [Father] is unlikely to change within a reasonable time"; and (3) the "Department provided reasonable efforts to reunify the family[.]" Father appeals, challenging several of the court's findings of fact and arguing that the District Court abused its discretion when it terminated his rights.

¶11 This Court reviews a district court's decision to terminate parental rights for abuse of discretion. *In re K.A.*, 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478. We review a court's findings of fact for clear error. *In re C.M.*, 2019 MT 227, ¶ 13, 397 Mont. 275, 449 P.3d 806; *In re K.A.*, ¶ 19. Clear error exists if the finding is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if our review

convinces us that a mistake has been made. *In re X.B.*, 2018 MT 153, ¶ 20, 392 Mont. 15, 420 P.3d 538.

¶12 Under § 41-3-609(1)(f), MCA, a court may order termination of parental rights upon a finding by clear and convincing evidence that:

> the child is an adjudicated youth in need of care and both of the following exist: (i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and (ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

Absent certain enumerated exceptions not at issue in this appeal, DPHHS must make reasonable efforts to avoid removing a child from the child's family or, if removal is necessary, make "reasonable efforts" to reunify them. Section 41-3-423(1), MCA.

¶13 The parties do not dispute that W.W. was appropriately adjudicated a youth in need of care. Father argues, though, that the District Court erred when it found that he failed to sufficiently comply with his treatment plan. He asserts first that the court never specifically found that his two court-ordered treatment plans were appropriate. With respect to the first treatment plan, however, the court reviewed and approved it on April 20, 2016, stating at the hearing, "I've had a chance to review [the treatment plan]" and "I do think the treatment plan is directly related to the reasons why we intervened in the case, why we adjudicated the child. I'm going to approve that treatment plan[.]" The second treatment plan was signed by Father and Olson on May 5, 2017, and approved and ordered by the District Court on May 9. Father did not object to either treatment plan as inappropriate, either

before or at the termination hearing. The District Court's statements on the record make it clear the court considered the treatment plans and found them appropriate.

¶14 Section 41-3-609(1)(f), MCA, requires a parent to "fully comply with a treatment plan. Partial or even substantial compliance is not sufficient." *In re A.H.*, 2015 MT 75, ¶ 35, 378 Mont. 351, 344 P.3d 403 (internal citations omitted). As the State acknowledged, Father demonstrated a "sincere love [for] and desire to reunite with" his daughter and completed portions of his treatment plan to this end. But well-intentioned efforts toward completion of a treatment plan do not demonstrate completion or success of the plan. *In re S.M.*, 1999 MT 36, ¶ 25, 293 Mont. 294, 975 P.2d 334. Here, the court based its finding on affidavits and testimony by the child protection specialists that Father did not comply or only superficially complied with several components of his treatment plans and that he "did not demonstrate change." We conclude that substantial credible evidence supported the District Court's finding that Father did not fully comply with his treatment plans.

¶15 Father next asserts that the District Court erred in finding that the conduct or conditions rendering him unfit to parent were unlikely to change within a reasonable period of time. In making this determination, a court must find that continuation of the parent-child legal relationship likely will result in continued abuse or neglect or that the conduct or the condition of the parents render the parents unfit, unable, or unwilling to give the child adequate parental care. Section 41-3-609(2), MCA.

¶16 Reviewing the testimony and evidence presented in the District Court, we conclude that substantial credible evidence supported its finding that the standards of § 41-3-609(2), MCA, were satisfied. Olson stated in her affidavit accompanying the petition for termination that "[c]ontinuation of the parent-child legal relationship will likely result in continued abuse and neglect." At the termination hearing, W.W.'s licensed clinical professional counselor, Debra McGrath, confirmed that W.W. had been exposed to trauma in her "pre-verbal" life and suffered from PTSD. McGrath testified to the best of her knowledge that W.W. would suffer continued abuse and neglect if returned to Father's care. Olson's supervisor, Melinda Newman, testified that failure to terminate Father's rights "would be a severe detriment to [W.W.]" The record supports the District Court's finding that Father's conduct or condition was unlikely to change in a reasonable period of time. The fact that a parent has demonstrated progress in making the necessary changes does not necessarily render a district court's finding under § 41-3-609(2), MCA, clearly erroneous. *See*, *e.g.*, *In re D.F.*, 2007 MT 147, ¶ 43, 337 Mont. 461, 161 P.3d 825. And determining a reasonable time may depend on the child's special needs. *See In re D.F.*, ¶ 43.

¶17 Here, during both the course of Father's treatment and his termination hearing, numerous treatment providers observed that he was unable to meet W.W.'s high special needs. Olson attested that "[Father]'s inability to demonstrate change renders him unfit to give [W.W.] adequate parental care on ongoing physical, mental and emotional needs of [W.W.] within a reasonable time." Although Father engaged in efforts to comply with his

treatment plan and to regain custody of his daughter, the District Court did not commit clear error when it found those efforts unsuccessful and that he was unlikely to change within a reasonable time.

¶18 Finally, Father contends that the District Court erred in finding that DPHHS made reasonable efforts to reunite him with W.W. "Reasonable efforts include but are not limited to voluntary protective services agreements, development of individual written case plans specifying state efforts to reunify families, placement in the least disruptive setting possible, provision of services pursuant to a case plan, and periodic review of each case to ensure timely progress toward reunification or permanent placement." Section 41-3-423(1), MCA. DPHHS must act "in good faith . . . to preserve the parent-child relationship and the family unit" and to assist a parent in completing his treatment plan. *In re C.M.*, ¶ 16 (internal quotations and citations omitted). The child's health and safety are of paramount concern in making reasonable efforts to provide preservation or reunification services. Section 41-3-423(1), MCA. Whether DPHHS has made reasonable efforts is a fact-dependent inquiry. *In re C.M.*, ¶ 16.

¶19 Father maintains that DPHHS made minimal efforts to reunify him and his daughter before terminating his visits altogether and also failed to engage him with W.W. in family therapy. But the District Court identified DPHHS's efforts in its termination order, including, among others: collaborating with law enforcement; placing W.W. in foster care; implementing and monitoring two treatment plans for Father; supervising visitation between Father and W.W.; referring Father to anger management and PCIT; and

conducting ongoing coaching and redirecting of concerning behaviors. Section 41-3-423, MCA, "does not require herculean efforts." *In re K.L.*, 2014 MT 28, ¶ 41, 373 Mont. 421, 318 P.3d 691. The District Court's determination that DPHHS made reasonable efforts to reunify Father and W.W. was supported by substantial credible evidence.

¶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. When substantial evidence in the record supports a district court's findings of fact, we will not re-weigh that evidence to hold the court in error. In the opinion of the Court, the District Court's findings of fact were not clearly erroneous and its ruling was not an abuse of discretion. The District Court's order terminating Father's parental rights is affirmed.

/S/ BETH BAKER

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON
/S/ JIM RICE