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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

DA 18-0321

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 79N

IN THE MATTER OF:

T.N. and O.N.,

Youths in Need of Care.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADN-2015-114
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Keith Newmeyer, Self-Represented, Helena, Montana

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For Appellee:

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Submitted on Briefs: March 6, 2019

Decided: April 2, 2019

Filed:



Clerk

Justice James Jeremiah Shea 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.N. (Mother) and K.N. (Father) appeal the Order of the First Judicial District Court, Lewis and Clark County, terminating their parental rights to their adopted children, T.N. and O.N. We affirm.

¶3 On October 15, 2015, the Montana Department of Public Health and Human Services (Department) petitioned for emergency protective services (EPS) and temporary investigative authority (TIA) of T.N. and O.N. due to concerns of: (1) physical and psychological abuse by Father, and (2) Mother failing to protect or intervene. Mother and Father adopted T.N. and O.N. from Ukraine. T.N. was born in 2007 and adopted in 2013. O.N. was born in 2001 and adopted in 2014. The Department's petition alleged routine occurrences of Father physically assaulting T.N. and O.N.; incidents of psychological abuse and intimidation, including Mother and Father's admission that they burned the Ukrainian flag in front of T.N. and O.N. after the children had expressed they liked their native country more than the United States; and that T.N. and O.N. were fearful of returning home after school due to Father's abuse. On December 8, 2015, Mother and Father stipulated to the District Court's grant of TIA to the Department.

¶4 During TIA, T.N. and O.N. continued to express fear of Father's abuse throughout an unsuccessful trial of family therapy sessions. On February 12, 2016, the Department petitioned for EPS, adjudication of T.N. and O.N. as youth in need of care (YINC), and temporary legal custody (TLC). On March 2-3, 2016, Mother and Father stipulated to the Department's petition. On March 15, 2016, the District Court granted the Department TLC and adjudicated T.N. and O.N. YINC.

¶5 On August 9, 2016, the District Court approved treatment plans for Mother and Father. Mother's and Father's treatment plans required them to submit to mental health services, mental health evaluations, counseling services, and to maintain cooperation with the Department to obtain the skills necessary to meet T.N.'s and O.N.'s physical and emotional needs. On August 17, 2016, the District Court extended the Department's TLC of T.N. and O.N. to allow Mother and Father additional time to complete their treatment plans.

¶6 On February 9, 2017, Mother and Father filed a motion to reinstate visitation and family therapy. On February 14, 2017, the Department filed a Petition for Permanent Legal Custody and Termination of Parental Rights to T.N. and O.N. The Department's Petition alleged that Father physically abused T.N. and O.N., that the youths feared Father, that Mother failed to protect the youths, and that Mother and Father had failed to comply with their treatment plans.

¶7 On June 23, 2017, the District Court directed the Department to make further efforts to reunify T.N. and O.N. with Mother and Father and to schedule supervised visits. The

parties attended multiple supervised visits throughout the remainder of that summer. However, the counselor's summary of the visits expressed that they were "uncomfortable and tense," that neither parent had demonstrated progress in their therapy, and that it was not in T.N.'s and O.N.'s best interests to reunify. On November 6-8, 2017, January 22-24, 2018, and April 30, 2018, the District Court conducted a termination hearing on the Department's petition.

¶8 On May 7, 2018, the District Court issued its Order terminating Mother's and Father's parental rights to T.N. and O.N. The District Court held: T.N. and O.N. had been in foster care for approximately thirty months by the conclusion of the termination hearing; Mother and Father were provided appropriate treatment plans by the Department, with which they failed to comply; the condition and conduct rendering Mother and Father unfit to parent was unlikely to change within a reasonable amount of time; and that termination of Mother's and Father's parental rights was in T.N.'s and O.N.'s best interests. The District Court specifically noted that, prior to the Department's termination petition, Mother and Father had significant opportunity to obtain counseling to address the safety concerns that led to the removal of the children from their care. The District Court also noted that Mother and Father demonstrated an unwillingness or inability to identify and address those concerns, and that "the preponderance of psychological evidence demonstrated both [Mother] and [Father] have long-term and characterological impairments in which change is not likely." Mother and Father appeal.

¶9 We review a district court's decision to terminate parental rights for an abuse of discretion. *In re K.B.*, 2013 MT 133, ¶ 18, 370 Mont. 254, 301 P.3d 836 (citation omitted). Findings of fact are reviewed for clear error. *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715 (citation omitted). 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 this Court a mistake was made. *In re J.B.*, ¶ 10 (citation omitted). Conclusions of law are reviewed to determine whether the district court interpreted the law correctly. *In re J.B.*, ¶ 9 (citation omitted).

¶10 Mother and Father argue that the District Court erred in concluding that the condition or conduct rendering them unfit to parent was unlikely to change within a reasonable time, primarily asserting that they were not given enough time to parent T.N. and O.N. before the Department filed its termination petition.

¶11 A parent's right to care and custody of a child is a fundamental liberty interest which courts must protect with fundamentally fair procedures at all stages of termination proceedings. *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282 (citations omitted). However, the best interests of the child are of paramount concern and take precedence over parental rights. *In re K.L.*, 2014 MT 28, ¶ 15, 373 Mont. 421, 318 P.3d 691 (citation omitted).

¶12 A district court may terminate a parent's rights on a finding, by clear and convincing evidence, that a child is a YINC, an appropriate treatment plan has not been complied with, and the conduct of the parent rendering him unfit is unlikely to change within a reasonable

time. Section 41-3-609(1)(f), MCA. Clear and convincing evidence requires that “a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof.” *In re D.B.*, 2007 MT 246, ¶ 29, 339 Mont. 240, 168 P.3d 691 (internal quotation and citation omitted).

¶13 Consideration of a parent’s past conduct is appropriate in determining whether that parent’s conduct is likely to change. *In re R.M.T.*, 2011 MT 164, ¶ 38, 361 Mont. 159, 256 P.3d 935 (citation omitted). This may include conduct prior to any work or progress made in a treatment plan. *In re D.F.*, 2007 MT 147, ¶ 44, 337 Mont. 461, 161 P.3d 825 (citation omitted). Partial or even substantial compliance with a treatment plan is insufficient to preclude termination of parental rights. *In re D.F.*, ¶ 30 (citation omitted).

¶14 The District Court did not err in its determination that Mother and Father failed to make meaningful changes to demonstrate the conduct or condition rendering them unfit to parent was likely to change. *See* § 41-3-609(1)(f), MCA. Though both Mother and Father engaged with the Department in obtaining various evaluations and attending classes, their efforts failed to meaningfully address their identified parenting deficiencies. *See In re R.M.T.*, ¶ 38; *In re D.F.*, ¶ 30. The District Court’s determination correctly relied upon the testimony of the nearly dozen Department service providers who testified at the termination hearing that Mother and Father were unable to safely parent T.N. and O.N. *See* § 41-3-609(1)(f), MCA; *In re D.B.*, ¶ 29. Mother and Father failed to demonstrate sufficient progress on their treatment plans to dispel concerns about their ability to safely

parent T.N. and O.N. within a reasonable time. *See* § 41-3-609(1)(f), MCA; *In re D.F.*, ¶ 30; *In re K.L.*, ¶ 15.

¶15 Next, Mother and Father argue the Department failed to make reasonable efforts to reunite them with T.N. and O.N. Section 41-3-423(1), MCA, requires that the Department make reasonable efforts to prevent removal of a child and to reunite a family. While the statute does not define “reasonable efforts,” it provides examples, including: entering into a voluntary protective services agreement; developing individual written case plans; providing for services pursuant to a case plan; and providing for periodic reviews. Analysis of reasonable efforts is highly fact-dependent. *In re J.H.*, 2016 MT 35, ¶ 17, 382 Mont. 214, 367 P.3d 339 (citation omitted). While the Department may assist parents in completing their treatment plans, the parents retain the ultimate responsibility for complying with the treatment plans. *In re T.D.H.*, 2015 MT 244, ¶ 42, 380 Mont. 401, 356 P.3d 457 (internal quotations and citations omitted).

¶16 From our review of the record, we conclude the Department made reasonable efforts to reunite Mother and Father with T.N. and O.N. The Department and its service providers delivered substantial and intensive services geared toward reuniting Mother and Father with T.N. and O.N, including: (1) making appropriate and prompt referrals for therapy and counseling services; (2) developing appropriate treatment plans; (3) providing for the services called for in the treatment plans; and (4) allowing for supervised visitations with T.N. and O.N. pursuant to progress in the treatment plans. *See* § 41-3-423(1), MCA; *In re J.H.*, ¶ 17. Additionally, as the District Court noted, Mother and Father had more than

sufficient time to comply with their treatment plans prior to the Department's termination petition given the Department's involvement with Mother and Father across the last three years. *See In re T.D.H.*, ¶ 42. Despite the Department's efforts, Mother and Father refused to address the concerns outlined by the Department, and the District Court properly concluded that they are unable to provide an emotionally safe and healthy home for T.N. and O.N. *See* § 41-3-423(1), MCA; *In re T.D.H.*, ¶ 42; *In re J.H.*, ¶ 17.

¶17 Finally, Father argues that under *In re A.N.*, 2000 MT 35, 298 Mont. 237, 995 P.2d 427, the Department violated his Fifth Amendment right against self-incrimination by requiring him to admit that he physically abused T.N. and O.N. to complete his treatment plan. The Fifth Amendment privilege against self-incrimination protects an individual from being compelled to testify against himself in a criminal or civil proceeding, including a proceeding to terminate parental rights. *In re A.N.*, ¶¶ 33-35 (citations omitted). We have previously held a treatment plan is inappropriate where it requires the individual to incriminate himself in a separate criminal proceeding or face losing his parental rights. *In re A.N.*, ¶¶ 36-38 (citations omitted). Despite the Fifth Amendment's protections in termination proceedings, the State's duty to protect children necessitates that the parent of an abused child "come to terms with how and why the child was abused while in the parent's care" to properly effectuate the parent's treatment plan. *In re A.C.*, 2001 MT 126, ¶ 32, 305 Mont. 404, 27 P.3d 960.

¶18 As a part of his treatment plan, Father was tasked with obtaining psychological evaluations, following the evaluation's recommendations, and seeking out appropriate

mental health services based on those recommendations. The Department's service provider's recommendations asked Father to validate T.N.'s and O.N.'s feelings of being unsafe in his care, to learn how to appreciate the youths' perspective of their parental relationship, and to recognize the youths' emotional needs.

¶19 The record evinces that the purpose of Father's treatment plan was to provide him with therapy and direction to learn how to validate T.N.'s and O.N.'s feelings of not being safe in his care. Unlike the parent in *In re A.N.*, Father was not specifically required to admit to abusing T.N. and O.N. to comply with his treatment plan tasks. *See In re A.N.*, ¶ 36. Instead, Father's treatment plan tasks required Father to attempt to understand why the youths felt the way they did about him to help remedy his parenting deficiencies. *See In re A.C.*, ¶ 32. Additionally, unlike the parent *In re A.N.*, Father was not faced with incriminating himself in a separate criminal proceeding. *See In re A.N.*, ¶ 36. Father's treatment plan tasks were a fair and necessary requirement to rehabilitate his ability to safely parent. *See In re A.C.*, ¶ 32. The Department did not violate Father's Fifth Amendment right against self-incrimination in its implementation of his treatment plan. *See In re A.C.*, ¶ 32; *In re A.N.*, ¶ 36.

¶20 The District Court's findings are supported by clear and convincing evidence. *See* § 41-3-609(1)(f), MCA; *In re J.B.*, ¶ 10. The District Court did not err when it found that T.N. and O.N. should be adjudicated YINC, and that the condition and conduct rendering Mother and Father unfit to parent was unlikely change in a reasonable period of time. *See* § 41-3-609(1)(f), MCA; *In re J.B.*, ¶ 9. Accordingly, the District Court did not abuse its

discretion in terminating Mother's and Father's parental rights to T.N. and O.N. *See In re K.B.*, ¶ 18.

¶21 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. We affirm.

/S/ JAMES JEREMIAH SHEA

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR

**Additional material
from this filing is
available in the
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