DA 18-0345

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 55N

IN THE MATTER OF:

Z.B.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DN 15-91
Honorable Donald L. Harris, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Shannon Hathaway, Montana Legal Justice, PLLC, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Mike Andersen, Deputy County Attorney, Billings, Montana

Submitted on Briefs: January 30, 2019

Decided: March 5, 2019

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 D.B. (Father) appeals the Thirteenth Judicial District Court's Findings of Fact, Conclusions of Law, and Order of May 22, 2018, terminating his parental rights to his daughter, Z.B. (Child). We affirm.

¶3 On March 2, 2015, the Montana Department of Public Health and Human Services (Department) filed a Petition for Emergency Protective Services (EPS), Adjudication as a Youth in Need of Care (YINC), and Temporary Legal Custody (TLC) of Child when she was one-week-old. On March 5, 2015, the District Court issued an order concluding there was probable cause to believe Child was in danger of being abused or neglected and scheduled an initial hearing on the Department's Petition 18 days later. At the time of removal, Father had an open case with the Department involving another child.[1]

[1] Father's other child was placed in the Department's care in May 2014 due to physical neglect. There was a court-ordered treatment plan in place in that case, and Father did not complete that plan.

¶4 On July 6, 2015, following two continuances,[2] the District Court held a contested show cause and adjudication hearing. Father testified he had completed an anger management assessment and a psychological evaluation, he and K.D. (Mother) had scheduled a couples counseling appointment, and he was nearly done with his parenting classes. The Department did not have sufficient time to present its evidence in support of the TLC petition during the hearing. As the District Court attempted to find another date to finish the hearing, the Department suggested it could amend its petition to one for temporary investigative authority (TIA). Father agreed and did not object to this proposal. On July 20, 2015, the District Court issued its written order granting the Department TIA for a period of 90 days.

¶5 On October 8, 2015, before expiration of TIA, the Department filed a second Petition for Adjudication as a YINC and TLC of Child. The District Court set a hearing for November 30, 2015. Following a couple additional continuances, Father stipulated to Child being adjudicated a YINC and to TLC for six months. On February 16, 2016, the District Court adopted the stipulation, adjudicated Child as a YINC, granted the Department TLC for a period of six months, and ordered the Department to develop a treatment plan for Father within 30 days. On May 16, 2016, the District Court held a

[2] At the time of the initially scheduled show cause hearing, Father's counsel informed the District Court it was her understanding the hearing would be postponed until the time set for adjudication and asked if that was acceptable. The District Court then postponed the show cause hearing until June 1, 2015, the time set for the adjudication hearing. On June 1, 2015, despite Father's objection to further continuance, the Department moved for continuance because it had not yet received Father's psychological evaluation and its counsel was out of office. The District Court reset the show cause hearing for July 6, 2015.

permanency plan hearing. At the time of the permanency hearing, Child was residing with her great grandparents, and the Department was working toward reunification with Father and Mother.

¶6 On June 9, 2016, as Father had not yet signed his proposed treatment plan, the Department provided it to the District Court and moved for its approval. On June 29, 2016, the District Court approved and ordered the Department's proposed treatment plan. The treatment plan required Father to: complete parenting classes; maintain a safe and healthy residence free from domestic violence and drug use; complete a psychological evaluation; comply with counseling services; attend visits with Child; utilize non-physical age-appropriate forms of discipline; and work cooperatively with the Department to complete these tasks.

¶7 On August 16, 2016, the Department sought extension of TLC. On October 17, 2016, the District Court held a hearing on the Department's motion, where Father stipulated to an extension of TLC for six months. On October 28, 2016, pursuant to mediation, the Department and Father negotiated a reunification plan. The mediator's summary of the plan contained an agreement to reach reunification by: increasing the parents' in-home parenting time; agreeing to a later meeting to draft and discuss an in-home safety plan; continuing therapeutic parenting visits; continuing with counseling; providing ongoing monitoring by the Department; and planning to meet again in approximately three weeks to discuss the progress of this plan.[3]

[3] Despite reaching this mediated agreement on October 28, 2016, the Notice of Agreement Reached at Mediation was not filed until December 8, 2017.

¶8 On April 18, 2017, Father filed a Motion for Reunification, Placement with Parents, and Dismissal. On May 8, 2017, the District Court considered Father's Motion during a previously scheduled permanency plan hearing. At the hearing, Father's counsel informed the District Court Father's Motion was intended to reinstate unsupervised visits twice a week. The District Court ordered the Department to reinstate unsupervised visits with Child.

¶9 On May 25, 2017, the Department filed a Petition for Permanent Legal Custody and Termination of Parental Rights based on Father's failure to complete his treatment plan. On March 7, 2018, March 21, 2018, and April 16, 2018, the District Court conducted a termination hearing on the Department's Petition. On April 12, 2018, Father filed a brief regarding an estoppel issue raised during his termination hearing concerning the Department's failure to timely advise him it was dissatisfied with his treatment plan progress.

¶10 On May 22, 2018, the District Court denied Father's estoppel argument and entered its Findings of Fact, Conclusions of Law, and Order terminating Father's parental rights. The District Court determined Father had failed to meet the elements required for estoppel, Father had admitted he did not fully complete his treatment plan during the termination hearing, and any reunification plan reached in October 2016 was contingent upon Father's continued efforts with his treatment plan. The District Court further held Child had been removed from her parents' care four days after she was born and had been in foster care continuously for over three years, Father failed to successfully complete his treatment plan, Father acknowledged he failed to successfully complete his treatment plan, the conduct or

condition rendering Father unfit to parent was unlikely to change in a reasonable time, and termination of Father's parental rights was in Child's best interests. Father appeals.

¶11 A district court's decision to terminate parental rights is reviewed for an abuse of discretion. *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715 (citation omitted). Findings of fact are reviewed for clear error. 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 district court a mistake was made. *In re J.B.*, ¶ 10 (citation omitted). Conclusions of law are reviewed to determine whether the district court interpreted the law correctly. *In re J.B.*, ¶ 9 (citation omitted).

¶12 Father initially asserts he was denied due process because the Department did not make reasonable efforts to reunite him with Child. Father argues the Department failed to make reasonable efforts because: (1) the Department did not act in good faith when it agreed to transition Child back to his care without indicating to him what additional steps he needed to take to achieve reunification; and (2) the Department misled him to believe he had fulfilled the requirements of his treatment plan after entering into the mediated reunification agreement. Father further argues, due to the Department's failure to make reasonable efforts, the District Court erroneously concluded the conduct or condition rendering him unfit to parent was unlikely to change within a reasonable time. Finally, Father argues he was denied due process because the Department and the District Court did not follow proper statutory procedures governing child dependency proceedings.

¶13 It is well established a natural parent's right to care and custody of a child is a fundamental liberty interest which courts must protect with fundamentally fair procedures

at all stages of termination proceedings. *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282 (citations omitted). The best interests of the child are of paramount concern, however, and take precedence over parental rights. *In re A.H.D.*, 2008 MT 57, ¶ 13, 341 Mont. 494, 178 P.3d 131 (citation omitted). We have consistently held a district court may protect the child's best interests despite procedural error. *In re M.S.*, 2014 MT 265A, ¶ 22, 376 Mont. 394, 336 P.3d 930 (citations omitted).

¶14 Section 41-3-423(1), MCA, provides the Department must make reasonable efforts to prevent removal of a child and to reunite a family. While the statute does not define "reasonable efforts," it provides examples of such, including: entering into a voluntary protective services agreement; developing individual written case plans; providing for services pursuant to a case plan, and providing for periodic reviews. *See* § 41-3-423(1), MCA. Analysis of reasonable efforts is highly fact-dependent. *In re J.H.*, 2016 MT 35, ¶ 17, 382 Mont. 214, 367 P.3d 339 (citation omitted).

¶15 A district court may order termination of the parent-child relationship if the child is an adjudicated YINC, an appropriate treatment plan has not been complied with, and the conduct of the parents rendering them unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA. A treatment plan is an agreement or court order specifying the actions a parent must take to resolve the conditions that resulted in the need for protective services for the child. Section 41-3-102(30), MCA. Partial or even substantial compliance with a treatment plan is insufficient to preclude termination of parental rights. *In re D.F.*, 2007 MT 147, ¶ 30, 337 Mont. 461, 161 P.3d 825 (citation omitted).

¶16 From our review of the record, we conclude the Department made reasonable efforts to reunite Father with Child. Here, the Department's reasonable efforts included: (1) offering Father a voluntary protective services agreement, which Father rejected; (2) developing an appropriate and written court-ordered treatment plan; (3) providing for services, including a psychological evaluation, counseling services, anger assessment evaluation and services, parenting classes, therapeutic parenting evaluation and services, and parenting-child interactive therapy; (4) providing for visitations with Child; (5) participating in mediation; (6) trialing increased in-home parenting; and (7) allowing for kinship placement of Child. *See* § 41-3-423(1), MCA; *In re J.H.*, ¶ 17.

¶17 Contrary to Father's assertion, nothing in the October 2016 reunification plan summary indicates Father fulfilled his treatment plan or provides any indication the treatment plan was not still in full force and effect. The mediator's summary merely contemplates re-assessment in approximately three weeks where, presumably if Father and Mother did well, a schedule for further increased parenting would be developed. Following the period of these in-home visits, the supervising reunification specialist discontinued in-home visits. Due to the parents' lack of progress, no additional in-home parenting schedule was ever developed. From the record, it is clear the Department provided reasonable efforts, and we find no error with the District Court in this regard. *See* § 41-3-423(1), MCA; *In re J.H.*, ¶ 17.

¶18 Father's assertion of error in the District Court's finding that he was unlikely to change within a reasonable time is not persuasive. Although Father initially engaged somewhat with the Department in obtaining various evaluations and attending some

classes, his efforts dwindled and he ceased participating in any meaningful way to address his identified parenting deficiencies, most primarily failing to address his mental health issues.[4] *See In re D.F.*, ¶ 30. Father stopped attending counseling—in the six months prior to the termination hearing, Father only attended one session with his therapist. Father stopped having contact with his social worker. Father stopped visiting Child and had not requested a visit with Child in the six months preceding the termination hearing. Father's lack of effort to engage in and complete his treatment plan tasks does not lead to the conclusion the Department did not make reasonable efforts at reunification. *See* § 41-3-423(1), MCA; *In re J.H.*, ¶ 17; *In re D.F.*, ¶ 30. Based on Father's progressively deteriorating conduct over the three years from Child's removal to the termination hearing, we likewise conclude the District Court did not err in finding the conduct and conditions rendering Father unfit to parent was unlikely to change within a reasonable time. *See* § 41-3-609(1)(f), MCA.

¶19 Section 41-3-432(1)(a), MCA, provides that "a show cause hearing must be conducted within 20 days of the filing of an initial child abuse and neglect petition unless otherwise stipulated by the parties . . . ." We will not reverse a district court's ruling due

[4] Father was diagnosed with a Narcissistic Personality Disorder and Obsessive-Compulsive Personality Disorder, with histrionic traits. Father's histrionic traits magnify his narcissism resulting in excessive emotionality and a high level of attention seeking behavior. Father's personality disorders manifest in his seeking dominance and control, combined with a lack of empathy, compassion, and a tendency to make decisions based upon defying others. Due to his lack of engagement with his treatment plan, Father failed to address the manifestations of his disorders, remained consumed with his own experiences, and did not demonstrate the ability to recognize Child's needs and appropriately meet them.

to an error that would have no significant impact upon the result. *In re J.C.*, 2008 MT 127, ¶ 43, 343 Mont. 30, 183 P.3d 22 (citation omitted).

¶20 We conclude Father's due process rights were not violated by any failure of the District Court to adhere to prescribed statutory procedures. Upon the Department's filing of its first Petition for Adjudication as a YINC and TLC, the District Court appropriately issued an order concluding there was probable cause to believe Child was in danger of being abused or neglected. The District Court scheduled an initial hearing on the Petition 18 days later, thus meeting the requirements of § 41-3-432(1)(a), MCA. During the adjudication hearing, the Department suggested it could amend its Petition to one for TIA, Father agreed to TIA, and the District Court granted TIA. Before expiration of TIA, the Department filed its second Petition for Adjudication as a YINC and TLC, and the District Court set a hearing within 20 days as required by § 41-3-432(1)(a), MCA.

¶21 Although the District Court ordered the Department to develop a treatment plan within 30 days of its adjudication order, it is unclear from the record why it took over three months for the Department to move the District Court to approve the plan. Despite this, it is clear from the record from the outset of this case, the Department was offering and providing Father services to satisfy the tasks ultimately contained in his treatment plan. *See In re M.S.*, ¶ 22; *In re J.C.*, ¶ 43. Prior to the District Court's approval of his treatment plan, Father had completed mental health evaluations, completed an anger management assessment, attended some counseling, attended parenting classes, and visited Child. Various evaluator's recommendations from these sessions were ultimately incorporated into Father's treatment plan. The District Court's delay in approving Father's treatment

plan did not delay Father from knowing what he needed to do to complete his treatment plan to reunite with Child nor result in a delay in providing services to Father. *See In re M.S.*, ¶ 22; *In re J.C.*, ¶ 43.

¶22 Father's due process rights were not violated by the District Court's handling of this case, and any error in not issuing and approving Father's treatment plan sooner was harmless. *See In re J.C.*, ¶ 43. Father had full opportunity to participate at hearings and to engage in timely, meaningful services designed to assist him in addressing his parenting deficiencies. We agree with the State—considered in its totality, Father's child dependency proceedings provided him with fundamental fairness, and the District Court did not abuse its discretion in terminating Father's parental rights to Child. *See In re C.J.*, ¶ 26; *In re J.B.*, ¶ 10.

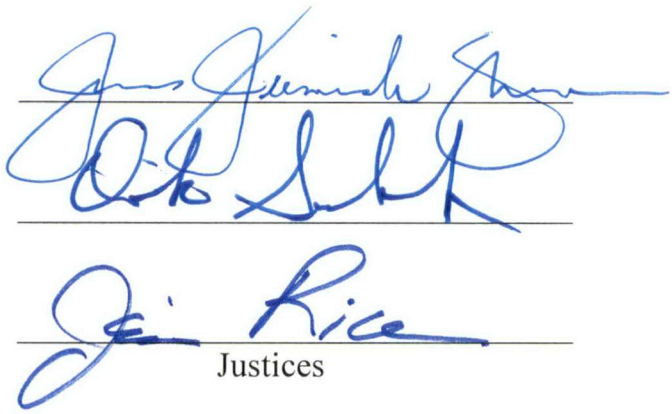
¶23 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶24 Affirmed.

Justice

We concur:

Chief Justice



Justices