

ORIGINAL

FILED

03/19/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 18-0337

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IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 65N

IN THE MATTER OF:

C.J.G.,

A Youth in Need of Care.

FILED

MAR 19 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Twelfth Judicial District,
In and For the County of Hill, Cause No. DN 16-040
Honorable Daniel A. Boucher, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Julie Brown, Montana Legal Justice, PLLC, Missoula, Montana
(for Child)

Michael P. Sinks, Sinks Law Office, Bozeman, Montana (for Father)

For Appellee:

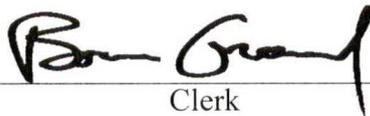
Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant
Attorney General, Helena, Montana

Karen Alley, Hill County Attorney, Havre, Montana

Submitted on Briefs: January 30, 2019

Decided: March 19, 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 G.G. (Father) appeals from a May 20, 2018 order of the Twelfth Judicial District Court, Hill County, terminating his parental rights to C.J.G. (Child).¹ Father asserts the order terminating his parental rights should be reversed for two reasons: (1) the evidence did not support adjudication of Child as a youth in need of care (YINC); and (2) Father's due process rights were violated when the District Court provided an incomplete summary of its in-chambers interview of A.G. Child appeals the termination order asserting Child received ineffective assistance of counsel. Child argues that the District Court based its findings of fact, conclusions of law, and order terminating Father's parental rights upon an incorrect impression of Child's wishes due to ineffective counsel. We affirm.

¶3 The Child and Family Services Division of the Montana Department of Public Health and Human Services (Department) became involved after receiving a September 26, 2016 report that Father physically assaulted his sixteen-year-old daughter,

¹ Father has three children, A.G., C.M.G., and Child. A.G. and C.M.G. were also subjects to Department intervention. During this proceeding, A.G. was dismissed as she reached the age of majority. Father's parental rights to C.M.G. were ultimately terminated.

A.G. A.G. reported to Child Protection Specialist (CPS) Andrew Prevost that Father grabbed her and pushed her to the ground, leaving an indentation on her arm and a bump on her head. A.G. reported she was concerned by Father's recent behavior changes, including his increasingly erratic and angry demeanor. A.G. reported she witnessed Father and his friends using drugs in the garage of their home and that she believed Father was selling drugs.

¶4 C.M.G. and Child provided CPS Prevost with similar accounts of Father's recent behavior. C.M.G. reported he found a glass pipe in Father's truck, a rubber strap in Father's drawer that he believed was used around a person's arm, and syringes in the trash, though he admitted the syringes could be from his grandmother. C.M.G. further reported that Father used his grandmother's pain pills.

¶5 Father admitted to CPS Prevost that he grabbed A.G.'s wrist during an argument, that he used methamphetamine two months prior, and that he sometimes takes pain pills from his mother when he runs out because they have the same prescription. He attributed the recent changes in his behavior to high stress due to his mother's hospitalization.

¶6 The Havre Police arrested Father for the reported assault against A.G. and found a methamphetamine pipe in his pocket.

¶7 On September 30, 2016, the Department filed a petition for emergency protective services (EPS), adjudication of Child as a YINC, and temporary legal custody (TLC). CPS Prevost alleged in his supporting affidavit that Father physically abused and neglected his three children.

¶8 On October 18, 2016, the District Court held a show cause hearing. Consistent with his prior affidavit, CPS Prevost testified in support of the Department's petition. Father testified that A.G. fabricated the incident in collusion with her step-mother, because A.G. wanted to move out of the home to live with her boyfriend and Father had previously denied that request. The District Court concluded it had probable cause to believe Child was abused or neglected or in danger of being abused or neglected, and ordered Father to submit to drug testing.

¶9 On November 14, 2016, the District Court held an adjudicatory hearing where it interviewed A.G. in chambers over Father's objection. The District Court then summarized what was said in chambers for the parties, including that A.G. felt uncomfortable near Father, that she had noticed recent changes in Father's behavior and demeanor, and that she believed Father used drugs. At the time of the hearing, Father had not yet participated in drug testing. Following the hearing, the District Court issued an order adjudicating Child as a YINC.

¶10 On December 27, 2016, the District Court approved the Department's proposed treatment plan for Father, requiring Father to complete tasks addressing chemical dependency, mental health, anger management, and parenting skills, and requiring Father to cooperate with the Department. Father failed to complete the ordered treatment plan. On May 3, 2018, following a hearing, the District Court terminated Father's parental rights.

¶11 At the termination hearing, Child's counsel advised the court that Child and C.M.G. were present, and that C.M.G. wanted to testify. Child was not sure whether he wanted to

speak with the judge or testify, but wanted to be present. C.M.G. testified. After C.M.G.'s testimony, the court again inquired if Child desired to speak with the judge in chambers. Counsel for Child indicated Child would rather not unless the court had additional questions. Following testimony from another witness, the court again inquired if Child wanted to speak with the judge in chambers. Child's counsel indicated Child was no longer in the courtroom, but that Child was willing to sit for an interview if the court had additional questions. During the hearing, Child's counsel explained that both C.M.G. and Child wanted to return to Father's care. The District Court elected not to meet with Child in chambers.

¶12 This Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re T.N.-S.*, 2015 MT 117, ¶ 16, 379 Mont. 60, 347 P.3d 1263. A district court abuses its discretion if it "acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *In re T.N.-S.*, ¶ 16 (citing *In re R.M.T.*, 2011 MT 164, ¶ 26, 361 Mont. 159, 256 P.3d 935). This Court reviews a district court's findings of fact for clear error and its conclusions of law for correctness. *In re T.N.-S.*, ¶ 16. Clear error exists where findings of fact are not supported by substantial evidence, a district court misapprehended the effect of the evidence, or this Court has a definite and firm conviction that the lower court was mistaken. *In re D.E.*, 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586.

¶13 Pursuant to § 41-3-609(1)(f), MCA:

(1) The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence, except as provided in the federal Indian Child Welfare Act, if applicable, that any of the following circumstances exist:

(f) the child is an adjudicated youth in need of care and both of the following exist:

(i) an appropriate treatment plan that has been approved by the court 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.

¶14 Father does not challenge the District Court's findings that his treatment plan was appropriate, that he failed to complete his treatment plan, and that the conduct or condition rendering him unfit to parent was unlikely to change within a reasonable time. Father challenges the court's adjudication of Child as a YINC.

¶15 A YINC is a youth "who has been adjudicated or determined, after a hearing, to be or to have been abused, neglected, or abandoned." Section 41-3-102(34), MCA. A child is "abused or neglected" when a child suffers actual physical or psychological harm or substantial risk of physical or psychological harm. Section 41-3-102(3), (7), MCA. Abuse or neglect occurs when a parent exposes or allows a child to be exposed to an unreasonable physical or psychological risk, including an act of violence against another person residing in the child's home. Section 41-3-102(21)(v), (23)(a), MCA.

¶16 Father asserts the evidence was insufficient to establish Child met the definition of a YINC. Father asserts his assault of A.G. did not meet the definition of physical abuse under § 41-3-102(19), MCA, and that his drug use was not sufficient to meet the standard of abuse or neglect.

¶17 From our review of the record, the District Court did not abuse its discretion in adjudicating Child as a YINC. A child need not suffer actual physical injury or exposure to drug distribution or production to be adjudicated a YINC. The District Court adjudicated Child as a YINC based on substantial, credible evidence presented at Child's adjudication hearing. Father was arrested and charged with a partner or family member assault against A.G., who resided in the home with Father and Child. The arresting officer and CPS Prevost observed the injury to A.G. Father had a methamphetamine pipe in his pocket when he was arrested. The children reported a significant change in Father's behavior. They described him as angrier, and reported that he and his friends were using drugs at the home. Father admitted to using his mother's prescribed medications and previously using methamphetamine. This evidence supports the District Court's adjudication of Child as a YINC.

¶18 Father next asserts the District Court violated his due process rights because the District Court did not provide a complete summary or record of its interview with A.G. in chambers. A district court may conduct in-chambers interviews of children in abuse and neglect cases. *In re T.N.-S.*, ¶ 36. This Court previously held that a district court is not required to disclose the transcript of its in-chambers interview with a child to the parties in dependency and neglect proceedings. *In re T.N.-S.*, ¶ 34. Father asks this Court to revisit this holding. We decline to do so. Father did not previously request a transcript of the District Court's interview with A.G. or challenge the sufficiency of the District Court's summary of the interview. He thus waived this argument.

¶19 Next, Child asserts he received ineffective assistance of counsel, and that the District Court therefore based its findings of fact, conclusions of law, and order terminating Father's parental rights upon an incorrect impression of Child's wishes. This Court evaluates "the effectiveness of counsel in dependent-neglect matters by looking to two main factors: counsel's experience in this type of case and the quality of counsel's advocacy during the proceeding. We then analyze whether the [party represented by counsel] suffered prejudice as a result of any ineffectiveness of counsel." *In re A.L.D.*, 2018 MT 112, ¶ 19, 391 Mont. 273, 417 P.3d 342.

¶20 Child asserts that had his counsel had the appropriate training and experience, he would have objected to the Department's petition to terminate Father's rights. This assertion is speculative and unsupported by any evidence.

¶21 Child further asserts that his counsel was ineffective because he failed to advocate for his wishes and failed to correct the District Court's understanding of his wishes. However, the record does not support that counsel did not advocate for Child's wishes. Counsel consistently asserted that Child wished to return to his Father's care. Counsel's explanation to the District Court that Child did not desire to talk with the judge, but was willing to do so if the court so desired, does not indicate counsel did not advocate for Child's wishes. The District Court was not required to follow Child's expressed wishes. Child fails to demonstrate that his counsel's assistance prejudiced him in light of the District Court's findings, uncontested by Father, that Father failed to successfully complete

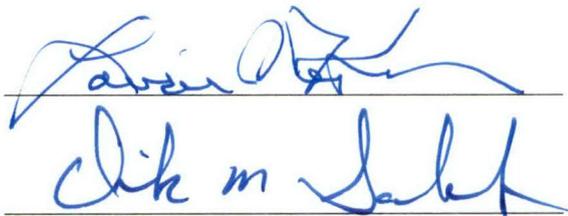
his court-ordered treatment plan and that the conduct or condition rendering Father unfit was unlikely to change within a reasonable time.

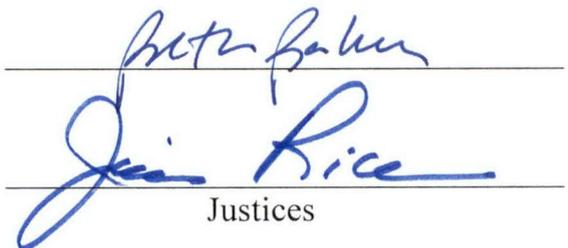
¶22 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶23 Affirmed.


Justice

We concur:


Justice


Justice