DA 19-0198

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 272N

IN THE MATTER OF:

K.P.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADN-18-69
Honorable Gregory G. Pinski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Tracy Labin Rhodes, Attorney at Law, Missoula, Montana

For Appellee:

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

Joshua A. Racki, Cascade County Attorney, Valerie M. Winfield, Deputy County Attorney, Great Falls, Montana

Submitted on Briefs: September 25, 2019

Decided: November 12, 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 R.M. ("Father") appeals from an Eighth Judicial District Court order terminating his parental rights to his child, K.P. We affirm.

¶3 On February 27, 2018, K.P. was placed in protective custody with the Montana Department of Public Health and Human Services ("Department"). On that day, the Department received a report that the apartment property manager—who was conducting unit inspections—discovered Father passed out in his apartment with drugs (white powdery substance) and drug paraphernalia (burnt pipe) present, while K.P., age 5, was asleep in his room. Father denied substance abuse but, after initially agreeing, refused to take a urinalysis test ("UA") upon the arrival of the technician. Father was taken into custody due to active warrants for his arrest.

¶4 On March 6, 2018, the Department filed a petition for emergency protective services ("EPS"), adjudication of a youth in need of care ("YINC") and temporary legal custody ("TLC"). In the petition, the Department outlined concerns related to substantial risk of physical neglect due to Father's ongoing substance abuse, lack of protective capacities, and inability to meet K.P.'s basic needs. On March 14, 2018, the District

Court granted the Department's petition for EPS and TLC of K.P. and set a show cause hearing for April 11, 2018, on the Department's petition. On April 12, 2018, after the show cause hearing, the District Court issued an order maintaining the Department's TLC of K.P. On May 18, 2018, the District Court issued an order granting TLC and adjudicating K.P. as a YINC pending a dispositional hearing on June 6, 2018. Following that hearing, the District Court adopted the Department's proposed treatment plan for Father with an expected completion date of December 7, 2018, and granted the Department an extension of TLC for an additional six months. At the disposition hearing, counsel for Father did not object to the treatment plan or the deputy county attorney's statement that K.P.'s hair tested positive for methamphetamine. On September 10, 2018, the District Court, after learning of Father's failure to engage with the treatment plan, despite the Department's ongoing encouragement, ordered that continued placement was in the best interest of the child and set a review hearing date of December 5, 2018, later reset to January 17, 2019. With the exception of the April 11, 2018 show cause hearing, Father did not attend any of the above hearings but was represented by counsel.

¶5 On December 19, 2018, the Department filed a petition for permanent legal custody ("PLC") and termination of parental rights ("TPR"). The petition outlined that Father failed to comply with the ordered treatment plan, moved frequently from state to state without notifying the Department of his whereabouts, and failed to visit K.P. since the February 2018 removal. The petition also provided that K.P. expresses a great deal of fear when Father is mentioned and has been diagnosed with PTSD. Additionally, the Department alleged that the conduct or condition of the Father rendering him unfit was

unlikely to change within a reasonable time because Father has failed to address the safety concerns that arose during the Department's involvement.

¶6 On January 28, 2019, after the review hearing on January 17, 2019, the District Court issued an order extending the Department's TLC and maintained a TPR hearing previously set for February 20, 2019. After the TPR hearing, which Father attended with counsel, the District Court ordered the termination of the parent-child legal relationship between Father and K.P. on March 4, 2019. Father appeals.

¶7 Father asserts several due process arguments related to the allegation that the Department and the District Court committed statutory, policy, and constitutional errors. First, Father claims that the Department violated state statute and its own policy by failing to: 1) file a removal petition within the statutory timeframe governed by § 41-3-301(6), MCA; 2) abide by § 202-3 of the Department's Montana Child and Family Services Policy Manual governing the administering of UAs; 3) move for an extension of the TLC within the statutory timeframe governed by § 41-3-442(2), MCA; 4) make reasonable efforts to avoid removal and achieve reunification governed by § 41-3-423, MCA; and 5) properly serve Father with the petition for termination.

¶8 Father also claims the District Court erred by: 1) relying on insufficient evidence to support adjudication of K.P. as a YINC; 2) failing to determine whether the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, applied; 3) failing to grant Father's request for a continuance of the TPR proceedings; 4) concluding that Father was unlikely to change and relying on insufficient evidence to terminate Father's parental

rights; and 5) relying on the opinion of the guardian ad litem ("GAL") for K.P. during the TPR proceedings.

¶9 This Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re A.S.*, 2016 MT 156, ¶ 11, 384 Mont. 41, 373 P.3d 848. A district court's findings of fact are reviewed for clear error and conclusions of law for correctness. *In re M.V.R.*, 2016 MT 309, ¶ 23, 385 Mont. 448, 384 P.3d 1058. In matters involving abused and neglected children, we will uphold a district court's decision to protect the child's best interest despite the existence of procedural errors. *In re F.H.*, 266 Mont. 36, 39, 878 P.2d 890, 892 (1994). Regarding constitutional questions, we exercise plenary review. *In re M.V.R.*, ¶ 24.

¶10 At the outset, five of Father's eleven claims cannot be raised on appeal. Litigants must assert statutory violations in district court, and we will not fault a district court for failing to address such issues. *In re T.E.*, 2002 MT 195, ¶ 23, 311 Mont. 148, 54 P.3d 38. As such, Father failed to preserve for appeal the following claims: 1) the Department's alleged failure to file a removal petition within the statutory timeframe; 2) the Department's alleged failure to abide by its own policy governing UAs; 3) the Department's alleged failure to move for a TLC extension within the statutory timeframe; 4) the Department's alleged failure to make reasonable efforts to avoid removal and achieve reunification; and 5) the District Court's alleged error of relying on the opinion of the GAL. We do not address the claims not properly raised below. Father's remaining six issues will be addressed in turn.

¶11 Section 41-3-609(1)(f), MCA, provides the procedure a district court and the Department must follow in terminating a parent-child relationship. Before a parent's rights can be terminated under § 41-3-609(1)(f), MCA, the child must first be adjudicated a YINC by a preponderance of evidence. Section 41-3-609(1)(f), MCA; *In re B.N.Y.*, 2003 MT 241, ¶ 26, 317 Mont. 291, 77 P.3d 189. Following adjudication, the Department must also establish, by clear and convincing evidence, that the parent failed to comply with or failed to succeed at his or her treatment plan, and that the conduct rendering the parent unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA; *In re D.B.*, 2007 MT 246, ¶ 29, 339 Mont. 240, 168 P.3d 691. While these statutes ensure that parents receive a fundamentally fair process throughout termination proceedings, "the child's health and safety are of paramount concern." Section 41-3-101(7), MCA.

¶12 First, Father contends that the District Court lacked sufficient admissible evidence to adjudicate K.P. as a YINC. Whether a child is a YINC is determined by a preponderance of the evidence, and the district court "must determine the nature of the abuse and neglect and establish facts that resulted in state intervention and upon which disposition, case work, court review, and possible termination are based." Section 41-3-437(2), MCA. In a YINC proceeding, the "exigent protection of the health and welfare of the child is paramount where the State's initial intervention into otherwise private matters reveals an actual or potentially dangerous or unhealthy environment requiring removal of the child. . . ." *In re the Matter of A.M.*, 2001 MT 60, ¶ 39, 304 Mont. 379, 22 P.3d 185.

¶13 Here, the District Court found that, based on reliable affidavits and testimony, there was substantial risk of physical neglect due to the Father's substance abuse, incarceration, inability to meet K.P.'s basic needs, and lack of contact with K.P. Regardless of the alleged hearsay, there is sufficient evidence in the record to support by a preponderance of the evidence that K.P. was a YINC. Prior to removal, Father on multiple occasions failed to pick up K.P. from school. K.P. was also frequently late for school. On one occasion, Father left K.P. with his babysitter overnight and failed to return to pick him up for several days. At the time of removal, property managers of Father's apartment indicated he was going to be evicted since he was not on the lease. After removal, the Department had not heard from or seen Father until the April 11, 2018 show cause hearing. From the time of removal to the YINC adjudication, the Department made many attempts to contact Father, including calling and leaving Father messages. Father never answered or returned the Department's calls during business hours. Department personnel specifically informed Father of his right to visit K.P. upon being released from custody; however, Father failed to attend scheduled office visits and did not request to see K.P. as of the YINC adjudication hearing.

¶14 Great Falls Police Officer Kevin Supalla testified that on the day of removal he discovered a mirror with a white powdery residue on it, which Father claimed to be a crushed pill left by a friend, and a butane lighter next to the residue. Department personnel testified that the apartment smelled of marijuana. Finally, Father, through his counsel, took no position with regard to K.P.'s status as a YINC at the adjudication

hearing. Therefore, the District Court's findings were sufficient to establish by a preponderance of the evidence that K.P. was a YINC.

¶15 Second, Father argues that the Department failed to properly serve Father with the petition for termination. While the Department should have served Father via publication, in accordance with § 41-3-429, MCA, the Department made substantial efforts to provide proper personal service to Father regarding its TPR petition, including mailing notice on December 27, 2018, to Father's last known address, calling Father's sister, as she was the last known address and the last family member to see Father, and reaching out to Father's birth mother to his youngest child about his whereabouts. Through the Department's persistent and ongoing efforts to locate Father, Father eventually received verbal notice of the hearing a week in advance from Department personnel, which he then made arrangements to attend, and was present with his counsel at the TPR hearing. Regardless, Father had actual notice from the onset of the Department's involvement that his parental rights could be terminated should he fail to follow the court-ordered treatment plan. *In re A.E.*, 255 Mont. 56, 62, 840 P.2d 572, 576 (1992). Father failed to follow the District Court-ordered treatment plan.

¶16 Third, Father contends that since he did not receive proper service, the District Court's failure to grant a continuance of the termination proceedings is grounds for reversal. However, a district court's continuance decision is a matter of discretion, and where such decision—as is the case here—has "no bearing on whether the statutory criteria for terminating the father's parental rights had been established," we will not find that the district court abused its discretion. *In re B.S.*, 2009 MT 98, ¶ 27, 350 Mont. 86,

206 P.3d 565. Father was not prejudiced by the lack of service by publication or the District Court's failure to grant a continuance.

¶17 Father also argues the District Court relied on insufficient evidence and erred in terminating his parental rights. Father's failure to comply with the District Court-ordered treatment plan as well as the likelihood that he will remain unfit to parent K.P. and will not change within a reasonable time are adequate grounds for termination. Section 41-3-609(1)(f), MCA.

¶18 Contrary to Father's argument, minimal compliance with a treatment plan does not equal successful completion and is insufficient to prevent termination of parental rights. *In re S.M.*, 1999 MT 36, ¶¶ 23-26, 293 Mont. 294, 975 P.2d 334. After moving to North Dakota, Father contacted the DPHHS equivalent and completed a chemical dependency evaluation in August 2018 that recommended a Level 1 treatment. Father failed to follow through on treatment, and after missing several appointments, his case was discontinued. Other than this minimal step, Father has failed to take any other substantive steps toward completing his treatment plan. As the District Court noted, "for all intents and purposes," he had not even started his treatment plan. The District Court's findings that Father had failed to comply with his treatment plan were not clearly erroneous.

¶19 Father also disputes the District Court's finding that he is unlikely to change and is unfit to parent K.P. In determining whether a parent's conduct or condition is likely to change in a reasonable period of time, a court considers history of emotional and mental illness, history of violent behavior, chemical or alcohol dependency, and imprisonment. *In re S.H.*, 2003 MT 366, ¶ 12, 319 Mont. 90, 86 P.3d 1027 (citing § 41-3-609(2), MCA).

In determining a parent's unfitness and likelihood of changing, the important question is whether the parent is likely to make enough progress within a reasonable time. *In re D.F.*, 2007 MT 147, ¶ 43, 337 Mont. 461, 161 P.3d 825. "Substantial or partial compliance" with a treatment plan is "insufficient to prove that a person is prepared to be a fit or responsible parent." *In re S.H.*, ¶ 12. In considering what constitutes a reasonable time, "the needs of the child are always paramount" to the parent's rights. *In re D.F.*, ¶ 43.

¶20 The record is replete with instances of conduct by Father that raise credible questions of his fitness to parent K.P. and his likelihood of changing. The record here is similar to *In re S.H.*, where we held that the parent's failure to comply with the treatment plan, submit to random drug testing, submit actual verification of attendance at meetings, and maintain a healthy relationship with the children were adequate grounds to terminate the parent relationship. *In re S.H.*, ¶ 14. Similarly, here, Father wholly failed to comply with his treatment plan, failed to submit to random or voluntary drug testing as the Department requested, failed to provide actual verification of having taken UAs, failed to provide verification of alleged evaluations by health professionals, and failed to adequately communicate with the Department.

¶21 Father also failed to maintain a healthy relationship with K.P. After posting bond, Father left Great Falls without contacting the Department or his child. Father failed to keep the Department informed of his location and contact information and rarely contacted K.P. over nearly a year-long period. K.P.'s hair testing positive for methamphetamines made it apparent that methamphetamine use was occurring while

K.P. was with Father. The Department's affidavit indicated that K.P. has extreme fear of Father and has developed PTSD from past violence. Further, in considering the child's best interests, the record indicates that K.P. has since bonded with his new family, feels safe in his new home, and wants to change his name to his foster parents' last name. Father's history of noncompliance and minimal attempts to complete his treatment plan indicate Father is unfit to parent K.P. Coupled with a consideration of the best interests of K.P., the District Court had substantial evidence and did not abuse its discretion when it terminated Father's parental rights.

¶22 Lastly, Father's claim that the District Court's failure to determine whether ICWA applied to the proceedings constitutes reversible error also fails. While we agree that the District Court should have asked each participant in K.P.'s EPS hearing whether "the participant knows or has reason to know that the child is an Indian child," in accordance with 25 C.F.R. § 23.107(a), its failure to do so is harmless error. Father does not argue that ICWA applies and nothing in the record remotely suggests that K.P. has any tribal affiliation.

¶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. This appeal presents no constitutional questions, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶24 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE