DA 19-0667

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 204N

IN THE MATTER OF:

B.K.S.S.,

A Minor Child.

A.E.C and M.L.C.,

Petitioners and Appellees,

and

C.S.,

Appellant and Respondent,

and

C.F.,

Respondent.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DR 18-623(D)
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Dana A. Henkel, Terrazas Henkel, P.C., Missoula, Montana

For Appellee:

Peter F. Carroll, Attorney at Law, Kalispell, Montana

Submitted on Briefs: July 15, 2020
Decided: August 11, 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 Birth Mother C.S. ("Mother") appeals the Eleventh Judicial District Court's order terminating her parental rights on the petition of the child's guardians ("Guardians"), who are Mother's father's cousin and his wife. Mother urges reversal because the court's application of Montana's Adoption Act—by failing to provide her with reunification resources that would be available were the State to seek termination of her rights—violated her constitutional right to equal protection of the law. Mother argues further that Guardians lacked standing to seek termination on the ground that Mother abused or neglected her child by abandoning him. In any event, she claims, the record does not contain substantial credible evidence demonstrating that Mother willfully abandoned B.K.S.S. We affirm.

¶3 B.K.S.S. was born in April 2012 and has resided with Guardians since Mother placed him there in early 2014. They were appointed his legal guardians with Mother's consent in November 2015, when the child was three years old. Mother lived with them for a few months, but Guardians kicked her out after she spent her entire tax refund in a week's time instead of following their guidance to get her car fixed and set up a place for

her and B.K.S.S. to live. Guardians thereafter petitioned to terminate her rights in order to seek his adoption.[1] The District Court appointed counsel for Mother. Mother's counsel filed a motion to dismiss the petition on the ground that Montana's adoption laws violated the equal protection clause of both the state and federal constitutions. The District Court denied Mother's motion.

¶4 The court held a bench trial on October 21, 2019, at which the parties appeared with their respective counsel. The court heard testimony from Mother, her stepmother, and both Guardians.

¶5 Mother argued that she was entitled to reunification and rehabilitation services under the standards set forth in Title 41, ch. 3. She also argued that she did not abandon the child but ensured that he was adequately cared for and that she offered to contribute to his support, but Guardians had declined. Mother acknowledged a long history of drug and alcohol use and testified that she had been in residential treatment four or five times. She also acknowledged that she had not had primary custody of any of her three children, the oldest of whom she had placed with his grandparents when she was charged and imprisoned in Idaho years ago. Mother maintained, however, that after the 2016 termination of her rights to B.K.S.S.'s younger half-sibling (who was adopted by Guardians), she made substantial progress toward achieving sobriety. Mother maintained that Guardians had asked her not to provide support for or communication with B.K.S.S.

[1] Guardians' Petition also sought termination of the birth father's rights. He later relinquished his rights and consented to Guardians' adoption of B.K.S.S. Father's rights are not at issue in this appeal.

during the year before they filed the petition. She did not want to remove B.K.S.S. from Guardians' home but testified that she just didn't want to be cut out of his life.

¶6 Guardians presented testimony that Mother had not been and had not tried to be part of B.K.S.S.'s upbringing; that they had delayed seeking guardianship and had brought her in to live with them in hopes that she would get back on her feet; that she had not provided support for B.K.S.S. other than occasional gifts, which they finally discouraged; that she had made no attempt to see or contact him since the younger sibling's birthday party in June 2018; that she had not kept her contact information up to date with them; and that they had at no time threatened to keep her from seeing B.K.S.S. or from maintaining a relationship with him. B.K.S.S. was an integrated part of their family, as he had lived with them all but the first two years of his life, and was very attached to his younger sister.

¶7 A week after the hearing, the District Court issued its Findings of Fact, Conclusions of Law, and Order terminating Mother's rights. The court recounted Mother's history of drug dependence and the termination of Mother's rights to B.K.S.S.'s younger sister and Guardians' adoption of her. The District Court found that Mother had not consistently visited B.K.S.S. and had not provided for his material support since placing him with Guardians. The court noted Mother's testimony that she did not want to remove the child from their guardianship, as she was not in a position to parent him or to provide a good home, but found that she did not want her rights terminated "because she does not wish to be seen as a bad person or a bad mother and she believes that, if her

parental rights to B.K.S.S. are terminated and [Guardians] adopt B.K.S.S. that she will be 'cut out of his life.'" The court did not find this concern well-taken, stating there was no credible evidence that Guardians would prevent Mother from having contact with the child. The court found Mother's testimony in this regard not to be credible.

¶8 Based on the evidence, the District Court found by clear and convincing evidence that Guardians have established a stable and loving parent-child relationship with the child and that his best interests would be served by terminating Mother's parental rights and making him legally free for adoption by Guardians. In its Conclusions of Law, the District Court relied on §§ 42-2-607 and -608, MCA, as authority for termination, concluding that Mother had willfully abandoned the child, having left him in Guardians' full and indefinite care and custody under circumstances that make reasonable the belief that she does not intend to resume care of him. The court emphasized, "Mother does not intend to resume care of B.K.S.S. in the future." Separately, the court concluded that Mother also is unfit within the criteria of § 42-2-608, MCA. The court concluded that her reasons for opposing termination were not sufficient to deny Guardians' petition.

¶9 We review a district court's decision to terminate parental rights for abuse of discretion. *In re Adoption of B.W.Z.-S.*, 2009 MT 433, ¶ 10, 354 Mont. 116, 222 P.3d 613. We review its factual findings for clear error and its conclusions of law for correctness. *In re B.W.Z.-S.*, ¶ 10. *See also* M. R. Civ. P. 52(a)(6). We "defer to the District Court's ability to judge the credibility of witnesses and to resolve any conflicts in the evidence." *In re B.W.Z.-S.*, ¶ 20 n.1 (quoting *In re Adoption of K.P.M.*, 2009 MT 31,

¶ 28, 349 Mont. 170, 201 P.3d 833). Our review of constitutional issues is plenary. *A.W.S. v. A.W.*, 2014 MT 322, ¶ 10, 377 Mont. 234, 339 P.3d 414.

¶10 As she does on appeal, Mother argued to the District Court that this Court's holding in *A.W.S. v. A.W.* establishes that parents facing termination proceedings under Title 41 and parents facing termination proceedings under Title 42 are similarly situated for equal protection purposes. Mother argued that, under § 41-3-423(1), MCA, if the State intervenes in a parent-child relationship and seeks to terminate parental rights based on a demonstration of unfitness, the State must make reasonable efforts to provide preservation or reunification services before termination proceedings may occur. Unlike a parent in a state-initiated proceeding to terminate parental rights, a parent facing termination in a private proceeding under Title 42 is not afforded preservation or reunification services.

¶11 The District Court rejected the equal protection argument, reasoning that even under Title 41, ch. 3, a natural parent is not entitled to preservation or reunification services under certain circumstances, including when a parent has abandoned the child or had her rights to another child terminated. *See* § 41-3-423(2)(a), (e), MCA. The court concluded that Mother was not similarly situated to those parents facing a Title 41 termination process who were entitled to reunification services. Counsel again attempted to raise the issue at hearing, arguing "that unless and until those findings of aggravated circumstances are made under Title 41, [the parents are similarly situated], and then the Court can narrow people out of that class." The court declined to reconsider its ruling.

¶12 Mother frames the issue on appeal as whether the District Court's "application" of the adoption statutes violates her right to equal protection. Following its consideration of all the evidence, the District Court found as a matter of fact that Mother abandoned B.K.S.S. when she placed him with Guardians in 2014 and had not provided for his material support since that time. The court found also that B.K.S.S.'s younger sibling was removed by the State at birth and placed with Guardians, who later adopted her when Mother's rights were terminated. As noted below, Mother has not shown clear error in these findings. A parent facing State-initiated termination under similar circumstances would not be entitled to reunification services and resources. Section 41-3-423(2), MCA. As applied to Mother's circumstances, therefore, there is no disparate treatment of similarly situated persons. The District Court did not err in denying her equal protection challenge. *See Goble v. Mont. State Fund*, 2014 MT 99, ¶¶ 28-29, 374 Mont. 453, 325 P.3d 1211.

¶13 A child is not legally free for adoption until the birth parents' parental rights have been terminated in a proceeding under either Title 42, ch. 2, part 6, MCA—part of Montana's Adoption Act—or Title 41, ch. 3, MCA, in an action brought by the State, or when the parents' rights have been terminated by a court of competent jurisdiction in another state or country. Section 42-2-602, MCA. Mother's argument that Guardians lack standing to seek termination of her rights is squarely defeated by § 42-2-603(2), MCA, which provides in part that "a guardian with custody of the child" may seek termination by filing a signed and notarized petition with the court. Mother's

standing argument is predicated on the proposition that a petition claiming the birth parent has abandoned the child is based on an allegation of child abuse or neglect, which may be brought in the State's name only. But § 42-2-608(1)(b), MCA, allows a district court to "terminate parental rights for purposes of making a child available for adoption on the grounds of unfitness if . . . the parent has willfully abandoned the child, as defined in 41-3-102, in Montana or in any other jurisdiction of the United States[.]" Guardians were proper parties to bring the proceeding in this case.

¶14 Finally, we reject Mother's argument that the District Court did not have substantial credible evidence to find that she willfully abandoned B.K.S.S. "[W]e must view the evidence in the light most favorable to the prevailing party when determining whether substantial credible evidence supports the district court's findings." *In re B.D.*, 2015 MT 339, ¶ 5, 381 Mont. 505, 362 P.3d 636. Upon review of the record, we conclude that the District Court did not abuse its discretion in finding by clear and convincing evidence that Mother abandoned B.K.S.S. when she voluntarily placed him in Guardians' care at age two, consented to their legal guardianship, and failed to provide for his material support or to indicate in any other way that she intended to resume care of him in the future. Mother's own testimony showed that she did not intend to do so.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. Based on the record presented, the District Court did not clearly err in its findings of fact or

misinterpret the law. Having reviewed the briefs and the record, we conclude that Mother has not met her burden of persuasion on appeal. The judgment is affirmed.

/S/ BETH BAKER

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JIM RICE