IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0075

IN THE MATTERS OF

M.T. and L.T.,

A Youth in Need of Care

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Second Judicial District, Silver Bow County, the Honorable Robert Whelan, Presiding.

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1. Whether the District Court erred when it terminated Mother's parental rights in the absence of a conclusive tribal determination regarding the children's status as Indian children in the United Keetoowah Band of Cherokee Indians?
2. Whether the Department engaged in reasonable efforts to reunite Mother with her children?
3. Whether the District Court abused its discretion when it found that continuation of the parent-child relationship between Mother and her children would likely result in continued abuse or neglect.

STATEMENT OF THE CASE AND FACTS

C.T. (Mother) appeals the order from the Second Judicial District Court (District Court) terminating her parental rights to M.T. and L.T. (D.C. Doc. 119.[1]) The Department of Health and Human Services, Child and Family Services Division (Department) became involved with Mother and her daughter, M.T., due to concerns of drug use by both parents and domestic violence perpetrated the birthfather, G.M. (Father). (D.C. Docs. 1 and 2.)

[1] Citations to the District Court record will be to *In re M.T.*, Cause No. DN 20-0075 unless otherwise noted.

The Department filed a *Petition for Emergency Protective Services (EPS), Adjudication as Youth in Need of Care (YINC) and Temporary Legal Custody (TLC)* on July 15, 2016. (D.C. Doc. 1.) The accompanying affidavit reported that there was no reason to believe that ICWA applied to the matter. (D.C. Doc. 2.) The District Court issued an *Order to Show Cause, Order Granting EPS, and Notice of Show Cause.* (D.C. Doc. 3.) Prior to the Show Cause, the maternal grandmother, S.T., moved to intervene in the proceeding. (D.C. Docs. 11 and 12.) On August 10, 2016, the District Court held a hearing, originally set for the Show Cause but which was continued as requested by Father, on the intervention motion; however, there neither parent or their attorneys were present. (D.C. Doc. 13.) The District Court permitted the grandmother to intervene.[2] (D.C. Doc. 14.)

On August 17, 2016, the District Court held the Show Cause hearing. Mother was present and stipulated to the relief requested by the Department. (D.C. Doc. 16.) The District Court adjudicated M.T. as a youth in need of care and granted the Department TLC for six months. (D.C. Doc. 20.) The court made no finding regarding the application of ICWA.

[2] Mother initially objected to grandmother, S.T.'s, intervention (D.C. Doc. 16); however, she later withdrew that objection. (D.C. Doc. 22.)

On September 21, 2016, the District Court held a hearing regarding the parents' treatment plans. (D.C. Doc. 23.) Mother was present and signed the treatment plan, which the District Court approved. The treatment plan included tasks related to mental health, chemical dependency, parenting/visitation, housing, and contact with the Department. (D.C. Doc. 25.)

In December 2016 the Department sent mother a letter highlighting the areas she was doing well on, as well as notifying her of the issues still needing to be addressed. (D.C. Doc. 38, Exhibit J.) Mother needed to establish 90 days of sobriety before she could participate in the psychological assessment. Additionally, she needed to provide the Department with an updated phone number. (D.C. Doc. 38, Exhibit J.)

On January 31, 2017, the Department filed to extend TLC. (D.C. Doc. 37.) The *Petition to Extend TLC* and accompanying affidavit noted that Mother had been cooperative with the Department, was making efforts to follow the recommendations of treatment providers, and needed additional time to complete her treatment plan. (D.C. Doc. 38.) Mother was living with her mother but looking for independent housing. She had completed a mental health assessment and was under the care of a LCSW/LAC for counseling services, in which she was working on domestic violence issues,

mental health, and addiction. (D.C. Doc. 38, Exhibits A, C, and D; D.C. Doc. 62.) Her therapist reported that she was prompt, engaged, and open. (D.C. Doc. 38, Exhibit D.)

At the time of the extension request, Mother had been evaluated by the SMART program, which recommended outpatient therapy. (D.C. Doc. 38, Exhibit C.) Mother had some positive UAs for methamphetamine and THC earlier in the case, but had been negative since December 6, 2017. (D.C. Doc. 38.) Mother was having regular visits with M.T., albeit only for two hours a week, and always brought health snacks, was appropriate, and focused on the child. (D.C. Doc 38, Exhibit B.) The Department intended to move to unsupervised visitation in January 2017. (D.C. Doc 38, Exhibit J.) Additionally, Mother was pregnant and receiving prenatal care in the community. (D.C. Doc. 38, Exhibits A and C.)

After multiple continuance, a hearing on the *Petition to Extend* was held on April 12, 2017. (D.C. Doc. 47.) Mother was present and stipulated to the extension of TLC for another six months. (D.C. Doc. 47.) Mother and M.T. had been reunited under an in-home safety plan in February 2017. (D.C. Doc. 62.) The District Court extended TLC for another six months. (D.C. Doc. 48.)

During the early months of 2017, Mother made significant progress. M.T. was returned to Mother's care and Mother completed the Circle of Security parenting class. (D.C. Doc. 62.) Mother successfully completed counseling and outpatient therapy in April 2017 and her therapist recommended discharge from those services. (D.C. Doc. 62, Exhibit A.) Additionally, Mother developed a relapse plan and demonstrated sobriety.

On May 24, 2017, the Department filed a petition to terminate Father's parental rights to M.T. for abandonment and failure to complete his treatment plan. (D.C. Doc. 50.) The Guardian Ad Litem (GAL) supported the termination of Father's rights. (D.C. Doc. 56.) Mother filed a *Notice of No Objection to Petition for Termination of Birth Father's Parental Rights.* (D.C. Doc. 57.) On June 1, 2017, Mother gave birth to L.T. (DA 20-0076, D.C. Doc. 1.) L.T. has the same birthfather as M.T. (DA 20-0076, D.C. Doc. 1.) On June 26, 2017, the District Court terminated Father's parental rights to M.T. (D.C. Docs. 58, 59.)

On August 1, 2017, a little over a year after the initial removal, the Department moved to dismiss the case. (D.C. Doc. 61.) Child Protection Specialist (CPS) Borchert noted that Mother and M.T. had been successfully reunited and there were no further safety concerns. (D.C. Doc. 62.) The

District Court granted the request and issued an *Order Dismissing TLC* on August 4, 2017. (D.C. Doc. 63.)

In January 2018, Mother experienced a relapse. (D.C. Doc. 65.) On January 19, 2018, the Department filed a *Petition for EPS, Adjudication of Child as YINC, and TLC* for both M.T. and L.T., citing concerns that Mother had relapsed on methamphetamine. (D.C. Doc. 64.) The District Court issued an *Order to Show Cause, Granting EPS, and Notice of Show Cause Hearing*. (D.C. Doc. 66.) Mother stipulated to the relief requested and the District Court adjudicated the children as YINC and granted the Department TLC for six months. (D.C. Doc. 72.)

In March 2018, Mother completed a chemical dependency evaluation. (D.C. Doc. 78.) In early April 2018, Mother expressed interest in going to the Montana Chemical Dependency Center (MCDC), but then expressed hesitancy after she was hired in a new job. (D.C. Doc. 78.)

On April 4, 2018, the District Court held a hearing regarding mother's treatment plans.[3] (D.C. Doc. 74.) Mother was present at the hearing and did not object to the treatment plan. (D.C. Doc. 74) The treatment plan included the following tasks:

[3] Birth father was not offered a treatment plan and his rights were subsequently terminated. (DA 20-0076 D.C. Docs 15, 16, 29.)

1. Safe Housing: Mother will obtain safe, stable, and substance free housing. Mother will keep CPS informed of housing and phone number. Mother will not allow unsafe individuals into the home. Mother will allow scheduled and unscheduled home visits.

2. Communication with the Department: Mother will have weekly contact with the CPS. Mother will return phone calls, sign releases, discuss barriers, and inform of any contact with law enforcement.

3. Parenting and Visitation: Mother will complete the Circle of Security class if requested and demonstrate what she has learned. Mother will complete the Safe Care class if requested and demonstrate what she has learned. Mother will follow the recommendations of providers and sign all releases. Mother will have supervised visitation. Mother will participate with an in-home safety plan and allow all support persons into the home.

4. Chemical Dependency: Mother will have a chemical dependency evaluation and follow recommendations. Mother will engage in treatment to maintain sobriety and attend 1 weekly group and 1 individual sessions. Mother will participate in random UA program.

5. Mental Health: Mother will have a mental health assessment and follow recommendations. Mother will engage in individual therapy. After three months of sobriety, Mother will obtain a psychological/parenting assessment. (D.C. Doc. 75.)

On August 23, 2018, the Department filed a *Petition to Extend TLC.* (D.C. 77.) The following week, the District Court held the hearing on the Department's *Petition to Extend TLC.* (D.C. Doc. 81.) Mother was not

present as she had enrolled at MCDC on August 21, 2018. (D.C. Doc. 87.). The children were placed with the maternal grandmother at this time. (August 29, 2018 Hearing Transcript at 6:19-21.) The District Court issued its order extending TLC until March 2019. (D.C. Doc. 84.)

On September 14, 2018, Mother left MCDC after an incident where another patient gained access to Mother's private medical information and harassed her about it. (D.C. Doc. 87; August 8, 2019 Hearing Transcript (hereinafter 8/8/19 Hr.) at 97:1-5.) Mother struggled with her addiction during this time but reported the relapse to the Department and her chemical dependency counselor and expressed the desire to stop abusing drugs. (D.C. Doc. 87.) Mother also took steps to support her efforts at sobriety including deleting the contact information of drug dealers from her phone, attended 12 step meeting, meeting with Action Inc. to get assistance with housing, and filling out paperwork for a mother/child facility. (D.C. Doc. 87, Exhibit A.)

Additionally, in late September 2018, the children were removed from the placement at the maternal grandmother's home. (D.C. Doc. 87.) During an altercation between the grandmother and her son, Mother acted protectively and removed the children from the residence. Mother brought the children to the Department for assistance. (D.C. Doc. 87.)

Mother was actively seeking help for her substance use disorder in the fall of 2018. Mother was engaged in the SMART program's services, attending multiple meetings a week and individual sessions. (8/9/18 Hr. at 59:1-13.) Mother had a second chemical dependency evaluation in late November or early December of 2018, which recommended outpatient treatment. (8/9/18 Hr. at 93:14-20.) Mother asked to go to inpatient; however, because Butte did not have a detox center and she enrolled as a patient at MCDC in December 2018. (93:20-21.) Mother ultimately left MCDC after 18 days after deciding that she would be more successful outside of that facility. (94:11-13). Mother moved back in with her mother at that time; however, she continued to maintain her wish to go to a mother/child facility and expressed this desire at the Foster Care Review Committee on January 7,2019. (D.C. Doc. 87; Respondent's Exhibit B (8/9/19 Hr. at 115:1).) That same day, the Department informed Mother that they intended to terminate her rights. (8/9/19 Hr. at 116:8-24; Respondent's Exhibit B.)

Mother began providing consistently clean UAs in January 2019. (8/9/19 Hr. at 21:24-25) The Department decided to stop providing UAs to Mother after it moved for termination. (8/9/19 Hr. at 47- 48; 48:6-7.) At the termination hearing, CPS Dale did not know how many UAs Mother had

provided or for what time frame Mother provided negative UAs. (8/9/19 Hr. at 47:14-22.)

Although Mother left MCDC, she remained committed to her sobriety. Mother sought out the assistance of a mental health counselor, Karen Reynolds, LCSW, on her own. (8/9/19 Hr. at 65:10-14; 94: 24-25.) Mother attended multiple session each week with Karen Reynolds from January 7, 2019 until the time of the termination hearing. (8/9/19 Hr. at 65:5.) Mother was making good progress on addressing her emotional health, was under the care of a physician for medication management to address her PTSD and anxiety, and Reynolds believed Mother's prognosis was good. (8/8/19 Hr. at 73:10-14; 76:14-21.)

However, communications between Karen Reynolds and the Department were complicated due to a perceived issue with the release of information executed by Mother. (8/9/19 Hr. at 67-69.) During Mother's first appointment in January 2019, Karen Reynolds called the Department and tried to speak with CPS Dale and CPS Supervisor Kara Richardson, while Mother was present in her office. (8/9/19 Hr. at 70:2-12.) Reynolds left a voicemail indicating that she had agreed to work with Mother and requested a return call to coordinate services. (8/9/19 Hr. at 68:4-17; 70:2-12.) No one from the Department ever returned Karen Reynolds' call to

coordinate services. Instead, CPS Dale sent a letter months later in March. (8/9/19 Hr. at 68:18-25.) Mother signed a release for Karen Reynolds to discuss her care with the Department; however, when Mother brought the release to the Department,[4] she was informed that she could no longer see Karen Reynolds. (8/9/19 Hr. at 67:3-5;81:4; 87:3-8; 107:2-9.) Adding to this confusion, days later Reynolds received confirmation that she could work with Mother. (8/9/19 Hr. at 107:2-9.)

Mother also continued receiving substance use treatment from the SMART program and Roxanne Reynolds, LAC became her primary counselor. Mother began seeing Roxanne December 2018 and was still under her care at the time of the termination hearing. (8/9/19 Hr. at 56:15-17.) In addition to the individual counseling with Roxanne Reynolds, Mother had weekly peer support through the SMART program and attended weekly group sessions. (8/9/19 Hr. at 57-58; Respondent's Exhibit B.) Mother also attended an NA meeting each evening and a supplemental AA

[4] There is great confusion in the record concerning releases and it is unclear who told Mother that she needed to bring the release to the Department. Typically, a parent must sign a release authorizing a provider (i.e. a therapist or LAC) to communicate with the Department about the parent's treatment. The release is generally provided by the treating professional, signed by the parent, and retained by the provider in their office. Here, however, at least some of the individuals believed the Department needed to either sign the releases or hold on to the releases.

meeting during the day when she felt she needed extra support. (Respondent's Exhibit B.). Mother's LAC testified that Mother was actively participating in her treatment and had "gone above and beyond" in her efforts to address her addiction and maintain her sobriety. (8/9/19 Hr. at 57:17-25; 61:6-10.) Mother's decision to leave MCDC did not alarm Reynolds, who explained that many people go to MCDC multiple times and that a 30-day stay at the facility is not a guarantee for success because addiction is an "ongoing lifelong process." (8/9/19 Hr. at 62: 4-19.)

On January 13, 2019, the children's placement was changed from a foster placement in Butte to a kinship placement in Havre, MT. (8/9/19 Hr. at 41:12-15.) Mother was not notified of the move until the children had left Butte and was not given an opportunity to see them before the transition. (8/9/19 Hr. at 100:1-9.) Mother was provided with a $40 travel voucher, but this only covered a portion of the 500-mile round trip. (8/9/19 Hr. at 100:25-1001:1.) Mother drove to Havre for every visitation except for two visits that she was unable to make due to weather conditions. (8/9/19 Hr. at 100:10-14.) The children were moved to this placement as the Department believed it would be a concurrent, adoptive placement; however, it was later learned that the placement could not be licensed due to their beliefs around vaccinations and the placement broke down. (D.C. Doc. 90.)

On February 6, 2019, the Department filed a *Petition for Permanent Legal Custody, Termination of Parental Rights with Right to Consent to Adoption and Request for Hearing (Birth Mother)* (hereinafter Termination Petition.) (D.C. Doc. 86.) While the GAL initially supported the termination petition, she amended her position and no longer supported termination. (D.C. Docs. 89, 90.) The GAL pointed to the fact that Mother had been seeing her therapist 1-2 times a week since January, was sober, working with her LAC, and attending group meetings regularly. (D.C. Doc. 90.) The GAL also noted that she "has observed [Mother] parenting, and she really is a very good mother when she is sober." (D.C. Doc 90.) The GAL further shared that the children's former foster mother believed that, "[i]f [Mother] can get past her addiction, she is an amazing mom." (D.C. Doc. 90.) Finally, the GAL noted that Mother had been accepted into a mother/child facility and that while CPS Dale did not agree with the placement, the Family Drug Court had staffed the case and supported the children and Mother going to the facility. (D.C. Doc. 90.)

The GAL attached a January 21, 2019 letter from Rimrock that established that Mother had interviewed for the mother/child facility in the fall of 2018 and had been accepted. (D.C. Doc. 90, Exhibit A.) However, the letter noted that CPS Dale "was not in agreement to reunify you with your

children at that time" and therefore Mother was not a qualifying candidate for the program. The letter noted, however, that Mother would remain an appropriate candidate if the children were returned to her care.

The GAL also attached a letter from Karen Reynolds, mother's therapist. (D.C. Doc. 90, Exhibit B.) The letter confirms that Mother signed releases for CPS Dale and CPSS Richardson and that Reynolds requested a meeting to coordinate services, which was never acknowledged or responded to by the Department. (D.C. Doc. 90, Exhibit B.) The letter also confirmed Mother's regular attendance at sessions, as well as her engagement and active participation. At the urging of the GAL, the Department agreed to dismiss the termination petition and for Mother's case to transfer to the Butte Family Drug Court. (D.C. Doc. 92.) The District Court agreed to the transfer and Mother was accepted into the Butte Family Drug Court. (D.C. Docs. 95, 96.)

In April 2019, Mother enrolled in Willow's Way, a residential treatment program for mothers and their children in Billings. (D.C. Doc. 98.) The children joined her shortly thereafter. While at Willow's Way, Mother had a mental health evaluation, which diagnosed her with anxiety, depression, and PTSD. (8/9/19 Hr. at 102:12-29.) Five weeks into her stay at Willow's Way, during a conversation with fellow program participants

about why they were in the program, Mother articulated that she "there for her children." (8/9/19 Hr. at 103:18.) A peer confronted her, accusing her of not taking it seriously and that she would end up relapsing. (8/9/19 Hr. at 103:20-22.) Mother became upset and told the participant that she did not know her and should not be speaking for her. (8/9/19 Hr. at 103:23-24.) Mother went to her room and asked for time to collect herself before going to her scheduled individual session but was informed that she either needed to go to the session immediately or should leave. (8/9/19 Hr. at 104:1-5.) Mother requested time to calm down but was told to pack her bags. (8/9/19 Hr. at 104: 2-5.) The Department did not allow Mother to have the children placed with her in Butte and she did not see them again. (8/9/19 Hr. at 104:6-14.) The case was then transferred out of the Family Drug Treatment Court. (D.C. Doc. 102.)

Upon returning to Butte, Mother immediately resumed services with her therapist, Karen Reynolds, MSW, LCSW, and her substance use counselor, Roxanne Reynolds, LAC. (8/9/19 Hr. at 104:19-24.) She returned to her mother's home, maintained her sobriety, and remained committed to her treatment program including participating in daily NA and AA, peer support, and medication management. (8/9/19 Hr. at 56-57, 73:10-14;

104:11-24; Exhibit B) The Department had stopped providing services to Mother at this point. (8/9/19 Hr. at 105:1-6.)

On June 6, 2019, the Department filed a renew *Petition for Permanent Legal Custody, Termination of Parental Rights with Right to Consent to Adoption, and Request for Hearing* (Birth Mother). (D.C. Doc. 105.) The basis for termination was § 41-3-609(1)(f), MCA. The Department filed a subsequent request for a continuance, citing the need for additional time to serve Mother by publication.[5] (D.C. Doc. 113.)

In the days preceding the termination hearing, the question of whether the Indian Child Welfare Act (ICWA) applied to the case arose. The maternal grandmother called Karen Reynold and indicated that Mother's grandfather may have been a member of a tribe. (8/9/19 Hr. at 26:15-25.) CPS Dale later testified that it was the "Cheyenne Tribe." (8/9/19 Hr. at 26:25.) This was the first time that the Department believed that there was reason to know that ICWA may apply. (8/9/19 Hr. at 27:1-7.) The Department contacted the Northern Cheyenne Tribe, which sent a letter

[5] The request for service by publication did not indicate why Mother could not be personally served with the termination petition or the Department's prior unsuccessful attempts to serve Mother. Additionally, there is no subsequent filing showing that Mother was ever served, either personally or through publication. Nonetheless, Mother was present at the termination hearing and prepared a robust defense, therefore she does not raise this issue on appeal.

indicating that the children were not listed on the Tribe's enrollment data. (8/9/19 Hr. at 28, Petitioner's Exhibit 1.)

The Termination Hearing was held on August 8, 2019 and the District Court heard testimony from CPS Dale, Karen Reynolds, Roxanne Reynolds, and Mother. (D.C. Doc. 116.) During her testimony, Mother stated that she was not associated with the Northern Cheyenne Tribe, but that she believed she may be Cherokee. (8/9/19 Hr. at 112:1-9.) Following this testimony, the District Court took the matter under advisement to clarify the application of the Indian Child Welfare Act. The Department subsequently sent requests for verification to the Cherokee Nation of Tahlequah, OK; the Eastern Band Cherokee of Cherokee, NC, and the Catawaba Indian Nation of Rock Hill, SC. (D.C. Doc. 117, Exhibits A, B, C, D.) The Department did not send a request for verification to the United Keetoowah Band of Cherokee Indians in Tahlequah, OK.

On November 14, 2019 the Department filed an *Affidavit of Department Child Protection Specialist Update to the Court* indicating that it had sent the request for verifications to two of the three federally recognized Cherokee Tribes, as well as the Catawaba Indian Nation of Rock Hill. (D.C. Doc. 117, Exhibits A, B, and C.) The Eastern Band of Cherokee responded that the children were not eligible. (D.C. Doc. 117, Exhibit A.)

Similarly, the Catawba Indian Nation, which is not affiliated with the Cherokee Tribes, responded that the children were not members. (D.C. Doc. 117, Exhibit B.) The Cherokee Nation initially responded that it needed additional information on the birthfather, which the Department provided. (D.C. Doc. 117, Exhibits C and D.) The Cherokee Nation subsequently concluded that the children were not Indian Children in relation to its tribe. (D.C. Doc. 118, Exhibit A.) Relying on this information, the Department concluded that the ICWA did not apply to Mother's children. (D.C. Doc. 118.)

On January 9, 2020, the District Court issued its *Findings of Fact, Conclusions of Law, and Order Terminating Parental Rights Re: Birth Mother* (Termination Order). (D.C. Doc. 119.) The Court found that ICWA did not apply to the cases. (D.C. Doc. 119) The Court further found that the children had been adjudicated as youths in need of care, that Mother had failed to successfully complete her treatment plan, and that continuation of the parent child legal relationship would likely result in continued abuse or neglect. (D.C. Doc. 119.) Mother filed a timely Notice of Appeal. (D.C. Doc. 104.)

Supplemental facts are discussed below as necessary.

SUMMARY OF THE ARGUMENTS

The District Court erred when it found that the ICWA did not apply prior to seeking verification from the United Keetoowah Band of Cherokee Indians in Tahlequah, OK. The Department only sought verification from two of the three federally recognized Cherokee Tribes. The District Court did not comply with ICWA when it found that the children were not Indian children as defined by ICWA without a conclusive decision from the United Keetoowah Band of Cherokee Indians. Proceeding to termination without a conclusive determination from the tribe on the children's ICWA status was clear error.

The Department violated Mother's fundamental right to parent and Montana statutory law when it stopped providing reunification services prior to the termination of Mother's parental rights and without a judicial determination that those services could end. The failure to continue to provide Mother with reasonable efforts throughout the case, but particularly after filing the termination petition, is directly related to the erroneous conclusion that continuation of the parent child legal relationship would likely result in abuse or neglect.

The District Court erred when it concluded that continuation of the parent-child relationship between Mother and her children would likely

result in continued abuse or neglect. Mother had addressed the primary reasons leading to the removal of her children. There was substantial evidence presented establishing that Mother had made significant action towards maintaining her sobriety for the long term, was under the treatment of a mental health therapist and an addiction counselor, and had been sober for eight months. Moreover, the evidence presented established that Mother was an excellent parent when her addiction was being treated and she was in recovery.

STANDARD OF REVIEW

This Court reviews a district court's order to terminate parental rights for an abuse of discretion. *In re R.J.F.*, 2019 MT 113, ¶ 20, 395 Mont. 454, 443 P. 3d 387; *In re A.S.*, 2016 MT 156, ¶ 22, 384 Mont. 41, 373 P.3d 848. The Department must establish, by clear and convincing evidence, the statutory criteria for termination. *In re R.J.F.*, ¶ 20. In cases involving the termination of parental rights, "clear and convincing evidence is the requirement that a preponderance of the evidence be definite, clear, and convincing." *In re R.J.F.*, ¶ *20 (citing In re K.L.*,2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691.)

A district court has abused its discretion if the underlying elements were established by findings of fact that were clearly erroneous or by

conclusions of law were incorrect. *In re R.J.F.*, ¶ 20. 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 the definite and firm conviction that a mistake has been made. *In re R.J.F.*, ¶ 20; *In re A.A.*, 2005 MT 119, ¶ 16, 327 Mont. 127, 112 P.3d 993.

A proceeding governed by ICWA is subject to heightened standards of proof. Under ICWA, if termination of a parent's rights is sought, then the court must be "satisfied by proof beyond a reasonable doubt" that the termination criteria has been met. 25 U.S.C. § 1912(f). A proceeding governed by ICWA may be invalidated upon proof that any provision of sections 1911, 1912, or 1913 of the Act has been violated. 25 U.S.C. § 1914.

ARGUMENT

I. THE DEPARTMENT FAILED TO PROPERLY VERIFY THE CHILDREN'S ICWA STATUS WITH ALL TRIBES IN WHICH THERE WAS A REASON TO KNOW THE CHILD MAY BE ENROLLED OR ENROLLABLE.

The District Court did not comply with ICWA in making its determination that M.T. and L.T. were not Indian children as defined by ICWA. The Department did not seek verification from the United Keetoowah Band of Cherokee Indians regarding the children status as Indian children. Consequently, the District Court failed to address the threshold

question of whether the United Keetoowah Band of Cherokee Indians had conclusively decided whether the children were Indian children.

ICWA applies to child-custody proceedings involving an "Indian child." 25 U.S.C. § 1912; *In re L.D.*, ¶ 12. A district court must address two threshold questions: "(1) whether the court has reason to believe the subject child may be an 'Indian child' and (2) whether an Indian tribe has conclusively determined that the child is a member or eligible for tribal membership." *In re L.D.*, ¶ 14 (citing *In re A.G.*, 2005 MT 81, ¶¶ 14-17, 326 Mont. 403, 109 P.3d 756; *In re Adoption of Riffle*, 273 Mont. 237, 242, 902 P.2d 542, 545 (1995);

ICWA defines an "Indian child" as a person who is unmarried, under the age of eighteen, and either (a) a member of an Indian Tribe or (b) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4). The determination of whether a child is an "Indian child" under ICWA represents a threshold inquiry that is *solely* determined by an Indian child's Tribe. *In re L.D.*, ¶ 14; *In re A.G.*, ¶ 13; 25 C.F.R. 23.108(b)(a state "court may not substitute its own determination regarding a child's membership...[or]... eligibility.")

When the Department has reason to know that the child may be an Indian child, it must seek verification from the child's tribe. *In re L.D.*, 2018

MT 60, ¶ 13, 391 Mont. 33, 414 P.3d 768. It is an abuse of discretion for a district court to proceed to termination "when a court has reason to believe that a child may be an Indian child without a conclusive determination for of tribal membership or eligibility." *In re L.D.*, ¶ 14. The district court must:

> (1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with *all of the Tribes of which there is reason to know the child may be a member (or eligible for membership)*, to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); **and**
>
> (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child' in this part.

25 CFR § 23.107(b)(1), (2) (emphasis added).

The Department must seek verification and serve notice of the child-custody proceeding on the designated agent of the Tribe. 25 U.S.C. § 1912; § 23.12 C.F.R. The designated agent's name and address are published in the Federal Register. § 23.12 C.F.R. The 2019 version also contains a fax number and email address. 84 Fed. Reg. 20387 (See https://www.federalregister.gov/documents/2019/05/09/2019-09611/indian-child-welfare-act-designated-tribal-agents-for-service-of-notice.) Once the individual tribe determines whether the child is an Indian child in their tribe, the determination must then be documented and entered into the record. 25

CFR § 23.107(b)(2). Until the determination is made on the record, the district court must treat the proceeding as if ICWA applies. 25 CFR § 23.107(b)(2); 80 Fed. Reg. 10146, 10152 (2015); 81 Fed. Reg. 38777, 38803 (2016); *In re A.G.*, ¶¶ 13-14.

Here, the District Court abused its discretion when it failed to address the threshold question regarding the children's status as an Indian child in the United Keetoowah Tribe of Cherokee Indians. There are three, federally recognized Cherokee Tribes: (1) the Eastern Band of Cherokee Indians, (2) the Cherokee Nation, and (3) the United Keetoowah Band of Cherokee Indians in Oklahoma. 84 Fed. Reg. 20387, 20407, 20409 (2019). The Department sent notices to two of the three Cherokee tribes -- the Eastern Band of Cherokee Indians, P.O. Box 666, Cherokee, NC and the Cherokee Nation, P.O. Box 948, Tahlequah, OK. The Department failed to seek verification of the children's status from the third Cherokee tribe, the United Keetoowah Band of Cherokee Indians, instead sending a notice to an unrelated tribe, the Catawba Indian Nation of South Carolina.

The Department failed to properly "actively investigate and ultimately make formal inquiry with the [United Keetoowah Band of Cherokee Indians] for a conclusive determination" of whether the children were Indian children. *In re L.D.*, ¶ 15. There is no evidence on the record that the

Department ever contacted the United Keetoowah Band of Cherokee Indians. The Department did not file with the District Court either an original or a copy of the notice or a return receipt or other proof of service showing it had provided notice to the United Keetoowah Band of Cherokee Indians. Similarly, the record is void of any evidence that the Department "ever sought or received a conclusive tribal determination" that M.T. and L.T. were or were not eligible for tribal membership. *In re L.D.*, ¶ 15. Without such a determination, the District Court was obligated to continue to treat the case as if ICWA applied until it was determined that the children were not Indian children. 81 Fed. Reg. 38777, 38803(2016), *In re A.G.*, ¶¶ 13-14.

The District Court failed to properly address the threshold question of whether M.T. and L.T. were Indian children. This Court should reverse the District Court's termination of Mother's parental right and remand for a determination of whether M.T. and L.T. are Indian children. If the children are determined to be Indian children, the District Court should apply the applicable federal standards pursuant to ICWA. Mother further alleges violations of her fundamental right to parent under Montana law as detailed below.

II. THE DISTRICT COURT VIOLATED MOTHER'S FUNDAMENTAL RIGHT TO PARENT WHEN IT TERMINATED HER PARENTAL RIGHTS IN THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE THAT SHE WAS UNLIKELY TO CHANGE.

A "natural 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 the proceedings for the termination of parental rights." *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282 (citing *In re B.N.Y.*, 2003 MT 241, ¶ 21, 317 Mont. 291, 77 P.3d 189). Because the procedures to terminate an individual's right to parent his or her child implicates a fundamental liberty interest, the procedures are protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution which guarantees that those procedures are fundamentally fair. *In re C.J.*, ¶ 26; U.S. Const. amend. XIV.

A district court may order the termination of the parent-child legal relationship if there is clear and convincing evidence that the child was adjudicated a YINC, the parent failed to comply with an appropriate treatment plan, and the condition or conduct that rendered the parent unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA. The State has the burden of proof to demonstrate by clear and convincing evidence that every requirement of the termination statute has been satisfied.

Section 41-3-609(1), MCA; *In re L.M.A.T.*, 2002 MT 163, ¶ 33, 310 Mont. 422, 51 P.3d 504. The clear and convincing standard requires that a preponderance of the evidence is definite, clear and convincing. *In re L.M.A.T.*,¶ 33.

The District Court erred when it terminated Mother's parental rights without clear and convincing evidence that Mother was unlikely to change within a reasonable time. The District Court erred when it found that continuation of the parent child legal relationship between Mother and her children would likely result in continued abuse or neglect.

A. The Department Failed To Provide Reasonable Efforts To The Family.

In a Dependent-Neglect proceeding, the Department must engage in reasonable efforts to reunify the family. Section 41-3-423(1), MCA; *In re R.J.F.*, ¶ 25. In determining whether the Department has made reasonable efforts, the court is to consider the services provided to the family. Section 41-3-423(7), MCA. Reasonable efforts will differ depending on the particular facts of each family. The child protection specialist assigned to the case must tailor their efforts to each family, with the ultimate goal of reuniting the child and parent. Montana law provides a non-exhaustive list of reasonable efforts including the "provision of services to accomplish a case plan and periodic review of the plan to ensure timely progress toward

reunification." Section 41-3-423(1), MCA. This Court has held that reasonable efforts "requires the Department to diligently attempt to contact reluctant parents and engage them with services, . . . requires the development and implementation of voluntary services and/or a treatment plan reasonably designed to address the parent's treatment and other needs precluding the parent from safely parenting, [and] . . . requires more than merely suggesting services to a parent and waiting for the parent to then arrange those services for herself." *In re R.L.*, 2019 MT 267, ¶ 22, 397 Mont. 507, 452 P. 3d 890.

The Department must provide reasonable efforts in most Dependent-Neglect matters. Section 41-3-423(1),(2), MCA. The Department may seek permission to end the provision of reunification services. Section 41-3-423(2), MCA. It is up to the *district court* to make a finding that the Department is no longer required to make reasonable efforts to reunify the family and such a determination may only occur in limited situations. Section 41-3-423(2),(4) MCA. That is, the Department must continue to provide reasonable efforts to the parent until either the parent's rights are terminated or the district court relieves the Department of its obligations. A judicial finding that reunification services are not necessary must be supported by clear and convincing evidence. Section 41-3-423(4), MCA.

Although a determination of reasonable efforts is not a separate requirement for termination, this Court has held it may be a predicate for determining whether a parent's conduct or condition is likely to change. *In re R.J.F.*, ¶ 26; Section 41-3-609(1)(f)(ii), MCA. A district court's "conclusion that a parent is unlikely to change could be called into question if the Department failed to make reasonable efforts to assist the parent." *In re C.M.* 2019 MT 227, ¶ 22, 397 Mont. 275, 449 P.3d 806. Additionally, the presumption in favor of termination when children have been under the physical custody of the state for 15 of the most recent 22 months does not apply when the Department "has not provided the services considered necessary for the safe return of the child to the child's home." Section 41-3-604(1)(b), MCA; *In re R.J.F.*, ¶¶ 40-41.

In this case, the Department did not provide reasonable efforts to reunify Mother with her children. The Department, without permission from the District Court, stopped working with Mother precisely at the time she was making significant progress in addressing the issue that led to the Department's involvement with the family. Mother raised this issue at the termination hearing, both in her testimony and in a letter introduced into evidence. (8/9/19 Hr. at 99: 8-13; Respondent's Exhibit B.)

i. The Children's Placement

The Department's efforts regarding contact between Mother and her children do not rise to the "reasonable efforts" standard. This Court has held that while the Department is not required to make "herculean efforts," it must "adhere to its policies and use its best efforts to place a child in close enough proximity to a parent to arrange visitation in sufficient frequency and duration to make it possible for a parent to establish a bond between herself and her child." *In re R.J.F.*, ¶ 37. Department Policy recognizes that children in foster care have a "fundamental right…to have visits with his/her parents." DPHHS Policy No. 402-5. Frequent visitation "provides an opportunity for the child and parent to reconnect and to maintain the parent/child relationship." DPHHS Policy No. 402-5. Moreover, visits are critical to children's wellbeing while in state custody and "reduce the sense of abandonment that children experience due to placements." DPHHS Policy No. 402-5; *In re R.J.F.* ¶ 30. The Department should strive to provide "consistent and frequent" visits between parents and children as it is "strongly-associated with shorter placement time and faster family reunification." *In re R.J.F.*, ¶ 30 (citing Peg Hess, *Visiting Between Children in Care and their Families,* The National Resource Center for Foster Care & Permanency Planning (2003), https://perma.cc/NJD3-KP4F; *Child Welfare*

for the 21st Century: A Handbook of Practices, Policies, and Programs (Gerald P. Mallon, Peg McCartt Hess, eds., 2005). Best practice for young child is to have *daily* visits with their parent, and if not daily, then multiple visits a week. *In re R.J.F.*, ¶ 31 (emphasis added) (citing Margaret Smariga, *Visitation with Infants and Toddlers in Foster Care* , American Bar Association (2007), https://perma.cc/QYZ4-C5B9; Child and Family Visitation Best Practice Guide (Tex. DPFS 2015), https://perma.cc/Q79J-X87J.) Here, the Department failed to provide reasonable efforts concerning parenting time when it placed the children hundreds of miles away from Mother in Havre, when it removed the children from her care after she left Willow's Way, and when it failed to provide visits after filing for termination.

The Department moved the children hundreds of miles away from Mother without notifying her in advance or allowing a visit prior to the children's move.(8/9/19 Tr. at 37:16-24;42-43; Respondent's Exhibit B) Mother was not able to prepare the children for the transition or discuss it with them in anyway. (8/9/19 Tr. At 100:1-9.) Moving children without notifying the parent and allowing the parent to discuss the placement change with the children contributes to a sense of insecurity experienced by many children and families involved in the foster care system. After the move, the

Department failed to set up visits for three weeks and, even after visits began, only occurred once a week. (Respondent's Exhibit B.) Despite the distance, Mother made all, but two of the visits due to road conditions. (8/9/19 Hr. at 100). Mother's attendance at the long-distance visits does not diminish the fact that the placement significantly limited her ability to see her children regularly. The decision to place the children so far away limited both the frequency of visits and the length of time Mother and the children could spend together.

The Department also put up repeated roadblocks to Mother's admission into a mother/child facility. Mother was accepted into Rimrock's mother/child home in the fall of 2018, yet CPS Dale refused to send the children to the placement. (D.C. Doc. 90.) It was not until the GAL pushed for Mother and the children to be permitted to go to the facility that the Department relented. Had the children been able to go with Mother to the facility when she was first accepted in the fall of 2018 the children may have been spared from the multiple placement changes that occurred in 2019. Mother and the children would have been able to have frequent contact and receive services together as a family. The Department's decision to not permit Mother and the children to move into the facility until months after she was accepted is suspect, especially given the testimony that Mother was

a safe parent when sober and that she would have been supervised and tested in such a facility. The evidence shows that there was no safety concern for the children being placed in the care of Mother in the mother/child facility, but nonetheless the Department opposed the placement.

Even after Mother's decision to leave Willow's Way, the Department could have placed the children with Mother under an in-home safety plan or facilitated frequent visits. (See DPHHS Policy No. 302-7.) Department Policy provides that the court, when determining whether reasonable efforts were made, should consider whether "the child's health or safety [would] have been compromised had the agency attempted to maintain him/her at home." (DPHHS Policy 302-7, page 7.) Here, the children's safety and health would not have been compromised by maintaining them in Mother's home. There was no indication that Mother was abusing substances or engaging in dangerous behaviors at all. Mother returned to her local service providers for substance use treatment and mental health support. She had housing and was actively demonstrating that she was a safe and appropriate caregiver. The Department could have placed the children in her care, or at a minimum, facilitated visits. The Department failed to provide reasonable efforts to the family when it did not allow the children to remain in Mother's

care and provided no visitation after Mother left Willow's Way in May 2019.

ii. Coordination with Service Providers

The lack of coordination by the Department with Mother's service providers constitutes a lack of reasonable efforts. The degree to which the coordination with Mother's therapist, Karen Reynolds, was complicated by the perceived lack of a release is troubling. CPS Dale, as part of reasonable efforts, was tasked with the periodic review of Mother's treatment plan. Part of that involves working with service providers. CPS Dale was aware that Mother was working with the therapist as Reynolds left her a message asking to coordinate services in January. At a minimum, CPS Dale should have returned the message and set up a time to discuss Mother's treatment plan. CPS Dale admitted that the Department should reach out to providers as part of a treatment plan. (8/9/19 Hr. at 51:16-19) CPS Dale never elaborated on what "written documentation" Reynolds needed to provide to the Department to be considered an approved-provider or what was in the March letter she sent Reynolds. The record establishes that Mother executed a release for Karen Reynolds to contact the Department to request information and coordinate services and that Reynolds did attempt to

coordinate service, but that the Department fell short on holding up its obligation to work with service providers. (8/9/19 Hr. at 67; 87:1-8.)

Similarly, Mother's treatment plan required her to complete a psychological/parenting assessment after she established three months of sobriety. (D.C. Doc. 75.) Reynolds testified that she believed Mother would benefit from a neuropsychological assessment. (8/9/19 Hr. at 77:19-24.) Rather than ask the Department social worker whether she had made a referral for the assessment, the State's focus was on whether Mother had "taken steps to do that." (8/9/19 Hr. at 121:5-11.) Mother had clearly established three months of sobriety and her mental health provider recommended a psychological assessment, yet the Department failed to provide the steps necessary for Mother to comply with the treatment plan task.

Finally, the Department's decision to stop provided UAs after the Department filed its petition for termination constituted a lack of reasonable efforts. Both CPS Dale and Mother testified that the Department stopped provided UA opportunities after the Department filed for termination. (48:6-8; 99:8-15.) There was no reason to stop this service, particularly given that Mother had finally established sobriety and the UA could prove it. Moreover, the Department held up as evidence the UAs Mother missed

when she was actively using, but Mother was not similarly given the opportunity to demonstrate her sobriety through negative UAs.

B. The District Court Erred When It Determined that Continuation of the Parent-Child Legal Relationship Would Result in Continued Abuse or Neglect.

There was insufficient evidence to conclude that continuing the relationship between Mother and her children would result in further abuse or neglect. If a district court has found, based on clear and convincing evidence, that a child has been adjudicated a YINC and the child's parent has failed to successfully complete an appropriate treatment plan, the court can only order the parent's rights terminated if it also makes a finding that the conduct or condition that rendered the parent unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f)(ii), MCA. When determining whether the parent is likely to change within a reasonable time, the court 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 parent renders the parent unfit, unable, or unwilling to give the child adequate parental care. Section 41-3-609(2), MCA. The district court must consider whether the parent has an emotional or mental illness or deficiency that renders the parent unable to care for the child, whether there is a history of violent behavior by the parent, whether

the parent has a history of substance abuse, and whether the parent is or will be incarcerated for a long period of time. Section 41-3-609(2), MCA.

An important measure of whether a parent's condition or conduct that made him unfit to parent is unlikely to change in a reasonable amount of time involves a review of the parent's progress in regard to the treatment plan designed to resolve the condition or conduct. *In re C.J.M. and A.J.M.*, 2012 MT 137, ¶ 19, 365 Mont. 298, 280 P.3d 899. There is no set definition for a "reasonable time;" rather, what constitutes a reasonable time is dependent on each family's unique needs. *In re D.F.*, 2007 MT 147, ¶ 43, 337 Mont. 461, 161 P.3d 825. The evidence clearly showed that Mother had made substantial progress in addressing her chemical dependency, which was the primary issue that had led to the Department's involvement with the family. Mother was in compliance with her treatment plan and established that she "was on a path reasonably expected to lead to long-term sobriety and stability." *In re R.J.F., ¶ 44.* At the time of the termination hearing, Mother had at least eight months of sobriety. (8/9/19 Hr. at 45:18-22; 46:5-8.)

Mother introduced evidence establishing that she was actively involved in mental health counseling to support her sobriety. Mother had been under the care of Karen Reynold, MSW, LCSW, since January 2019

and Reynolds testified that Mother actively participated in her appointments. (8/9/19 Hr. at 70:15-24) Karen Reynold's testified that Mother had made progress on her emotional and behavioral mental health and that she had a good prognosis for success if she continued on the trajectory she was on. (8/9/19 Hr. at 76:14-21.) Karen Reynolds did not feel that Mother presented a risk to her children at the time of the termination hearing. (8/9/19 Hr. at 77:1-4.)

Roxanne Reynold's testimony illustrated the substantial changes Mother had made to maintain her sobriety. Roxanne Reynolds, LAC testified that since January 2019 Mother had attended 27 individual sessions and 51 group sessions, noting that Mother was an active participant in those sessions and actively participating in a 12-step program. (8/9/19 Hr. at 57-58.) Roxanne Reynolds also noted that Mother attended multiple support meetings a week, dating back to prior to January 2019, and testified that "[Mother's] been invested in becoming sober for quite some time." (8/9/19 Hr. at 59:17-18.)

Moreover, Reynold's testimony supports the conclusion that Mother was committed to her sobriety even if the various inpatient programs were not good fits for Mother. Reynolds noted that after discharging from the mother/child facility in Billings, Mother immediately sought her services

and maintained her sobriety throughout, demonstrating "a good indication of her ability to move forward in the future maintaining her sobriety." (8/9/19 Hr. at 61:1-5.) Individuals struggling with addiction may go to treatment multiple times, but even a successful 30-day inpatient stay is not a guarantee for success. Rather, as Reynold's testified, parents must work to maintain their sobriety over time and Mother has "gone above and beyond" in her resolve to treat her illness and maintain her sobriety. (8/9/19 Hr. at 61:6-10;62.)

Mother resolved the issues of domestic violence that were present when the children were removed. Mother was no longer in a relationship with the children's father and there was no evidence of continued risk of exposure to domestic violence. Although there was an incident between maternal grandmother and uncle when Mother and the children were in the home, Mother acted protectively and removed the children from the situation. (8/9/19 Hr. at 37.) CPS Dale agreed that Mother demonstrated protective capacity in her handling of the situation and that the Department was not aware of any further domestic violence in the home. (8/9/19 Hr. at 37:1-15.) Mother maintained stable housing and CPS Dale testified that she was aware of Mother's living arrangements. (8/9/19 Hr. at 34:14-20.)

Mother demonstrated safe and appropriate parenting skills. Mother completed the Circle of Security Parenting Course to the Department's satisfaction. CPS Dale described Mother as "one of our better parents" when maintaining her sobriety and noted that Mother was prepared for visits, brought appropriate snacks, and had activities for the children during visits. (8/9/19 Hr. at 38:20-25; 39:16-19.) Both the GAL and the children's foster mother praised Mother's parenting skills. (D.C. Doc. 90 "she really is a very good mother when she is sober"; "if [Mother] can get past her addiction, she is an amazing mom.")

Substantial evidence establishes that Mother had left her violent partner, addressed her chemical dependency, and taken concerted efforts to commit to her sobriety. The District Court erred when it found the Department had presented clear and convincing evidence that continuation of the parent child legal relationship would likely result in abuse or neglect. The evidence clearly shows that Mother had made substantial progress in achieving sobriety and had sustained it for an extended period. She deserved the opportunity to be a family with her children.

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CONCLUSION

For these reasons, Mother respectfully requests this Court reverse the order of the District Court terminating her parental rights and remand for further proceedings.

Respectfully submitted this 29th day of May, 2020.

By: /s/ Kelly Driscoll
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening 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, excluding certificate of service and certificate of compliance.

/s/ Kelly Driscoll
KELLY DRISCOLL

APPENDIX

CERTIFICATE OF SERVICE

I, Kelly M. Driscoll, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-29-2020:

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