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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 21-0384

DA 21-0384

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 63N

IN THE MATTER OF:

J.S.

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-17-111
Honorable Robert J. Whelan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Gregory D. Birdsong, Birdsong Law Office, Santa Fe, New Mexico

For Appellee:

Austin Knudsen, Montana Attorney General, Cori Losing, Assistant
Attorney General, Helena, Montana

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

Submitted on Briefs: February 16, 2022

Decided: March 29, 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 A Butte-Silver Bow County man (Father, C.G.) appeals from the Second Judicial District Court's July 21, 2021 order terminating his parental rights to J.S., a six-year-old child, pursuant to § 41-3-609(1)(f), MCA. We affirm.

¶3 In 2017, the District Court adjudicated J.S. a youth in need of care (YINC). The Child and Family Services Division at the Montana Department of Public Health and Human Services (the Department) had removed J.S., then age two, from Father and from J.S.'s mother, who has since voluntarily relinquished parental rights. Following the YINC designation, Father signed a treatment plan that the District Court approved. The plan included parenting classes, visitation sessions, a chemical dependency evaluation, a mental health evaluation, anger management training, and requirements that Father maintain a safe and stable residence and maintain communication with the Child Protection Specialist (CPS) managing his case.

¶4 Father's issues underlying the proceedings included failures to control his temper, evidence of abuse or neglect leading to his children's injuries, overuse of marijuana, and failure to provide a safe and stable residence. The incident that catalyzed the Department's

involvement was J.S.'s half-sibling attending school with numerous visible injuries; the child said that Father had angrily shoved her into a metal desk, but Father and the children's mother gave contradictory explanations of how it was an accident. At times, Father's residence had the water shut off, and the Department received reports about other people living there, some of whom the Department had dealt with previously or were known to have substance abuse problems. Father's interactions with the Department included angry denials of these issues and shifting explanations.

¶5 In 2018 and again in 2019, the Department requested extensions of its temporary legal custody over J.S. Father stipulated to the first extension but contested the second. At a hearing on the second extension, the CPS worker assigned to Father's case testified to concerns that Father needed more time to successfully complete his treatment plan because he struggled to maintain focus on the wants and needs of J.S., a child with cognitive delays who needs above-average parenting attention. The Department had also communicated with Father's therapist, who surmised that Father had reached "maximum therapeutic benefit" whereby further work was unlikely to yield positive results. The District Court granted the second extension.

¶6 Following the second extension of the Department's temporary custody, Father continued to pursue the steps outlined in the parenting plan. But the Department's continued observation caused it to doubt his successful completion and ability to gain the fitness to safely parent J.S. For example, Father posted several concerning videos to social media. In one, during an unsupervised visit with J.S., Father referred to a room in his house with the implication that someone else was living there, which would contradict assertions

to the contrary that Father made to CPS workers. In another, Father and an unknown woman were “screaming and swearing at each other while driving down the road,” and J.S. was “improperly buckled.” Once, a visit with J.S. was cancelled because the CPS worker was out sick and a snowstorm made it difficult to drive for the transfer. Father posted a video of himself angrily ranting while driving past the home of J.S.’s foster parents. While the video caused the foster parents to feel threatened, Father failed to demonstrate an understanding of why his behavior was inappropriate. Although Father consistently attended the parenting classes and chemical dependency treatment in the assigned plan, he failed to demonstrate “actual change with his impulsivity” or that he “learned things from the parenting classes,” and he continued his heavy marijuana use.

¶7 In August 2019, the Department petitioned to terminate Father’s parental rights to J.S. As the parties prepared for a hearing on the matter, Father made comments that his CPS worker said indicated he “struggled to understand the nature of his treatment plan.” The Department worked to improve Father’s comprehension and vacated the scheduled hearing to create time for Father to undergo another psychological evaluation. A clinical psychologist, Dr. Susan Day, evaluated Father. Dr. Day opined that Father’s lifelong behavioral issues, impulsive temper, and drug use were related to brain damage from substantial earlier head injuries and indicated chronic PTSD and antisocial personality disorder. These factors, the doctor said, demonstrated an inability to manage himself and a child and were unlikely to change. The doctor noted that Father’s “chronic acting out and impulsive problems” appeared unresponsive to treatment and did not reflect a typical tempering of such traits seen in adults by their 50s. The doctor connected Father’s

long-term and continuing heavy marijuana use to Father being desensitized to the level of his aggressive tendencies and the risks they posed to himself and to a child.

¶8 The District Court held a hearing in February 2020. Dr. Day testified about her observations of Father, and the Department presented additional evidence regarding CPS observations. The CPS testimony covered Father’s parenting interactions with J.S. and matters like the conditions at Father’s residence, where he was unable to recognize safety concerns without assistance. For example, Father left a smoke detector beeping in his house for weeks (a risk given his smoking habits), and he appeared unable to manage risks such as ensuring J.S.—who suffers developmental delays—eats appropriately. Following some visits, he would vomit after Father allowed him to overeat. The CPS witnesses also testified about Father having individuals in his home and around J.S. who were people the Department had interacted with in other cases—individuals known by the Department to have concerning histories regarding substance abuse and child safety. After further briefing on the termination petition, the District Court granted the petition in July 2021. Father appeals.

¶9 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.

¶10 On appeal, Father argues that the Department failed to act in good faith in providing him the opportunity to successfully complete a treatment plan and regain custody. Father makes two arguments in this regard: first, that the Department’s plan was not appropriate given his circumstances; and second, that the Department’s communication with Father about his progress and its failure to modify the plan created impediments to his successful completion. Father argues that the District Court erred in its findings that he had failed to succeed at the treatment plan and that he was unlikely to become fit to parent in a reasonable time.

¶11 At the termination hearing, the Department bore the burden of demonstrating for the District Court the appropriateness of the treatment plan and its good faith efforts at implementation. *In re D.B.*, 2007 MT 246, ¶¶ 29-31, 339 Mont. 240, 168 P.3d 691. The treatment plan must address “the actions a parent must take to resolve the conditions that resulted in the need for protective services.” *In re A.L.P.*, 2020 MT 87, ¶ 15, 399 Mont. 504, 461 P.3d 136.

¶12 Father was represented by counsel and stipulated to the plan that the District Court approved. Furthermore, Father made no objections about the appropriateness of the treatment plan prior to this appeal. He has therefore waived his ability to raise the issue on appeal absent plain error by the District Court, which is a higher standard that depends on a “manifest miscarriage of justice” affecting a fundamental right. *In re C.B.*, 2019 MT 294, ¶ 14, 398 Mont. 176, 454 P.3d 1195. Father’s argument about the treatment plan being inappropriate for his circumstances rests on his inference that because the Department added a late-hour psychological evaluation, it must therefore be conceding that the plan as

approved was insufficient. But Father does not argue that the components of the plan did not account for the conditions underlying its necessity, and the Department's additional psychological evaluation followed Father's indication that he lacked understanding of the plan in place. Dr. Day presented findings about the intractability of Father's issues that the plan sought to address, and she focused on Father's unresponsiveness to treatment. Dr. Day noted that he "has brain damage, and it's not going to get better," she observed his suicidal ideations, and she explained that "due to [his] risk factors [] he has a great amount of difficulty handling his impulses when he's upset, and he's prone to be aggressive towards himself and other people." Her testimony added context regarding whether Father was likely to gain the ability to parent and did not undercut the sufficiency of the treatment plan that had been in place. Father's argument here is not enough to demonstrate plain error.

¶13 Father's next arguments hinge on the Department's reactions to Father's progress under the treatment plan. Father attended chemical dependency evaluation to address his marijuana use, and the CPS evaluator stated that "there is no point in recommending treatment for him since he has no desire to change" his smoking habits. Father argues that rather than noting these results—and later wielding them as evidence for termination—the Department should have communicated with him about the impediment and helped him find ways to overcome it. Similarly, Father argues that the Department should have been more forthright about its concerns regarding his progress interacting with J.S. during visits and the conditions in his home. Before pursuing termination on these grounds, Father argues, the Department should have modified the plan to help him find counseling alternatives. Father argues that after the doctor who examined him before the termination

hearing observed behavioral and mental issues, the Department should have sought plan modifications that would accommodate his special needs rather than continue with the termination petition.

¶14 The Department does have an obligation to act in good faith to preserve the parent-child relationship. *In re D.B.*, ¶ 33. This obligation continues throughout the parent's efforts under the plan and may sometimes warrant modification. *In re D.B.*, ¶¶ 33, 35. The Department's observations about Father's conduct, and the way it handled its concerns, were reflective of evidence not that the plan needed to be modified, but rather that Father's progress under the plan was not indicative of a viable parenting future. The Department acknowledged Father's attendance and areas of progress according to the plan, and the Department sought, through two extensions of time, to continue with those steps. But the Department also noted important aspects of his behavior that indicated his unwillingness or inability to achieve the necessary changes that the plan sought to address. When it appeared that Father was struggling to understand the plan, the Department sought an additional mental evaluation. And contrary to Father's framing, the doctor's evaluation did not indicate that the *plan* was insufficient but instead showed that Father was simply unlikely to be able to achieve its *goals*. These processes demonstrate sufficient action by the Department to provide Father an opportunity to develop the capacity to keep the child safe.

¶15 Following the evidence demonstrated through the termination proceeding, the court had no basis in fact to extend Father's opportunity beyond the 26 months that had already passed. When a district court approves a Department petition to terminate parental rights,

it must find that the parent's conduct or condition renders the parent unfit to parent and that such conduct or condition is unlikely to change in a reasonable time. Section 41-3-609(1)(f)(ii), MCA. It 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 parent[] renders the parent[] unfit, unable, or unwilling to give the child adequate parental care." Section 41-3-609(2), MCA. The district court must consider the conditions that create the parent's unfitness, and it must determine "whether the parent is likely to make enough progress within a reasonable time to overcome" those circumstances. *In re A.B.*, 2020 MT 64, ¶ 27, 399 Mont. 219, 460 P.3d 405.

¶16 Here, the District Court found that clear and convincing evidence supported terminating Father's parental rights to J.S. based on these standards. We hold that the District Court did not abuse its discretion in doing so. Although Father did show some progress toward the steps in the parenting plan, the Department presented ample evidence of Father's failure to translate those steps into a substantive improvement in his ability to safely parent J.S. This included testimony demonstrating Father's inability to regulate his temper, his long-standing aggressive tendencies, his disinterest in curtailing his drug use, and expert opinion about the intractability of these issues and Father's inability to understand and meet J.S.'s needs and keep him safe. The Department's showing included the evidence of Father's violence toward his children that catalyzed the Department's involvement combined with a demonstration of Father's inability to change his aggressive impulsivity.

¶17 The fact that Father can point to some evidence that might weigh against termination does not demonstrate that the District Court's consideration of the evidence as a whole was clearly erroneous. The Department's evidence well supported the District Court's factual findings and legal conclusions, and we find no basis for reversal.

¶18 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.

¶19 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR