

DA 19-0291

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 39N

IN THE MATTER OF:

J.M.M.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause No. DN-18-03
Honorable Jeffrey H. Langton, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Laura M. Reed, Attorney at Law, Missoula, Montana

For Appellee:

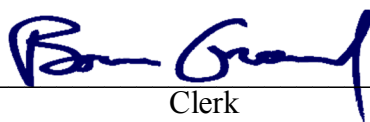
Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant
Attorney General, Helena, Montana

William Fulbright, Ravalli County Attorney, Hamilton, Montana

Submitted on Briefs: January 22, 2020

Decided: February 18, 2020

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 H.T. (Mother) appeals from the April 25, 2019 order of the Twenty-First Judicial District Court, Ravalli County, terminating Mother's parental rights to J.M.M. (Child). We affirm.

¶3 Child was born in 2016 and is the biological child of Mother and T.M. (Father).¹ Following investigation of a report of neglect on December 14, 2017, Mother entered into a thirty-day, voluntary, out-of-home-service agreement (VSA) with the Montana Department of Health and Human Services, Child and Family Services Division (the Department), and Child was placed with family friends. Throughout the VSA, Mother was unable to demonstrate abstinence from illegal drug use, consistently testing positive. As such, on January 16, 2018, the Department removed Child and filed its petition for emergency protective services (EPS), show cause, adjudication, and temporary legal custody (TLC). Based on the petition and supporting affidavit, the District Court granted EPS and set a show cause hearing for January 31, 2018. As the attorney for the mother of Father's other child did not appear at the hearing on January 31, 2018, the show cause

¹ Although Father's parental rights were terminated in the same order, Father does not appeal, and we thus address only the termination of Mother's rights herein.

hearing was continued without objection to February 21, 2018.² At the February 21, 2018 hearing, Mother stipulated to adjudication of Child as a youth in need of care (YINC).³ Within a week of the February 21, 2018 hearing, the Department drafted a treatment plan for Mother and provided her referrals for parenting classes, chemical dependency (CD) evaluation and treatment, and individual and couples counseling.

¶4 At the adjudication hearing on March 27, 2018, the District Court adjudicated Child as a YINC. The parties appeared at the dispositional hearing on April 11, 2018. At that time, Father requested continuance to have additional time to meet with counsel. Rather than objecting to the untimeliness of her treatment plan, as now asserted, Mother likewise requested additional time to review her proposed treatment plan. The matter was then continued to April 25, 2018. On April 25, 2018, Mother signed her treatment plan, indicating the tasks and goals of the plan were reasonable and appropriate and at hearing on that date, the District Court approved Mother's treatment plan.⁴ By the time Mother signed her treatment plan and it was approved by the court, she had completed a CD

² Upon investigation of the original report, Father's eight-year-old child was also removed. She was placed in her mother's care, and the proceeding involving her was ultimately dismissed.

³ Although Mother stipulated to adjudication of Child as a YINC, Father did not, and the hearing was continued to March 22, 2018. On March 22, 2018, Father's counsel requested continuance due to a calendaring error on his part, and the hearing was continued to March 27, 2018.

⁴ Mother's treatment plan required her to 1) complete a CD evaluation; 2) complete a parenting education program; 3) participate in monitored visitation; 4) refrain from alcohol, illegal drugs, and prescription drugs unless prescribed to her by a physician, and participate in random urinalysis testing; 5) secure safe and stable housing; 6) participate in individual counseling; 7) complete a mental health evaluation; 8) participate in couples counseling; 9) if Child is reunified with her, comply with an in-home safety plan; and 10) apply for Medicaid.

evaluation in late January 2018⁵ with licensed addictions counselor (LAC) Amanda Stevens and had enrolled in an outpatient CD treatment program at the beginning of March 2018.

¶5 In May 2018, Mother underwent a mental health assessment with Brett Hamilton at the Western Montana Mental Health Center. Similar to her initial CD evaluation, Mother was not completely honest during the evaluation and did not report all of her prescribed medications. She was diagnosed with generalized anxiety disorder, post-traumatic stress disorder, and cannabis use disorder interfering to some degree with her ability to engage socially. Weekly outpatient mental health treatment was recommended. Mother then attended one weekly session but failed to call or show for the following three weeks, resulting in Hamilton discharging her from the program and transferring her to the addiction counselor at Western Montana Mental Health Center Addiction Services, Rachel LaTorre, LAC.

¶6 LaTorre took over Mother's group and individual therapy in May 2018. Thereafter, although Mother was more consistent in attending individual counseling sessions, she failed to attend nearly half of her group treatment sessions and continued to test positive for illegal drug use. This resulted in re-evaluation of Mother's treatment needs, resulting in LaTorre amending her treatment recommendation to that of inpatient treatment, followed by residential care. It was suggested to Mother that she complete the Montana

⁵ At Mother's initial CD evaluation, she failed to accurately report her drug use, and the evaluator recommended she engage in outpatient treatment. When the evaluator learned Mother had not been honest in reporting the substances she was using, she updated her recommendation to that of intensive outpatient treatment.

Chemical Dependency Program (MCDC) in Butte, followed by residential treatment, hopefully at the Carole A. Graham Home in Missoula.⁶ Arrangements were made for Mother's admission into MCDC on August 22, 2018. Upon admission, Mother tested positive for marijuana, opiates, and cocaine—she admitted she had first tried cocaine the evening before. Five days after admission to MCDC, and despite being homeless, Mother left the program against medical advice (AMA). LaTorre continued to recommend Mother needed inpatient treatment and requested Mother reapply. Although Mother reapplied, she insisted she did not need inpatient treatment, and when accepted for inpatient treatment on her reapplication, she chose not to attend. Mother then contacted her Child Protection Specialist (CPS) worker and requested to complete another CD evaluation.

¶7 Following Mother's leaving MCDC AMA, her being discontinued from treatment services with Western Montana Mental Health Center Addiction Services, and her refusal to attend inpatient treatment, the Department filed its petition seeking termination of Mother's parental rights. Thereafter, the Department arranged for Mother to have another CD evaluation with Shawna Heckerth, LCSW, LAC, in October 2018. After gathering information from Mother and collateral sources, Heckerth informed Mother she would likely recommend an inpatient treatment level of care like LAC LaTorre had. Although

⁶ The Carole A. Graham Home, operated by Western Montana Addiction Services, provides a therapeutic, structured environment for chemically dependent women and their children. While in the program, residents are expected to participate in CD treatment, case management services, life skills classes, and community parenting classes. Residents also work on employment/educational goals, obtaining independent housing, and developing a support system to maintain a healthy lifestyle. The length of stay in the program varies and is based on motivation and individual work within the program. The average length of stay in the program is 9 to 12 months. See W. Mont. Addiction Servs., *Carole A. Graham Home Eligibility Requirements 1*, <https://perma.cc/WRP7-M6RS>.

Heckerorth set two meetings with Mother to complete the evaluation and discuss her recommendations, Mother failed to show for either appointment, and the evaluation could not be completed.

¶8 As the Department had filed its termination petition in which it sought continued TLC pending hearing on the termination petition, it did not file a separate petition for extension of TLC. Without hearing, the District Court continued TLC pending resolution of the termination petition and set hearing on the petition for November 13, 2018. Mother did not object or raise issue with the Department not filing a separate petition requesting TLC or with the District Court's failure to hold a separate hearing regarding extension of TLC.

¶9 The Department sought to terminate Mother's parental rights on the basis that Mother failed to complete her treatment plan and the conduct or condition rendering Mother unfit to parent was unlikely to change within a reasonable time. *See* § 41-3-609(1)(f), MCA. As Father's counsel was not present at the November 13, 2018 hearing, Mother requested continuance, and the hearing was reset for December 27, 2018. The Department then sought continuance due to witness availability issues. Termination hearings were ultimately held on February 14, 2019 and April 3, 2019.

¶10 At the termination hearings, CPS Brittany Turley testified Mother had not successfully engaged in or completed any level of recommended CD treatment, failed to maintain stable housing,⁷ failed to actively participate in individual or couples counseling,

⁷ Mother was basically homeless for the year period from February 2018 to February 2019.

failed to attend all drug tests, and failed to show any consistent abstinence from illegal drug use. At the April 3, 2019 hearing, Mother testified she had made gains over the past two months, contending she was now attending group and individual CD sessions with LaTorre, had not been positive for marijuana since September 2018,⁸ and had secured housing with Father on a week-to-week basis at a long-term stay hotel since February 2019.

¶11 The District Court found Mother did not successfully complete her treatment plan—failed to follow recommendations of her chemical dependency evaluations, failed to submit to drug testing when required and tested positive for illicit drugs, tested positive for prescribed medications when she did not have a valid prescription, and failed to follow through on all recommendations of a mental health evaluation by failing to consistently and successfully participate in individual and couples counseling—and the conduct or condition rendering her unfit to parent was unlikely to change in a reasonable time. Over the at least 14 months post removal, Mother repeatedly did not engage in chemical dependency treatment, actively rejected treatment recommendations, and hindered herself from progressing in treatment with inconsistent attendance. Only after commencement of the termination hearing did Mother start to engage. In its termination order, the District Court found Child had been in foster care for more than 15 of the most recent 22 months, triggering the presumption that termination was in Child’s best interest pursuant to § 41-3-604, MCA.

⁸ Mother admitted no drug test results confirming this.

¶12 On appeal, Mother asserts her due process rights were violated and she was denied a fundamentally fair process because the Department and court failed to adhere to various statutory requirements, the Department failed to make reasonable reunification efforts, and the District Court erred in relying on the statutory presumption of § 41-3-604, MCA—as the termination petition was filed only nine months after Child was removed. Finally, Mother asserts the court erred in concluding Mother’s condition or conduct was unlikely to change in a reasonable time.

¶13 A court may terminate parental rights when (1) a child has been adjudicated as a YINC; (2) an appropriate treatment plan approved by the court has not been complied with by the parent or has not been successful; and (3) the conduct or condition of the parent rendering him or her unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA. Each factor must be supported by clear and convincing evidence. Section 41-3-609(1), MCA.

¶14 This Court reviews a district court’s decision to terminate parental rights for an abuse of discretion. *In re A.S.*, 2016 MT 156, ¶ 11, 384 Mont. 41, 373 P.3d 848. A district court abuses its discretion when it acts arbitrarily, without employing conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *In re K.A.*, 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478.

¶15 Termination procedures must meet the requisites of the Due Process Clause of the Fourteenth Amendment. *See Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24-25, 101 S. Ct. 2153, 2158 (1981). Although “due process” cannot be precisely defined, the phrase requires “fundamental fairness,” and fundamental fairness requires fair procedures.

See Lassiter, 452 U.S. at 24-25, 101 S. Ct. at 2158. While the concept of due process remains fluid, we have held that a parent in a termination proceeding has the right to be heard at a meaningful time and in a meaningful manner. *In re B.P.*, 2001 MT 219, ¶ 31, 306 Mont. 430, 35 P.3d 291. A natural parent's right to the care and custody of a child is a fundamental liberty interest, which courts must protect with fundamentally fair procedures at all stages of termination proceedings. *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282.

¶16 Mother asserts the Department and the court violated her due process rights by missing statutory requirements, delaying her treatment, and failing to hold review hearings. The State asserts Mother did not assert these due process claims to the District Court and thus waived them for appeal. We agree Mother did not previously assert the Department's initial petition to be untimely, did not object to the continuance of the show cause hearing, did not assert her treatment plan was not approved quickly enough,⁹ and did not object to the Department's failure to file for an extension of TLC while the termination hearing was pending. Mother did not raise these issues below, and thus she must first convince this Court that failure to review the error may result in a manifest miscarriage of justice or may compromise the integrity of the judicial process. *In re S.C.*, 2005 MT 241, ¶ 35, 328 Mont. 476, 121 P.3d 552. We conclude Mother has not met this burden.

⁹ In fact, Mother asserted the opposite with respect to her treatment plan, requesting the dispositional hearing be continued to provide her more time to consider her proposed treatment plan.

¶17 From our review of the record, there was no actionable delay in offering and providing services to Mother. Mother was offered and provided services, beginning at the time she entered into the VSA on December 14, 2017. Upon Mother's failure to demonstrate the ability to remain substantially drug free during the period of the VSA, the Department removed Child on January 16, 2018, and the State filed its initial petition on that same date. Although Mother asserts delay in holding the show cause hearing, it was initially set for January 31, 2018—15 days after the filing of the initial petition and within the statutory time frame set forth in § 41-3-432, MCA. Mother offered no objection to continuation of the show cause hearing, adjudication, or dispositional hearings and received services throughout the pendency of these hearings.

¶18 Mother's treatment plan was developed in February 2018, but Mother sought additional time to review it, such that it was not approved until the dispositional hearing on April 25, 2018. Prior to approval of her treatment plan, Mother had received referrals and underwent a CD evaluation and had already enrolled in CD treatment. While she did not engage in the treatment, she has failed to demonstrate how she was prejudiced or denied fundamentally fair procedures in getting her treatment plan approved or services implemented. Mother had several opportunities to appear before the District Court for scheduled hearings. At scheduled proceedings, when a proceeding was continued, Mother either requested it or did not object. At no time did Mother request the court set periodic status hearings or any special hearing to address her progression, any of her treatment plan tasks, or expansion of treatment plan tasks. CPS Turley, through her affidavits and

testimony, demonstrated her monitoring of Mother's efforts through contact with treatment providers, review of drug testing, and supervision of visits.

¶19 Mother also asserts—relying on n.13 in *In re R.J.F.*, 2019 MT 113, ¶ 40, 395 Mont. 454, 443 P.3d 387—that the District Court erred in imposing the presumption under § 41-3-604, MCA, that termination was in the best interest of Child, as Child had not been in an out-of-home placement for 15 months preceding the filing of the termination petition. While it is preferential for the District Court to hold regular status hearings and for the Department to wait until expiration of the 15 months of out-of-home care to file a petition seeking termination of parental rights, in this particular situation we need not determine whether imposition of the statutory § 41-3-604, MCA, presumption violated Mother's constitutional due process right to fundamentally fair procedures. The record herein supports the District Court's termination without imposition of the statutory presumption under § 41-3-604, MCA, and demonstrates fundamentally fair procedures, such that Mother's due process rights were not violated in terminating her parental rights.

¶20 Next, Mother asserts the Department failed to make reasonable efforts to reunify her with Child. Section 41-3-423(1), MCA, mandates that the Department must make reasonable efforts “to prevent the necessity of removal of a child from the child's home and to reunify families that have been separated by the state.” Analysis of what amounts to reasonable is highly case-dependent. *In re J.H.*, 2016 MT 35, ¶ 17, 382 Mont. 214, 367 P.3d 339; *In re K.L.*, 2014 MT 28, ¶ 41, 373 Mont. 421, 318 P.3d 691.

¶21 Mother asserts the Department failed to make reasonable efforts to reunify her with Child as it should have provided her with increased visitation, transportation, and housing

assistance; periodic family functioning assessments¹⁰; and ongoing services after the termination petition was filed.

¶22 On the record before us, we cannot conclude the Department failed to engage in reasonable efforts. At no point throughout the case did Mother assert she needed or requested assistance with transportation or housing. Mother should reasonably have known that if she were having transportation problems interfering with her ability to complete her treatment plans tasks, she could request assistance from her CPS worker, as early on, Mother's CPS worker provided Mother transportation to the Department's office and there assisted Mother in applying for Medicaid. Ultimately, Mother's parental rights were not terminated due to lack of a bond between her and Child or for housing deficiencies, but rather for her inability to avail herself of treatment services designed to address her substantial substance use disorder and relationship dysfunction.

¶23 The Department provided reasonable efforts to reunify Mother with Child including: a VSP; treatment plans for both Mother and Father; CPS case monitoring and support; parenting education classes; random drug testing through three different providers; visitation (albeit minimal); referrals for multiple CD evaluations for Mother;

¹⁰ We do not endorse the State's position that conducting a family functioning assessment with periodic reevaluation as required by Department policy would necessarily have been futile, as such may have provided the Department with additional information on how to better assist Mother to engage with services. Nonetheless, Mother, for whatever reason, did not engage with treatment, continued to use illicit drugs, and did not show a likelihood that she would be able to successfully parent within a reasonable period of time. It was Mother's lack of candor with her treatment providers, failure to attend group and individual sessions, refusal to attend inpatient treatment, and continued non-compliance with urine analysis testing that resulted in Mother not adequately addressing the issues precluding her from parenting—not lack of good faith on the part of the Department as alleged by Mother.

facilitation of CD treatment, including referral and admission to MCDC; mental health evaluation; referral and follow-up with individual counseling; and referral and follow-up with couples counseling. These services were designed to assist Mother in addressing her significant substance use disorder and had Mother fully engaged in these services, it is likely she could have made the necessary progress to demonstrate her ability to change within a reasonable time. Mother's rights were terminated as she failed to meaningfully engage in CD and mental health treatment, consistently tested positive for drugs, and was unable to demonstrate she could address these issues in a reasonable period of time.

¶24 While the Department must in good faith assist a parent in completing his or her treatment plan, the parent retains “the ultimate responsibility for complying with the plan.” *In re T.D.H.*, 2015 MT 244, ¶ 42, 380 Mont. 401, 356 P.3d 457. “We have long held that 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 R.J.F.*, ¶ 38; *see also In re R.L.*, 2019 MT 267, ¶ 20, 397 Mont. 507, 452 P.3d 890; *In re C.M.*, 2019 MT 227, ¶ 19, 397 Mont. 275, 449 P.3d 806; *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. Here Mother chose not to engage with the Department despite the Department's reasonable efforts to reunify her with Child.

¶25 Finally, Mother asserts the court erred in concluding the conduct or condition rendering her unfit was unlikely to change within a reasonable time because in the two months prior to the final termination hearing, Mother “had begun to change.” The

District Court considered Mother's past conduct, including her complete resistance and non-engagement in treatment over the year post-removal. Even giving Mother the benefit of doubt and accepting she had attended treatment and refrained from illegal drug use for the two months prior to the final day of the termination hearing, given the record herein, we cannot find error with the District Court's conclusion that Mother was not likely to make enough progress, within a reasonable time, to overcome the circumstances rendering her unfit.

¶26 Although Mother had made recent progress, the District Court weighed that evidence against Mother's failure to complete her treatment plan and her prolonged non-compliance with the treatment plan's requirements. To reverse a district court's ruling for an abuse of discretion, we must determine the court either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason, resulting in substantial injustice. *In re O.A.W.*, 2007 MT 13, ¶ 32, 335 Mont. 304, 153 P.3d 6. Here, Mother has not convinced us the District Court acted arbitrarily or in a manner resulting in substantial injustice.

¶27 In conclusion, Mother's due process rights were not violated by the District Court's handling of this case. Mother's court-approved treatment plan was appropriate, and Mother had full opportunity to participate in meaningful services designed to assist her in addressing her parenting deficiencies. The proceedings provided Mother with fundamental fairness, and the District Court did not abuse its discretion in terminating Mother's parental rights to Child pursuant to § 41-3-609(1)(f), MCA.

¶28 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.

¶29 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ JAMES JEREMIAH SHEA

/S/ DIRK M. SANDEFUR