DA 22-0710

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 185N

IN THE MATTER OF:

G.F.,

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-20-37-RW
Honorable Robert J. Whelan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Taryn Gray, Office of the State Public Defender, Missoula, Montana

For Appellee:

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

Eileen Joyce, Butte-Silver Bow County Attorney, Mark Vucurovich, Special Deputy County Attorney, Butte, Montana

Submitted on Briefs: July 26, 2023

Decided: October 3, 2023

Filed:

Clerk

Justice Laurie McKinnon 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.S. (Mother) appeals the November 14, 2022 Order of the Montana Second Judicial District Court, Silver Bow County, terminating her parental rights to G.F. We affirm.

¶3 Mother raises two issues on appeal:

1. Whether the Department failed to provide Mother with the required reasonable efforts to reunify her family.
2. Whether clear and convincing evidence in the record supported guardianship rather than termination of Mother's parental rights.

¶4 G.F. was born October 1, 2017, in Billings, Montana, and he resided there with Mother until December 29, 2019, when they relocated to Butte to live with Mother's paramour (K.S.). Mother was G.F.'s primary caretaker.

¶5 On Friday, May 8, 2020, Mother gave G.F. a bath, and on Saturday, May 9, she changed him into clean clothes before Mother, K.S., and G.F. drove to Billings. Late that evening, they dropped G.F. off at his maternal great-grandparents' residence (M.W. and N.W.). Mother told Great-grandparents that G.F. had fallen a few times and had some bruises. Later that evening, G.F.'s maternal grandmother, J.D., came to pick up G.F. to

spend some time with him. She noticed that G.F. had significant bruising throughout the lower half of his body. J.D. and Great-grandfather, M.W., did not believe the bruising came from falling, and they brought G.F. to the emergency room for medical care. The injuries were "layered with new and healing bruises" and "appear[ed] to be non-accidental and the result of child physical abuse." Mother denied observing any significant bruising on G.F. despite bathing him the previous evening and denied having any knowledge of how it occurred.

¶6 Billings Police and the Montana Department of Health and Human Services, Child and Family Services Division (Department) suspected K.S. had abused G.F. Because the only two people who had custody of G.F. were Mother and K.S., the Department alleged that Mother either abused G.F. or knew that K.S. had abused G.F. but chose to ignore it. The Department placed G.F. with Great-grandparents in Billings. About a month later, Mother and K.S. moved to Billings. G.F. was two years old at the time of removal.

¶7 During the prehearing conference with Mother, the Department discussed some of the tasks that would be included in her treatment plan and expressed its concerns about K.S. On June 17, 2020, Mother attended a show cause hearing by telephone, with counsel present, at the Montana Second Judicial District Court in Butte. Mother stipulated to the petition, noting that she disagreed with some of the statements in the affidavit. The District Court adjudicated G.F. as a youth in need of care, continued emergency protective services, and granted temporary legal custody to the Department. The Department continued G.F.'s placement with Great-grandparents in Billings. Because G.F., Great-grandparents, and Mother all resided in Billings, the Department anticipated the case would transfer to

Yellowstone County. While awaiting transfer, the Department did not submit Mother's treatment plan to the District Court in Butte.

¶8 G.F.'s guardian ad litem (GAL), Mary Kay Starin, objected to the transfer to Yellowstone County because the abuse occurred in Butte. The GAL requested that local law enforcement also investigate G.F.'s injuries and asked that the District Court keep the case in Butte while the investigation took place. Mother requested a status hearing when no treatment plan or ruling on the change of venue was forthcoming. The District Court denied the change of venue at the hearing on September 9, 2020, because of the ongoing criminal investigation. Ultimately, no criminal charges were filed in Butte or Billings regarding the abuse.

¶9 On September 16, 2020, Father, who was incarcerated, submitted a motion for placement and dismissal requesting that G.F. be placed with his wife, A.F. Mother, the Department, and the GAL objected to this placement because G.F. had never met A.F., who had only been married to Father for six months. The Department then submitted treatment plans for both Father and Mother, and the District Court approved Mother's treatment plan on October 7, 2020, over four months after the case was opened. Although a courtesy worker was assigned in Billings, the case remained in Butte for its duration, and the treatment plan was delayed by the contention over transfer.

¶10 Mother's treatment plan required her to take a parenting class and apply the skills to her parenting of G.F., complete a mental health evaluation, participate in mental health therapy, obtain appropriate housing, approve any roommates with the Department, and maintain a legal source of income. The treatment plan included specific tasks such as

releasing her mental health records, staying in contact with the Department, maintaining regular supervised visits, and addressing safety concerns. Although the treatment plan did not name Mother's paramour, K.S., it required her to keep G.F. away from anyone who could harm him and to approve any housemates with the Department. The Department made it clear that it did not approve K.S. as a housemate and that it believed K.S. posed an ongoing safety threat to G.F. Mother continued to deny that anyone had abused G.F.

¶11 In February 2021, the Department filed a petition for extension of temporary legal custody. Mother had made progress in several areas of the treatment plan: she enrolled in parenting classes, completed a mental health evaluation, and maintained supervised visits with G.F. However, the Department noted that Mother needed more time to complete the treatment plan because she had not signed a release allowing the Department to obtain a written report of the mental health evaluation, had not obtained stable and sufficient housing, and had ceased attending therapy sessions after her Medicaid coverage lapsed. The Department requested that Mother reapply for Medicaid and provide the Department with proof of denial before it could cover the cost of her therapy sessions. Mother did not do so. The Department expressed "grave concern" that Mother would not acknowledge the safety risks K.S. posed to G.F. Mother told the Department that she planned to continue her relationship with K.S., and Mother was unwilling to address the origin or extent of G.F.'s injuries. The Department determined that an extension of temporary legal custody was in G.F.'s best interests until it could discover the "nature and cause of [G.F.'s] injuries which initiated Department involvement."

¶12 Mother had separated from K.S. between roughly September 2020 to March 2021, after he moved to Texas. However, in late March, Mother told the Department she was going on a vacation to Austin, Texas, and she visited K.S. there. She did not return or contact the Department for several months. When she resumed contact with the Department, Mother reported that she had moved to Austin permanently and signed a lease with K.S. on April 4, 2021. The Department submitted an Interstate Compact for the Placement of Children (ICPC) request to Texas, and a courtesy worker was assigned to evaluate Mother's housing and assist with services.

¶13 The courtesy worker met with Mother on September 10, 2021, after Mother repeatedly cancelled her appointments. The courtesy worker reported that Mother's studio apartment had insufficient space for G.F. She also informed the Department that K.S. was residing in the apartment with Mother, although Mother had previously denied that she was still in a relationship with K.S. The courtesy worker provided Mother with options for applying for Medicaid, referrals for local providers who could conduct a mental health assessment and therapy sessions, peer support, and general community resources in Austin. Although the courtesy worker informed Mother that she needed to move to a residence with sufficient space for G.F. before she could be granted custody, Mother insisted that she would only move when G.F. was returned to her care.

¶14 The Department again submitted a petition to extend temporary legal custody on November 4, 2021. Though Mother did complete a mental health assessment in Texas, she did not continue to attend therapy sessions and would not submit the Medicaid application documentation. In her initial therapy sessions, Mother denied that G.F. had been abused

and stated that the bruising on G.F. resulted from running into a table and sitting on the toilet for long periods of time during potty training. The Department considered continued therapy sessions to be a priority because Mother had not yet addressed her relationship with K.S. or acknowledged the "severe repeated injuries" to G.F. in the therapy sessions she did complete. Mother reported to the courtesy worker in Austin that they "have always been a couple and yes [K.S.] lives here." Mother did not believe she needed mental health therapy. The Department sent monthly non-compliance letters to Mother.

¶15 The Department filed a petition to terminate Mother's parental rights on December 8, 2021. The ICPC had not yet been approved. Around the same time the Department filed to terminate Mother's parental rights, Mother purportedly ended her relationship with K.S. and moved to her own apartment. While the termination was pending, the Department had only two successful phone calls with Mother. Mother moved to continue the termination hearing on February 9, 2022. Mother then moved to a two-bedroom home with sufficient space for G.F. in April 2022. The termination hearing occurred on July 5, 2022, and Mother submitted a motion for guardianship on July 12, 2022, arguing that terminating Mother's parental rights was not in G.F.'s best interests.

¶16 At the termination hearing, G.F.'s therapist testified that G.F. suffered from PTSD as a direct result of the injuries he sustained in Mother's care. She also noted that G.F. was thriving in his placement with Great-grandparents and would struggle if separated from them. G.F.'s nightmares lessened over time, and he began sleeping separately from Great-grandparents. However, G.F. experiences ongoing symptoms of PTSD because of the abuse, including separation anxiety, difficulty handling changes in routine, and

occasional nightmares. He still seeks out Great-grandparents when nightmares occur. G.F.'s therapist further testified that after Mother made a surprise visit to Billings in November 2021, G.F. exhibited regressive behaviors in therapy sessions and expressed fear that he would be separated from Great-grandparents. G.F., four years old at the time of the termination hearing, had a strong attachment to Great-grandparents as his primary caregivers. G.F.'s therapist testified that if he were to be separated from Great-grandparents, G.F. would experience stress and trauma and would likely regress significantly in his PTSD treatment.

¶17 Other than this surprise visit, Mother's move to Texas limited her to brief phone and video calls with G.F., which had slowed to a few times per week. The GAL reported that after phone calls with Mother, G.F. would sometimes express anxiety about having to move away from Great-grandparents and would exhibit some regressive behaviors. Before termination of Mother's parental rights, Great-grandparents cared for G.F. for thirty months. The Department had maintained temporary legal custody of G.F. consistently from the initial hearing on June 17, 2020, until the termination ruling.

¶18 The District Court found that clear and convincing evidence supported termination of Mother's parental rights. First, the District Court found that Mother could not demonstrate that G.F. could be safely returned to her care because G.F. suffered injuries in her custody and still endures the effects of that trauma. Mother refused to acknowledge the Department's concerns about K.S. and her own role in keeping her child safe. Mother also failed the mental health component of the treatment plan because she did not complete individual therapy. Finally, the court concluded that G.F. was prospering in his current

placement and needed permanency. The District Court thus determined that the conduct rendering Mother unfit was unlikely to change and would likely result in continued abuse of G.F., and it granted the Department's petition to terminate Mother's parental rights on November 14, 2022. Mother appeals.

¶19 This Court will not overturn a district court's decision to terminate parental rights unless "a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion" has occurred. *Matter of A.B.*, 2020 MT 64, ¶ 23, 399 Mont. 219, 460 P.3d 405 (quoting *Matter of D.B.*, 2012 MT 231, ¶ 17, 366 Mont. 392, 288 P.3d 160). We examine whether findings of fact are clearly erroneous and whether the district court arrived at the correct conclusions of law. *Matter of J.J.L.*, 2010 MT 4, ¶ 14, 355 Mont. 23, 223 P.3d 921. 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 review of the record convinces the Court a mistake was made." *Matter of J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715.

¶20 A district court may terminate a parent-child legal relationship when clear and convincing evidence demonstrates that the child was adjudicated a youth in need of care, the parent has not complied with or completed an approved treatment plan, and the conduct or condition of the parent rendering her unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA. The clear and convincing evidence standard is met when "a preponderance of the evidence [is] definite, clear, and convincing, or . . . a particular issue [is] clearly established by a preponderance of the evidence or by a clear preponderance of the proof." *Matter of K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d

691 (internal citations omitted). It does not require "unanswerable or conclusive evidence." *Matter of A.K.*, 2015 MT 116, ¶ 22, 379 Mont. 41, 347 P.3d 711 (internal citations omitted).

¶21 When determining whether the conduct or condition of the parent rendering them unfit is unlikely to change within a reasonable time, primary consideration must be given to the "physical, mental, and emotional conditions and needs of the child." Section 41-3-609(3), MCA; *Matter of A.K.*, ¶ 20. "A child's best interests take precedence over parental rights." *Matter of A.K.*, ¶ 20 (citing *Matter of E.K.*, 2001 MT 279, ¶ 33, 307 Mont. 328, 37 P.3d 690). In determining whether the conditions rendering a parent unfit is unlikely to change within a reasonable time, the court looks to the parent's past and present conduct. *Matter of A.B.*, ¶ 27 (internal citations omitted). The court does not consider "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." *Matter of A.B.*, ¶ 27.

¶22 Mother argues that the Department failed to make reasonable efforts to reunify her with G.F. and that clear and convincing evidence supported guardianship as the best option for G.F. rather than termination of her parental rights. We address each issue in turn.

¶23 In cases of abuse and neglect, the Department must make "reasonable efforts . . . to reunify families that have been separated by the state." Section 41-3-423(1)(a), MCA. In the Department's process of determining which reunification services are appropriate and making reasonable efforts to provide them, "the child's health and safety are of paramount concern." Section 41-3-423(1)(c), MCA. A determination that the Department made

reasonable efforts is not a separate requirement for termination of parental rights, but it may be a predicate for a court's finding that "the conduct or condition rendering a parent unfit, unwilling, or unable to parent is unlikely to change within a reasonable time." *Matter of B.F.*, 2020 MT 223, ¶ 41, 401 Mont. 185, 472 P.3d 142; § 41-3-609(1)(f)(ii), MCA.

¶24 To meet the standard of reasonable efforts, the Department must "in good faith develop and implement treatment plans designed to preserve the parent-child relationship and the family unit." *Matter of B.F.*, ¶ 42. A parent has a corresponding obligation to "avail herself of services arranged or referred by the Department and engage with the Department to successfully complete her treatment plan." *Matter of R.J.F.*, 2019 MT 113, ¶ 38, 395 Mont. 454, 443 P.3d 387 (internal citations omitted). We have consistently held that Montana law requires reasonable, not herculean, efforts by the Department to reunify parents with their children. *Matter of R.J.F.*, ¶ 38.

¶25 Mother argues that the Department did not make statutorily required reasonable efforts because her treatment plan was delayed, a case worker did not visit her home in Billings, Department workers did not contact her regularly, and the Department stopped paying for her therapy sessions. Mother contends that these issues prevented her from receiving the tools and support necessary to complete the tasks in her treatment plan and therefore prevented her from being reunited with G.F. However, clear and convincing evidence in the record reveals that Mother consistently failed to engage with services provided by the Department and to address the most fundamental aspect of the treatment plan: the physical safety of G.F.

¶26 A treatment plan must be ordered no later than 30 days after the dispositional hearing "except for good cause shown." Section 41-3-443(6), MCA. Here, Mother's treatment plan was delayed beyond the time permitted by statute. The delay occurred due to the GAL's objection and the ongoing police investigation of the abuse that prevented transfer to Yellowstone County. However, less than a month after the District Court ruled against the transfer and two weeks after Mother objected to Father's motion to place G.F. with his wife, it approved her treatment plan. Additionally, the Department met with Mother early in the process and explained the tasks that would be included in the treatment plan. During the delay, the Department ensured that Mother was able to visit G.F. weekly and communicate with him daily.

¶27 Here, the GAL's insistence upon keeping the case in Butte delayed the implementation of the treatment plan and inconvenienced all parties involved. Shortly after the case was opened, Mother and K.S. moved to Billings, where G.F., Great-grandparents, other relatives involved in his care, Father, and Step-mother resided. Though a courtesy worker in Billings was assigned to G.F., Mother did not receive her own local support. The District Court and the Department workers responsible for this case were located in Butte, hours away from Mother, G.F., and Great-grandparents. Although this does not affect the outcome of Mother's case, it did create obstacles for G.F.'s family and the Department.

¶28 Mother argues that she suffered prejudice because she could have been engaged in reunification efforts during the two-month delay. However, the failed aspects of Mother's treatment plan were not affected by this delay. The Department notified Mother from the

beginning of the investigation that K.S. was a safety risk and unapproved as a housemate. Nonetheless, Mother continued to live with K.S. after G.F.'s removal and moved the following year to Texas to continue their relationship. Similarly, Mother's failure to complete individual therapy occurred well after the initial treatment plan was entered. Her decision not to provide the Department with her Medicaid rejection documents was not affected by the initial delay in filing the treatment plan.

¶29 Mother received sufficient support to complete a parenting class, arrange a mental health assessment, and begin individual therapy sessions. However, although she engaged in therapy initially, Mother would not respond to the Department's efforts to continue therapy once her Medicaid coverage lapsed. Caseworkers testified that they called Mother regularly, and conducted at least two family engagement meetings. The Department communicated that Mother would need to submit the rejection letter from Medicaid, and Mother did not do so. This failure is not attributable to the Department.

¶30 Mother then moved to Texas to resume her relationship with K.S., thereby prioritizing the only person other than herself who could have perpetrated the abuse, distancing herself from G.F., and limiting her contact with G.F. to occasional phone and video calls. For several months after she moved, Mother did not respond to the Department's efforts to contact her. When she did notify them that she had moved to Texas, the Department began the process of applying for an ICPC, assigned a courtesy worker, and ensured that Mother had access to community services in Texas. Caseworkers testified to communicating regularly with Mother and attempting to engage her with services.

¶31 The Department stopped funding Mother's individual therapy sessions when Mother's Medicaid coverage lapsed. The Department notified Mother that to receive funding for this service, Mother would need to provide proof that she reapplied to Medicaid and was rejected. Mother failed to do so.

¶32 Although Mother reportedly ended her relationship with K.S. around the time the Department petitioned to terminate her parental rights, Mother has never acknowledged the danger K.S. posed to G.F. or admitted that the abuse leading to Department involvement ever occurred. Whether Mother or K.S. committed the abuse is still unclear. Because Mother did not engage with the Department and provide the necessary Medicaid documentation to continue individual therapy, Mother has never addressed the abuse in her individual therapy sessions.

¶33 Mother had made progress on several aspects of her treatment plan, such as completing the parenting class and initial mental health evaluation, but she had not made progress toward the most foundational components: addressing the origin of G.F.'s severe bruising and preventing it from happening in the future. Completion of *some* of a treatment plan's requirements "is not sufficient for compliance with a treatment plan under statute." *Matter of B.F.*, ¶ 51 (internal citations omitted); § 41-3-609(1)(f)(i), MCA. Even if Mother had completed every requirement in the treatment plan, "completion of the plan without a change in behavior that caused removal in the first instance may result in termination of parental rights." Section 41-3-443(5)(d), MCA. Mother insists that she does not know how the bruising occurred and denies that G.F. was abused. After the Department informed her that K.S. posed a threat to G.F.'s safety, she refused to comply with the aspects of the

treatment plan requiring her to maintain a safe home environment for G.F. and approve housemates with the Department. Mother would not engage in individual therapy or provide the Department with the necessary documentation to receive funding for it.

¶34 The record supports that the Department made reasonable efforts to engage Mother with services. Furthermore, Mother did not comply with the Department's requests for the Medicaid denial letter, and she continued to reside with K.S. despite the safety risk to G.F. Although the GAL's objection to the transfer to Billings resulted in added inconvenience and difficulty, Mother's decisions demonstrate her failure to complete the treatment plan and address the abuse that necessitated Department involvement in the first instance. Thus, the District Court did not abuse its discretion when it determined that the conditions rendering Mother unfit to parent G.F. were unlikely to change.

¶35 Our review of the record also supports the District Court's conclusion that Mother's noncompliance with the treatment plan indicated that termination of parental rights, rather than guardianship, was in G.F.'s best interests. Mother argues that she is entitled to one of the exceptions that eliminates the Department's obligation to file for termination of parental rights when the child has been out of the home for fifteen of the most recent twenty-two months. Section 41-3-604(1)(a), MCA. Because G.F. was in the care of a relative for the more than two-year timeframe following his removal, Mother argues that the presumption that termination is in G.F.'s best interest does not apply. However, we have consistently held that the Department retains discretion to file for termination even when an exception applies. *Matter of A.B.*, ¶ 31. Finally, the Department twice filed for extensions of temporary legal custody, in accordance with the exception for children in the

care of a relative. Section 41-3-604(5), MCA ("If an exception in subsections (1)(a) through (1)(c) of this section applies, a petition for extension of temporary legal custody . . . must be filed.").

¶36 The District Court found that it was in G.F.'s best interests to terminate Mother's parental rights. When the circumstances allowing termination under § 41-3-609(1)(f), MCA, exist, the "statute's permissive language gives district courts discretion in deciding whether to terminate parental rights." *Matter of C.M.*, 2015 MT 292, ¶ 35, 381 Mont. 230, 359 P.3d 1081. In rendering its decision, "[n]o limitation is placed upon a court which requires consideration of other options, such as a guardianship, prior to terminating parental rights." *Matter of E.A.T.*, 1999 MT 281, ¶ 33, 296 Mont. 535, 989 P.2d 860. "A child's need for a permanent, stable, and loving home supersedes a parent's right to parent the child." *Matter of A.B.*, ¶ 38 (internal citations omitted).

¶37 Ample support in the record shows that termination served G.F.'s best interests. G.F.'s therapist testified that G.F. needs the stable, strong bond he formed with Great-grandparents to continue to thrive. The therapist explicitly linked G.F.'s PTSD diagnosis to the trauma resulting from the severe, repeated injuries he suffered in Mother's care. Although his symptoms were improving, G.F. regressed after Mother's unexpected visit and was fearful of moving away from Great-grandparents. The GAL reported that G.F. sometimes exhibited similar regressive tendencies after phone calls with Mother. The District Court's conclusion that continued efforts toward reunification would likely result in further abuse is supported by Mother's ongoing refusal to recognize the severity of G.F.'s physical injuries and address their origin.

¶38 The record demonstrates that Mother failed several key aspects of her treatment plan and that the circumstances leading to G.F.'s abuse were unlikely to change within a reasonable time. Mother did not complete individual mental health therapy after being given the opportunity to have the Department cover the cost, would not address the Department's safety concerns about K.S., and never acknowledged the abuse leading to G.F.'s original injuries. Therefore, we affirm the District Court's termination of Mother's parental rights.

¶39 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.

¶40 Affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR