

ORIGINAL

DA 18-0611

FILED

08/20/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 18-0611

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 203N

IN THE MATTER OF:

S.Y.,

A Youth in Need of Care.

FILED

AUG 20 2019

Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DN-15-25
Honorable Karen Townsend, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Gregory D. Birdsong, Birdsong Law Office, PC, Santa Fe, New Mexico

For Appellee:

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

Kirsten H. Pabst, Missoula County Attorney, Kelly Henkel, Deputy
County Attorney, Missoula, Montana

Submitted on Briefs: July 24, 2019

Decided: August 20, 2019

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 K.P. (Putative Father) appeals from an order of the Fourth Judicial District Court, Missoula County, terminating his parental rights to S.Y. (Child). We affirm.

¶3 Child was born in May 2013 in Great Falls, Montana. At the time of Child's birth, Mother was married to A.C.Y. (Presumptive Father), who was in prison. Presumptive Father's name appears on Child's birth certificate. The Montana Department of Health and Human Services, Child and Family Services Division (Department), initially petitioned for the termination of Presumptive Father's parental rights. However, at a September 5, 2017 hearing, the Department learned that Presumptive Father was not Child's biological father. A paternity test later confirmed that K.P. (Putative Father) was Child's biological father.

¶4 Prior to Child's birth, Mother began dating Putative Father, and Mother and her son, A.Y.,¹ moved in with Putative Father in Great Falls. In July 2012, the Department received a report that Mother and Putative Father were using drugs in front of A.Y. The report additionally alleged that Putative Father hit A.Y. in the face. As a result, A.Y.

¹ Presumptive Father is A.Y.'s biological father.

lived with his maternal grandparents for a short time while Mother and Putative Father worked with the Department. A.Y. eventually returned to live with Mother and Putative Father.

¶5 In October 2012, Mother became pregnant with Child. Putative Father went with Mother to get a blood test confirming her pregnancy, learned Child's expected due date, and attended prenatal appointments with her. Putative Father told his mother he was excited to be a father.

¶6 In April 2013, Mother ended the relationship and told Putative Father that she and A.Y. were moving to Missoula, Montana, because her father was dying. Thereafter, Putative Father tried calling Mother, but she did not return his calls. Putative Father began dating another woman. Mother remained in Great Falls until Child was born.

¶7 A mutual friend informed Putative Father when Mother gave birth to Child in Great Falls. Putative Father testified that he went to the Department. The Department sent him to the Great Falls Police Department, which provided him with no assistance. Putative Father did not return to the Department. In August 2013, Putative Father sent eight messages to Mother through social media. Putative Father did not register with the Putative Father's Registry, stating he did not know it existed.² While Putative Father knew Mother's maiden name and shared a mutual friend with Mother, he admitted he did not try harder to contact Mother because he did not wish to upset his new girlfriend or

² If a man believes he is the biological parent of a child, he may voluntarily register on the Putative Father Registry. The Department searches the Registry when petitions for termination of parental rights are initiated.

disrupt Child's life. Putative Father made no other efforts to locate Mother or Child and made no financial contributions to help support Child over the next five years.

¶8 Following Child's birth, Mother, A.Y., and Child, moved to Missoula to live with Mother's parents. When Presumptive Father was released from prison one year later on parole, Presumptive Father, Mother, A.Y., and Child lived together. The Department became involved with Mother and Presumptive Father when Presumptive Father missed a parole appointment. His parole officer went to the house and found hypodermic needles, baggies with methamphetamine residue, and drug paraphernalia. The Department removed Child and A.Y., citing active methamphetamine use in the house and neglect of the children. Presumptive Father returned to prison, and Child has not been in Presumptive Father's care since that time. Presumptive Father has spent the vast majority of this proceeding in custody. On February 25, 2015, the 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. The Department placed Child and A.Y. with their maternal grandparents.

¶9 Mother and Presumptive Father stipulated to TLC on March 16, 2015, and on May 5, 2016, respectively. The Department developed and the District Court approved treatment plans for Mother and Presumptive Father to complete. On September 9, 2015, the District Court extended TLC and began a trial home visit with Mother. Initially, things went well. However, in February 2016, A.Y. exhibited serious behavioral problems and returned to live with his maternal grandparents. The Department requested two additional extensions of TLC while Mother worked on her treatment plan. The

Department's permanency plan was to reunify Child with Mother and to establish guardianship for A.Y. with his maternal grandparents due to his emotional needs.³ Child continued to live with Mother until September 2017, when Mother lost stable housing and the Department questioned her ability to safely care for Child.

¶10 At a September 5, 2017 hearing, the District Court learned Presumptive Father told the Department that he was not Child's biological father. Mother confirmed this information and provided the names of three possible fathers, including Putative Father. In May 2018, a paternity test confirmed Putative Father was Child's biological father. Putative Father's first appearance in this proceeding was at a May 14, 2018 hearing.

¶11 On July 10, 2018, the Department filed an amended petition to terminate the parental rights of Mother, Presumptive Father, and Putative Father.⁴ The Department asserted that Putative Father abandoned Child and his rights should be terminated pursuant to § 41-3-609(1)(b) or (d), MCA. At an August 27, 2018 hearing on the petition, Child Protection Specialist (CPS) Rebecca Wemple testified that a sense of permanency was in Child's best interests. Throughout the Department's involvement in this proceeding, Child lived primarily with her maternal grandparents, who were willing to adopt Child and raise her with A.Y. CPS Wemple testified that Child's maternal grandparents were consistent and stable caregivers in Child's life.

³ In September 2017, the District Court established guardianship for A.Y. with his maternal grandparents.

⁴ The Department had previously filed a petition to terminate Mother's, Presumptive Father's, and any and all putative fathers' parental rights pursuant to § 41-3-609(1)(b), (1)(d), (1)(e), and (1)(f), MCA.

¶12 In contrast, CPS Wemple testified that despite Putative Father's knowledge of Child's birth, Putative Father did not meaningfully attempt to locate Mother, provide for Child emotionally or financially, or indicate any desire to do so in the future. Furthermore, CPS Wemple noted that Putative Father's partner, whom Putative Father testified would care for Child while he was at work, had a history with the Department, did not have custody of her three children, and had previously failed to complete a Department-offered treatment plan. Child's maternal grandparents intervened and submitted a post-hearing brief in support of terminating Putative Father's parental rights pursuant to § 41-3-609(1)(e), MCA, asserting that Putative Father met the definition of "putative father."

¶13 On September 25, 2018, the District Court determined that Putative Father abandoned Child and terminated the parent-child relationship between Putative Father and Child. The District Court concluded it was in Child's best interests to terminate Putative Father's rights and award the Department permanent legal custody with the right to consent to her adoption.⁵ Putative Father appeals, arguing that the District Court's termination of his parental rights pursuant to Montana's putative father statutes denied him due process rights and equal protection under the Montana and U.S. Constitutions.

¶14 This Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re X.M.* 2018 MT 264, ¶ 17, 393 Mont. 210, 429 P.3d 920. A district court abuses its discretion when it acts arbitrarily, without employment of

⁵ On December 4, 2018, the District Court dismissed Presumptive Father from the proceeding, and on December 5, 2018, the District Court issued its final judgment terminating Mother's parental rights to Child.

conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. This Court reviews a district court's findings of fact for clear error and conclusions of law for correctness. *In re X.M.*, ¶ 17. Whether a parent has been denied his or her right to due process is a question of constitutional law, over which this Court has plenary review. *In re A.S.*, 2004 MT 62, ¶ 9, 320 Mont. 268, 87 P.3d 408.

¶15 A parent's right to the care and custody of a child is a fundamental liberty interest which must be protected by fundamentally fair procedures. *In re D.B.*, 2007 MT 246, ¶ 17, 339 Mont. 240, 168 P.3d 691. A district court may terminate parental rights when clear and convincing evidence demonstrates that a parent has abandoned the child. Section 41-3-609(1)(b), (d), MCA; *In re M.J.C.*, 2014 MT 122, ¶ 11, 375 Mont. 106, 324 P.3d 1198. Section 41-3-609(1)(b) and (d), MCA, specifically state that the court may terminate parental rights where "the child has been abandoned by the parents," and "the parent has subjected a child to any of the circumstances listed in 41-3-423(2)(a) through (2)(e)," which include abandonment. Abandonment includes: "leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future"; and "willfully surrendering physical custody for a period of 6 months and during that period not manifesting to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child." Section 41-3-102(1)(a)(i), (ii), MCA. Additionally, § 41-3-604(1), MCA, states that the best interests of the child are presumed to be served by the termination of parental rights when the child has been in foster care for fifteen of the most recent twenty-two months. *In re M.J.C.*, ¶ 11.

¶16 In termination proceedings for abandonment, no treatment plan is required. Section 41-3-609(4)(a), (1)(b), MCA; *In re J.J.*, 2001 MT 131, ¶ 19, 305 Mont. 431, 28 P.3d 1076. The best interests of the child “take precedence over the parental rights.” *In re T.S.B.*, 2008 MT 23, ¶ 19, 341 Mont. 204, 177 P.3d 429. Children need not be left to “twist in the wind” when their parent’s fail to give priority to their stability and permanency. *In re T.S.*, 2013 MT 274, ¶ 30, 372 Mont. 79, 310 P.3d 538 (internal citation omitted).

¶17 Putative Father argues on appeal that Montana’s statutory process to terminate the parental rights of putative fathers pursuant to § 41-3-609(1)(e), MCA, is fundamentally unfair and violated his right to due process. However, the District Court terminated Putative Father’s parental rights pursuant to § 41-3-609(1)(b) and (d), MCA, based on its conclusion that Putative Father abandoned Child. The statute cited by Putative Father as the basis for his due process argument is not the same statute cited by the District Court in its order terminating Putative Father’s parental rights. We therefore consider whether Putative Father abandoned Child pursuant to § 41-3-609(1)(b) and (d), MCA, and whether Putative Father received fair process pursuant to Montana’s termination of parental rights statutes in the case of abandonment.

¶18 The District Court heard testimony from Putative Father and CPS Wemple and considered Putative Father’s efforts to contact Mother and Child after Child’s birth and to establish a relationship with Child after his paternity was confirmed. The District Court found that Putative Father had “met none of [Child’s] basic needs since her birth.” Putative Father knew when and where his Child was born. For the first five years of

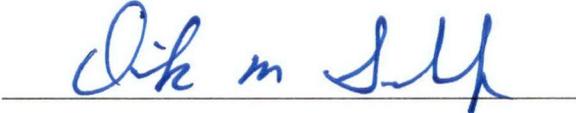
Child's life, the sole effort Putative Father made to establish a relationship with Child was to send eight messages through social media to Mother the week after Child's birth. Putative Father never financially contributed to Child's well-being. His inadequate effort did not manifest to Child or Mother his "firm intention to resume physical custody or to make permanent legal arrangements for the care of [Child]." See § 41-3-102(1)(a)(i), (ii), MCA. Accordingly, the District Court correctly concluded that Putative Father abandoned Child; Putative Father received fundamentally fair process throughout this proceeding.

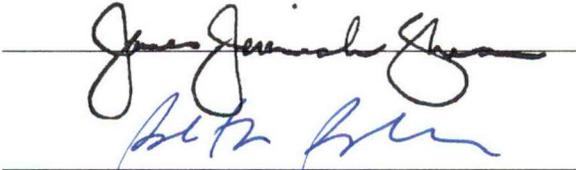
¶19 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

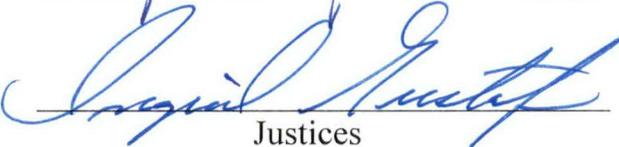
¶20 Affirmed.


Chief Justice

We Concur:






Justices