DA 19-0210

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 267

IN THE MATTER OF:

R.L., K.S. and T.S.,

Youths in Need of Care.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause Nos. ADN 17-396, ADN 17-397, and ADN 17-398
Honorable Gregory G. Pinski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Julie Brown, Montana Legal Justice, PLLC, Missoula, Montana

For Appellee:

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

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

Submitted on Briefs: September 25, 2019

Decided: November 12, 2019

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 S.L. (Mother) appeals from the termination of her parental rights to R.L., K.S., and T.S. (Children) issued March 4, 2019, by the Eighth Judicial District Court, Cascade County. We affirm.

¶2 We restate the issues on appeal as follows:

> *1. Whether the Department engaged in reasonable efforts to prevent removal of Children and to reunite Mother with Children;*
>
> *2. Whether the District Court erred in determining the conduct or condition rendering Mother unfit, unable, or unwilling to parent was unlikely to change within a reasonable time.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Prior to this case, the Montana Department of Health and Human Services, Child and Family Services Division (Department) had a history of prior intervention with this family, including a four-month period in late 2016 when Children were placed in foster care. At that time, Mother's use of drugs was of concern to the Department as such interfered with her ability to manage R.L.'s diabetes. In early November 2017, R.L. required hospitalization in treatment of diabetic ketoacidosis, again raising concern that Mother was neglecting R.L.'s medical needs. While investigating the situation, Mother exhibited behavior indicative of drug or alcohol use including fast, slurred, and tangential speech; erratic moods; and dilated pupils. Mother refused to do a UA or participate with the Department without a court order. T.S. and K.S. reported drug use and related drug activities in the home and expressed they did not feel safe in Mother's care. Given prior

intervention with the family regarding the same issues, R.L.'s medical situation, T.S.'s and K.S.'s reports, and Mother's refusal to work with the Department on an informal basis, on November 21, 2017, the Department filed petitions for Emergency Protective Services (EPS), adjudication of Youth in Need of Care (YINC), and Temporary Legal Custody (TLC) for all three Children, alleging physical and medical neglect.[1]

¶4 The show cause hearing was initially set for December 20, 2017, but the Department was unable to personally serve Mother, requiring a continuance. Thereafter, CPS Julie Bass attempted to conduct a home visit but was denied entry. She set an appointment with Mother for the following day, but Mother failed to appear. She also attempted to confirm Mother had received the petition and notice of the show cause hearing, but Mother refused to admit receipt of such. Ultimately, the Department had to serve Mother through publication.

¶5 In early 2018, the Department offered Mother a family group decision making meeting but Mother did not follow through with this. Mother did not appear for the hearing on February 14, 2018, at which the court adjudicated Children as youths in need of care, or for the dispositional hearing on March 28, 2018. At this hearing, Mother's counsel reported that she had not talked to Mother and had not been able to discuss the Department's proposed treatment plan with Mother. At the conclusion of this hearing, the District Court granted the Department TLC for a period of six months and approved the

[1] The cause also involved allegations regarding C.L. (Father). Father's parental rights were also terminated. As Father has not appealed, only Mother's situation is discussed herein.

Department's proposed treatment plan for Mother. Mother's treatment plan required her to complete a mental health evaluation and follow the recommendations thereof; complete an anger management evaluation and follow the recommendations thereof; attend parenting classes; utilize a family-based service provider; apply for Medicaid; sign releases of information for the Department; and remain in weekly contact with the Department.

¶6 The Department provided Mother with contact information and referred her to Gateway and Misfits in Great Falls for a mental health evaluation and additional counseling or treatment if recommended. The Department also requested Mother sign releases so the Department could obtain information from these service providers. Mother did not report receipt of any services from these providers and failed to sign releases for any service providers.

¶7 Mother failed to appear at the status hearing on June 20, 2018. Mother's counsel was provided contact information for Amanda Big Head, the new CPS worker assigned to the case. In July 2018, Mother met with CPS Big Head and reported she was moving to Idaho and wanted the case transferred there.[2] CPS Big Head advised Mother that if she moved to Idaho, Mother would need to provide her contact information and also would need to maintain contact with her so she could assist Mother in implementing services necessary to complete Mother's treatment plan in Idaho. At that time, Mother did not indicate confusion or lack of understanding as to the tasks of her treatment plan and there

[2] Mother never filed a motion to transfer the case to Idaho or any other jurisdiction.

is no indication she requested clarification of her treatment plan with CPS Big Head. CPS Big Head never heard from Mother again.[3]

¶8 The Department sought extension of TLC for a period of six months. Hearing on the petition for extension was held September 26, 2018. Mother did not appear. At the hearing, counsel for the Department indicated the Department did not know where Mother was, and Mother's counsel indicated she had not heard from Mother for over a month. The District Court expressed concern about extending TLC for six months given Mother's total lack of engagement with the Department. The court ultimately granted a 90-day extension indicating that if Mother did not engage shortly, termination proceedings should be pursued. Two months later, Mother's counsel advised CPS Big Head that Mother had enrolled in a life plan program at the Ginny May Wellness Center in Boise, Idaho. On December 24, 2018, the Department filed a Petition for Termination of Parental Rights, asserting Mother failed to complete her treatment plan and the conduct or condition rendering Mother unfit is unlikely to change within a reasonable time pursuant to § 41-3-609(1)(f), MCA. After the termination petition was filed, CPS Big Head also received an e-mail from the Ginny May Wellness Center advising of Mother's participation with that program.

[3] CPS Big Head reported she did later receive a telephone call from Father at which time she advised him there was no plan to transfer the case. During that conversation she related to Father her expectation that he and Mother keep in contact with her so that she could assist them with implementation of services and that they could provide her releases so she could confirm their participation in any services. Thereafter, CPS Big Head never heard from Father again.

¶9 Mother appeared at the termination hearing on February 14, 2019, via VisionNet from Idaho. The District Court interviewed K.S.[4] K.S., then 15 years old, expressed she did not want to live with Mother and did not believe R.L. should live with Mother either. She expressed concerns that Mother was using drugs and having a hard time stopping. CPS Big Head testified Mother had failed to complete her treatment plan—by failing to complete a mental health evaluation, failing to complete an anger management evaluation, failing to engage in visitation, and failing to maintain consistent contact with her. She also testified she had never received any releases which would allow her to follow up with any service providers. Mother testified that through the Ginny May Wellness Center she had completed anger management treatment and parenting classes and was receiving drug treatment. She testified she had signed releases with the Ginny May Wellness Center that allowed the Department to access information from that center.

¶10 In its written orders terminating Mother's parental rights to Children, the District Court specifically found:

> 13. Birth Mother testified that she has done her treatment plan and is working to complete it, however, there is no documentation or evidence other than her self-serving testimony that she has done anything on the treatment plan. Birth Mother failed to provide any documentation of any attendance at any of the treatment she claimed to have completed, did not forward any of the documentation to CPS Big Head, or forward signed releases for the documentation so that CPS Big Head could obtain the records. The Court finds the testimony of Birth Mother not credible and unsupported by any evidence. CPS Big Head testified that she had attempted to engage the parents with services here in Montana and that the parents moved to Boise,

[4] By the time of this hearing, T.S. was a month from his eighteenth birthday, and R.L. was 11 years old.

> Idaho, and did not maintain contact with her or with the children, did not provide any documentation, releases or testimony to support that she engaged in any portion of the treatment plan.
>
> . . .
>
> 16. Birth Mother and Birth Father [C.L.] left the state and did not keep the Department informed of their contact information, which prevented the Department from establishing courtesy services and did not complete any releases which would allow CPS Big Head to obtain any documentation on any services in which the parents have allegedly engaged.
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> . . .
>
> 18. The Court found that both Birth Mother and Birth Father [C.L.] made self-serving statements that they have completed their treatment plans, without providing any documentation, and in contravention of this Court's explicit order to comply with and successfully complete their respective treatment plans. The Court finds that the Birth Mother [S.L.] and the Birth Father [C.L.] chose to do their own treatment plan, to not provide the documentation of any work they performed to the Department and failed to maintain contact with the Department or the Children. The conduct or condition of [Mother] and [Father] is unlikely to change within any reasonable period of time as they have been given numerous opportunities to comply with and complete their treatment plan and they have failed to do so.

¶11 Mother appeals.

STANDARD OF REVIEW

¶12 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; *In re K.A.*, 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478. "The Department has the burden of proving by clear and convincing evidence that the statutory criteria for termination have been satisfied." *In re K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691. In the context of parental rights cases, clear and convincing evidence is the requirement that a

preponderance of the evidence be definite, clear, and convincing. *In re K.L.*, ¶ 14. This Court reviews a district court's findings of fact 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. "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 Court a mistake was made." *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715. "To reverse a district court's evidentiary ruling for an abuse of discretion, this Court must determine the district court either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *In re I.M.*, 2018 MT 61, ¶ 13, 391 Mont. 42, 414 P.3d 797.

DISCUSSION

¶13 *1. Whether the Department engaged in reasonable efforts to prevent removal of Children and to reunite Mother with Children.*

¶14 Mother asserts the Department violated her fundamental constitutional right to parent and abused its discretion by failing to provide Mother with the required reasonable efforts to reunify her with Children. More specifically, Mother asserts the Department drafted a treatment plan for her "but then did essentially nothing to help her reach any of the goals of the treatment plan or accomplish any of the tasks" and the Department provided Mother with incorrect legal advice that the case could not be transferred to Idaho. Mother relies on *In re R.J.F.*, 2019 MT 113, 395 Mont. 454, 443 P.3d 387 in her assertions the Department failed to provide reasonable efforts to reunify her with Children.

¶15 The Department asserts it made reasonable efforts—prior services and support during the 2016 court case; repeated attempts to engage Mother in services; going to the family home to investigate referrals and try to engage Mother; interviewing collateral contacts; making multiple attempts to speak to Mother and Children in different settings; providing foster care and keeping Children together; preparing a treatment plan for Mother; offering Mother a family engagement meeting; offering Mother office meetings; and repeatedly attempting to contact Mother. The Department asserts Mother's apathy and failure to engage resulted in her failure to complete her treatment plan and address the issues precluding her safe parenting of Children. The Department also contends this Court expanded the criteria for termination of parental rights in *In re R.J.F.*, and that we should re-examine that holding.

¶16 Section 41-3-609(1)(f), MCA, protects a parent's fundamental right to the care and custody of a child in termination proceedings. *In re D.B.*, 2007 MT 246, ¶ 17, 339 Mont. 240, 168 P.3d 691. A district court may terminate the parent-child relationship, if a child is adjudicated a YINC and the court 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).

¶17 Because "a natural parent's right to care and custody of a child is a fundamental liberty interest," a district court "must adequately address each applicable statutory

requirement" before terminating an individual's parental rights. *In re A.T.*, 2003 MT 154, ¶ 10, 316 Mont. 255, 70 P.3d 1247. Section 41-3-423(1), MCA, is one such requirement. It provides in pertinent part:

> The department **shall make reasonable efforts** to prevent the necessity of removal of a child from the child's home and **to reunify families that have been separated by the state.** Reasonable efforts include but are not limited to voluntary protective services agreements, development of individual written case plans specifying state efforts to reunify families, placement in the least disruptive setting possible, provision of services pursuant to a case plan, and periodic review of each case to ensure timely progress toward reunification or permanent placement. In determining preservation or reunification services to be provided and in making reasonable efforts at providing preservation or reunification services, the child's health and safety are of paramount concern.

(Emphasis added.)

¶18 Although determination of whether the Department made reasonable efforts is not a separate requirement for termination, it may be a predicate for finding that the conduct or condition rendering a parent unfit, unwilling, or unable to parent is unlikely to change within a reasonable time—one of the factors required for termination of a parent's rights. *In re R.J.F.*, ¶ 26; *see also* § 41-3-609(1)(f)(ii), MCA; *In re D.B.*, ¶ 25. With regard to the termination of parental rights, the analysis of reasonable efforts is highly fact dependent. *In re R.J.F*, ¶ 27.

¶19 "To meet its requirements to provide reasonable efforts, the Department must in good faith develop and implement treatment plans designed 'to preserve the parent-child relationship and the family unit.'" *In re R.J.F.*, ¶ 28 (quoting *In re D.B.*, ¶ 33); *see also In re T.D.H.*, 2015 MT 244, ¶ 42, 380 Mont. 401, 356 P.3d 457; Child and Family Services

Policy Manual, § 401-1 (DPHHS 2014), https://perma.cc/7J9J-FQF7. Further, "the Department must, in good faith, assist a parent in completing her treatment plan." *In re R.J.F.*, ¶ 28; *see also In re T.D.H.*, ¶ 42; *In re D.B.*, ¶ 33; Child and Family Services Policy Manual, § 401-1.

¶20 "[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; *see also 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 Department must make reasonable efforts to reunite parents with their children, not herculean efforts. *In re R.J.F.*, ¶ 38; *In re A.G.*, 2016 MT 203, ¶ 17, 384 Mont. 361, 378 P.3d 1177.

¶21 From our review of the record, we conclude the District Court did not err in determining the Department provided reasonable efforts as required by § 41-3-423(1), MCA. Mother's reliance on *In re R.J.F.* is misplaced. Here, Mother's engagement with the Department was far different than that of R.J.F.'s mother. Despite prior intervention by the Department, at the outset Mother refused to work voluntarily with the Department, forcing the Department to seek legal intervention. Throughout the case, Mother failed to attend court proceedings, failed to keep scheduled appointments with the CPS worker, failed to participate in a family engagement meeting, failed to follow up with initial referrals to Gateway and Misfits in Great Falls, failed to maintain contact with the CPS

worker, failed to provide the CPS worker with current contact information, failed to maintain consistent contact with her legal counsel, and failed to maintain contact with Children. Nine months after Children were removed and legal proceedings initiated by the Department, Mother unilaterally decided to move away from Montana—where she had resided on a long-term basis and which was Children's home state—to Idaho. Unlike in *In re R.J.F.*, here, the Department developed a treatment plan, which was not destined to fail. Mother was offered immediate services—mental health, counseling and substance abuse treatment services—in her town of residence. She was offered meetings with her CPS worker. She was offered participation in a family engagement meeting. Further, Children were placed in her town of residence where she could have contact with them on a regular basis. She was provided a CPS worker—in her town of residence—with whom she could have had regular and ongoing contact to assist her with any issues or difficulties she was experiencing. Rather than placing barriers to her success, Mother's CPS worker actively tried to get Mother to engage and was at the ready to assist Mother. Mother never engaged with the Department. In the most positive light, approximately one month prior to the Department filing petitions to terminate Mother's parental rights, Mother began to engage in some services, which potentially may have addressed the conduct or condition rendering her unable to safely parent. But she failed to provide the Department sufficient information to evaluate if the services were actually designed to address the issues identified by the Department and, if so, whether Mother was making any progress.

¶22 Engaging in reasonable efforts requires the Department to diligently attempt to contact reluctant parents and engage them with services. Engaging in reasonable efforts requires the development and implementation of voluntary services and/or a treatment plan reasonably designed to address the parent's treatment and other needs precluding the parent from safely parenting. Further, engaging in reasonable efforts requires more than merely suggesting services to a parent and waiting for the parent to then arrange those services for herself. The means by which the Department prescribed Mother was going to address her parenting deficiencies—refer and assist Mother in obtaining mental health, counseling, and substance abuse treatment in her town of residence; placing Children where Mother could exercise frequent and ongoing contact with Children; offering a family engagement meeting; and providing Mother a CPS worker to be available for regular contact and assistance—would realistically have addressed Mother's deficiencies while maintaining and improving her relationship with Children. Instead, Mother resisted engagement with the Department, abruptly moved to another state, failed to provide her CPS worker with reliable contact information, and then never contacted her CPS worker again. Mother's apathy and/or active resistance to engagement with the Department, does not constitute failure on the Department's part to provide reasonable efforts. What constitutes reasonable efforts is not static or determined in a vacuum, but rather is dependent on the factual circumstances of each case—the totality of the circumstances— including a parent's apathy and/or disregard for the Department's attempts to engage and assist the parent. Here, based

on our review of the record, the District Court did not abuse its discretion in finding the Department engaged in reasonable efforts to reunify Mother with Children.

¶23 *2. Whether the District Court erred in determining the conduct or condition rendering Mother unfit, unable, or unwilling to parent was unlikely to change within a reasonable time.*

¶24 Mother asserts the District Court erred when it found the Department presented clear and convincing evidence that the condition or conduct rendering her unfit to parent was unlikely to change in a reasonable time. The Department asserts Mother failed to meet her burden of establishing error by the District Court as the District Court's findings are supported by substantial evidence, the court did not misapprehend the effect of the evidence, and review of the record does not leave a definite and firm conviction that the District Court erred. We agree with the Department.

¶25 Mother's argument hinges on her interpretation of *In re R.J.F.* and her claim that the Department failed to make reasonable efforts to reunify her with Children. As previously discussed above, Mother misapprehends *In re R.J.F.* As discussed above, the Department made reasonable efforts to avoid removal and reunify Mother with Children, those efforts were, however, hindered by Mother's apathy or active refusal to engage with the Department. Given the Department's history with this family, the Department's reasonable efforts to get Mother to engage with the Department and access necessary services, Mother's ongoing apathy or refusal to engage with the Department, and lack of any reliable evidence indicating any progress on Mother's part, the District Court did not err when it found the Department presented clear and convincing evidence that the

condition or conduct rendering Mother unable to safely parent is not likely to change within any reasonable period of time.

¶26 The Department's assertion regarding making "predicate findings" about reasonable efforts misconstrues our holding in *In re R.J.F.* and ignores the statutory requirements of § 41-3-423(1), MCA.[5] In *In re C.M.*, 2019 MT 227, 397 Mont. 275, 449 P.3d 806, we addressed this issue. As such, we decline to further revisit or clarify our holding in *In re R.J.F.*

CONCLUSION

¶27 The Department provided reasonable efforts to avoid removal and to reunify Mother and Children and those efforts were hindered by Mother's apathy or active refusal to engage with the Department. Given the Department's reasonable efforts, the family's prior involvement with the Department based on the same issues, and Mother's apathy or refusal to engage with the Department, the District Court did not err in terminating Mother's parental rights to Children.

¶28 Affirmed.

/S/ INGRID GUSTAFSON

[5] In *In re R.J.F.* we did not require "predicate findings" of reasonable efforts. The determination of whether the Department made reasonable efforts is not a separate requirement for termination, but rather may be a predicate for finding that the conduct or condition rendering a parent unfit, unwilling, or unable to parent is unlikely to change within a reasonable time. *In re R.J.F.*, ¶ 26; *In re C.M.*, ¶ 22. What constitutes reasonable efforts is dependent on the factual circumstances of each case.

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE