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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 18-0587

DA 18-0587

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 227

IN THE MATTER OF:

C.M.,

A Youth in Need of Care.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis And Clark, Cause No. BDN 2017-10
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Katy Stack, Stack & Kottke, PLLC, Missoula, Montana

For Appellee:

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

Leo Gallagher, Lewis and Clark County Attorney, Anne Peterson, Deputy
County Attorney, Helena, Montana

Submitted on Briefs: August 14, 2019

Decided: September 24, 2019

Filed:



Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 T.M. (Mother) appeals an order entered by the Montana First Judicial District Court, Lewis and Clark County, terminating Mother's parental rights to her child, C.M. We affirm, and address the following issue:

Did the District Court err by terminating Mother's parental rights because the Department failed to provide reasonable efforts to reunite Mother with C.M. as required by § 41-3-423(1), MCA?

FACTUAL AND PROCEDURAL BACKGROUND

¶2 C.M. is the natural child of Mother and E.M. (Father). C.M. lived with Mother in the Helena area and had very little contact with Father throughout her life. In January of 2017, the Department of Public Health and Human Services (the Department) removed C.M. from her Mother's care. Between 2013 and C.M.'s removal, the Department received several reports expressing concern about Mother's care for C.M., including allegations of physical abuse, neglect, and drug use by Mother. Ultimately, the Department removed C.M. based on reports that Mother was using methamphetamines, had exposed C.M. to an absconded sex offender from Oregon, and planned to flee the state with the child. The Department determined Mother physically neglected C.M. by providing inadequate care for C.M.'s health, hygiene, and educational needs.

¶3 On April 6, 2017, C.M. was adjudicated a youth in need of care, and temporary legal custody was granted to the Department. C.M. was initially placed in kinship care in Helena, but was thereafter placed with Watson Children's Center in Missoula. Mother remained in the Helena area throughout the proceedings. The Department allowed Mother

to call C.M. at any time and allowed visitation in Missoula on some holidays. Mother consistently called C.M. once or twice per week.

¶4 At the time of removal, C.M. was eleven years old but was mentally functioning at the level of a second-grade student, and had been diagnosed with oppositional defiance disorder and ADHD. C.M.’s case manager at Watson described C.M. as socially immature, struggling with personal boundaries and hygiene. Watson staff worked with C.M. to remedy these behaviors to prepare her for future foster care placement. C.M. attended therapy sessions at Watson and participated in a life skills program in school to assist her development. C.M.’s case manager testified C.M. had matured during her time at Watson and was doing well in that placement.

¶5 On April 27, 2017, the District Court held a hearing on Mother’s proposed treatment plan. Mother, represented by counsel, agreed to the plan’s terms. The plan required Mother to complete several tasks, including: maintaining contact with the Department and C.M.; keeping the Department advised her current address; completing a parenting course and a domestic violence course; participating in a mental health evaluation; and addressing her chemical dependency through evaluation, treatment, and remaining chemically free. The Department later indicated Mother’s chemical dependency was its primary concern.

¶6 However, on April 16, 2018, the Department filed a petition to terminate the rights of both of C.M.’s parents, alleging as to mother that she “has failed to successfully comply with the treatment plan and her conduct is unlikely to change within a reasonable time.”

C.M.’s Father voluntarily relinquished his parental rights, but Mother contested the termination of her rights.

¶7 On July 17, 2018, the District Court held a hearing on the termination of Mother’s rights. Several witnesses testified regarding Mother’s failure to comply with her treatment plan. A collection specialist who administered Mother’s drug tests testified Mother provided 22 urine samples over six months, each of which tested positive for methamphetamines. The specialist also testified Mother had failed to appear for her scheduled testing on several occasions. Eric Gilmore, who completed Mother’s chemical dependency evaluation, testified that, although he was initially inclined to recommend outpatient treatment for Mother based on her answers in his in-person evaluation, he ultimately recommended inpatient treatment. Gilmore explained his recommendation was based primarily on the “toxic” and “saturating” levels of methamphetamines shown on Mother’s urinalysis testing. Gilmore stated these levels were particularly important when contrasted with the use Mother had reported to him, as the discrepancies indicated an unwillingness to recognize her drug problem and an increased likelihood for relapse.

¶8 The child protection specialist for C.M., Enrique Victorero, testified Mother had failed to complete several of the tasks on her treatment plan, including that Mother had not kept him informed of her current address. He had been unable to confirm Mother was residing at the only address she had provided. Victorero testified Mother had not obtained a mental health evaluation or completed the required parenting and domestic violence courses. Victorero explained the Department was predominantly concerned that Mother

had failed to address her chemical dependency issues, including failing to complete the treatment recommended by Gilmore, failing numerous drug tests, and refusing to provide samples for testing on more than one occasion—even when Vitorero offered to drive her to the drug testing center.

¶9 Mother testified that she had obtained a mental health evaluation, but that it had never been sent to the Department due to an apparent error by the individual who completed the evaluation. She testified she had lived in the same home for the last eleven months and had provided that address to the Department. Mother stated she did not attend the domestic violence class, believing it to be unnecessary because she had never been in a violent relationship. Mother testified she had not completed the parenting class because the organization she contacted for registration had not returned her phone calls. Mother testified she had not followed through with Gilmore's recommendation for inpatient treatment because she wanted to get a second opinion. However, on cross-examination, Mother acknowledged she had over a year to obtain a second opinion, or follow through with treatment, but that she had failed to do either.

¶10 At the conclusion of the hearing, the District Court found by a preponderance of the evidence that Mother had failed to complete most of her treatment plan. The District Court particularly emphasized the testimony regarding Mother's high levels of methamphetamines, her failure to complete a number of urinalysis tests, and her failure to seek treatment for her chemical dependency.

¶11 On September 5, 2018, the District Court issued its Findings of Fact and Conclusions of Law and Order Terminating Parental Rights of T.M. with Consent to Adoption or Guardianship. The court concluded the treatment plan was appropriate, but Mother had failed to complete it and her unfitness was unlikely to change within a reasonable time. The court noted termination was presumed to be in the C.M.’s best interests because C.M. had been in foster care for 17 of the last 22 months, and further determined termination to be in C.M.’s best interests as established by clear and convincing evidence. Therefore, the District Court ordered termination of Mother’s rights.

¶12 Mother appeals.

STANDARD OF REVIEW

¶13 We review a district court’s factual findings in a parental termination order for clear error and its conclusions of law in such proceedings for correctness. *In re M.J.*, 2013 MT 60, ¶ 16, 369 Mont. 247, 296 P.3d 1197. Likewise, we review the district court’s “ultimate decision regarding adjudication and disposition” in parental termination actions for abuse of discretion. *In re M.J.*, ¶ 16.

DISCUSSION

¶14 *Did the District Court err by terminating Mother’s parental rights because the Department failed to provide reasonable efforts to reunite Mother with C.M. as required by § 41-3-423(1), MCA?*

¶15 Citing *In re R.J.F.*, 2019 MT 113, 395 Mont. 454, 443 P.3d 387, Mother argues her parental rights were likewise wrongfully terminated because the Department failed to make reasonable efforts to reunite her with C.M. Mother contends the Department’s placement

of C.M. in Missoula and failure to help her complete her treatment plan tasks violated the Department's duty under § 41-3-423(1), MCA. The State counters that it did make reasonable efforts to reunite Mother and C.M., but that Mother was unable and unwilling to complete her treatment plan, and the District Court's termination of Mother's rights was proper. Within its argument, the State contends this Court incorrectly expanded the criteria for termination of parental rights in *In re R.J.F.*, and that we should re-examine that holding.

¶16 Under § 41-3-609(1)(f), MCA, a district court may terminate a parent's fundamental right to the care and custody of their child who is adjudicated a youth in need of care only if it finds "by clear and convincing evidence that: (1) an appropriate court-approved treatment plan was not complied with by the parents or was not successful; and that (2) the conduct or condition of the parents rendering them unfit was unlikely to change within a reasonable time." *In re X.M.*, 2018 MT 264, ¶ 18, 393 Mont. 210, 429 P.3d 920 (citing § 41-3-609(1)(f)(i), (ii), MCA). "The department shall make reasonable efforts to . . . reunify families that have been separated by the state." Section 41-3-423(1), MCA. To meet the reasonable efforts requirement, 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' and to meet the Department's policy to provide 'the child with maximum opportunity for visits with his/her birth parents while services are provided to the family.'" *In re R.J.F.*, ¶ 28 (quoting *In re D.B.*, 2007 MT 246, ¶ 33, 339 Mont. 240, 1698 P.3d 691; citing *In re T.D.H.*, 2015 MT 244, ¶ 42, 380 Mont.

401, 356 P.3d 457). Reasonable efforts require that the Department, “in good faith, assist a parent in completing his or her voluntary services and treatment plan.” *In re R.J.F.*, ¶ 28 (citing *In re D.B.*, ¶ 33; *In re T.D.H.*, ¶ 42). Whether the Department has made reasonable efforts is highly fact dependent. *In re R.J.F.*, ¶ 28 (citing *In re J.H.*, 2016 MT 35, ¶ 17, 382 Mont. 2014, 367 P.3d 339).

¶17 In *R.J.F.*, a child was removed from the care of her mother at birth after the mother tested positive for methamphetamines and marijuana. *In re R.J.F.*, ¶ 3. The child was born in Billings, Montana, but the mother lived in Williston, North Dakota. The mother returned home shortly after the child’s birth. *In re R.J.F.*, ¶ 3. The State of Montana obtained temporary legal custody of the child and the District Court denied the mother’s motion to transfer the case to North Dakota. *In re R.J.F.*, ¶¶ 3-5. The child was placed in non-kinship foster care in Billings, nearly 300 miles from the mother’s home. *In re R.J.F.*, ¶ 5. The mother found it difficult to visit the child due to the far distance, her lack of transportation, and the winter road conditions. *In re R.J.F.*, ¶ 5. Later in the case, the Department arranged plane tickets for the mother to visit the child every other week. *In re R.J.F.*, ¶ 8. However, the mother still found visitation difficult due to transportation, work schedules, and her addiction. *In re R.J.F.*, ¶ 8. To aid the placement of her child nearer to her, the mother gave the Department the names of two different kinship placements geographically closer to Williston, but the Department did not investigate either placement suggestion. *In re R.J.F.*, ¶¶ 9-10. The mother was to undergo chemical dependency testing and treatment, but the Department refused to arrange this treatment in North Dakota, and instead arranged

bi-weekly outpatient treatment for the mother in Billings. *In re R.J.F.*, ¶¶ 6-7. The Department advised the mother if she wanted treatment, her “only option” was to move to Billings. *In re R.J.F.*, ¶ 11. However, after mother sold her house in North Dakota and moved to Billings, the Department did not help her arrange treatment. *In re R.J.F.*, ¶ 11. Even so, at the time of the termination hearing, the mother had attended and completed significant treatment for her chemical dependency and had stayed sober for five months. *In re R.J.F.*, ¶ 16. The District Court terminated the mother’s parental rights to the child, but this Court reversed, reasoning the Department failed to make reasonable efforts to reunite the mother and her child because the means by which the Department prescribed the mother would accomplish necessary visitation and chemical dependency treatment did not realistically address the mother’s or the child’s needs. *In re R.J.F.*, ¶ 37. Mother argues the Department, as in *R.J.F.*, failed to make reasonable efforts to reunify her because C.M. was placed in Missoula and substantial efforts were not made to place C.M. in kinship care closer to Mother.

¶18 However, Mother’s case is distinguishable from *R.J.F.* on various grounds. First, the child in *R.J.F.* was an infant. This fact was highlighted in *R.J.F.* because “[r]emoval of an infant implicates different services than removal of an older child.” *In re R.J.F.*, ¶ 30. Here, C.M. was 12 years old at the time the termination petition was filed. Second, the child in *R.J.F.* had no special needs that would require a particular placement. *In re R.J.F.*, ¶ 33 (“In selecting a placement, the Department considers: the services the child will need. . . .”). In contrast, C.M. had special needs. She was diagnosed with ADHD and

oppositional defiance disorder, and was functioning, at the time of removal, at only a second-grade level. She lacked basic skills, such as the ability to take care of her personal hygiene. These special needs were being addressed at her Missoula placement. Third, the record in *R.J.F.* demonstrated clearly that the mother's visitation was negatively impacted by the distance between Williston and Billings, and the mother had asked for the case to be transferred to North Dakota. *In re R.J.F.*, ¶¶ 5-8. The facts in *R.J.F.* demonstrate the unreasonableness of the Department's efforts in that case, while, here, the record contains no evidence indicating Mother's visitation was negatively impacted by C.M.'s Missoula placement.

¶19 Mother also contends that, as in *R.J.F.*, the Department failed to undertake reasonable efforts to help her complete her treatment plan. Again, *R.J.F.* does not control here. In *R.J.F.*, the Department did not assist in arranging treatment in North Dakota, where the mother lived, but instead made her fly to Billings for treatment every other week. *In re R.J.F.*, ¶¶ 6-7. Nothing here indicates the Department failed to help Mother access treatment conveniently or that the treatment offered was inadequate to treat Mother's addiction. After Mother's chemical dependency screening, Gilmore recommended that Mother seek inpatient treatment at one of the several facilities in Montana. However, Mother refused to pursue such treatment. Mother explained she wanted a second opinion, but admitted she had not obtained one in the year that passed after her initial evaluation. While the Department must make reasonable efforts, "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 (citing *In re C.B.*, 2014 MT 4, ¶¶ 19, 23, 373 Mont. 204, 316 P.3d 177; *In re D.F.*, 2007 MT 147, ¶ 29, 337 Mont. 461, 161 P.3d 825; *In re T.R.*, 2004 MT 388, ¶ 26, 325 Mont. 125, 104 P.3d 439; *In re L.S.*, 2003 MT 12, ¶ 11, 314 Mont. 42, 63 P.3d 497). The District Court did not err in finding that Mother was unwilling and unable to complete the chemical dependency treatment she needed to effectively parent her child.

¶20 Mother’s case is further distinguishable from *R.J.F.* because of the lack of progress Mother made on her treatment plan here. In *R.J.F.*, the mother made significant strides towards treating her chemical dependency, which were unreasonably ignored by the Department. Here, Mother failed to undergo any treatment for her chemical dependency and consistently failed her urinalysis tests, with “toxic” and “saturating” levels of methamphetamines.

¶21 Finally, Mother argues the Department failed to make reasonable efforts to confirm her physical address, help her register for required classes, or obtain her mental health evaluation. In non-jury trials, witness credibility and the weight to be given to witness testimony is squarely within the province of the district court. *In re J.M.W.E.H.*, 1998 MT 18, ¶ 34, 287 Mont. 239, 954 P.2d 26 (citing *Keebler v. Harding*, 247 Mont. 518, 523, 807 P.2d 1354, 1357 (1991)). Witnesses presented conflicting testimony in the hearing. Victorero testified he was never able to verify Mother’s address, that Mother never told him about complications in registering for classes, and that he had no record Mother completed a mental health evaluation. Mother testified she had given the Department her

address, that the individuals administering the classes never returned her calls, and that she had a mental health evaluation completed but it was never sent to the Department, through no fault of her own. As the factfinder, the District Court assessed credibility and weight to the testimony and was convinced Mother was unwilling to complete the tasks of the treatment plan. The District Court extensively addressed Mother's failure to complete the parenting plan tasks regarding her chemical dependency. The Court noted that complete compliance with a treatment plan is required, and partial or even substantial compliance is insufficient. *In re D.V.*, 2003 MT 160, ¶ 27, 316 Mont. 282, 70 P.3d 1253 (citing *In re N.A.*, 2002 MT 303, 313 Mont. 27, 59 P.3d 1135). Here, there was substantial evidence that Mother failed to complete the primary task of addressing her chemical dependency, and the District Court's findings that Mother was unwilling and unable to complete her treatment plan were not clearly erroneous.

¶22 The State's concern that *R.J.F.* overturned long-settled precedent that a specific finding of "reasonable efforts" is not required for termination, *see, e.g., In re M.V.R.*, 2016 MT 309, ¶ 41, 385 Mont. 448, 384 P.3d 1058, and instead imposed a "predicate finding" requirement of reasonable efforts, reads too much into that decision. We were careful in *R.J.F.* to reiterate that "determination of whether the Department made reasonable efforts is not a separate requirement for termination," *In re R.J.F.*, ¶ 26, but noted that reasonable efforts can be, as it was in that case, a "predicate for finding" that the parent's conduct or condition is unlikely to change within a reasonable time, and was thus important. *In re R.J.F.*, ¶ 26. In other words, a conclusion that a parent is unlikely to change could be called

into question if the Department failed to make reasonable efforts to assist the parent. However, in other cases, a parent's unlikelihood of change may well be unaffected by the Department's efforts. Thus, in *R.J.F.*, we cited *In re D.B.*, 2007 MT 246, 339 Mont. 240, 168 P.3d 691, where we explained that "the 'reasonable efforts' inquiry is relevant to abuse and neglect proceedings, in preventing the removal of a child or in working towards reunification of a family separated by the state," but that "it does not replace the two-prong statutory inquiry mandated by § 41-3-609(1)(f), MCA." *In re D.B.*, ¶ 25.

¶23 The District Court did not err by terminating Mother's rights after concluding the Department had made reasonable efforts to help Mother, Mother had not complied with her treatment plan, and the condition rendering Mother unfit was unlikely to change within a reasonable time.

¶24 Affirmed.

/S/ JIM RICE

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR