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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 21-0414

DA 21-0414

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 75

IN THE MATTER OF:

S.S.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. CDN-19-114
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Shannon Hathaway, Driscoll Hathaway Law Group, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Jonathan M. Krauss, Assistant Attorney General, Helena, Montana

Josh Racki, Cascade County Attorney, Valerie M. Winfield, Deputy County Attorney, Great Falls, Montana

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Submitted on Briefs: March 9, 2022

Decided: April 12, 2022

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 S.S. (Mother) appeals the January 13, 2021 Findings, Conclusions, and Order and Decree of Guardianship by the Eighth Judicial District Court, Cascade County, granting guardianship of her son, S.S., to his maternal grandparents. We address the following issue on appeal:

> *Whether the District Court erred in finding that continued efforts to reunify Mother and child would likely be unproductive.*

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The Department of Public Health and Human Services removed six-year-old S.S. on April 5, 2019, after receiving reports that Mother was running illegal drugs into Montana from Portland, Oregon, and selling methamphetamine. After several weeks of searching for Mother to no avail, an investigation with local law enforcement led officers to a house in Great Falls where they found Mother and took her into custody. Mother refused to provide officers with any information regarding S.S.'s whereabouts, but they eventually located him after visiting two residences, a motor home, and the parking lot of a Fleet Supply, in what the District Court characterized as "a bizarre series of hand-offs . . . among multiple non-parental third parties in what appeared to be a deliberate attempt to keep the Department from checking in on his welfare." Officers reported that S.S. was terrified of them. At one point, S.S. took off "at a dead sprint" across a parking lot screaming, "You guys are baby snatchers; get away from me." On April 12, 2019, a hair sample from S.S. tested positive for methamphetamine. As his birth father was

unknown, the Department placed S.S. with his maternal grandparents, Mother's father and his wife.

¶3 The State charged Mother with two counts of possession of dangerous drugs and theft after officers discovered she was carrying methamphetamine and $1,100 when they picked her up on April 5, 2019. Mother was arrested on those charges on April 21, 2019, and incarcerated until May 30, 2019. The State charged Mother with child endangerment after S.S.'s positive methamphetamine test result.

¶4 On April 10, 2019, the Department filed petitions for emergency protective services, adjudication as a youth in need of care, and temporary legal custody. The District Court adjudicated S.S. to be a youth in need of care on August 27, 2019. The court based its decision primarily on the fact that S.S. had tested positive for methamphetamine, describing the April 5, 2019 ordeal to locate Mother and S.S. as "confusing" and stating, "It hasn't been established, at least not this morning, that any of those people were necessarily inappropriate or dangerous caregivers. It's just confusing. What isn't confusing is that [S.S.], who's [six], tested positive for methamphetamine. Based on that, I find probable cause to support the filing of the petition and the issuance of the citation."

¶5 On September 17, 2019, the District Court adopted a treatment plan for Mother, without objection, and granted six months of temporary legal custody (TLC) to the Department. Mother's treatment plan included tasks related to chemical dependency, parenting education, and maintaining communication with the Department. TLC was extended on March 17, 2020, and September 15, 2020.

¶6 On April 13, 2020, the Department filed a motion for a permanency plan to establish guardianship with S.S.'s maternal grandparents, alleging that Mother had not completed any tasks in her treatment plan because she was incarcerated on new charges. The District Court approved the Department's proposed permanency plan at a hearing on June 16, 2020. At the hearing, Child Protection Specialist Aimie Arnold testified that S.S. was "happy and thriving with his grandparents." Mother, who had recently been released from jail, did not object to the plan. Mother testified that she was living in the house next door to her father and S.S., and while she was spending a lot of time with S.S., "I just want him back really, really bad, and he wants to be home."

¶7 Throughout this case, Mother has continued to deny the allegations that she is or has been a drug user and that she ever exposed S.S. to methamphetamine. Mother claims either that S.S.'s hair sample test result was wrong, or that the exposure occurred sometime in the first seven days that he was in the Department's care. At an October 27, 2020 status hearing, the Department advised the court that it had received two notices of patch violations (removal of the patch) and a positive patch test for methamphetamine. Mother maintained that she was not a drug user and attributed the positive test result to her Adderall prescription. The Department countered that the drug testing laboratory confirmed that such a result was not possible, and concluded "there is still obviously a real concern with birth mother using methamphetamines."

¶8 On October 31, 2020, Mother was involved in a vehicle crash resulting in an outstanding warrant for her arrest. Mother allegedly reported to emergency room staff that she had been drinking alcohol and smoking marijuana that night.

¶9 The Department filed a petition for guardianship on December 10, 2020. The Department's affidavit in support of the petition acknowledged that Mother had completed some elements of her treatment plan, but concluded that "[b]irth mother[']s continued criminal behavior leads the Department to believe she has no intentions to change this behavior as she sees nothing wrong with it[,] and therefor[e], she is likely to continue to put the child at risk of serious harm."

¶10 The District Court held a hearing on the Department's petition for guardianship on December 29, 2020. Mother opposed the petition on the grounds that the Department could not prove that continuing reunification services were unlikely to be productive and that reunification with Mother, not guardianship, was in the best interest of the child. Arnold testified that, due to her adamant denial of drug use, Mother had not made any progress on the chemical dependency element of her treatment plan. While Mother asserted that she had completed a chemical dependency evaluation in October, Arnold testified that the evaluation was incomplete because the Department was not able to provide collateral information to the counselor prior to the evaluation, and because Mother had not signed a release giving the Department access to the results. Arnold also testified that Mother's insistence that S.S. was never unsafe, despite all the evidence to the contrary, "is very concerning." Arnold testified that she did not believe further reunification efforts would be productive because "we just have gotten nowhere with her. At this point, we're just kind of spinning our wheels."

¶11 The District Court granted the Department's petition on January 13, 2021, concluding that the Department had made reasonable efforts to help Mother comply with

her treatment plan after her release from jail; however, Mother's "treatment record and her ongoing denial that there was any reason to remove [S.S.] in the first place indicate lack of insight and an ongoing state of denial that would more likely than not place [S.S.] at risk of additional abuse or neglect if returned to her care." The court determined that it was unnecessary to resolve whether Mother had recently used methamphetamine to decide that "the stability that will come with a grandparent guardianship is in [S.S.]'s best interest" and that guardianship, as opposed to termination, "preserves [S.S.]'s options to have ongoing contact with [Mother] as allowed by the guardians and to have a future relationship with her if he so chooses." The District Court found that "[o]n this record, termination of [Mother's] parental rights would be unwarranted and would accordingly not be in [S.S.]'s best interests."

STANDARDS OF REVIEW

¶12 We review a district court's conclusions of law to determine whether they are correct. *In re Custody of & the Parental Rights of T.Z. & J.Z.*, 2000 MT 205, ¶ 10, 300 Mont. 522, 6 P.3d 960. We review a district court's findings of fact to determine if they are clearly erroneous. *In re J.S.*, 2014 MT 79, ¶ 14, 374 Mont. 329, 321 P.3d 103. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if this Court is left with the definite and firm conviction that a mistake has been committed. *In re J.S.*, ¶ 14. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion, even if weak and conflicting. *In re J.H.*, 2016 MT 35, ¶ 24, 382 Mont. 214, 367 P.3d 339 ("It consists of more than a mere scintilla of evidence but may be less than a

preponderance."). When determining whether substantial credible evidence supports the district court's findings, we view the evidence in the light most favorable to the prevailing party. *In re J.H.*, ¶ 13.[1]

DISCUSSION

Whether the District Court erred in finding that continued efforts to reunify Mother and child would likely be unproductive.

¶13 Relevant to this case, a district court may appoint a guardian for a child who has been placed in the temporary or permanent custody of the Department if the court finds the following facts:

> (a) the department has given its written consent to the appointment of the guardian, whether the guardianship is to be subsidized or not;
>
> (b) if the guardianship is to be subsidized, the department has given its written consent after the department has considered initiating or continuing financial subsidies pursuant to subsection (9);
>
> (c) the child has been adjudicated a youth in need of care;
>
> (d) the department has made reasonable efforts to reunite the parent and child, further efforts to reunite the parent and child by the

[1] On appeal, Mother asserts that "the State had not met its burden by clear and convincing evidence that future reunification efforts were likely to be unproductive." Other than baldly asserting that the State's burden was "clear and convincing evidence," Mother offers no argument or analysis on this point. Section 41-3-444, MCA, does not impose a "clear and convincing evidence" burden. The statute states only that "[t]he court may appoint a guardian for a child pursuant to this section if the following facts are found by the court." Section 41-3-444(2), MCA. *Compare* § 41-3-444(2), MCA, to § 41-3-422(5)(a), MCA (providing that the party filing the abuse and neglect petition has the burden of presenting evidence required to justify the relief requested and establishing: (i) probable cause for the issuance of an order for immediate protection and emergency protective services or an order for temporary investigative authority; (ii) a preponderance of the evidence for an order of adjudication or temporary legal custody; (iii) a preponderance of the evidence for an order of long-term custody; or (iv) clear and convincing evidence for an order terminating the parent-child legal relationship).

> department would likely be unproductive, and reunification of the parent and child would be contrary to the best interests of the child;
>
> (e) the child has lived with the potential guardian in a family setting and the potential guardian is committed to providing a long-term relationship with the child;
>
> (f) it is in the best interests of the child to remain or be placed with the potential guardian;
>
> (g) either termination of parental rights to the child is not in the child's best interests or parental rights to the child have been terminated, but adoption is not in the child's best interests.

Section 41-3-444(2), MCA.

¶14 Mother concedes that all but one of the statutory criteria for guardianship in this case have been met. Mother argues that the District Court erroneously found that further efforts by the Department to reunite Mother and S.S. would likely be unproductive, as required by § 41-3-444(2)(d), MCA. Mother contends that, unlike § 41-3-609(1)(f)(ii), MCA, the statute governing termination of parental rights, the standard applied to guardianship petitions does not ask whether continued reasonable efforts are likely to result in change, only whether they are likely to be productive. Mother asserts that because she had made progress on some aspects of her treatment plan, the District Court's determination that further efforts by the Department would be unproductive is incorrect.

¶15 The Department responds that substantial evidence in the record supports the District Court's factual finding that "further efforts to reunite the parent and child by the department would likely be unproductive."

¶16 The Department petitioned the District Court to grant guardianship of S.S. to his grandparents because, despite Mother's limited progress in some areas of her treatment

plan, it contended that further progress was unlikely. Arnold testified that, after more than 15 months, Mother had not substantially completed her treatment plan; Mother still refused to acknowledge that S.S. had tested positive for methamphetamine while in her care; and the Department had "gotten nowhere with [Mother]" and was "just kind of spinning [its] wheels." The record contains substantial evidence to support the District Court's finding that additional reunification efforts would not be productive. "In reviewing a district court's findings, [this Court will] not consider whether the evidence could support a different finding; nor [will it] substitute [its] judgment for that of the fact-finder regarding the weight given to the evidence." *In re M.B.*, 2004 MT 304, ¶ 12, 323 Mont. 468, 100 P.3d 1006 (citing *In re L.S.*, 2003 MT 12, ¶ 10, 314 Mont. 42, 63 P.3d 497).

CONCLUSION

¶17 Viewing the evidence in the light most favorable to the Department, a reasonable mind could conclude based on the above facts that further efforts by the Department to reunite Mother and S.S. would likely be unproductive. The District Court's findings were not clearly erroneous and its conclusions of law were correct.

¶18 We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON