

DA 23-0594

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 61N

IN THE MATTER OF

A.J.K., J.S.K., M.S.K., and R.A.K.,

Youths in Need of Care.

APPEAL FROM: District Court of the Fourteenth Judicial District,
In and For the County of Musselshell, Cause No. DN-22-03
Honorable Randal I. Spaulding, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Laura Reed, Attorney at Law, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Bjorn
Boyer, Assistant Attorneys General, Helena, Montana

Adam Larsen, Musselshell County Attorney, Roundup, Montana

Submitted on Briefs: March 6, 2024

Decided: March 19, 2024

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 B.P. (Mother) has four biological daughters: A.K. (born in 2012), J.K. (born in 2013), M.K. (born in 2014), and R.K. (born in 2016). B.K. (Father) is the children's biological father and has been only minimally involved with the children and these proceedings. He did not appear for the termination hearing and has not appealed the termination of his parental rights.

¶3 The Department of Public Health and Human Services, Child and Family Services Division (Department) has been involved with Mother since 2013. In this action, the Department received a report on January 6, 2022, that Mother and her new husband, M.H., had been gone since December 31, 2021, and could not be reached. The children were residing with their maternal grandmother in Roundup, Montana. Mother and Stepfather were residing there as well. A.K. was having suicidal ideation and thoughts, hearing voices, sleepwalking, having nightmares, and was self-harming. A.K. needed a mental health evaluation but Mother and Stepfather could not be located, were not answering calls, and thus could not be reached to give consent. A.K. said Mother and Stepfather were also gone for two weeks before Christmas and came back for Christmas week before leaving again.

¶4 The Department investigated the report and learned that Mother and M.H. still had M.K. and R.K. in their care and were believed to be in Billings. The Department was able to locate the children. R.K. said she had observed her parents “take medicine,” which included them lighting a fire under a spoon with aluminum and there being smoke in a glass bowl. R.K. reported that Mother and M.H. do this every day. Department worker Michaela Viviano (Viviano) tested the children’s hair follicles. A.K. tested positive for methamphetamine, J.K. and M.K. tested positive for methamphetamine and amphetamines, and R.K. tested positive for methamphetamine, amphetamine, opioids, and fentanyl.

¶5 Viviano attempted on multiple occasions to talk and meet with Mother. Viviano’s contact with Mother, however, was limited. Mother did report she was living at various hotels in Billings. Phone numbers Mother gave Viviano also stopped working. Viviano located Mother’s Facebook profile and reached out to Mother through Facebook Messenger on April 19, 2022. Viviano had limited contact through Facebook Messenger as well and Mother continued to refuse to provide Viviano with an address where she was residing. Ultimately, the Department could not locate Mother to serve her with the Petition for Emergency Services and Adjudication of Children as Youth in Need of Care. Mother had to be served by publication. Publication was accomplished by placing notice in two Musselshell County newspapers for three weeks from July 20, 2022, through August 3, 2022.

¶6 On August 9, 2022, the District Court held a show cause and adjudication hearing, found the children were not Indian children for purposes of the Indian Child Welfare Act, adjudicated the children youth in need of care, and approved Mother's treatment plan. Mother did not appear for the hearing. Mother's treatment plan identified her chemical dependency issues, her inability to obtain safe and stable housing, and her ongoing criminal behavior and possible incarceration. The plan required Mother to complete a parenting class, have in-person or telephone contact with the children, obtain a chemical dependency evaluation and follow the recommendations of the evaluator, maintain sobriety, engage in random drug testing, obtain a mental health evaluation and follow through with the recommendations of the evaluator, obtain safe and stable housing, obtain a legal source of income, and maintain contact with the Department.

¶7 Viviano made numerous attempts to meet with Mother. Viviano drove to Billings on two occasions after arranging with Mother a meeting place, but Mother never showed up. On a third occasion, Viviano travelled to Billings and was able to meet with Mother at the residence of one of Mother's friends. Viviano gave Mother the treatment plan and told Mother she needed to stay in contact with her and to speak to Viviano on a weekly basis. After this meeting, Viviano was unable to reach Mother and did not speak to Mother again until Mother was arrested on a probation violation related to an April 2020 drug offense conviction. Viviano learned Mother was in the Musselshell County jail through other sources and not Mother. Mother also failed to stay in contact with her probation officer,

Rodney Johnson. Officer Johnson was also not able to locate or contact Mother for nearly a year prior to him filing a report of violation on November 16, 2022.

¶8 While incarcerated on the probation violation, Viviano spoke with Mother at length about the need to maintain sobriety. Viviano learned that Mother was attempting to get into Rimrock but that she was unsuccessful because Mother had let her insurance expire. Viviano arranged for Mother to have an in-person visit with A.K. after Mother's release in April 2023, but Mother immediately began using again and tested positive for fentanyl during her check-in with Officer Johnson on April 7, 2023. After being released from jail, Mother would text Viviano but still failed to meet Viviano in person and failed to appear for numerous in-person visits. By the end of May 2023, Mother had stopped communicating with Viviano and the Department filed its petition for termination of parental rights on June 19, 2023. Mother was again served by publication.

¶9 The District Court conducted a termination hearing on September 12-13, 2023. Mother was present because she had been arrested for a probation violation and detained at the Musselshell County jail. The court heard testimony from numerous witnesses, including Mother. Mother acknowledged her severe drug addiction and that her addiction prevented her from parenting her children. Mother also agreed that she had not completed any of her treatment plan tasks. Mother acknowledged that she had not been capable of parenting her children for the past twenty months and that the disposition in her criminal case would likely involve another year of incarceration with placement, Mother hoped, at Passages.

¶10 The District Court terminated Mother’s rights to her children. It found that Mother had failed to complete any of the tasks identified in her treatment plan. Mother had not engaged in chemical dependency treatment, mental health therapy, and had no income or home for the children. The court determined that Mother’s addiction was of such a nature and duration that it was unlikely to improve within a reasonable amount of time and that the children had been in foster care placement since the case was opened twenty months ago. The court noted that because the children had been placed in foster care for 15 of the most recent 22 months, that termination was presumed to be in their best interest.

¶11 Mother claims on appeal that the Department did not make reasonable efforts to reunify Mother with her children and that the District Court abused its discretion when it found Mother’s conduct was unlikely to change. Mother represents that the Department did not refer her for any services and denied Mother adequate visitation with her children. Mother also claims that the Department violated its own policies when it did not place the children with M.H.’s mother in Oklahoma. Finally, Mother argues the court should have granted guardianship instead of termination.

¶12 This Court reviews a district court’s decision to terminate parental rights for an abuse of discretion. *In re R.L.*, 2019 MT 267, ¶ 12, 397 Mont. 507, 452 P.3d 890. The Department has the burden of proving by clear and convincing evidence that the statutory criteria for termination have been established. *In re K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691. We review a district court’s findings of fact for clear error and conclusions of law for correctness. *In re R.L.*, ¶ 12. “A factual finding 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.” *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715.

¶13 To meet its requirement to provide reasonable efforts, “the Department must in good faith develop and implement voluntary services plans and treatment plans designed ‘to preserve the parent-child relationship and the family unit.’” *In re R.J.F.*, 2019 MT 113, ¶ 28, 395 Mont. 454, 443 P.3d 387 (quoting *In re D.B.*, 2007 MT 246, ¶ 33, 339 Mont. 240, 168 P.3d 691). The “Department must, in good faith, assist a parent in completing his or her voluntary services and treatment plan.” *In re R.J.F.*, ¶ 28. However, a parent has “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 R.J.F.*, ¶ 38. “A district court may not find a treatment plan unsuccessful solely based on a finding that a parent’s incarceration rendered the plan unsuccessful.” *In re A.L.P.*, 2020 MT 87, ¶ 18, 399 Mont. 504, 461 P.3d 136.

¶14 From our review of the record, we conclude the District Court did not err in determining the Department provided reasonable efforts as required by § 41-3-423(1), MCA. Here, Mother had almost a year before her incarceration in December 2022 to work with the Department and complete her treatment plan. Instead, Mother failed to engage with the Department and failed to communicate with Viviano despite Viviano’s numerous efforts to reach out to Mother. Mother was served twice by publication because her whereabouts were unknown and she had absconded from supervision with the Department

of Corrections. Viviano travelled to Billings several times to meet Mother but Mother failed to show up. The court concluded Mother's drug addiction interfered with progress on her treatment plan and her ability to engage in services.

¶15 Mother claims the Department did not make reasonable efforts when she was denied in-person and/or phone visitation. However, the Department provided Mother an in-person visit with A.K. immediately upon her release from jail in April 2023, but Mother relapsed and tested positive for fentanyl. Mother did have some weekly phone contact with the children, but the Department became concerned about some of the communications and terminated those calls in August of 2023.

¶16 The District Court determined Mother's severe addiction and inability to parent would not change within a reasonable period of time. It noted the presumption contained in § 41-3-604(1), MCA, that termination was in the children's best interest because they had been in foster care for nearly twenty months immediately preceding the termination hearing. The court found clear and convincing evidence that termination of the parent-child relationship and awarding permanent custody to the Department was in the children's best interests. It found that Mother had been involved previously with the Department and thus contributed to its conclusion that Mother was unlikely to be able to parent within a reasonable period of time. The record supports that Mother was completely unwilling to engage with the Department and that she had a severe addiction spanning several years. There was substantial evidence supporting the District Court's conclusion that Mother's conduct was not likely to change within a reasonable period of time.

¶17 Mother claims the Department should have placed the children with M.H.’s mother in Oklahoma. However, this argument must fail. Placement of the children in Oklahoma would have removed them from other family with whom they were familiar that lived in Montana. Additionally, Mother would have had difficulty successfully completing her treatment plan if the children were placed in Oklahoma.

¶18 Finally, Mother argues the District Court erred by terminating Mother’s rights instead of ordering a guardianship. However, we have held that once “a district court finds the statutory criteria supporting termination are met, ‘no limitation requires the district court to consider other options prior to terminating parental rights.’” *In re A.B.*, 2020 MT 64, ¶ 38, 399 Mont. 219, 460 P.3d 405 (quoting *In re T.S.*, 2013 MT 274, ¶ 30, 372 Mont. 79, 310 P.3d 538). Here, the Department proved by clear and convincing evidence the statutory requirements for termination, and the District Court did not err in so concluding.

¶19 We conclude that the District Court did not abuse its discretion in terminating Mother’s parental rights to her children. The Department has proven by clear and convincing evidence the statutory criteria for termination. There is no error in the District Court’s findings of fact and its conclusions of law are correct. Accordingly, the District Court’s Order Terminating Parental Rights and Granting Permanent Legal Custody to the Department is affirmed.

¶20 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents

no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶21 Affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ INGRID GUSTAFSON

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR