

DA 21-0457

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 135N

IN THE MATTER OF:

X.G., A.G. and K.G.,

Youths in Need of Care.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause Nos. ADN 2018-93,
ADN 2018-94, and ADN 2018-95
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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

For Appellee:


Austin Knudsen, Montana Attorney General, Roy Brown, Assistant
Attorney General, Helena, Montana

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Submitted on Briefs: May 4, 2022

Decided: July 5, 2022

Filed:


Clerk

Justice Ingrid Gustafson 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 C.Y. (Mother) appeals from the August 11, 2021 Findings of Fact, Conclusions of Law and Order Terminating Parental Rights with Consent to Adoption or Guardianship issued in cause numbers ADN-2018-93, ADN-2018-94, and ADN-2018-95 by the First Judicial District Court, Lewis and Clark County, which terminated her parental rights to her children X.G., A.G., and K.G. We affirm.

¶3 X.G., A.G., and K.G. are the biological children of Mother and I.G. (Father). Mother and the children first became involved with the Montana Department of Public Health and Human Services, Child and Family Services Division (Department), in early 2018, after a report of physical abuse by Mother towards X.G. Father was living in Missouri at the time. Mother entered a voluntary diversion program, was convicted of criminal endangerment, and received a deferred sentence. As part of the diversion program, Mother received in-home services and a referral for a parenting class from the Department. The Department did not remove the children from Mother's care and closed its file on approximately October 1, 2018.

¶4 On October 30, 2018, the children were removed from Mother's care by the Department after it received a confidential report that X.G. was missing from school for multiple days and A.G. had told a teacher it was because X.G.'s "cheek was red" where Mother's live-in boyfriend, S.L., had "hit him." Child Protection Specialist (CPS) Gerald Hill responded to the report and met with A.G. at school. A.G. told CPS Hill X.G. was missing because X.G.'s cheek was red where Mother's boyfriend had hit him. CPS Hill then went to Mother's residence and attempted to speak with her. Mother first did not respond to CPS Hill knocking on the door and then lied about being at the doctor's office with the children when CPS Hill called her telephone. Ultimately, she let CPS Hill inside the home. CPS Hill discovered X.G. with "significant bruising" on his cheeks. Mother informed CPS Hill she did not take X.G. to school for the last two days because she did not want to get in trouble due to X.G.'s face being bruised. Mother's boyfriend was arrested on assault charges on October 31, 2018.

¶5 On November 7, 2018, the Department filed a Petition for Emergency Protective Services (EPS), Adjudication as Youth in Need of Care (YINC), and Temporary Legal Custody (TLC). On November 9, 2018, the District Court granted EPS and set a show cause hearing for November 28, 2018. The initial show cause hearing was then continued until December 20, 2018, to allow the parties time to prepare for a contested show cause hearing. At that hearing, CPS Hill testified regarding the bruising he observed on X.G., Mother's lies about her whereabouts when he was attempting to investigate the report, and to how he did not believe it was safe to leave the children in Mother's care at the time of

their removal on October 30, 2018. Father also testified at the show cause hearing, asserting he wished for the children to be placed with him in Missouri after the completion of an Interstate Compact on the Placement of Children (ICPC) home study. At the end of the hearing, the District Court found the Department's removal of the children was appropriate, approved the Department's request for an expedited ICPC, noted Mother "failed to keep these children safe," and granted the State's petition.¹

¶6 The District Court held an adjudication hearing on January 2, 2019, and a treatment plan hearing on January 30, 2019. On February 20, 2019, the court issued orders which adjudicated the children as YINCs pursuant to the stipulation of the parents, granted TLC to the Department for six months, and approved Mother's treatment plan. Mother's treatment plan sought to address her limited parenting skills and domestic violence history, possible chemical dependency, mental health issues, and criminal conduct. The District Court issued an order extending TLC for an additional six months on August 19, 2019, following a June 19, 2019 hearing. At that hearing, CPS Grace Wadlington noted A.G. and X.G. have been diagnosed with autism spectrum disorder and were "going to require a lot of services over the long term." The court issued an order extending TLC for another six months on January 13, 2020, following a December 18, 2019 hearing. Prior to the

¹ While an ICPC was not necessarily required to place children with Father, *see In re E.Y.R.*, 2019 MT 189, ¶ 30, 396 Mont. 515, 446 P.3d 1117 and *In re B.H.*, 2020 MT 4, ¶ 44, 398 Mont. 275, 456 P.3d 233, Father requested both an expedited ICPC and an order placing the children in his care and dismissing the case. Despite this, he stopped participating in the case, did not cooperate with the ICPC he requested, and his parental rights were terminated. Father did not appeal the termination of his parental rights.

hearing, Court-Appointed Special Advocate (CASA)/Guardian ad Litem (GAL) Susan Epstein filed a report with the court which noted Mother had not yet completed a parenting class, taken classes to learn to deal with autism, or taken anger management. CASA/GAL Epstein's report noted the CPS visitation specialist had suggested Mother take SafeCare and Parent-Child Interactional Therapy (PCIT) to improve her parenting skills. At the hearing, the Department noted it was working with Mother "to get some additional services."

¶7 The District Court held a status hearing on March 11, 2020. Prior to that hearing, CASA/GAL Epstein filed another report with the court, which noted Mother was scheduled to begin PCIT with X.G. on February 24, 2020, but failed to pick him up from school and the session had to be postponed. The report further noted the PCIT instructor recommended Mother take a Parenting Competency Assessment and that X.G.'s foster mother had invited Mother to join her for weekly meetings with the behavior therapist, offering to change the time and provide Mother a ride to make it easier, but Mother had not contacted the foster mother about the offer. The report also informed the court Mother was missing visits with the children and, while she had made some progress, Mother was not at the point where she could handle visiting with more than one child at a time.

¶8 On August 14, 2020, the District Court issued an order extending TLC for another six months, following a June 10, 2020 hearing. The court then held a status hearing on August 19, 2020. Prior to that hearing, CASA/GAL Epstein filed a report to the court noting the special needs of the children and assessing that Mother "does not have the

parenting skills or the wherewithal to parent and meet the needs of these special needs children.” CASA/GAL Epstein’s report recommended the termination of Mother’s parental rights. At the hearing, CPS Supervisor Brent Lashinski informed the court he intended to sit down with Mother to “have a talk and figure out what we’re going to do.” On August 24, 2020, the Department filed a Petition for Termination of Parental Rights and for Permanent Legal Custody with Right to Consent to Adoption or Guardianship. The Department’s petition noted the children had been in foster care for over 15 of the last 22 months and the best interests of the children were presumed to be served by termination of Mother’s parental rights pursuant to § 41-3-604(1), MCA. The petition sought termination of Mother’s parental rights due to her failure to complete the court-ordered treatment plan and because Mother’s conduct or condition rendering her unfit to parent was unlikely to change within a reasonable time pursuant to § 41-3-609(1)(f), MCA. Attached to the termination petition was an affidavit from CPS Supervisor Krista Westerhold, which noted Mother failed to complete numerous treatment plan tasks and “continue[d] to struggle with the most basic parenting plans.” CPS Westerhold’s affidavit further noted the behavior of the children worsened after visits with Mother and that Dr. Christa Smelko, a licensed psychologist who conducted an evaluation of Mother, did not believe Mother would be fit to parent within a reasonable time. Dr. Smelko’s evaluation also recommended Mother take PCIT.

¶9 The District Court held a termination hearing on May 11 and 25, 2021. The court heard testimony from Dr. Smelko, visitation specialist Hays Bartruff, behavior analyst

Shelley Burbank, licensed clinical social worker Trista Vonada, K.G.'s foster mother, X.G.'s foster mother, CASA/GAL Epstein, school psychologist Alexandria Weisberg, CPS Supervisor Lashinski, Mother's boyfriend G.W., and Mother. Dr. Smelko testified Mother had a decreased motivation for treatment and she had recommended Mother go to individual therapy, have supervised visits, and do PCIT, as well as further education regarding the special needs of the children. Dr. Smelko noted it may take Mother "six months to a year" and possibly up to 18 months to develop, understand, and implement the parenting recommendations, but due to Mother's low motivation it could "extend the time frame of treatment[.]" Bartruff testified Mother's improvement in visits with the children had been "slight" over the two-year period and the children would be traumatized by further visitations. Burbank testified she had invited Mother to participate in autism trainings "at least four or five" and "probably at least five to seven" times, but Mother never came. Vonada testified Mother did two sessions of PCIT with X.G. and his foster mother, before the COVID-19 pandemic shut down visits from mid-March to late June of 2020. After the restrictions were lifted, X.G.'s foster mother reached out to Vonada to continue PCIT, but Mother did not. X.G.'s foster mother testified she reached out to ask Mother to participate in PCIT once restrictions were lifted, but Mother did not. X.G. and K.G. ultimately graduated from PCIT, with X.G. exhibiting behaviors "atypical of an autism diagnosis." K.G.'s foster mother testified PCIT "made a huge difference" in K.G.'s behaviors, but K.G. would regress after visits with Mother. CASA/GAL Epstein testified mother had done some of the things on her treatment plan, but did not complete PCIT or other suggested

therapy courses. CPS Supervisor Lashinski testified Mother had an “inability to engage with the services when they were offered.”

¶10 Mother also testified at the termination hearing. Mother testified she was offered services “at the beginning” but “didn’t get any emails about anything opening up” after COVID restrictions were lifted and “assumed that they weren’t going to open up.” Mother testified she told the Department to contact her by text, rather than email, but the Department would email her and she wouldn’t get the Department’s emails “until a week or two later,” because her email was “stupid” and her phone “doesn’t like emails.” Mother testified she “wasn’t used to checking” her email and that her “emails take forever to load up” on her phone. Mother further testified she did not reach out to the Department after COVID restrictions were lifted. At the end of the termination hearing, the District Court found Mother’s condition was not likely going to change in a way “that would render her able to care for these children who have significant special needs” and that “continuation of the parent-child relationship . . . will likely result in continued abuse or neglect.” The District Court orally granted the State’s petition for termination.

¶11 On August 11, 2021, the District Court issued its written Findings of Fact, Conclusions of Law and Order Terminating Parental Rights with Consent to Adoption or Guardianship, which found Mother did not complete her treatment plan and the conduct or condition rendering her unfit to parent was unlikely to change within a reasonable time. Mother appeals. We restate the issue on appeal as follows: whether the District Court

abused its discretion when it determined the conduct or condition rendering Mother unfit to parent was unlikely to change within a reasonable time.

¶12 We review a district court’s determination to terminate parental rights for an abuse of discretion. *In re E.Y.R.*, 2019 MT 189, ¶ 21, 396 Mont. 515, 446 P.3d 1117. An abuse of discretion occurs when a district court acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *In re X.M.*, 2018 MT 264, ¶ 17, 393 Mont. 210, 429 P.3d 920 (citing *In re K.A.*, 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478). We review a district court’s findings of fact for clear error and its conclusions of law for correctness. *In re M.V.R.*, 2016 MT 309, ¶ 23, 385 Mont. 448, 384 P.3d 1058.

¶13 Section 41-3-609(1)(f), MCA, protects a parent’s fundamental right to the care and custody of a child in termination proceedings. *In re E.Y.R.*, ¶ 26. “Before the court may terminate the parent-child relationship of a YINC, the court must find by clear and convincing evidence that: (1) an appropriate court-approved treatment plan was not complied with by the parents or was not successful; and that (2) the conduct or condition of the parents rendering them unfit was unlikely to change within a reasonable time.” *In re X.M.*, ¶ 18 (citing § 41-3-609(1)(f)(i), (ii), MCA). The Department is required to make “reasonable efforts . . . to reunify families that have been separated by the state.” Section 41-3-423(1), MCA. “To meet its requirements to provide reasonable efforts, the Department must in good faith develop and implement treatment plans designed ‘to preserve the parent-child relationship and the family unit’ and must, in good faith, assist a

parent in completing his treatment plan.” *In re B.J.J.*, 2019 MT 129, ¶ 22, 396 Mont. 108, 443 P.3d 488 (quoting *In re D.B.*, 2007 MT 246, ¶ 33, 339 Mont. 240, 168 P.3d 691) (internal footnote omitted). “[A] parent has an obligation to avail himself of services arranged or referred by the Department and engage with the Department to successfully complete his treatment plan.” *In re B.J.J.*, ¶ 24 (collecting cases).

¶14 From our review of the record, and pursuant to the applicable standard of review, we conclude the District Court’s decision to terminate Mother’s parental rights was not an abuse of discretion. At the time of termination, Children had been in the custody of the Department for at least 15 of the most recent 22 months—22 out of the last 22 months in this case—and termination of Mother’s parental rights was presumed to be in the best interests of the children. Section 41-3-604(1), MCA. The District Court found Mother had not completed the court-ordered treatment plan and the conduct or condition rendering her unfit to parent was unlikely to change within a reasonable time pursuant to § 41-3-609(1)(f), MCA. On appeal, Mother does not contest that she did not complete her treatment plan, but asserts the District Court abused its discretion by determining the conduct or condition rendering her unfit to parent was unlikely to change within a reasonable time. Essentially, Mother asserts she never had a meaningful opportunity to complete PCIT due to COVID.

¶15 In determining whether the conduct or condition of a parent is unlikely to change within a reasonable time, the District Court “must find that the parent’s conduct or condition renders the parent unfit, unable, or unwilling to give the child adequate parental

care.” *In re A.B.*, 2020 MT 64, ¶ 27, 399 Mont. 219, 460 P.3d 405 (citing § 41-3-609(2), MCA). “[T]he question is not merely whether a parent has made progress or would make some progress in the future, but whether the parent is likely to make enough progress within a reasonable time to overcome the circumstances rendering her unfit to parent.” *In re A.B.*, ¶ 27 (citing *In re D.F.*, 2007 MT 147, ¶ 43, 337 Mont. 461, 161 P.3d 825). Sufficient evidence was presented to support the District Court’s conclusion the conduct or condition rendering Mother unfit to parent would not change within a reasonable time. At the time of termination, Mother had a nearly three-year history with the Department since the children were removed. In that time, she had made progress on some treatment plan goals, “slight” progress during visitations, and failed to complete other treatment plan tasks. Mother had a history of not responding to the Department’s efforts to contact her, choosing to blame her non-responsiveness on her “stupid” email. Mother also did not respond to behavior analyst Burbank’s repeated offers to provide her with autism trainings. Mother also blames the “Department’s unwillingness to resume [PCIT] treatment,” but this assertion is belied by the record. Both X.G. and K.G. resumed and graduated from PCIT treatment when COVID restrictions were lifted. X.G.’s foster mother testified she reached out to Mother to resume PCIT with her and X.G. after COVID restrictions were lifted, but Mother simply did not join.

¶16 Mother had full opportunity to join X.G.’s post-COVID restriction PCIT treatment with his foster mother, or to contact the Department herself to set up alternative PCIT treatments, but chose to do neither. Mother had an obligation to avail herself of services

arranged or referred by the Department and engage with the Department to successfully complete her treatment plan, *In re B.J.J.*, ¶ 24, but did not. The treatment providers and other specialists who testified all agreed it would be, at a minimum, several more months before Mother could possibly effectively parent the children, which is not a reasonable time when the Children had been in the custody of the Department for nearly three years already. The District Court correctly found the conduct or condition rendering Mother unfit to parent was unlikely to change within a reasonable time. The Children had been in the custody of the Department for 22 of the 22 months preceding termination in this case and deserved stability. The District Court's decision to terminate Mother's parental rights was not an abuse of discretion.

¶17 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.

¶18 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR