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Montana Supreme Court Clarifies Reasonable Efforts in Child Welfare Case

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In re R.J.F., 443 P.3d 387 (Mont. 2019).

The Montana Supreme Court overturned a termination of parental rights decision, holding: (1) the child welfare agency failed to make reasonable efforts to reunite the mother with her child; and (2) the agency did not establish by clear and convincing evidence that the mother's substance use disorder was unlikely to change within a reasonable time.

Practical Significance

This decision addresses three important areas of legal analysis in child welfare cases:

Adds to the body of law interpreting reasonable efforts in child welfare cases. [1] Reasonable efforts findings allow dependency courts to determine whether the agency has satisfied its statutory requirement to prevent removal, reunify the family, and achieve timely permanency for the child.[2] Although federal law requires courts to make reasonable efforts findings, the laws lacks a definition, and services vary greatly across jurisdictions. The Montana Supreme Court provided clear guidance on what actions constitute reasonable efforts, including placement close to family, as outlined in the bulleted section of the summary below. Although not binding in other states, this guidance can be used as persuasive authority for attorneys who seek to ensure reasonable efforts are provided in other cases, especially those involving distant placements or removals at birth.

In addition to guidance on reasonable efforts, the court's decision connects reasonable efforts with termination of parental rights (TPR) decisions. The court explained that although reasonable efforts are not a predicate for TPR decisions, they are connected because reasonable efforts are required before concluding a parent is

unlikely to resolve the original basis for being found unfit. In other words, if the agency has not provided reasonable efforts to help the parent address the basis for removal, then the basis for TPR may also be lacking. The court's reasonable efforts holding is also significant for acknowledging that the presumption that TPR is in a child's best interest after being in foster care for 15 of the last 22 months may not apply if the department has failed to provide reasonable efforts for the parent and child to reunify.

Stresses the importance of parent-child contact in child welfare cases. The court's analysis hinged on the importance of infant-parent bonding through regular visitation. The court cited several sources related to best practices in child welfare, including an ABA Center on Children and the Law policy brief, noting the critical role of the parent-child relationship in early childhood development and the need for meaningful parent-child visitation. The court's emphasis on the importance of family time and parent-child visitation can be used in other cases to show how these factors influence long-term outcomes in a case.

Provides guidance on admitting expert reports. The decision clarifies that written reports of experts, evaluators, and service providers are subject to hearsay and foundational objections and courts cannot take judicial notice of the full contents of such materials. Instead, in some instances courts may take judicial notice of the limited recommendations in such reports to determine if a parent has followed the treatment plan. This holding is relevant for attorneys who seek to challenge the admission of expert reports as hearsay when the report authors do not testify.

Background

In October 2016, a mother gave birth to R.J.F in Billings, Montana, where she was visiting temporarily. Her permanent residence was 300 miles away in Williston, North Dakota, where she owned a home and was employed. When R.J.F was born, the mother tested positive for methamphetamine and marijuana. On October 8, 2016, the Montana Department of Health and Human Services, Child and Family Services Division (department), removed R.J.F. from the mother's care. Ten days later, the department filed a petition for emergency protective custody. The infant was placed in a non-kinship foster placement in Montana, with no ties to family. Because the mother needed to return to North Dakota to her home and job, the department arranged visits for the her "whenever she was in town or whenever she could make it to town." The mother did not have a car, or driver's license.

Following multiple delays, the court set the show cause, adjudication, and disposition hearings for February 21, 2017.

District Court Decision

Reasonable Efforts Related to Visitation and Treatment Plan

The first social worker assigned to the case communicated with the mother about visits between October and December 2016. A new social worker who took over the case two months after the infant's placement determined the mother should fly to Billings biweekly for visits. Both workers decided it would be best for the mother to obtain services in Billings during her trips, rather than in North Dakota where she lived. Between October and January, the mother visited the infant eight times, including attending the well-baby check-up. On January 11, 2017, she filed a petition to transfer venue to Williams County, ND where she lived.

A hearing on the mother's petition was held in February at the same time as the show cause, adjudication, and disposition hearings. The mother's attorney argued that 300 miles was a considerable distance between Billings and her home in Williston, ND, which made visiting her child difficult, especially in winter. The mother testified that while driving to Billings in October she was arrested for driving without a driver's license, which

further prevented her from visiting regularly. The department opposed venue transfer based on concerns about the mother's "inconsistent visits." The social worker assigned in December explained that she would hate for the child to be removed from the foster parents. Mother's counsel argued the department should be working to increase the bond between mother and child, not the bond between foster parents and child. The guardian *ad litem* did not object to the mother's petition to transfer.

The district court judge agreed with the department and denied the transfer request, indicating she lacked enough information about the social worker in North Dakota and she would need to talk to a North Dakota judge. The district court judge did not direct anyone to obtain more information or make any arrangements, and the parties did not provide any more information to the court.

Regarding the adjudication, the initial social worker testified that she had worked with the mother on a voluntary service list that included a chemical dependency evaluation, random drug testing, and arranging visits in Billings. As part of that plan, the mother had completed an evaluation that recommended outpatient treatment. The mother testified that she did well for the first few months after the child's removal, but had relapsed into drug use. The department did not arrange for drug testing or services in North Dakota and relied on the mother to do so on her own. Regarding reasonable efforts, the CPS worker testified that she set up visits whenever the mother "was in town or whenever she could make it to town." The district court adjudicated the infant dependent.

In March 2017, the department proposed a treatment plan for the mother, approved in April, six months after her infant's removal. During this time, the mother's active addiction, difficulties with transportation, and work responsibilities impacted her ability to make scheduled visits. Between December 2016 and July 2017, the mother made less than half of the scheduled visits. Although the mother was in constant contact with the department social worker, the viability of the treatment plan was not reevaluated, and no services were arranged or referred in North Dakota.

Reasonable Efforts Related to Kin Engagement

In August 2017, 10 months after her child's removal, a Family Engagement Team (FET) meeting was held at which the mother identified two potential family members, her mother and an aunt, for the department to consider as placements for her child. Pursuant to department policy, when a child is placed in out-of-home care and the noncustodial parent is not an option, the department must consider a child's extended family.

Eleven days after the FET meeting, the second social worker on the case went on maternity leave and a third worker was assigned. The new department social worker tried calling the baby's maternal grandmother without success. She did not attempt to contact the aunt. The new department social worker discontinued visitation assistance and did not seek services for the mother in North Dakota. The mother testified that she told the social worker she recognized she had a drug problem and needed help and support to address it and reunify with her baby. The social worker explained her only option was to leave her home and move to Billings.

At this time, the mother requested a new social worker. She testified later that she did not feel supported and felt the new social worker was working against her. The request was not granted.

Reasonable Efforts after Mother's Relocation to Montana

The mother sold her home and moved to Montana to work toward reunification. Upon her arrival, she contacted the department social worker to provide information about where she was living and request visitation. The social worker said she had a large caseload, lacked time to schedule visits, and had already filed for TPR.

In September 2017, less than a month after being assigned to the case and only five months after the mother's treatment plan was put in place, the third department social worker filed for permanent legal custody and TPR. The social worker asserted the mother failed to complete her treatment plan, abandoned her child, and was unlikely to address her substance use within a reasonable time. The court set a hearing on the TPR petition. In October 2017, the department requested a permanency hearing and indicated adoption as the only option. A permanency hearing was set for the same time as the termination hearing.

After moving to Billings, the mother engaged in another chemical dependency evaluation, which again recommended outpatient treatment. She began attending treatment and self-help meetings, underwent a psychological evaluation, and enrolled in and completed all but the final session of a parenting course in Billings. The social worker did not meet with the mother to review any of the evaluations but referred her for visits with the child and arranged for a drug patch. The department did not change the permanency goal and continued to seek TPR.

Shortly before the termination hearing, the mother traveled to North Dakota, where she relapsed and was hospitalized. In January 2018, she moved in with her mother and stepfather in California. She contacted the department social worker from California and told her she wanted to keep working toward reunification. She requested help with visitation, transportation, and Skype communication. Her requests were denied. The social worker did not refer the mother for any treatment services in California or pursue requirements of the Interstate Compact on the Placement of Children (ICPC) or any family placements.

Admission of Evidence to Support Termination of Parental Rights

Before the TPR hearing, the department asked the district court to take judicial notice of the mother's psychological evaluation, chemical dependency evaluations, drug test results, and visitation notes to show noncompliance with her treatment plan. The mother objected to the admission of these reports without testimony and cross-examination of the service providers and evaluators. The department argued that hearsay objections do not apply because the records pertain to the mother's treatment plan. The district court agreed and took judicial notice of the materials.

The termination of parental rights hearing was held on April 23, 2018 and June 8, 2018. By the close of the hearing in June, the mother had been substance-free for five months, was residing in a sober-living home, was participating in intensive outpatient treatment and counseling, attended AA/NA meetings multiple times per week, had started a weekly self-help meeting group, was maintaining full-time employment, had a valid driver's license, was undergoing regular drug testing, and completed online parenting and anger management courses. She described having a support system in place with her mother, stepfather, sisters, grandmother, great aunt, cousins and AA/NA sponsor who all lived near her in California.

The department social worker said all of this was true but testified the mother had not moved forward in her treatment plan. She also testified she had not seen the mother's drug test results but acknowledged she had not requested them from the mother or any provider in California. The district court agreed with the department and found the mother failed to complete her treatment plan and found her substance use (the condition rendering her unfit) was not likely to change within a reasonable time. The judge then terminated the mother's parental rights to R.J.F.

Montana Supreme Court Decision

On appeal, the mother raised two challenges:

1. Reasonable Efforts: The department violated her fundamental rights to parent by failing to provide reasonable efforts to reunify her with her baby.

2. Clear and Convincing Evidence: The district court erred when it found clear and convincing evidence that her substance use was unlikely to change in a reasonable time.

The Montana Supreme Court reviewed both assertions and held in a unanimous decision that: (1) the department failed to provide reasonable efforts to reunite the mother with her child; and (2) the district court erred in determining the conduct or condition rendering the mother unfit, unable, or unwilling to parent was unlikely to change within a reasonable time.

The supreme court reversed the TPR and remanded to the district court. The supreme court instructed the department to provide the mother reasonable efforts to reunify her with the child, and the district court to conduct further proceedings consistent with the supreme court's opinion.

Reasonable Efforts Holding

The court explained that assessing the department's reasonable efforts to reunify is a predicate for finding the conduct or conditions rendering a parent unfit are unlikely to change within a reasonable time, one factor required to terminate a parent's rights. The court also explained that to meet its reasonable efforts requirements, the department must in good faith develop and implement voluntary service and treatment plans designed "to preserve the parent-child relationship and the family unit" and the department must follow its own policy to provide "the child maximum opportunity for visits with his/her birth parents while services are provided to the family."

The court acknowledged the parent-child relationship plays a vital role in early childhood development, and consistent and frequent family time is a best practice for families in dependency cases because contact between a child and his biological family is the most important factor related to whether he remains in out-of-home care.

The court found that contrary to its own policies, the department maintained a placement that precluded the mother and child from having sufficient contact to bond. In addition, when developing the service plan, the department failed to arrange drug testing where the mother lived, make a referral for drug treatment, or meaningfully investigate or pursue potential kinship placements. Further, despite the mother's difficulties traveling to Billings for visitation and services, the department continued the same visitation and service arrangement without making any adjustments. In a strong admonishment, the supreme court concluded:

For the first eleven months of this case, the Department primarily engaged in efforts to strengthen the bond between Child and the foster parents and faulted and penalized Mother for living in another state.

In addition to finding the department had not provided reasonable efforts, the supreme court also detailed what reasonable efforts means in practice moving forward, including that the department must:

- adhere to its own policies;
- use its best efforts to place a child in close proximity to a parent;
- arrange visitation in sufficient frequency and duration to make it possible for a parent to establish a bond with her child;
- help the parent engage in services rather than merely suggesting services and waiting for the parent to arrange them herself; and
- develop and implement a voluntary services and/or a treatment plan to address the parent's treatment and other safe parenting needs.

The supreme court concluded the department's failure to provide reasonable efforts to reunify the mother and baby directly contributed to the mother's lack of progress over the first 11 months of this case; and the district court erred in determining the department provided reasonable efforts throughout the case. The court noted its

holding does not diminish a parent’s duty to engage with the department or use services arranged or referred by the department when completing a treatment plan.

Clear and Convincing Evidence Holding

Because reasonable efforts are a predicate for finding parental conduct is unlikely to change, the supreme court reversed the district court’s evidentiary holding because there was not clear and convincing evidence to support it. In other words, the court explained a parent cannot be found to have failed to address unfitness by the time of a TPR hearing if the agency never provided reasonable efforts to help the parent address the basis of unfitness in a case with a reunification goal. The court noted the distance between mother and newborn, delays in court proceedings, and an ineffective treatment plan all disadvantaged mother’s ability to change the conduct originally rendering her unfit. The court recognized the mother had relapsed but noted that relapses are “typical and expected with the disease of addiction and does not necessarily evidence change to be unlikely.” The court also recognized the mother’s relapse came shortly before a scheduled TPR hearing after the mother moved to Montana at the department’s request. As the mother had testified, “no matter what she did, the department intended to terminate her parental rights.”

The department had argued that in spite of these challenges, TPR was appropriate because under state and federal law termination is “presumed to be in a Child’s best interest” after the child has been in foster care for 15 months. The supreme court rejected this argument and explained that a presumption in favor of termination is “misplaced” when “the Department fail[s] to provide reasonable efforts to reunify Mother and Child throughout.”

Also significant, the supreme court rejected the lower court’s hearsay analysis and clarified that courts may not take judicial notice of complete evaluations and service reports to decide a termination petition. Rather, as a narrow exception courts may at times take judicial notice of the specific treatment recommendations in an evaluation to understand those recommendations when determining whether a parent has complied.

Recognizing the challenges inherent in child welfare cases, the supreme court acknowledged that by the time of its decision in the case, R.J.F. had been in foster placement for over two years and was thriving. The court also noted there was no guarantee the mother’s substance use disorder would stay in remission. Despite these factors, the court explained that “[t]here are times, however, when the Court must recognize the parent has not received what the law guarantees before her rights may be terminated. This is such a case.”

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[1] Millner, J., Kelly, D. “[Reasonable Efforts as Prevention](#).” *ABA Child Law Practice Today*, November 5, 2018; Edwards, Leonard. “[Overcoming Barriers to Making Meaningful Reasonable Efforts Findings](#).” *ABA Child Law Practice Today*, January 29, 2019.; Hardin, Mark. “[Claiming Title IV-E Funds to Pay for Parents’ and Children’s Attorneys: A Brief Technical Overview](#).” *ABA Child Law Practice Today*, February 25, 2019.

[2] [Social Security Act §§471\(a\)\(15\), 472\(a\)\(1\), 42 U.S.C.A. §§671\(a\)\(15\), 672\(a\)\(1\)\(West Supp. 1981\)](#).