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**IN THE SUPREME FOR THE MONTANA**

**No. DA 18-0638**

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IN THE MATTER OF:

C.W.-.S.,

A Youth In Need Of Care.

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**ANDERS BRIEF**

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On Appeal from Montana's Fourth Judicial District,  
Missoula County, The Honorable Robert L. Deschamps, III Presiding

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APPEARANCES:

ATTORNEYS FOR DEFENDANT AND  
APPELLANT:

GREGORY D. BIRDSONG  
Birdsong Law Office, PC  
P.O. Box 5899  
Missoula, MT 59806

ATTORNEYS FOR PLAINTIFF AND  
APPELLEE:

Timothy C. Fox  
Tammy Plubell  
Montana Attorney General's Office  
P.O. Box 201401  
Helena, MT 59620-1401

Kirsten Pabst  
Missoula County Attorney's Office  
200 West Broadway  
Missoula, MT 59801

Karen P. Kane  
Assistant Attorney General  
Child Protection Unit  
2677 Palmer St., Suite 300  
Missoula, MT 59808

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## STATEMENT OF THE ISSUE

Whether, pursuant to the criteria set forth in *Anders v. California*, 386 U.S. 738 (1967) and Mont. Code Ann. §46-8-103, counsel for Appellant should be permitted to withdraw from this cause of action.

## STATEMENT OF THE CASE

Mother and Appellant, N.L.W., appeals the order entered October 16, 2018 by the Fourth Judicial District Court, Missoula County terminating her parental rights to C.W.-S. (10 years old). (Appendix A) The birth father had previously relinquished parental rights voluntarily.

### **Procedural History**

The case originated March 1, 2017, when the Missoula County Attorney filed Petitions for Emergency Protective Services (EPS), Adjudication of Child as Youth In Need of Care (YINC), and Temporary Legal Custody (TLC) on behalf of the Department of Health and Human Services (the Department) for C.W.-S. (DC01). The Department alleged probable cause to believe the child was or was in danger of being, abused or neglected. (*Id.*)

The Petition was supported by the affidavit of Child Protection Specialist (CPS) Brandy Rountree who attests the basis for the allegations of abuse or neglect were physical neglect by the N.L.W. and her domestic partner F.H. (Attachment to DC01., Aff. Brandy Rountree) arising from circumstances in which N.L.W.

subjected C.W.-S. to physical neglect arising from drug use by N.L.W. who “tested positive for meth use on 02/22/17 and admitted to having used meth recently” and her domestic partner F.H. who “was living in the home with C.W.-S, was arrested on 02/05/17 for possession of drugs” (*Id.*) CPS Rountree asserts “A DEC kit was performed on C.W.-S at First Step and during the interview, staff witnessed N.L.W. slurring her words and falling asleep while being questioned, causing concern that N.L.W. was under the influence and not able to safely care for C.W.-S. C.W.-S made disclosures of witnessing N.L.W. sell his brother's<sup>1</sup> medication and having found needles in his mother's room in the past.” CPS Rountree further alleges that C.W.-S. had been teased in school for having poor hygiene and smelling bad. Rountree attests that, to the best of her knowledge, C.W.-S. was not Native American and ICWA did not apply. (*Id.*)

The district court immediately granted the Department’s Petition and set a Show Cause hearing for March 21, 2017. (DC04) The court appointed a representative of CASA to act as Guardian ad Litem (GAL), and appointed counsel for the parents, N.L.W. and birth father B.S., and for C.W.-S. through the Montana Public Defender’s Office (the OPD). *Id.* The district court also ordered the parties

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<sup>1</sup> February 17, 2017 the Department filed a Petition for EPS, Adjudication as YINC and TLC regarding C.W.-S.’s brother A.W.-S. on unrelated grounds. (DN-17-17) N.L.W.’s parental rights were subsequently terminated regarding A.W.-S. and that case is also on appeal. (DA 18-0636) The facts and circumstances of the cases were sufficiently different that counsel did not feel it was appropriate to join them on appeal.

to a pretrial intervention conference on March 11, 2017. (DC05)

The standing master held the intervention conference on March 14, 2017. (DC09) C.W.-S. was reported to be with his maternal uncle and his wife. (*Id.*) Both N.L.W. was reported to object to TLC. (*Id.*)

The district court held the Show Cause and adjudicatory hearing on March 21, 2017. (DC11) The court was advised B.S.'s had signed papers to relinquish parental rights to C.W.-S. and his brother A.W.-S. (*Id.*) After inquiry and review of the papers, the court accepted the relinquishment and ordered B.S.'s parental rights terminated. (*Id.*) Counsel advised the court that N.L.W. did not agree with the State's Petition and requested an adjudication hearing. The district court set an adjudication hearing for April 28, 2017. (*Id.*)

An adjudication hearing was held April 28, 2017 after which the district court adjudicated C.W.-S. as a YINC and granted the Department TLC for six months. The court entered its written order on May 22, 2017. (DC16) The district court set a dispositional hearing on N.L.W.'s treatment plan regarding C.W.-S for May 30, 2017. The court entered its judgment terminating B.S.'s parental rights June 6, 2017. (DC21)

After a continuance, the disposition hearing was held June 6, 2017 at which time N.L.W.'s attorney advised the only remaining issue regarding N.L.W.'s

treatment plan was drug testing. (DC23, 6/6/2017 Hrg Tr. 154:17-156:14) The district court set a status conference and treatment plan disposition hearing for June 8, 2017. (DC23, 6/6/2017 Hrg. Tr. 157:19-21) Counsel for N.L.W. subsequently appeared and advised the court N.L.W. stipulated to the treatment plan and requested the disposition hearing be vacated. (DC23)<sup>2</sup> The district court set a status conference for June 20, 2017. (*Id.*)

June 21, 2017 the district court entered its order approving N.L.W.'s treatment plan regarding C.W.-S. (DC24) The order provides that, although N.L.W. did not sign the proposed treatment plan, she stipulated and agreed to complete it in open court. (*Id.*)<sup>3</sup>

At the June 26, 2017 status hearing, the Department requested, and N.L.W. stipulated to, a six-month extension of TLC which the district court granted. (DC25) July 17, 2017 the Department filed the stipulated petition with supporting affidavit by CPS Trisha Christensen. (DC26) July 18, 2017 the district court entered its order extending TLC until January 31, 2018. (DC27)

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<sup>2</sup> Though reported in the Minutes and Note of Ruling, there is no transcript of counsel's subsequent appearance before the court. However, at the June 20, 2017 status hearing, in response to an inquiry regarding the treatment plan, N.L.W.'s attorney asserts, "We already stipulated." (6/20/2017 Hrg. Tr. 169:3-9)

<sup>3</sup> N.L.W.'s stipulation was misreported by the district court as having occurred as part of a contested treatment plan hearing regarding C.W.-S.'s on June 2, 2017. (Appendix B) There is no record of a contested hearing regarding N.L.W.'s treatment plan regarding C.W.-S. (Appendix C) The only two contested hearings regarding C.W.-S were an adjudication hearing held April 28, 2017 and the termination hearing held July 26, 2018. (*Id.*)

January 23, 2018 the Department filed a petition to extend TLC until July 21, 2018 and supporting affidavit by CPS Trisha Christensen. (DC33) At the January 30, 2018 hearing the district court granted the petition without objection, entering the written order January 31, 2018. (DC34, DC35)

May 15, 2018 the Department filed a petition to terminate N.L.W.'s parental rights to A.W.-S. and the supporting affidavit of CPS Christensen. (DC39) May 29, 2018 N.L.W. had a subpoena issued for C.W.-S.<sup>4</sup> (Appendix D) June 11, 2018 C.W.-S. filed a Motion to Quash the subpoena. (DC41) July 17, 2018, after the motion was fully-briefed and argument was heard, the district court quashed the subpoena. (DC42, DC43, DC53)

July 26, 2018 the district court held a termination hearing, after which it granted the State's petition, terminating N.L.W.'s parental rights. (DC59) The court entered its Findings of Fact, Conclusions of Law and Orders terminating N.L.W.'s parental rights to A.W.-S. on October 16, 2018. (DC61) October 22, 2018 the State filed Notice of Entry of Judgment. (DC62) The Clerk of the Montana Supreme Court filed its Notice of Filing Appeal and N.W.L.'s Notice of Appeal on November 9, 2018. (DC64, DC64.1)

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<sup>4</sup> The subpoena is not contained in the record from below. It was inadvertently recorded in the file of C.W.-S's brother A.W.-S. and is provided here as an Appendix.

## Facts of the Case

**Affidavit of CPS Rountree – March 1, 2017.** The Department’s Petition for Emergency Protective Services, Adjudication of Child as a Youth in Need of Care and Temporary Legal Custody for A.W.-S. was supported by an affidavit by CPS Brandy Rountree. (DC01, Attachment Aff. CPS Rountree)

CPS Rountree stated the Department received a report in July 2010 of sexualized behavior by A.W.-S. which the birth parents addressed through counseling. (Aff. Rountree p4) In 2015, the Department received reports A.W.-S. had alleged sexual abuse by his father, B.S. and that A.W.-S had unexplained bruising,<sup>5</sup> which he denied was caused by his parents. (*Id.*) In September 2015 CPS received a report that A.W.-S,’s brother, C.W.-S. reported his parents left him locked in a room when they left the house. (*Id.*) In December 2015 CPS received a report that C.W.-S. had alleged N.L.W. “was spanking him with a board.” (*Id.*)

CPS Rountree states that in January 2016 CPS received a report that A.W.-S. had sexual contact with C.W.-S. (DC01, Aff. CPS Rountree, p4) CPS Rountree reports A.W.-S. was seen by a therapist who recommended sleeping arrangements for the children. (*Id.*) In February 2016, the Department received a report of physical neglect to A.W.-S and C.W.-S arising from domestic violence in the

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<sup>5</sup> A.W.-S. denied the bruising was caused by his parents.

home. (*Id.*, p4) In June 2016 C.W.-S was reported to have alleged B.S. had sexual contact with him and had thrown him across the room. (*Id.*) In September 2016 A.W.-S. was alleged to have reported that C.W.-S. had threatened to “attack their father with a box cutter for raping them.” (*Id.*)

October 4, 2016 the Department received a priority one report that C.W.-S. reported that his brother A.W.-S. had performed oral sex on him in the middle of the night and then forced C.W.-S. to perform oral sex on him. (DC01, Aff. CPS Rountree, p5) C.W.-S. stated that this had also happened on another occasion in the summer. (*Id.*) January 12, 2017 CPS removed A.W.-S. from the home and placed him at Watson’s Children’s Shelter .

December 12, 2016 the Department received a priority 2 report for physical neglect by N.L.W. and F.H. (DC01, Aff., p5) CPS Rountree reported concerns N.L.W. and F.H. had been fighting and throwing Christmas ornaments at C.W.-S. (*Id.*) There were also concerns A.W.-S.’s medication had been sold to a family friend. (*Id.*)

February 16, 2017 the Department received a report that N.L.W. and F.H. were using methamphetamine in the home, that F.H. had been arrested for possession of drugs in Ravalli County and that C.W.-S. had been teased at school for poor hygiene and smelling bad. (DC01, Aff., p6)

June 21, 2017 C.W.-S. told CPS that F.H. had been gone for three weeks, that N.L.W. was “not doing good” and that C.W.-S. had been sick. (DC01, Aff. p6) C.W.-S. said he once found a bag with 5 needles by N.L.W.’s bed. (*Id.*) C.W.-S’s psychiatrist told CPS that she received an anonymous voicemail alleging N.L.W. was using methamphetamine and that A.W.-S. had been missing medications after F.H. picked them up. (*Id.*)

N.L.W. agreed to do a UA and told CPS she was unaware of F.H.’s drug use and kicked him out of the house when she found out. (DC01, Aff. p7) N.L.W. tested positive for methamphetamine and admitted to doing methamphetamine with F.H. (*Id.*) N.L.W. said she did not use drugs in the home or around C.W.-S. (*Id.*, p8) A CSCT therapist reported that C.W.-S. had run away from home the previous night and was not located until midnight. (*Id.*) A nurse practitioner at First Step contacted CPS to report that N.L.W. appeared to be under the influence during an interview and the staff did not feel comfortable allowing her to drive C.W.-S. home. (*Id.*, p8) It was decided the Department would take custody of C.W.-S. and place him with his maternal uncle. (*Id.*) When told, N.L.W. became very upset and had to be escorted from First Step. (*Id.*) When told he was being removed from the home, C.W.-S. lost control and lashed out, “screaming and cussing and banging his head against the wall.” (*Id.*)

Police were called to the scene and were able to calm C.W.-S., after which he was transported to Watson's Children Shelter. (DC01, Aff. p9) Police were again called after C.W.-S. ran out of the building. (*Id.*) C.W.-S. agreed to stop running away when he was told he was going to stay with his uncle and could continue to see his family. (*Id.*)

**Show Cause Hearing – March 21, 2017.** N.W.L. was present for the Show Cause Hearing. N.L.W., through counsel, disputed the allegations in the Petition, objected to TLC and adjudication of C.W.-S. as YINC and requested an adjudication hearing. (DC11, 3/21/2017 Hrg. Tr. 9:22-10:6) The district court set an adjudication hearing for April 28, 2017. (DC11)

**Adjudication Hearing – April 28, 2017.** N.L.W. was present at the adjudication hearing. (4/28/2017 Hrg. Tr. 16:14-16)

Forensic toxicologist April Mitchell testified that a urine sample collected from C.W.-S. on February 22, 2017, tested positive for methamphetamine, nicotine, methylphenidate, diphenhydramine and olanzapine. (4/28/2017 Hrg. Tr. 22:24-23:10) Therapist Kiely Howard testified regarding her treatment of C.W.-S. and verified that, in mid-February 2017, she had received an anonymous voice message "that N.L.W. was using methamphetamine." (*Id.* 34:16, et seq., 39:16-18) Ms. Howard testified that her concerns regarding N.L.W.'s ability to care for

C.W.-S. were escalated by possible drug use, N.L.W.'s health problems and N.L.W.'s history of frequently failing to bring C.W.-S. in for treatment. (*Id.* 47:17-48:16) Ms. Howard expressed the opinion that reunification with N.L.W. was not in C.W.-S.'s best interest until N.L.W. and F.H. completed a "comprehensive treatment plan that includes mental health and chemical dependency treatment." (*Id.*49:5-24) Ms. Howard further testified that, even if N.L.W. were clean and sober, it would not be in C.W.-S.'s best interest to go home in his current mental and emotional state. (*Id.* 64:22-66:6)

CPS Brandy Rountree testified in support of the allegations in her Affidavit restating and expanding upon those allegations. (4/28/2017 Hrg. Tr. 68:13 et seq.) CPS Rountree testified that, based on N.L.W.'s failure to protect C.W.-S. from sexual molestation by his brother, likely drug use, "a lot of concerns" about domestic violence, and C.W.-S. need for services N.L.W. cannot provide, C.W.-S. should be adjudicated as a YINC. (*Id.* 81:6-82:15) CPS Rountree testified C.W.-S. would be at risk of future abuse or neglect if returned to N.L.W. (*Id.* 83:17-23)

Jocelyn Nelson testified regarding drug tests done on N.L.W. (4/28/2017 Hrg. Tr. 96:24 et seq.) Ms. Nelson testified that N.L.W. was referred for drug testing, complied with three tests, then missed the next two tests. (*Id.* 97:24-98:7) Ms. Nelson testified that N.L.W. tested positive for methamphetamine on February

22, 2017 and tested negative on April 4, 2017 and April 5, 2017. (*Id.* 98:10-99:1)

N.L.W. testified in opposition to the Petition. (4/28/2017 Hrg. Tr. 106:12 et seq.) N.L.W. testified regarding her care of C.W.-S, indicating that his difficulties were due primarily to the Department's decision to remove him from her care. (*Id.* 107:3-111:10) N.L.W. testified that her use of methamphetamine was an isolated incident caused by the stress of having her oldest son removed from her care, that she had not used methamphetamine in the home and that, to her knowledge, there had never been methamphetamine in the house. (*Id.* 114:11-115:4) N.L.W. said she had failed to comply with drug testing because her phone was disconnected, and she lacked funds to renew it. (*Id.* 115:18-116:2) N.L.W. said she had missed appointments with Ms. Howard because of "lack of memory from prior medical problems with myself" including three brain surgeries for tumors since 2014 117:4-117:15) N.L.W. testified that she agreed that C.W.-S needed more intensive care but that the way he was removed didn't help. (*Id.* 118:24-119:6) N.L.W. testified that the Department has failed to communicate or allow providers to communicate with her. (*Id.* 120:22-121:5, 122:14-19)

At the conclusion of testimony, the district court adjudicated C.W.-S. a YINC, "mostly because of his current psychiatric condition.... He needs to be – even by his mother's admission, he needs some wrap-around services. And under

those circumstances, I think that I need to grant the petition.” (4/28/2017 Hrg. Tr. 126:1-167:1) The court set a treatment plan disposition hearing to May 30, 2017. (*Id.* 131:2-13)

**First CASA Report – February 27, 2018.** The first CASA report detailed the history of the case and interviews performed by the CASA. (DC37) The CASA reported that, since removal from the home:

C.W.-S. has been in and out of different residential care as it was difficult to find temporary placement for C.W.-S. due to the high level of care needed; his behavior over about a six-month period from the time of removal escalated to the point where he was placed at the St. Joseph's Children's Residential facility in June 2017. (DC37, p2)

The CASA reported that, since removal of her children:

...the trailer park where N.L.W. lived has been sold, and the mobile homes have been either sold or relocated. N.L.W. could not afford to move her mobile home so she sold it and moved in with F.H.'s mother.... N.L.W. has only recently returned to the work force; she did not work between 2008 and 2017. N.L.W. and the boys lived on social security disability benefits payable to and for the boys, and when they were removed, N.L.W. was left with no income. She is working approximately 10-12 hours a week as a CNA, and it does not appear she qualifies for disability, though she does have some health issues that interfere with her ability to work. (*Id.*, p6)

The CASA expressed concern that N.L.W. has not been compliant with her treatment plan. (*Id.*, p7)

**Affidavit in Support of Termination of Parental Rights – May 15, 2018.**

May 15, 2018 the Department filed a petition to terminate N.L.W.'s parental rights.

(DC50) In the accompanying Affidavit, executed May 10, 2018, CPS Christensen recommended termination of N.L.W.'s parental rights, alleging:

N.L.W. failed to comply with the tasks of her court ordered treatment plan and has failed to alleviate the concerns of CFS involvement. N.L.W. has failed to consistently engaged in her children's therapy and treatment and follow the recommendations of their mental health providers. N.L.W. has not maintained safe and stable housing. N.L.W. has not complied with the recommendations of her chemical dependency or psychological evaluation. N.L.W. has not demonstrated sobriety, developed a relapse prevention plan, or engaged in individual therapy. N.L.W.'s current untreated chemical dependency and mental health needs, along with her inability to demonstrate stability and consistency for her children has rendered her unfit to provide adequate care for her children.

(DC50, Aff. p5)

CPS Christensen addressed the specific areas of the treatment plan as follows:

1. Parenting: N.L.W. has not been consistently engaged with C.W.-S.'s treatment providers nor maintained regular consistent contact with her children, and has not demonstrated she an meet the physical and emotional needs of her children.
2. Housing: N.L.W. moved several times and did not keep the Department informed of her address or the individuals with whom she was living. N.L.W. reported living with a boyfriend and his parents in Kalispell until her boyfriend physically assaulted her and his parents kicked her out. N.L.W. said she returned to Missoula and was living in her car. N.L.W. spent most of the case living with friends or acquaintances or staying in her car.

3. Substance Use: N.L.W. completed a CD evaluation that recommended intensive outpatient treatment, close monitoring for methamphetamine withdrawal, and mental health services. N.L.W. refused to work with some providers, failed to engage some providers, had numerous cancellations and “no-shows”, failed to engage in court-ordered drug testing, failed to complete a relapse prevention plan, and failed to demonstrate nine months of sobriety.
4. Mental Health: N.L.W. completed a psychological evaluation but failed to follow recommendations for individual counseling for at least nine months.
5. Contact with the Department: N.L.W. maintained “fairly consistent” contact with CPS Christensen by e-mail, but failed to respond to questions regarding her service needs or engagement. N.L.W. did not sign requested releases for medical information recording alleged medical conditions presented as reasons for missed appointments and refusal to use drug patches.

(39, Aff., pp6-13)

**Second Casa Report – July 24, 2018.** The CASA reported that:

C.W.-S. has been residing in a high level residential treatment facility in Torrington, WY since June 2017. Initially his estimated treatment period was to be through December, 2017 but based on re-evaluation of his treatment and progress to date; his estimated discharge date has not been identified, though CPS is working with his medical providers to evaluate C.W.-S. for placement back in Montana. The current issue (since June 15, 2018) is whether or not he should "step-down" in treatment to a group home, or if placement with a relative that includes support services will be adequate. C.W.-S. has expressed multiple times in our phone conversations that he wants to come back to Montana to live with his [maternal aunt]. He has been tearful and states that he [is] mad at his biological mother for not doing what she says she'll do and for not following/completing her own treatment plan. He also misses his mother very much. C.W.-S. has recently been having regular contact with his paternal grandparents who are planning a trip to visit C.W.-S. in Wyoming.

(DC57, p4)

The CASA reports that N.L.W. worked only intermittently over the previous six months and had not been able to secure housing. (DC57, p5) N.W.L. is reported to be homeless and says that her health makes it difficult for her to work. (*Id.*) The CASA reports that N.L.W. recently completed a psychological evaluation has not taken advantage of available mental health support or followed through with treatment tasks. (DC57, p5)

C.W.-S's therapist told the CASA N.L.W. "is difficult to get a hold of and that she has missed many appointments" which is particularly hard on C.W.-S. (*Id.*) The CASA expressed concern that, though N.L.W.'s treatment plan requires her to demonstrate that she can meet the physical and emotional needs of the children:

N.L.W. has not been actively engaging in or with workers attempting to assist her; she schedules then misses appointments, no-shows without calling and is sometimes not responsive.  
(DC57, p6)

**Termination Hearing – July 26, 2018.** N.L.W. was present at the commencement of the July 26, 2018 Termination Hearing, but did not return after the noon recess. (7/26/2018 Hrg. Tr. 496:18, 618:2-12) CPS Trisha Christensen testified that that C.W.-S. was adjudicated YINC April 28, 2017 on the basis of drug use and physical neglect. (*Id.* 241:12-242:2)

CPS Christensen stated N.L.W. “struggled to comply” with the parenting requirements of her treatment plan, citing missed appointments, inability to communicate by telephone, and failure to provide requested information by e-mail. (7/26/2018 Hrg. Tr. 245:2-247:51:20) CPS Christensen testified that N.L.W. did not take advantage of visitation opportunities with C.W.-S. in Wyoming and failed to attend or respond regarding appointments to visit A.W.-S. in Missoula, resulting in A.W.-S. requesting minimal contact due to his frustration with N.L.W.’s lack of involvement. (*Id.* 247:21-249:15)

CPS Christensen testified N.L.W. failed to provide for the safe, suitable and appropriate housing for the children because she exposed them to F.H. who, along with N.L.W. was charged with criminal possession of dangerous drugs and drug paraphernalia. (7/26/2018 Hrg. Tr. 249:24-250:10) CPS Christensen said that, at the time of removal in early 2017, N.L.W. and the children were sleeping in the living room of a two-bedroom trailer along with N.L.W., F.H. and two other adults. (*Id.* 251:19-252:5) CPS Christensen testified N.L.W. ended up selling the trailer and, at the time of the hearing, had been homeless for “roughly eight months, if not longer.” (*Id.* 252:6-20) According to CPS Christensen, N.L.W. did not keep the Department updated on her living arrangements, but said, at various times, she was staying with “friends in Missoula and other times it was friends in Kalispell” but N.L.W. would not provide names or addresses. (*Id.* 253:16-254:6)

CPS Christensen testified the treatment plan required N.L.W. to complete a CD evaluation, follow the recommendations of the recommendation, engage in regular random testing, maintain and demonstrate sobriety, and develop a relapse plan. (7/26/2018 Hrg. Tr. 255:6-12) CPS Christensen detailed the Department became concerned about methamphetamine use when N.L.W. tested positive for the drug February 22, 2017 and C.W.-S. tested positive for methamphetamine in his urine and in his hair. (*Id.* 255:18-23) CPS Christensen said N.L.W. completed a CD evaluation which diagnosed her with “stimulant use disorder” and recommended “level 2.1 intensive outpatient treatment. (*Id.* 256:21-257:20) According to CPS Christensen, N.L.W. denied knowing of the recommendations and did not participate in the recommended outpatient treatment despite being offered different options including an opportunity to participate in a reduced treatment regime. (*Id.* 257:23-258:13) CPS Christensen testified that, despite four referrals to attempt to engage her, N.L.W. did not comply with any of the requested random breath, urine or other testing for substance, aside from the testing when C.W.-S was removed and two tests in April 2017. (*Id.* 258:14-259:19) CPS Christensen said N.L.W. did not develop a relapse prevention program and, did not successfully complete the substance use goals and objectives of her treatment plan. (*Id.* 259:21-260:11)

CPS Christensen testified N.L.W. was required to complete a psychological

evaluation and to engage in recommended therapy in order to “demonstrate insight into her mental functioning and identify changes she is making towards stability and keeping herself and her children safe.” (7/26/2018 Hrg. Tr. 265:18-266:4) CPS Christensen testified N.L.W. completed a psychological evaluation and was diagnosed with, “major depressive disorder, generalized anxiety disorder, and an unspecified personality disorder, as well as a stimulant use disorder.” (*Id.* 267:6-21) It was recommended N.L.W. participate in at least nine months of individual counseling to address her disorders and allow for prescription of appropriate medications. (*Id.* 269:14-19) CPS Christensen testified it was recommended that, prior to reunification, N.L.W. demonstrate at least nine months of sustained abstinence from all substances, establish and maintain employment and appropriate housing, and refrain from problematic relationships with people with substance use or criminal histories. (*Id.* 269:20-270:5) CPS Christensen testified that, despite referrals to “agencies and individuals that could help her complete” the recommended treatments, N.L.W. did not follow the recommendations. (*Id.* 271:1-272:5, 273:2-14) N.L.W. did not provide the Department with requested documentation or releases from care providers or demonstrate engagement in treatment “to improve her functioning.” (*Id.* 272:6-13)

Under cross-examination, CPS Christensen testified the Department was not considering guardianship as an alternative to termination “Because of N.L.W.'s

continued instability and inability to demonstrate sobriety and that she can meet her own basic needs, especially the needs of the children. And based on the needs of C.W.-S., a guardianship does not provide the same supports, financially, as an adoption would if C.W.-S. needs a higher level of care in the future.” (7/26/2018 Hrg. Tr. 287:6-17) Under further cross-examination, CPS Christensen amended a former statement to attest that F.H. was charged with possession of dangerous drugs but N.L.W. was charged with possession of drug paraphernalia. (*Id.* 308:12-14)

Phil Lukalu, licensed professional counselor at St. Joseph’s Children’s Home in Torrington, Wyoming testified regarding C.W.-S.’s treatment and progress. (7/26/2018 Hrg. Tr. 315:11, et seq.) Mr. Lukalu testified that N.L.W.’s engagement in C.W.-S.’s treatment is “inconsistent as far as, like, her – her availability. But when she made herself available, she was attentive and engaging with C.W.-S. regarding what was going on with him and his concerns.” (*Id.* 322:10-17) Mr. Lukalu testified that N.L.W. participated in about half of the C.W.-S.’s family therapy sessions and that her sporadic attendance caused C.W.-S.’s behavior to regress, impacted his ability to do schoolwork, and resulted in moderate restraint and seclusion for a significant period. (*Id.* 322:25-323:23) Mr. Lukalu testified they were unable to get N.L.W. to participate in a free weekend parenting program to identify areas for improvement in her parenting skills and “to

implement some of those specific skills that our family teachers use in the living unit here, so that N.L.W. could implement within her household.” (*Id.* 324:8-21, 326:2-8) Mr. Lukalu testified that, to his knowledge, N.L.W. only made one trip to Wyoming to visit C.W.-S. for about four hours. (*Id.* 326:22-327:8) Mr. Lukalu describe C.W.S.’s progress in therapy and concluded he had improved and was responding well to the therapy with regressions when he expects contact with N.L.W. diminishing since C.W.-S. began to consider living with someone else. (*Id.* 329:24-331:7) On cross-examination, Mr. Lukalu testified that “not having contact with N.L.W. altogether would lead to an emotional breakdown because he is very connected to his mother.” (*Id.* 336:1-4)

LCSW Carleigh O’Brien, A.W.-S’s therapist at the Radtke center testified regarding A.W.-S.’s treatment and progress. (7/26/2018 Hrg. Tr. 351:2 et seq.) Ms. O’Brien testified that N.L.W. didn’t show up for the initial family therapy session with A.W.-S. and it took several days to get a response from her causing nearly a six-week delay in commencing family therapy. (7/26/2018 Hrg. Tr. 356:10-357:9) Ms. O’Brien stated that from the third week of November through December 2017 N.L.W. maintained “the most consistent contact.” (*Id.* 357:2-357:25) In early to mid-January 2018, Ms. O’Brien said, “things started to go south.” (*Id.* 358:18-24) According to Ms. O’Brien, N.L.W. reported that she was homeless and “having some pretty significant health issues,” so Radtke decided to postpone out of facility

visits until the end of February 2018 to allow N.L.W. to work on her problems and to increase phone calls to twice a week. (*Id.* 359:17-360:13) Ms. O'Brien testified the "out-visits" were never accomplished because of difficulty maintaining telephone communications with N.L.W. (*Id.* 360:14-362:2) Ms. O'Brien testified that, after learning N.L.W. had not told him the truth about seeing a doctor for a "spinal fluid leak" A.W.-S. became very upset and things "shifted, really, at that point" leading A.W.-S. to ask to discontinue telephone calls outside the session. (*Id.* 367:2-10) Ms. O'Brien noted that A.W.-S. was further agitated by N.L.W.'s failure to attend an IEP meeting in May 2018. (*Id.* 367:11-378:25) Ms. O'Brien testified that A.W.-S. would complete sex offender treatment no earlier than February 2019. (*Id.* 381:15-24) Ms. O'Brien expressed her opinion that N.L.W. could not provide the structure and consistency A.W.-S. needed, but that his maternal grandmother had been actively involved in family therapy and had developed the tools to parent him effectively. (*Id.* 383:20-385:20)

Marylou de Roulhac, case manager at 3 Rivers Mental Health testified regarding N.L.W.'s participation in her case management. (7/26/2018 Hrg. Tr. 389:5 et seq.) Ms. de Roulhac testified that N.L.W. suffered significant difficulties as a result of her health problems, her loss of income and problems keeping a phone and a working vehicle. (*Id.* 395:5-396:6) Ms. de Roulhac testified that N.L.W. did not take advantage of services 3 Rivers could have provide to her.

(*Id.*398:10-25, 398:10-399:10)

LCSW Kristina Miner testified regarding her chemical dependency treatment of N.L.W. (7/26/2018 Hrg. Tr. 403:6 et seq.) Ms. Miner testified she begun individual CD treatment on April 23, 2018. (*Id.* 670:16-22) Ms. Miner testified that, she discharged N.L.W. from service after the initial intake interview because N.L.W. canceled or was a no-show for her next two appointments. (*Id.* 409:5-22)

CASA Renee Kjelsrud testified. (7/26/2018 Hrg. Tr. 414:15 et seq.) After detailing his efforts to assist N.L.W. in various ways, Ms. Kjelsrud expressed her opinion that N.L.W. could not provide the consistency and stability A.W.-S. and C.W.-S. needed in their lives. (*Id.* 418:5-10) On cross-examination, Ms. Kjelsrud testified that, in his opinion, termination of N.L.W.'s parental rights to A.W.-S. and C.W.-S. was appropriate. (*Id.* 419:7-11)

After the conclusion of the CASA's testimony, the district court expressed dissatisfaction with N.L.W.'s failure to return to court after the noon recess:

I mean, that's just -- that's just the hallmark of this case. She's completely irresponsible. And I don't know what she expects us to do when she can't even show up to defend herself, and I think she has the capacity to do it.  
(7/26/2018 Hrg. Tr. 423:8-12)

N.L.W.'s attorney, in the absence of his client, advised the court,

I did intend to put on a case, but I'm somewhat hampered in doing so by the absence of one of my primary witnesses. And I don't think -- I don't think it would be appropriate to call the other witnesses without having N.L.W.'s testimony.

(7/26/2018 Hrg. Tr. 425:12-17)

After N.L.W.'s attorney declined the district court's offer to continue the hearing, due to concerns about his ability to produce his client, the district court entered oral findings.

I -- we can't be taking people's kids away from them because they're poor. We can't -- although, we've done it, and I've been involved in doing it, take them away just because they're homeless if they can't provide adequate shelter and care for the children. I'm not even sure we can take them away because they're -- they've got a substance abuse problem. But, you know, she has shown no inclination to do anything about any of these problems. And I think there have been people out there that have been willing to help, and she just -- I don't know what her problem is. But it seems clear that it's in the best interest of these children to have stability. I think they need it. I think they need placement. I think it appears pretty clear that we've got family members who are willing to step up to the plate and take these children.

(7/26/2018 Hrg. Tr. 427:2-20)

The court terminated N.L.W.'s parental rights to A.W.-S. and C.W.-S. (*Id.* 428:4)

**Findings of the District Court.** In the Order entered October 16, 2018 the district court entered the following significant Findings of Fact in support of its decision to terminate N.L.W.'s parental rights to A.W.-S.:

1. On October 4, 2016 and December 12, 2016, CFS received CI Reports alleging concerns that A.W.-S. was performing oral sex on his younger

- brother C.W.-S. in N.L.W.'s home and that N.L.W. had been physically neglecting the children and fighting with her live-in boyfriend, F.H.
2. CFS' investigation into these reports led to the January 12, 2017, removal of A.W.-S. from N.L.W.'s care after concluding that N.L.W. physically neglected and failed to protect her children because A.W.-S. had sexually perpetrated against C.W.-S. on numerous occasions in their home and N.L.W. could not provide a safe home for her children due to A.W.-S.'s increasing behaviors and continued acts of sexual assault against his brother; and lacked the capacity to provide appropriate and reasonable supervision, seriously harming her children and placing them at serious risk of harm.
  3. On February 5, 2017, N.L.W.'s boyfriend and housemate, F.H., was arrested for possession of dangerous drugs in Ravalli County.
  4. On February 16, 2017, CFS received another CI Report alleging that F.H. was arrested for possession of dangerous drugs, that N.L.W. was using methamphetamine, and that C.W.-S. had poor hygiene and smelled bad.
  5. On February 21, 2017, CFS interviewed C.W.-S. at his elementary school and stated that his mother "was not doing good," would fall asleep when he was asking her questions, and that he had once found a bag with 5 needles in it by his mother's bed and took them out, filled them with water, and injected them into his teddy bear.
  6. On February 22, 2017, N.L.W. tested positive for methamphetamine and admitted to using methamphetamine. On February 22, 2017, at CFS' request, N.L.W. took C.W.-S. to a forensic interview at First Step in Missoula. A Drug Endangered Child (DEC) kit was performed to drug test C.W.-S.'s hair for exposure to illicit drugs. During his First Step interview, C.W.-S. disclosed witnessing N.L.W. sell his older brother A.W.-S.'s prescription medication and finding needles in N.L.W.'s bedroom. C.W.-S.'s DEC kit later A DEC kit results were positive for methamphetamine. In addition, First Step personnel contacted CFS due to concerns that N.L.W. appeared under the influence at the facility, as she was slurring her words and falling asleep while being questioned, and did not want N.L.W. to drive anywhere with C.W.-S.
  7. C.W.-S.'s February 22, 2017 DEC hair drug test result was positive for methamphetamine, therefore C.W.-S. was exposed to methamphetamine while in N.L.W.'s care.

8. On March 1, 2017, CFS filed an initial petition with regard to C.W.-S. seeking Emergency Protective Services and Temporary Legal Custody.
9. On March 2, 2017, the Court granted CFS Emergency Protective Services as to C.W.-S.
10. On April 28, 2017, the Court Adjudicated C.W.-S. as a Youth in Need of Care within the meaning of Mont. Code Ann. § 41-3-102, and granted Temporary Legal Custody to CFS until July 31, 2017, in line with CFS' temporary legal custody period regarding A.W.-S.
11. On June 21, 2017, the Court ordered N.L.W. to complete an appropriate treatment plan in each child's case.
12. On May 15, 2018, CFS filed the Termination Petition seeking to terminate N.L.W.'s parental rights.
13. On July 26, 2018, the Court held the hearing on the Termination Petition.
14. At the hearing, the Court heard testimony from the following witnesses for the State: Trish Christensen, CFS CPS; Phil Lukalu, St. Joseph's Children's Home therapist for C.W.-S. Watzke; Carleigh O'Brien, Radtke Home for Boys therapist for C.W.-S. Watzke; Marylou de Rhoullac, Ed.D. (ABD), 3 Rivers Mental Health Case Manager for N.L.W.; Kristina Miner, LCSW, LAC, MSW for N.L.W., and CASA Renee Kjelsrud.
15. The testimony of the foregoing witnesses was compelling and believable, and, in conjunction with the record, including any affidavits, provided the Court with clear and convincing evidence that supports terminating N.L.W.'s parental right to C.W.-S.
16. N.L.W. failed to comply with virtually all of the tasks required by her court-ordered treatment plan and therefore was unable to alleviate the concerns that led to CFS' involvement with C.W.-S.
17. N.L.W.'s Treatment Plan required her to consistently engage in C.W.-S.'s therapy and mental health treatment and follow the recommendations of his mental health providers in order to understand how to best meet his needs, however, N.L.W. has not been actively engaged in C.W.-S.'s treatment to be able to better understand how to meet his needs.
18. In June of 2017, C.W.-S. was placed at the Saint Joseph's Children's Home in Torrington, Wyoming, a residential treatment facility where he is receiving intensive therapy for his serious emotional disturbances of

- Bipolar I Disorder, Post-Traumatic Stress Disorder, and Attention-Deficit/Hyperactivity Disorder, recurrent hypermanic.
19. Phil Lukalu, LCPC, provides individual and family therapy for C.W.-S. at the Saint Joseph Children's Home and attempted to engage N.L.W. in family therapy with C.W.-S., however, N.L.W. was not responsive to working with C.W.-S. or the St. Joseph's professionals working with him.
  20. N.L.W. was offered opportunities to engage in family therapy with C.W.-S. and Mr. Lukalu, however, she only attended during a 2-month time frame, and participated in less than half of his sessions at the time of the hearing.
  21. N.L.W.'s engagement with C.W.-S. and his treatment providers at St. Joseph's was sporadic at best.
  22. N.L.W. has not demonstrated that she can meet C.W.-S.'s physical and high emotional needs.
  23. Due to her use of methamphetamine, and the fact that her child, C.W.-S., was exposed to methamphetamine to the extent that his hair tested positive for this substance, N.L.W. was court-ordered to complete a chemical dependency evaluation and follow all recommendations and maintain sobriety.
  24. N.L.W. failed to engage in Level 2.1 Intensive Outpatient Services to treat her moderate Stimulant Use Disorder and CFS even offered N.L.W. a lower level of CD Treatment with Ms. Miner, namely, 1-4 hours of Intensive Outpatient Treatment (IOP) to start (instead of the usual 9-12 hours per week that IOP typically requires).
  25. On May 09, 2018, Ms. Miner discharged N.L.W. from therapy and CD treatment because N.L.W. continued to "no show" and cancel appointments, therefore Ms. Miner discharged her from her therapy and CD treatment services as she was no longer able to work with N.L.W.
  26. N.L.W. was ordered to, but has not engaged in random drug testing, nor has she complied with the many opportunities given to her to engage in this testing.
  27. N.L.W.'s current untreated chemical dependency, along with her inability to demonstrate stability and consistency for her children, renders her unfit to provide adequate, safe, parental care for her children.

28. N.L.W. has not complied with her Treatment Plan's mandated Mental Health Tasks.
29. Clear and convincing evidence supports a finding that N.L.W. has not been able to demonstrate any insight into her mental functioning, nor has she identified changes she is making towards stability and keeping herself and her children safe.
30. Overall, clear and convincing evidence supports this court's termination of the parent-child legal relationship between N.L.W. and C.W.-S. pursuant to Mont. Code Ann. § 41-3-609(1)(f), because C.W.-S. is an adjudicated "Youth in Need of Care;" an appropriate treatment plan that has been approved by the court has not been complied with by N.L.W. and has not been successful and the conduct and/or condition of N.L.W. rendering her unfit, unable, or unwilling to give the child adequate parental care is unlikely to change within a reasonable time.
31. In these factors in terminating the parent-child relationship between N.L.W. and the child, the court has given primary consideration to the physical, mental, and emotional conditions and needs of C.W.-S., which are extensive, require ongoing therapeutic intervention in a residential setting, and include residential treatment and intensive therapeutic work for his juvenile sexual offender treatment, serious emotional disturbances, and diagnoses of Bipolar I Disorder, Posttraumatic Stress Disorder, Recurrent hypermanic, severe, and Attention-Deficit / Hyperactivity Disorder.
32. C.W.-S. has finally begun to make progress in his placement at the St. Joseph Children's Home and is working on his therapeutic goals and N.L.W.'s infrequent and irregular contact upset his progress and severely dysregulated his behavior
33. C.W.-S.'s best interests require that his mother's parental rights be terminated so that he can achieve a stable, and safe permanent placement.
34. N.L.W. appeared at the hearing on the Termination Petition for a few hours in the morning, however, when the Court recessed for lunch, and during the pendency of the State's case in chief, N.L.W. failed to return to the hearing, and unfortunately, her avoidance of the hearing appeared to be in line with her avoidance of her treatment plan tasks and goals.
35. C.W.-S. has been in an out of home foster care placement for at least 15 of the most recent 22 months, therefore, the law presumes that termination of N.L.W.'s parental rights is in the child's best interests.

36. Clear and convincing evidence establishes that the best interests of C.W.-S. would be served by terminating the parental rights of N.L.W. and awarding CFS Permanent Legal Custody of the child with authority to consent to the child's adoption, guardianship, or other permanent placement.

(DC68)

### **STANDARDS OF REVIEW**

The Court reviews a district court's decision to terminate parental rights to determine whether the district court abused its discretion. *In re J.W.*, 2001 MT 86, ¶ 7, 305 Mont. 149, 23 P.3d 916. While the district court's decision to terminate parental rights is discretionary, the decision must be supported by specific findings of fact. *In re: Custody of C.F.* 2001 MT 19, ¶11, 304 Mont. 134, 18 P.3d 1014. The Court reviews the district court's findings of fact to determine whether they are clearly erroneous. *Id.* "A finding of fact is clearly erroneous if it is not supported by substantial evidence; if the district court misapprehended the effect of the evidence; or if, after reviewing the record, this Court is left with a definite and firm conviction that the district court made a mistake." *Id.* (citing *In re T.Z.*, 2000 MT 205, ¶10, 300 Mont. 522, 6 P.3d 960).

When the State seeks to terminate a parent's fundamental liberty interest in the care and custody of a child, due process requires that the parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, 2004 MT 62, ¶12, 320 Mont. 268, 87 P.3d 408. Fundamental fairness at termination proceedings

requires that a parent be represented by counsel. *Id.* Whether a person has been denied her right to due process is a question of constitutional law. *Id.* at ¶ 9. The Court's review of questions of constitutional law is plenary. *Id.* at ¶ 9 (citing *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290).

Ineffective assistance of counsel claims are mixed questions of law and fact that the Court reviews de novo. *State v. Lamere*, 2005 MT 118, ¶9, 327 Mont. 115, 112 P.3d 1005.

### **ARGUMENT**

**1. Counsel for N.L.W. should be permitted to withdraw from this cause in accordance with *Anders v. California* and Mont. Code Ann. §46-8-103.**

The Fourteenth Amendment of the United States Constitution and Article II, Section 17 of the Montana Constitution guarantee every defendant the right to a fair trial and due process of law, including fair representation. 386 U.S. 738, 742 (1967). When appellant's counsel "finds his case to be wholly frivolous" he should, after conscientious examination of the case, advise the court and request permission to withdraw. *Id.* at 744

To ensure protection of appellant's rights, counsel's request to withdraw must be accompanied by a brief that references anything in the record that might arguably support an appeal (an *Anders* brief). *Id.* A copy of the brief should be provided to the appellant and the appellant must be afforded the time to respond to

counsel's motion and brief. *Id.*

The State of Montana has codified the requirements of Mont. Code Ann. §46-8-103(2). If, after reviewing the entire record and researching the applicable law, counsel concludes that an appeal would be frivolous or wholly without merit, counsel must file a motion with the Montana Supreme Court requesting permission to withdraw. *Id.* A memorandum discussing any issues that arguably support an appeal must accompany the motion to withdraw. *Id.* The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, along with appropriate citations to the record and the law bearing on each issue. *Id.*

An *Anders* brief meets the requirements of both *Anders v. California* and Mont. Code Ann. §46-8-103(2). The brief is intended to assist the appellate court in determining that counsel has conducted the required detailed review of the case and that the appeal is so frivolous that counsel's motion to withdraw should be granted. *Penson v. Ohio*, 488 U.S. 75, 81–82 (1988). The requirements of an *Anders* brief are not meant to force counsel to argue against appellant. *Anders*, 386 U.S. at 745.

Pursuant to Mont. Code Ann. § 46-8-103(2), counsel for Appellant reluctantly advises the Court that, after conducting diligent review of the record

and the relevant law, counsel has not found any non-frivolous issues appropriate for appeal in this matter. While counsel has great sympathy for the Appellant, he can find no meritorious grounds for appeal. In accordance with the requirements of *Anders* and Mont. Code Ann. § 46-8-103(2), counsel provides this memorandum (Anders Brief) discussing any issues that arguably support an appeal, a summary of the procedural history of the case and any jurisdictional problems with the appeal, and appropriate citations to the record and the law bearing on each issue. *Id.*

**2. The record may arguably support N.L.W.’s assertion the district court erred when it terminated his parental rights.**

The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence that the child is an adjudicated youth in need of care, an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful, and the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time. Mont. Code Ann. § 41-3-609(1)(f); *In re D.B. and D.B.*, 2007 MT 246, ¶20, 339 Mont. 240, 168 P.3d 691. If the court determines the conduct or condition rendering a parent unfit is unlikely to change within a reasonable time, “it must enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care.” Mont. Code Ann. §41-3-609(2)

An order terminating an individual's right to parent his child must be supported by clear and convincing evidence that the statutory criteria for termination have been met. *In re A.T. and J.T.*, 2003 MT 154, ¶10, 316 Mont. 255, 70 P.3d 1247. Clear and convincing evidence is:

simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure—that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

*In re C.M.C.*, 2009 MT 153, ¶23, 350 Mont. 391, 208 P.3d 809.

Mont. Code Ann. §41-3-609(1), “requires proof to be made by clear and convincing evidence but does not require the court to recite that standard of proof in its findings of fact.” *In re B.S.*, 2009 MT 113, ¶20, 350 Mont. 132, 206 P.3d 74.

Once the criteria for termination of parental rights are met, the decision whether or not to terminate those rights is within the court’s discretion.

**3. N.L.W. may assert there was insufficient evidence to support adjudication of the child as Youths in Need of Care.**

The court may make an adjudication on a Petition for Emergency Protective Services and Temporary Legal Custody if the court determines by a preponderance of the evidence the child is a youth in need of care. Mont. Code Ann. §41-3-

437(2). Adjudication 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. *Id.* "Youth in need of care" means a youth who has been adjudicated or determined, after a hearing, to be or to have been abused, neglected, or abandoned. Mont. Code Ann. §41-3-102(34).

"Child abuse or neglect" means actual physical or psychological harm to a child and substantial risk of physical or psychological harm to a child, which includes acts or omissions of a person responsible for the child's welfare or exposing a child to the criminal distribution of dangerous drugs. Mont. Code Ann. §41-3-102(7). "Physical or psychological harm to a child" includes the harm that occurs whenever the parent fails to supply the child with adequate health care, though financially able to do so or offered financial or other reasonable means to do so. Mont. Code Ann. §41-3-102(21)(a)(iv). "Physical neglect" includes failure to provide basic necessities, or failure to provide cleanliness and general supervision, or both, or exposing or allowing the child to be exposed to an unreasonable physical or psychological risk. Mont. Code Ann. §41-3-102(20).

In this case, N.L.W. may arguably assert the child was not subject to abuse, neglect or abandonment as set forth in the statute. Removal of the child from the home was done based on hearsay allegations, a single drug test and statements by

C.W.-S., a 9-year old child. N.L.W. may argue the Department did not establish abuse or neglect by clear and convincing evidence and that his stipulation to adjudication of the child as YINC was not made knowingly.

**4. N.L.W. may arguably assert she received ineffective assistance of counsel.**

The Due Process Clause of the Montana Constitution, Article II, Section 17, provides that a parent involved in the termination of her parental rights is entitled to effective assistance of counsel. *In re A.S.*, ¶¶ 12, 20. In *In re A.S.*, this Court held the effectiveness of counsel in dependent neglect cases “should be evaluated by the following non-exclusive factors:

1. Training and experience. Specifically, whether counsel has experience and training in representing parents in matters and proceedings under the [DN statutes] and whether counsel has a verifiably competent understanding of the statutory and case law involving the [DN statutes].
2. Advocacy. .whether counsel has adequately investigated the case; whether counsel has timely and sufficiently met with the parent and has researched the applicable law; whether counsel has prepared for the termination hearing by interviewing the State’s witnesses and by discovering and reviewing documentary evidence that might be introduced; and whether counsel has demonstrated that he or she possesses trial skills, including making appropriate objections, producing evidence and calling and cross-examining witnesses and experts.”

*Id.* ¶ 26.

Additionally, a parent may not sustain an ineffective assistance of counsel claim when the parent cannot demonstrate prejudice because of the ineffective

assistance. *In re C.M.C.*, 2009 MT 153, ¶ 30, 350 Mont. 391, 208 P.3d 809. The factors denoted above are to be considered nonexclusive benchmark criteria for evaluating assistance of counsel in termination proceedings. *In re T.N.S.*, 2015 MT 117, ¶ 30, 379 Mont. 60, 347 P.3d 1263 (citing *In re A.S.*, ¶ 27.).

In this case, N.L.W. may assert that counsel's failure to request a continuance of the termination hearing to allow her the opportunity to testify deprived her of an opportunity to persuade the district court to select guardianship over termination.

### **CONCLUSION**

After thorough review of the entire record and researching applicable statutes, case law, and rules, counsel has determined that N.L.W.'s appeal presents no non-frivolous issues and is, therefore, wholly without merit. Counsel respectfully requests the court grant the motion to withdraw on direct appeal.

Respectfully submitted this March 17, 2019.

  
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Gregory D. Birdsong  
Birdsong Law Office, PC  
P.O. Box 5899  
Missoula, MT 59806  
406-543-2608  
gdb@birdsonglawoffice.com

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

  
\_\_\_\_\_  
Gregory D. Birdsong

Label	Question	Answer
<b>For Every Brief:</b>		
BriefTitle	Title of Brief eg. Appellant's Opening Brief	Anders Brief
DateExec	Date of Service	3/17/2019
CoS	Check if Certificate of Service is required:	<input type="checkbox"/> Certificate of Service
<b>For Every Case:</b>		
Court	Master List – Courts	000 Montana Supreme Court
Appeal	Master List – Appeals	DA 18-0638
OCOP	Master List - Opposing counsel/Opposing party	Timothy C. Fox Kirsten Pabst Karen P. Kane

## CERTIFICATE OF SERVICE

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders-Withdrawal of Counsel to the following on 03-17-2019:

Kirsten H. Pabst (Prosecutor)  
200 W. Broadway  
Missoula MT 59802  
Representing: State of Montana  
Service Method: eService

Chad M. Wright (Attorney)  
P.O. Box 200147  
Helena MT 59620-0147  
Representing: N. L. W.  
Service Method: eService

Shannon Colleen Hathaway (Attorney)  
521 N. Orange  
Missoula MT 59802  
Representing: C. W.-S.  
Service Method: eService

Kathryn Fey Schulz (Prosecutor)  
215 North Sanders  
P.O. Box 201401  
Helena MT 59620-1401  
Representing: State of Montana  
Service Method: eService

N. L. W.  
Service Method: E-mail Delivery  
E-mail Address: watzkefamily0406@gmail.com

Electronically Signed By: Gregory Dee Birdsong  
Dated: 03-17-2019