

DA 21-0281

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 8N

IN THE MATTER OF:

G.C.,

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-19-17
Honorable Robert Whelan, Presiding Judge

COUNSEL OF RECORD:

For Appellant Mother:

Shannon Hathaway, Driscoll Hathaway Law Group, Missoula, Montana

For Appellant Father:

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For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant
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Submitted on Briefs: December 1, 2021

Decided: January 11, 2022

Filed:


Clerk

Chief Justice Mike McGrath 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 M.Y. (Mother) and J.C. (Father) separately appeal from the Second Judicial District Court's May 17, 2021 orders terminating their parental rights to G.C. pursuant to § 41-3-609(1)(f), MCA. We affirm.

¶3 G.C. was born in September 2018, around one month after Mother and Father relinquished parental rights to her sibling after the Department of Public Health and Human Services (Department) filed for termination. Both Mother and Father have struggled for years with addiction. At the time of G.C.'s birth, Mother was on probation for meth possession. In November 2018, when G.C. was two months old, Mother missed her required urinalysis (UA). G.C. was voluntarily placed with a relative until Mother could demonstrate sobriety and receive services. G.C. was returned to Mother's care in February 2019.

¶4 Only one month later, Mother's probation-required UA tested positive for meth. This triggered G.C.'s official removal. The Department filed a petition for emergency protective services, adjudication as a youth in need of care, and temporary legal custody on March 19, 2019. In its supporting affidavit, the Department documented Mother's drug

use, a history of domestic violence between the couple, and Father's "erratic" and "defensive" responses to investigator questions about his efforts to protect G.C. and keep her away from Mother when Mother was using. The Department also chronicled Father's resistance to UA testing and noted both parents would need to demonstrate sobriety and protective parenting before G.C. could be returned.

¶5 At the May 21, 2019 show cause hearing, Mother stipulated to the adjudication of G.C. and the Department's temporary legal custody. Because Father's counsel had yet to meet with him, the District Court agreed to a second show cause hearing to address Father on June 5, 2019. At the June hearing, the Department motioned to amend its petition from temporary legal custody to temporary investigative authority, and Father stipulated. The court's June 10, 2019 order granted the Department temporary investigative authority for 90 days and continued the emergency protective services granted in its March 20, 2019 order to show cause.

¶6 G.C. was returned to her parents' care in June 2019 and remained there until October 2019. While G.C. was with her parents, Mother's treatment plan was approved by the District Court, and the Department's temporary investigative authority expired.

¶7 On October 1, 2019, the Department received a report that Mother had relapsed into meth use. The Department filed a new petition for emergency protective services, adjudication as a youth in need of care, and temporary legal custody on October 9, 2019. Mother admitted her relapse to the Department. Both parents delayed in submitting Department-requested UAs. Father then tried to submit someone else's urine for a UA and admitted to using unprescribed Adderall. Both parents admitted domestic violence was

occurring in the home. The Department determined both parents were actively using methamphetamine and had engaged in domestic violence. The Department also found Father lied about moving out with G.C. when Mother relapsed and had left G.C. in Mother's care while Mother was using.

¶8 Also in October, Mother spent three days at the Montana Chemical Dependency Center (MCDC). She left against medical advice and was subsequently arrested on a probation violation for walking away. She was with Father at the time of her arrest and admitted he was a trigger for her relapse and that the two had used meth together in the days prior.

¶9 The District Court issued an order to show cause on October 16, 2019, which granted emergency protective services and temporary legal custody to the Department. That order held G.C.'s immediate danger warranted her removal and out-of-home placement. The court issued a nunc pro tunc order on October 21, 2019, that noted the previous hearing on June 5 and continued the grant of emergency protective services from its March 20, 2019 order.

¶10 At the show cause hearing on October 30, 2019, the District Court clarified that the hearing was a new adjudication based on the new petition and October 1 removal of G.C. Both parents stipulated to adjudication of G.C. as a youth in need of care. The court's November 12, 2019 order continued the grant of emergency protective services and temporary legal custody from its October 16 order to show cause until April 30, 2020.

¶11 At the end of October 2019, Mother reentered MCDC for inpatient chemical dependency treatment, and in November, Mother transferred to the Carole Graham Home in Missoula to continue inpatient treatment. G.C. joined her there in December 2019.

¶12 In April 2020, the Department petitioned to continue its temporary legal custody, which both parents stipulated to at a May 27, 2020 hearing. The Department also filed a motion for a permanency hearing, which was held June 3, 2020. At that time, the Department recommended reunification continue.

¶13 In June 2020, the District Court extended the Department's temporary legal custody until November 27, 2020, and approved the permanency plan.

¶14 In August 2020, after being discharged from the Carole Graham Home, Mother returned to Butte with G.C. against Department recommendations to stay in Missoula. The Department was concerned about Mother and Father resuming their relationship because of their previous domestic violence and their pattern of using drugs together. When Mother returned to Butte, she began living with relatives, but the Department found there was drug use and domestic violence occurring in the home. Mother then moved in with her grandmother, and G.C. began living with Father. Mother and Father were to alternate weeks caring for G.C. On September 15, 2020, the Department conducted a surprise visit to Father's home. The investigator found Mother and Father together. Both parents were asked to submit UAs. Mother tested positive for cocaine, methamphetamine, THC, and alcohol. Father tested positive for amphetamines. G.C. was again removed and placed into foster care. By this time, G.C. was nearly two years old and had been the subject of protective services since March 2019, a period of 18 months

¶15 Following G.C.'s September 2020 removal, Mother entered the Southwest Montana Addiction Recovery and Treatment (SMART) Program. However, she failed to submit Department-requested UAs in the following months. In October 2020, Father again tried to "game" his UA by taping a bag of either another person's or synthetic urine to his leg.

¶16 On November 17, 2020, the Department filed petitions to terminate Mother's and Father's parental rights to G.C., citing §§ 41-3-604(1) and -609(1)(f), MCA, and that G.C. had been in the Department's custody for 13 of the previous 22 months.

¶17 Both Mother and Father filed motions to continue, and the termination hearing was held March 17, 2021. The court heard testimony from Mother and Father, Department caseworkers, a program manager from the Carole Graham Home, Mother's counselor from SMART, and staff from Butte 4-C's who had conducted supervised visits with Mother.

¶18 In its May 17, 2021 termination orders, the District Court found that G.C. had been adjudicated a youth in need of care and had been involved with the Department for 21 of the last 22 months.

¶19 The District Court found Mother had admitted to her ongoing drug use and the domestic violence between her and Father, and that both the drug use and violence had occurred in front of G.C. The court noted Mother had never obtained permanent safe and stable housing. She had violated the rules at Carole Graham Home multiple times and, upon returning to Butte, had failed to secure independent housing. Mother had repeatedly stopped and started mental health counseling. The District Court highlighted the Department's extensive efforts with Mother and described her participation in multiple inpatient treatments. Despite this extensive history, Mother remained unable to maintain

sobriety. The District Court concluded Mother was unsuccessful in completing her treatment plan because of her continued drug use and was unlikely to change within a reasonable time.

¶20 As to Father, the District Court found he had been working on a treatment plan since August 2017 when G.C.'s sibling was removed. The court noted that, over the course of its intervention on behalf of G.C., the Department had requested 36 UAs from Father and that he “no showed” 33 times and tested positive twice. Father’s communication with the Department and participation in mental health counseling were sporadic, and the court found Father had only “minimally engaged” with the Department. The District Court held Father was unsuccessful in his treatment plan because of his inability to maintain sobriety and was unlikely to change within a reasonable time.

¶21 The court concluded it was in G.C.'s best interests both parents’ rights be terminated.

¶22 We review a district court’s decision to terminate parental rights for abuse of discretion. *In re C.B.*, 2014 MT 4, ¶ 11, 373 Mont. 204, 316 P.3d 177. “We will presume that a district court’s decision is correct and will not disturb it on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion.” *In re E.K.*, 2001 MT 279, ¶ 33, 307 Mont. 328, 37 P.3d 690.

¶23 On appeal, Mother argues her right to due process was violated by the timing of the initial show cause hearing and the bifurcated proceedings as to Father. Father also argues

his right to due process was violated because the District Court never approved a treatment plan for him.

¶24 The right to parent a child is a fundamental liberty interest that must be protected by fundamentally fair procedures; however, the best interests of the child are paramount in termination proceedings and take precedence over parental rights. *In re C.B.*, ¶ 12; *see also* § 41-3-101(7), MCA; *In re J.C.*, 2008 MT 127, ¶ 43, 343 Mont. 30, 183 P.3d 22.

¶25 “Key components of a fair proceeding are notice and an opportunity to be heard.” *In re C.J.*, 2010 MT 179, ¶ 27, 357 Mont. 219, 237 P.3d 1282. “For a parent to establish a claim for violation of due process, a parent must demonstrate how the outcome would have been different had the alleged due process violation not occurred.” *In re B.J.J.*, 2019 MT 129, ¶ 13, 396 Mont. 108, 443 P.3d 488; *In re J.C.*, ¶ 43.

¶26 Mother claims procedural delay prejudiced her treatment plan success and lengthened the time G.C. was in Department custody. Mother argues the District Court erred in terminating her rights because it relied upon the statutory presumption termination was in G.C.’s best interests based G.C.’s extended time in Department custody.

¶27 Under § 41-3-432(1)(a), MCA, a show cause hearing must be held within 20 days of the filing of the initial abuse and neglect petition.¹ Here, the show cause hearing was

¹ The Department notes Mother failed to object below to the late scheduling of the initial show cause hearing and argues she must meet the burden for plain error. Generally, we will not review issues raised for the first time on appeal. *In re H.T.*, 2015 MT 41, ¶ 14, 378 Mont. 206, 343 P.3d 159. However, in *In re C.B.*, 2019 MT 294, ¶ 15, 398 Mont. 176, 454 P.3d 1195, we reviewed a parent’s due process claims despite a failure to object below in order to protect against any manifest miscarriage of justice or unsettled question about the fairness of the termination proceeding. *See In re Parenting of D.C.N.H.*, 2020 MT 119, ¶ 24, 400 Mont. 59, 463 P.3d 445.

scheduled 43 days from when the first petition was filed and held 63 days after filing. Mother argues UAs were the only services she received prior to the hearing and thus also challenges the Department's reasonable efforts.

¶28 We have previously held procedural delays in timing to be harmless if the district court made its determination based on the child's best interests and the proceedings were fundamentally fair. *In re F.H., J.K., and B.K.*, 266 Mont. 36, 39, 878 P.2d 890, 892 (1994).

¶29 Mother had sufficient notice of the Department's reasons for removal and fair opportunity to respond to the Department's allegations. Mother was represented by counsel at the May 21, 2019 show cause hearing and stipulated to the adjudication. The record shows the Department had been working with Mother on her sobriety during G.C.'s previous voluntary kinship placement. Mother also relinquished her rights to G.C.'s sibling when facing termination based on identical circumstances. *See In re J.W.*, 2013 MT 201, ¶ 39, 371 Mont. 98, 307 P.3d 274. The initial show cause hearing was fundamentally fair.

¶30 In its final order, the District Court did not solely rely upon the presumption about G.C.'s time in Department custody. Clear and convincing evidence supported the court's conclusion that termination was in G.C.'s best interests. The principal nature of Mother's abuse and neglect was her ongoing meth use, and the primary goal of her treatment was sobriety. The record shows Mother repeatedly admitted she continued to use, and her positive UAs confirmed her failure to stay sober. The Department's reports and testimony also show Mother failed to obtain stable, independent housing when she returned to Butte. Additionally, the District Court found Mother did not comply with the mental health

requirements of her treatment plan related to her relationship with Father. The record shows domestic violence occurred in front of G.C.

¶31 While the District Court correctly considered the statutory presumption about G.C.'s time under protective services, substantial evidence in the record also details Mother's continuing meth addiction, repeated relapses, and her failure to successfully complete the other aspects of her treatment plan necessary for G.C.'s care and protection.

¶32 Mother cannot show the outcome would have been any different if the initial show cause hearing had been held a few weeks earlier. The record documents years of the Department's extensive efforts over the life of this case, including reunification support during inpatient treatment. Yet, upon every return of G.C. to Mother's custody, Mother relapsed. As such, the court's conclusion Mother was unlikely to change is not undermined by any indication the Department failed to provide reasonable efforts.

¶33 Mother also argues the District Court's initial grant of temporary legal custody at the May 21, 2019 hearing was clearly erroneous because the Department later pursued only temporary investigative authority against Father. Mother claims the concurrent requests for relief indicate a lack of sufficient evidence to establish G.C. as a youth in need of care.

¶34 Here, substantial evidence in the record supports the District Court's conclusions that G.C.'s well-being would be jeopardized if the petition was dismissed and she remained in the home and that reasonable services had been provided to Mother, including UAs and interviews with probation. The trigger for the Department's initial petition was Mother's undisputed positive UA in March 2019.

¶35 Regardless of Mother's challenges to the first petition, the Department filed a new petition as to both parents on October 9, 2019, after both admitted to drug use and either failed or resisted UAs following G.C.'s return home in June 2019. The October 2019 UA was Mother's second positive in eight months and precipitated G.C.'s third out-of-home placement by the time she was just over one year old.

¶36 Both Mother and Father stipulated to G.C. as a youth in need of care at the October 30, 2019 show cause hearing. Both parents also stipulated to an extension of temporary legal custody in May 2020. On the second petition, which ultimately led to termination, it was undisputed G.C. was a youth in need of care.

¶37 As to Father's due process claim, the lack of a court-approved treatment plan could signal a serious procedural deficiency if Father was placed at an unfair disadvantage during the termination proceedings. *See In re Custody of A.P.*, 2007 MT 297, ¶ 18, 340 Mont. 39, 172 P.3d 105. Unless good cause is shown, the lack of a treatment plan after a dispositional hearing is a statutory violation under § 41-3-443(6), MCA (mandating a treatment plan be ordered no later than 30 days after a § 41-3-438, MCA, hearing). Failure to meet the criteria of an appropriate court-approved treatment plan is also a required prong for termination under § 41-3-609(1)(f)(i), MCA.

¶38 The District Court scheduled a hearing to approve Father's treatment plan for November 27, 2019, but any indication this hearing occurred is absent from the record. However, in its final order terminating Father's parental rights, the court noted Father had been working with the Department on a treatment plan since August 2017 when G.C.'s older sibling was removed from his care.

¶39 After both parents admitted drug use and failed or resisted UAs in October 2019 and the Department filed a new petition, Father stipulated to an extension of temporary legal custody. Father did not object to the lack of treatment plan. The Department's affidavit supporting its request for the custody extension listed Father's treatment plan expectations as follows: mental health counseling, chemical dependency counseling, consistent communication with the Department, and parenting classes.

¶40 Father also did not object to the lack of treatment plan at the June 3, 2020 permanency plan hearing, and, at that hearing, the Department caseworker testified about Father's treatment plan progress.

¶41 Further, Father relinquished his parental rights to G.C.'s sibling in anticipation of termination on exactly the same grounds as for G.C. The primary concerns as to G.C.'s abuse and neglect were Father's drug use and the perpetual patterns of violence, dependency, and substance abuse in his relationship with Mother.

¶42 Despite the lack of a new court-approved treatment plan, the record confirms Father had notice of the Department's expectations and requirements for reunification and the opportunity to challenge these at the hearings extending the Department's custody and establishing a permanency plan. The District Court was apprised of the treatment tasks and goals for Father and could thereby evaluate his treatment completion and success. Father declined available opportunities to challenge the appropriateness of the plan. There is no showing of substantial injustice. The District Court's erroneous finding that it had approved Father's treatment plan is harmless error. *See In re J.C.*, ¶ 43.

¶43 Father also argues G.C.'s removal from his care in September 2020 was error because the Department failed to request a new adjudication or file legal notice as required by the June 5, 2020 order extending temporary legal custody. Father claims this foreclosed his opportunity to object to the removal. Father claims the Department violated its own policy requiring a court order for removal from a trial home visit lasting over six months, and that G.C.'s placement with him was a continuation of a trial home visit begun when G.C. was placed with Mother in the Carole Graham Home.

¶44 Administrative rule 45 C.F.R. § 1356.21(e) requires that if a trial home visit exceeds six months without court authorization and the child is returned to foster care, that is considered a new placement which requires reestablishing care eligibility. 45 C.F.R. § 1356.21(e) (2021). "Under these circumstances the judicial determinations regarding contrary to the welfare and reasonable efforts to prevent removal are required." 45 C.F.R. § 1356.21(e) (2021).

¶45 The Department correctly argues G.C. remained under its temporary legal custody during her time at Carole Graham. Carole Graham Home is a family-based treatment facility that can be considered for foster care placement under the Family First Prevention Services Act. It is a structured and supervised living environment. As such, the Department's determination that the trial home visit did not begin until Mother and G.C. returned to Butte and the parents began alternating weekly care independently at home is well-founded. The Department could revoke a trial home visit of only one month without a new court order as it did in September 2020 when both parents tested positive for drugs. Per the Department's policy Section 402-2, "During a [trial home visit], the Division

retains placement and care authority. If the visit is unsuccessful and the child is placed back into care within 6 months (180 days), it is not considered a new removal.” Montana Child and Family Services Policy Manual, Section 402-2 (Dec. 2015), <https://perma.cc/3JZT-UVSD> (last visited January 6, 2022).

¶46 There was no statutory or procedural error in G.C.’s final removal from her parents’ care. The Department acted within its court-ordered authority.²

¶47 Both parents also contest the sufficiency of the evidence supporting termination of their rights and challenge the Department’s reasonable efforts.

¶48 Regarding termination pursuant to § 41-3-609(1)(f), MCA, Mother claims the District Court erred because drug use relapse is insufficient to provide clear and convincing evidence a parent is unlikely to change within a reasonable amount of time.

¶49 Under § 41-3-609(2)(c), MCA, the District Court was statutorily required to consider the parents’ continued drug abuse in determining whether they were likely to change. While relapse alone may be insufficient evidence a parent is unlikely to change, *In re R.J.F.*, 2019 MT 113, ¶ 44, 395 Mont. 454, 443 P.3d 387, a repeated lack of progress in successfully maintaining sobriety supports this conclusion, even if other treatment plan goals are met, *In re A.B.*, 2020 MT 64, ¶¶ 27-29, 399 Mont. 219, 460 P.3d 405.

² Father also claims ineffective assistance of counsel for his counsel’s failure to object to the lack of treatment plan and failure to challenge the September 2020 removal. A successful claim for ineffective assistance of counsel requires a showing of prejudice. *In re A.S.*, 2004 MT 62, ¶ 31, 320 Mont. 268, 87 P.3d 408. We have determined Father’s alleged errors herein to be harmless or legally insufficient to affect the outcome; thus, no showing of prejudice can be made.

¶50 Here, substantial evidence in the record supports the District Court's conclusions that Mother was not only clearly unable to maintain sobriety or make progress after repeated interventions but was also unsuccessful in other components of her treatment plan. The same is true of Father.

¶51 Both Mother and Father claim the Department failed to provide reasonable efforts because of its conflicting communication about whether they were to stay away from each other or demonstrate co-parenting. They claim the Department failed to assist them in planning exchanges that met with Department expectations and that it was bad faith to require such contact without guidance. Both parents allege the ambiguous exchange expectations undermine the District Court's holdings that they were unsuccessful in their treatment plans and unlikely to change within a reasonable time pursuant to § 41-3-609(1)(f), MCA.

¶52 Mother claims this lack of clarity made her plan unworkable and led to the District Court's conclusion she had failed her mental health component. Mother also asserts the Department failed to provide referrals to chemical dependency counselors when she returned to Butte after leaving the Carole Graham Home and failed to increase her visitations with G.C. after she relapsed in October 2020.

¶53 Testimony in the record indicates relapse planning was part of Mother's discharge from the Carole Graham Home and that the Department gave her clear expectations about staying away from Father until the couple attended counseling to address their domestic violence and habitual drug use when together. The record shows that upon Mother's return to Butte, she resisted returning to counseling because she felt all her treatment had been

completed. Mother's claim about a lack of visitations is negated by the Department's coordination with Carole Graham Home for inpatient treatment that allowed Mother to live with G.C. Mother also failed to provide any Department-requested UAs after G.C.'s final removal.

¶54 The Department's investigator acknowledged the Department's recommendation for co-parenting counseling with Mother and Father was a shift in tactics and that the Carole Graham Home recommended against it and did not facilitate it. The investigator testified Mother's parenting of G.C. declined when she had opportunities to interact with Father. However, the investigator reported the Department changed course because of Mother's plan to return to Butte. The Department recognized Mother and Father were going to continue their relationship against Department recommendations.

¶55 The Department's affidavits showed the investigator's concern upon finding Mother and Father together in September 2020 was not that they had met to exchange G.C. but that, upon questioning, the couple indicated they had been "hanging out." As the record demonstrates, the couple's repeated relapses when spending time together warranted the Department's concerns. The couple's failed UAs and admissions of drug use around the time of this incident substantiated the Department's concerns.

¶56 "Although the State may assist the parents in completing the treatment program, the parents retain the ultimate responsibility for complying with the plan." *In re R.H.*, 250 Mont. 164, 170, 819 P.2d 152, 156 (1991).

¶57 The District Court's conclusion Mother was unlikely to change within a reasonable time is substantially supported by Mother's lack of progress on the mental health

components of her plan and her inability to maintain sobriety despite years of Department intervention. The record demonstrates Mother's intermittent participation in counseling and her failure to substantively acknowledge the harmful impact her relationship with Father had on her sobriety and parenting. The Department's efforts on behalf of Mother were reasonable.

¶58 The principal goals of Father's treatment were his sobriety and keeping G.C. safe from Mother when her sobriety failed. The Department's affidavit in support of terminating Father's rights noted he "downplayed his addiction throughout the life of the case." The Department made referrals for mental health and chemical dependency treatment. Yet, despite these reasonable efforts, evidence in the record indicates Father was not committed to treatment. Father admitted to failing and "no showing" for UAs. In the course of the Department's 21-month intervention on behalf of G.C., Father submitted only one negative UA. The record provides he deceptively tried to "game" UAs twice.

¶59 Father also did not successfully demonstrate progress toward the Department's mental health expectations. Of primary concern were his lack of boundaries with Mother—leaving the child in her care despite drug use concerns—and his failure to acknowledge the domestic violence in their relationship. The Department's affidavits and testimony indicated Father's contact with the Department and visitations with G.C. were sporadic. The District Court held that Father's engagement with the Department was minimal. While the record contains evidence of Father's adequate parenting and willingness to complete parenting classes, the couple's repeated relapses into old patterns and subsequent positive UAs demonstrate Father's failure to achieve treatment goals.

¶60 The record contains substantial evidence supporting termination of both Mother's and Father's parental rights to G.C. and that termination was in G.C.'s best interests.

¶61 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. The District Court's ruling was not an abuse of discretion.

¶62 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ JIM RICE