

DA 21-0264

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 15N

IN THE MATTER OF:

E.V. and A.V.,

Youths in Need of Care.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Butte-Silver Bow, Cause Nos. DN-18-104 and
DN-18-105
Honorable Robert J. Whelan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Taryn Gray, Shannon Hathaway, Driscoll Hathaway Law Group, Missoula,
Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant
Attorney General, Helena, Montana

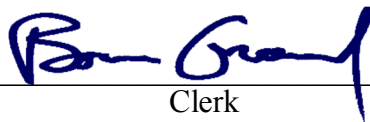
Eileen Joyce, Butte-Silver Bow County Attorney, Butte, Montana

Mark Vucurovich, Special Deputy County Attorney, Butte, Montana

Submitted on Briefs: December 15, 2021

Decided: January 18, 2022

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, 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 S.L.V. (Mother) appeals from the Second Judicial District Court Findings of Fact, Conclusions of Law and Order terminating her parental rights and granting the State permanent legal custody of A.V. (age 5) and E.V. (age 7). Mother argues the District Court had insufficient evidence to conclude that she was unlikely to overcome the circumstances rendering her an unfit parent within a reasonable time. We affirm.

¶3 In late 2018, the Department of Child and Family Services (Department) removed A.V., E.V., G.V. (age 8), and M.V. (age 12) from Mother's home in Butte after receiving multiple allegations of physical neglect and abuse since November 2015. The Department determined the children were in immediate danger because Mother "is unable to manage the chaos in the home and has demonstrated the inability to keep the children safe and meet their needs." Allegations included that the condition of the home was not safe due to Mother's inability to keep it sanitary and organized; the children were not taking their medications and had expressed food insecurity to providers; and there was a history of referrals to the police department regarding domestic violence toward Mother and the children, as well as concerns that the children were fighting and sexually touching each other.

¶4 The children were adjudicated youths in need of care in January 2019. The District Court approved a treatment plan for Mother in February. In addition to requiring Mother to complete a mental health evaluation and follow the mental health providers' recommendations, the plan required Mother to obtain safe, sanitary, and stable housing and adequate nutrition for the children; not allow any individual into the home that is under the influence of drugs or alcohol or has a history of sexual or violent crimes; regularly meet with and allow visits from the Department; regularly visit with the children and participate in their treatment and therapy as requested; and demonstrate "positive parenting" and an ability to understand her children's needs.

¶5 Mother and the children all suffer from mental health issues, but A.V. and E.V.'s behavioral and mental health issues are the most severe. Due to such extreme behaviors and mental health needs, the Department was unable to place all four children together. While Mother did not have a driver's license or reliable means of transportation, the children's maternal grandmother stayed with Mother in Butte during the summer of 2019 and was able to drive Mother to visits on a more regular basis. When Grandmother returned home to Arizona, however, Mother's in-person visits stopped. The Department contended it offered to give Mother bus and gas vouchers but that coordinating visits with Mother was difficult. Mother denied that the Department offered her bus vouchers.

¶6 In January and July 2020, the two older children, G.V. and M.V., were placed back in Mother's home for a trial visit.

¶7 In April 2020, E.V.’s providers recommended stopping all visits and phone calls with Mother and his siblings because visits were exacerbating E.V.’s behavior problems related to his PTSD diagnosis. Earlier that spring, the Department had stopped allowing in-person visits due to COVID-19 precautions, but continued to schedule phone visits between Mother and A.V. By late summer, communication between A.V. and Mother remained sporadic. A.V. required a “safe word” that she could use to end a phone visit if she was experiencing too much emotional distress. During the fall of 2020, Mother’s phone was disconnected and the Department was unable to reach her to facilitate phone calls with A.V. E.V.’s treatment team continued to recommend that communication between E.V. and Mother remain suspended.

¶8 Melanie Maki has been the sole child protection specialist on the case since 2018, visiting the home every week or every other week since that time. In August 2020, Maki reported that Mother required additional time to complete her treatment plan, and that she “vastly struggles with accepting or understanding how her behaviors and the behaviors of others that she allowed in the home with the children affect them and how it has caused a significant deterioration in their relationship.” In September, Maki testified that placing all four children back in the home would be a significant challenge. The children’s guardian ad litem supported extending temporary legal custody in September, but was doubtful that the two younger siblings could ever go back home to Mother because of their special needs, and noted Mother’s regression since her second child returned to the home in July.

¶9 In December 2020, the Department petitioned for termination of Mother’s parental rights and permanent legal custody of the two younger children, noting their “extensive mental health services that require ongoing intensive compliance and full engagement.” The Department determined that Mother “is unable to fulfill these needs as observed with [the] current situation of older children on a trial home visit and her struggle to maintain their needs, even with extensive community supports through treatment teams.” While not originally identified as an issue, the petition also noted that, in addition to her ongoing mental health issues and reluctance to fully engage in her treatment plan, providers had expressed concern that Mother may be under the influence of alcohol. Mother denied this.

¶10 The District Court held a termination hearing on February 1, 2021. Maki testified that she believed, as a whole, Mother had failed the treatment plan and the conduct or conditions rendering her unfit to care for her younger two children were unlikely to change within a reasonable time. Pointing to Mother’s continued difficulties caring for the two older children during the trial run, Maki testified that Mother’s home “is definitely not a safe and stable home for [the] two younger children.” The guardian ad litem recommended terminating parental rights, testifying that E.V. has made it very clear he does not want to return to Mother’s home, or have any relationship with his siblings, and A.V. “doesn’t want to talk about her mom at all.”

¶11 The District Court terminated Mother’s parental rights regarding A.V. on February 19, 2021, and regarding E.V. on April 14, 2021, concluding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect, and that

the best interests of the children would be served by terminating the relationship and awarding permanent legal custody to the State. The District Court found that Mother's treatment plan was unsuccessful "because she is unable to handle her own mental health needs in conjunction with the extensive mental health needs of her child[ren]." The District Court determined that Mother's inability to provide adequate parental care was unlikely to change within a reasonable time because "Mother's emotional illness, mental health issues, and mental deficiency for over the last 22 months renders it impossible" for her to parent children with profound special needs.

¶12 We review a district court decision to terminate parental rights for an abuse of discretion. *In re A.B.*, 2020 MT 64, ¶ 23, 399 Mont. 219, 460 P.3d 405 (citing *In re R.J.F.*, 2019 MT 113, ¶ 20, 395 Mont. 454, 443 P.3d 387). The district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *In re A.B.*, ¶ 23. We review a district court's findings of fact for clear error and conclusions of law for correctness. *In re R.J.F.*, ¶ 20. "A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces the Court a mistake was made." *In re A.B.*, ¶ 23; *In re R.J.F.*, ¶ 20.

¶13 The Department has the burden to prove by clear and convincing evidence that the statutory criteria for termination have been satisfied, meaning it must show that "a preponderance of the evidence [is] definite, clear, and convincing." *In re R.J.F.*, ¶ 20. "We 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 J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715.

¶14 Pursuant to § 41-3-609(1)(f), MCA, a court may terminate parental rights to children if clear and convincing evidence establishes that the children have been adjudicated youths 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.

“In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time,” the district court must find that “continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care.” Section 41-3-609(2), MCA.

¶15 The district court must presume it is in the best interest of the child to terminate a parent’s rights if a child has been in foster care under the physical custody of the State for 15 months of the most recent 22 months. Section 41-3-604(1), MCA. The district court is required to consider, among other factors, whether the “emotional illness, mental illness, or mental deficiency of the parent [is] of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time.” Section 41-3-609(2)(a), MCA. We have held that the determination of what constitutes a “reasonable time” is “largely dependent on [the child’s] special needs,”

which are “always paramount to the rights of the parent.” *In re D.F.*, 2007 MT 147, ¶ 43, 337 Mont. 461, 161 P.3d 825; *see also* § 41-3-609(3), MCA (“the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child”).

¶16 In dependent-neglect proceedings, the Department must engage in reasonable efforts to reunify the family. Section 41-3-423(1), MCA. The determination of whether the Department made reasonable efforts “is not a separate requirement for termination.” *In re C.M.*, 2019 MT 227, ¶ 22, 397 Mont. 275, 449 P.3d 806 (quoting *In re R.J.F.*, ¶ 26). Such a finding may be relevant in considering a parent’s capacity to change, but “a parent’s unlikelihood of change may well be unaffected” by allegedly lacking efforts. *In re C.M.*, ¶ 22; *see also In re D.B.*, 2007 MT 246, ¶ 25, 339 Mont. 240, 168 P.3d 691.

¶17 Mother does not dispute the District Court’s determination that the children are youths in need of care, and that she did not complete her treatment plan. Mother argues the District Court abused its discretion when it terminated her parental rights because the Department failed to prove by clear and convincing evidence that the conduct or condition making her an unfit parent was unlikely to change within a reasonable time. Mother also asserts the Department failed to make reasonable efforts to reunify her family pursuant to § 41-3-423(1), MCA.

¶18 While Mother has made some progress in her treatment plan, the District Court found the Department presented clear and convincing evidence that the concerns that led to the children’s initial removal are still legitimate concerns more than 22 months later, including the unstable and unsanitary condition of the home and Mother’s inability to

adequately manage and provide support for her youngest children's extreme mental health and behavioral issues. The testimony presented throughout this case and reiterated at the termination hearing establishes that A.V. and E.V. require consistently high levels of care and support, and Mother has struggled to maintain her home and participate in services during the trial period with her two older children who do not have profound special needs. Mother's rocky and sometimes harmful relationship with her two youngest children has continued, as evidenced by E.V.'s need to cut off communications with her and A.V.'s need to have a "safe word" during phone conversations with Mother. The District Court found that Mother still does not recognize how her actions affect her children, and has not made the necessary progress toward reunification by failing to demonstrate that she is capable of consistent engagement and the "positive parenting" required to adequately care for two young children with profound special needs.

¶19 Mother asserts the Department failed to make reasonable efforts to accommodate her visits with E.V. considering Mother's known lack of transportation and E.V.'s distant placement. Mother claims that "[w]ithout frequent and consistent visitation, Mother and E.V. had little to no chance to maintain, work on, improve, or progress their relationship to ultimately achieve reunification." However, the Department's concerns regarding Mother's visitation efforts are only one component of the Department's broader concerns about Mother's inability to build positive relationships with A.V. and E.V. Mother has failed to demonstrate how the Department's alleged shortcomings affected her likelihood of changing the conduct or conditions rendering her an unfit parent within a reasonable

time. The District Court did not abuse its discretion when it determined that the children's need for a safe and stable home outweighed Mother's right to parent and that Mother failed to overcome the statutory presumption that termination of her parental rights is in her children's best interests.

¶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 conclude the District Court's findings of fact were supported by substantial evidence. The District Court did not abuse its discretion when it concluded that termination of Mother's parental rights was in the children's best interests. We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JIM RICE