DA 21-0444

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 154N

IN THE MATTER OF:

A.N., J.G. and A.G.,

Youths in Need of Care.

APPEAL FROM: District Court of the Sixteenth Judicial District,
In and For the County of Custer, Cause No. DN-9-2017-38
Honorable Michael B. Hayworth, Presiding Judge

COUNSEL OF RECORD:

For Appellant Mother:

Robin A. Meguire, Attorney at Law, Great Falls, Montana

For Appellant Father:

Daniel V. Biddulph, Peppertree Law, PLLC, Missoula, Montana

For Appellee:

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

Wyatt A. Glade, Custer County Attorney, Shawn Quinlan, Deputy County Attorney, Miles City, Montana

Submitted on Briefs: June 22, 2022
Decided: August 2, 2022

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 S.N. (Mother) and C.G. (Father) each appeal the Sixteenth Judicial District Court's orders terminating their parental rights to their three children, A.N., J.G., and A.G. (the Children). We affirm.

¶3 The Department of Public Health and Human Services, Child and Family Services Division (the Department) removed the Children from Mother's and Father's care in December 2017 following a report of parental drug use, domestic violence in the Children's presence, neglect, and untreated parental mental health issues. Mother and Father stipulated the next month to temporary investigative authority (TIA) and emergency protective services for ninety days.

¶4 The Department petitioned for adjudication of the Children as Youths in Need of Care (YINC) and for Temporary Legal Custody (TLC) following the TIA period. The Department remained concerned with Mother's and Father's abilities to provide a safe home and basic necessities for the Children. Mother and Father stipulated to the adjudication, and the District Court granted the Department TLC in August 2018.

¶5 The Department developed a treatment plan for both parents, which the parents signed and the District Court approved in August 2018. The treatment plans required that Mother and Father remain sober and submit to random drug screenings, maintain a safe and clean home, engage in mental health treatment, and attend parenting classes. Mother's treatment plan also required that she regularly attend counseling sessions.

¶6 The parents had a series of trial home visits with the Children from August 2018 to March 2019. The Department ended a September 2018 home visit because of the condition of the home and the Children developing head lice. All home visits were suspended in March 2019 after the parents "had a significant fight in front of the Children."

¶7 The Department moved for termination of Mother's and Father's parental rights in September 2019. The District Court held a hearing on December 11, 2019. The Department, relying on psychological evaluations conducted by Dr. Paula Kiosse, remained concerned with each parent's ability to care for the Children given their mental health. Based on the testimony, however, the Department agreed to withdraw the termination petition, extend TLC for an additional six months, and provide Mother and Father each with a Phase II treatment plan. The District Court approved the Phase II treatment plans in January 2020. Incorporating Dr. Kiosse's recommendations, the plans required that the parents engage in therapeutic parenting observation time, family therapy, anger management classes and individual therapy, in addition to the conditions imposed by the original treatment plans, and that they follow the recommendations of all professionals working with the Children.

¶8 That same month, A.N. disclosed that she had been sexually assaulted by J.G., who admitted to the conduct. J.G. was removed from the Children's foster placement and placed in a treatment home. Following A.N.'s disclosure, the Department provided Mother and Father additional counseling with Dr. Alice Hougardy to assist them in learning how to parent both A.N. and J.G. Mother's and Father's Phase II treatment plans were not updated to address the sexual assault and did not require that Mother or Father engage in counseling with Dr. Hougardy.

¶9 Mother and Father underwent additional psychological evaluations with Dr. Tom Peterson in March 2020 as part of their Phase II treatment plans. Dr. Peterson concluded that Mother and Father continued to struggle with parenting and that both parents, because of their ADHD, would benefit from being taught in a hands-on teaching style, rather than through written or verbal learning.

¶10 Later that month, Mother's and Father's in-person parenting time was suspended because of the COVID-19 pandemic. Mother and Father conducted parenting time virtually, via video chat or by phone. In July 2020, Mother was hospitalized with an infection and was, at times, comatose. She was released from the hospital at the end of September 2020.

¶11 The Department filed a second termination petition in December 2020. The Department remained concerned with Mother's and Father's positive drug tests, mental health, and parenting abilities. The District Court held a termination hearing over four non-consecutive days in March, April, and June 2021. Over the course of the four hearing days, the court heard testimony from Child Protection Specialist Raylynn Sleight and from

Mother's and Father's mental health providers. Mother and Father testified to the steps they had taken and to the treatment each had received since the Children were removed in late 2017. They testified also to the impacts of the COVID-19 pandemic on their parenting time. Upon the conclusion of testimony, the District Court encouraged the parents and the Department to work toward a mutual resolution and scheduled a status hearing for July 2021.

¶12 The District Court held the status hearing on July 20, 2021. The court acknowledged that the Department did not do everything that it should have between the first and second termination petitions but noted that Dr. Peterson's testimony established that Mother and Father both had "significant deficiencies in parenting." The court raised concern with each parent's ability to "meet basic parenting responsibilities" given the Children's special needs. The court noted the long duration of the case, Mother's and Father's positive drug tests, and the Children's need for permanency.

¶13 The District Court issued separate orders on August 10, 2021, terminating the parental rights of both Mother and Father. This appeal followed.

¶14 A court may terminate parental rights upon findings by clear and convincing evidence that (1) the child is a YINC, (2) the parent failed to successfully comply with an approved treatment plan, and (3) "the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time." Section 41-3-609(1)(f), MCA. We presume that a district court's decision to terminate parental rights is correct and will not disturb it absent 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 Matter of E.K.*, 2001 MT 279,

¶ 33, 307 Mont. 328, 37 P.3d 690 (citation omitted). A finding of fact is clearly erroneous if it is "not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if this Court has a definite and firm conviction that the lower court was mistaken." *In re S.C.L.*, 2019 MT 61, ¶ 6, 395 Mont. 127, 437 P.3d 122 (citation omitted).

¶15 Mother and Father each assert that the District Court lacked clear and convincing evidence to support termination. They both raise several issues with respect to their treatment plans, arguing that the Department failed to make reasonable efforts at reunification. Each parent contends that because of these faults, the District Court's conclusion that Mother's and Father's conduct was unlikely to change within a reasonable time was in error.

¶16 Mother and Father first contend that the Department failed to customize their treatment plans to account for their disabilities. They argue that the Department should have modified their Phase II treatment plans to account for Dr. Peterson's findings and should have distributed Dr. Peterson's report to Mother's and Father's providers. Despite their arguments on appeal, neither parent objected to the sufficiency of the treatment plan in the District Court. *See In re T.S.*, 2013 MT 274, ¶ 27, 372 Mont. 79, 310 P.3d 538.

¶17 Lack of objection notwithstanding, the record supports the District Court's finding that the Department fulfilled its obligation to make reasonable efforts despite not integrating or distributing Dr. Peterson's findings. Though the parents make a valid point that the Department could have better incorporated Dr. Peterson's findings, the court found that given "the redundancy" of the information providers gave to the parents, and "the adjustments made by [the providers] to accommodate each parent's learning challenges,"

the Department satisfied its obligation to make reasonable efforts to reunify the family. Testimony from Mother's and Father's providers supports the District Court's findings. Several providers testified that the information in Dr. Peterson's report would not have changed how they provided care to Mother and Father. Many providers also testified that they incorporated hands-on learning or role playing—techniques recommended by Dr. Peterson—into their care. Moreover, Child Protection Specialist Sleight testified that she communicated the specific learning needs of Mother and Father to their providers. Based on this record, the District Court did not clearly err in finding that the Department made reasonable efforts to reunify the family.

¶18 Mother and Father next argue that the District Court should not have relied on the testimony of Dr. Hougardy when the Department did not include anything in the Phase II treatment plans regarding the sexual assault. But again, neither parent objected to Dr. Hougardy's testimony during the second termination hearings. *See In re T.S.*, ¶ 27.[1]

¶19 Even if either parent had objected, the District Court acknowledged in its findings that each parent's treatment plan did not require Mother or Father to work with Dr. Hougardy. The court explained that it was not considering Dr. Hougardy's concerns to be "a specific failure to satisfy the . . . [t]reatment [p]lan," but rather as evidence of the Parents' "inability to meet the[] [C]hildren's special needs." The District Court did not err

[1] We decline to consider Mother's undeveloped argument that the District Court erred by relying on Dr. Kiosse's testimony from the 2019 termination hearing. The District Court granted the State's motion for judicial notice of Dr. Kiosse's reports and prior testimony in March 2021 after neither parent made any objection. Mother did not preserve this argument.

when it considered Dr. Hougardy's testimony as evidence of each parent's ability to care for the Children's needs.

¶20 Mother and Father next contend that the District Court overlooked evidence of each parent's growth and development throughout the case. The record reveals that both Mother and Father made some improvements over the course of the Department's involvement, but it nonetheless also supports the District Court's finding that, "[d]espite the extended period of intervention measures," Mother and Father had not reached "minimum parental care." The Guardian Ad Litem, who worked with the family through the duration of the case, testified that Mother and Father still required redirection and that she had not seen improvement in either parent's parenting abilities. Mother and Father point to the testimony of their counselor, Pat Colombik, to show that they continued to make consistent improvement throughout the case. But Colombik also testified that despite each parent's progress, she believed that Mother and Father would be able to meet the Children's needs only if they "continued to be plugged in with their treatment team." Though Mother and Father did demonstrate some growth, the District Court did not err in finding that each parent's ability to provide the Children adequate parental care was unlikely to change within a reasonable time.

¶21 Mother and Father next argue that the District Court's reliance on the failed drug tests was clearly erroneous because their prescription drugs could have falsely indicated methamphetamine use. Father argues that even if the tests were accurate, any drug use did not render him unfit to parent. Both parents' sweat drug patches tested positive for amphetamine and methamphetamine numerous times. Each missed multiple tests during

the duration of the termination hearings, which the Department treated as positive tests. Father additionally had multiple urinalyses test positive for methamphetamine. The Parents did present some testimony from their providers that Mother's and Father's prescription medications could, in theory, result in false positives. The District Court did not, however, predicate its decision to terminate Mother's and Father's parental rights solely on evidence of methamphetamine use. The District Court's findings are not clearly erroneous when they conscientiously and diligently address the record as a whole and support the court's decision to terminate each parent's parental rights.

¶22 Mother and Father finally take issue with two procedural defects they allege prejudiced their due process rights. The parents first argue that the COVID-19 pandemic, specifically virtual visitation with the Children, interfered with the Department's reasonable efforts and violated their fundamental due process rights. Though unfortunate, given the public health dangers posed by in-person gatherings and the numerous governmental directives and guidelines related to the COVID-19 pandemic, it was reasonable at that time for the Department to move to virtual parenting time. Challenges posed by the COVID-19 pandemic may have changed the way in which the Department provided reunification efforts, but the Department still provided Mother and Father with services. And by March 2020, Mother and Father already had over two years of in-person parenting to demonstrate improved parenting skills. The Department continued to make reasonable efforts despite the pandemic-related challenges. We conclude that neither parent's fundamental rights were prejudiced.

¶23 Mother and Father contend second that the prosecutor had a conflict of interest because he previously had represented the Children while working for the Office of the Public Defender. Rule 1.9(a), M. R. Prof. Cond. prohibits "[a] lawyer who has formerly represented a client in a matter [from representing] another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Any alleged conflict does not lie with the parents, but rather with the prosecutor's former clients, the Children. Rule 1.9(a), M. R. Prof. Cond. The Children's attorney did not object. The District Court brought the conflict to the attention of all parties at the July 2018 hearing on temporary legal custody and neither the parties nor the Guardian Ad Litem raised an objection. Although the prosecutor had represented the Children briefly after their removal just months earlier, his role as a prosecutor was not materially adverse to the Children's interests. The prosecutor, Guardian Ad Litem, and the Children's attorney all recommended termination. Even if Mother and Father could assert a conflict, neither parent has demonstrated how the alleged conflict of interest prejudiced either of their rights. Mother's argument that the prosecutor could have obtained confidential information while representing the Children is purely speculative. Neither parent's right to due process was substantially prejudiced.

¶24 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 did not abuse its discretion in terminating the parental rights of Mother and Father. We affirm.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ JIM RICE