DA 21-0478

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 64N

IN THE MATTER OF:

J.W.P. III,

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-20-104-RW
Honorable Robert J. Whelan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Meri K. Althauser, Forward Legal, PLLC, Missoula, Montana

For Appellee:

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

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Submitted on Briefs: March 2, 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, J.W.P., Jr.) appeals from the Second Judicial District Court's August 24, 2021 order terminating his parental rights to J.W.P., III, a one-year-old child, pursuant to § 41-3-609(1)(f), MCA. We affirm.

¶3 The Child and Family Services Division at the Montana Department of Public Health and Human Services (the Department) became involved in J.W.P.'s care shortly following his birth. The Department had previously handled cases involving Father and J.W.P.'s mother; their parental rights to two other children had been terminated. The earlier proceedings made the Department aware of Father and J.W.P.'s mother's history of substance abuse and incarcerations, and that case also led to a period of Father's incarceration for an instance of partner-family member assault against the mother. At the time of J.W.P.'s birth in December 2020, Father and J.W.P.'s mother lacked stable housing and stayed in motel rooms, tents, on various couches, or with Father's mother. While at the hospital during J.W.P.'s birth, Father was taken to the ICU after he passed out due to the effects of drugs and hit his head in the bathroom.

¶4 J.W.P. was born prematurely and with a serious medical condition, gastroschisis, which is a birth defect of the abdominal wall that results in intestines protruding from the body. Citing the immediate danger of abuse and/or neglect given the parents' homelessness, substance abuse, criminal history, and history with the Department—and concerned about meeting the baby's medical needs—the Department petitioned for temporary legal custody and to adjudicate J.W.P. a youth in need of care. Soon afterwards, Mother and Father stipulated to the matter, and the District Court entered an order granting the Department's petition.

¶5 The Department and Father's attorney struggled to maintain contact with him in preparation for approval of a treatment plan. They mailed the proposed plan to Father's mother's house in order to get it to him, and the parties finally held a hearing in March 2021, at which Father was represented by counsel but not present. The District Court approved the treatment plan, which included a series of tasks and steps for Father to resolve the issues that created the need for protective services and restore custody. These included parenting classes, visitations, chemical dependency evaluation and treatment, mental health evaluation and treatment, maintenance of a safe and stable residence, and continued communication with the Department about his progress and any problems encountered.

¶6 Five days later, Father was arrested for assaulting his mother during a stay at her home. The State charged him with felony partner-family member assault, and Father was held at the Butte-Silver Bow Detention Center for several weeks. Department staff met him at the jail prior to his pre-trial release and discussed the treatment plan and Father's need to communicate with them to work on it when he got out on bond. Father was released

mid-April but did not follow up with the Department. About a month later, Father returned to jail following a parole violation for failure to keep his ankle monitor running. He remained incarcerated when the Department petitioned for termination of his parental rights in late June. The District Court held a termination hearing on August 5, 2021, by which time Father had been convicted on the assault charge and awaited a sentencing hearing. The baby, J.W.P., had moved from the hospital in Butte to foster care in Red Lodge, where his sibling also resided.

¶7 The District Court granted the Department's petition to terminate Father's parental rights. The District Court heard evidence presented by the Department of Father's failure to complete his treatment plan and unlikelihood of being able to gain the ability to safely parent J.W.P. within a reasonable time. The Department demonstrated that Father had not completed the parenting classes or visitation, had not completed chemical dependency evaluation or treatment, had not acquired safe and stable housing, and had not accomplished the mental health goals or successfully maintained communication with the Department. Father appeals the District Court's decision.

¶8 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.

¶9 On appeal, Father argues that the Department failed to act in good faith in providing him the opportunity to successfully complete his treatment plan and regain custody. Father argues that the Department and the District Court relied too much on his incarceration in assessing his failure to complete the plan, and he contends that the Department was obligated to do more to facilitate his achievement of the plan's objectives while in jail. Father notes previous cases in which we have held that the reasonable efforts required of the Department may include modification of a plan to account for changed circumstances and must include more assistance than "merely suggesting services to a parent and waiting for the parent to then arrange those services." *See In re R.J.F.*, 2019 MT 113, ¶¶ 37, 40-44, 395 Mont. 454, 443 P.3d 387; *In re A.L.P.*, 2020 MT 87, ¶ 25, 399 Mont. 504, 461 P.3d 136. According to Father, his failure to complete the treatment plan was less his own fault than the fault of his incarcerated circumstances—which the Department should accommodate. *In re A.T.*, 2003 MT 154, ¶¶ 21-24, 316 Mont. 255, 70 P.3d 1247. Father argues that the District Court relied solely on his incarceration in finding he met the criteria for terminating parental rights. *See* § 41-3-609(1)(f), MCA (permitting termination of parental rights if (i) an approved treatment plan "has not been complied with by the parents or has not been successful" and (ii) "the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time").

¶10 Indeed, the statute governing parental rights termination does contemplate different means for the Department to approach these matters when a parent is incarcerated for a long period of time. Under § 41-3-609(4)(c), MCA, the Department can forego a treatment plan altogether if the parent is incarcerated for more than one year and reunification is not

in the best interests of the child. In *In re A.T.* and *In re A.L.P.*—which Father relies upon for his argument—we faulted the Department for pursuing termination based on the failure of a treatment plan that it should have known was futile because of the parent's long-term incarceration. We said that the Department should have undertaken the § 41-3-609(4)(c), MCA, process instead. *See In re A.T.*, ¶¶ 23-24; *In re A.L.P.*, ¶¶ 24-27.

¶11 But Father's situation is unlike those cases. Here, Father was not incarcerated prior to the approval of his treatment plan. The Department had no foreknowledge that he would soon be arrested, and when Father was released pending trial, the Department did not know he would soon be incarcerated again after his parole violation. Here, it was appropriate for the Department to pursue Father's process for reunification via the treatment plan, and it was appropriate to petition for termination based on the failure of that process. We have previously recognized that there are "significant limitations that an incarcerated father faces when trying to establish a relationship with his infant child." *In re M.P.*, 2008 MT 39, ¶ 29, 341 Mont. 333, 177 P.3d 495. And we have noted that the statutes in place account for such burdens and evaluate a parent's treatment plan efforts under the circumstances. *In re M.P.*, ¶ 29. The relevant inquiry for the District Court in applying § 41-3-609(1)(f), MCA, is whether Father himself generated the failure of the treatment plan, rather than the Department or his mere incarceration. The Department's obligation to help facilitate treatment is not "excused if a parent is incarcerated, but we will not fault the [Department] if its efforts are curtailed by the parent's own criminal behavior." *In re D.S.B.*, 2013 MT 112, ¶ 15, 370 Mont. 37, 300 P.3d 702.

¶12 Thus, the central question for this Court to review is whether the District Court's findings under the § 41-3-609(1)(f), MCA, factors were not supported by substantial evidence or demonstrate an abuse of discretion. Given the evidence that the Department presented about Father's own actions contributing to his failure under the treatment plan, we affirm the District Court.

¶13 A period of about eight months passed between J.W.P.'s birth and the District Court's termination hearing. Father had previously lost parental rights to two other children, and the Department's immediate involvement in J.W.P.'s case made clear to Father his need to make efforts to achieve an ability to safely parent the baby. The treatment plan approved in March was the third Father had attempted, and he was thus well aware of what was required of him. During that eight months, Father spent about three and a half in jail—the result, notably, of Father's actions *after* the Department's temporary custody of J.W.P. was established and the treatment plan was in place. Furthermore, Father's obligations of communication with the Department and to secure safe and stable housing were demonstrably not met.

¶14 Father contacted a mental health provider in the days between the treatment plan approval and his arrest, but despite the advice of Department staff who met with him before his release, he did not follow up on his mental health treatment or communicate with the Department in the subsequent month he spent out of jail. Father attended regular counseling sessions provided during his incarceration, but he did not take steps to achieve chemical dependency treatment from jail until Department staff gave him additional warning about his shortcomings in the couple of weeks before the termination hearing.

¶15 Father never pursued the parenting classes contemplated in his plan. Father argues that it should have been the Department's responsibility to send him reading material in jail, but this argument glosses over the significant time he spent outside incarceration from the start of the Department's involvement, during which he made no proactive efforts to communicate with the Department or pursue such steps. Similarly, although Father complains that J.W.P. was placed far away from Butte, he ignores the fact that he failed to attend all but one visitation during the period he was out of jail. The Department scheduled 23 weekly visitation sessions (including transport) with J.W.P.'s parents during 2021, and Father showed up for only one hour of one session. This was the only time Father saw J.W.P. following his birth.

¶16 Under § 41-3-609(1)(f)(ii), MCA, the District Court 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. Given the evidence presented regarding Father's relatively minimal efforts to pursue his treatment plan goals and the consequences of Father's own subsequent actions leading to further incarceration, the District Court did not abuse its discretion by terminating his parental rights.

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

¶18 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE