

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. DA 20-0217

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IN THE MATTER OF:

T.N.B., A.M.B., AND S.M.B.,

Youths in Need of Care.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Thirteenth Judicial District Court,  
Yellowstone County, The Honorable Mary Jane Knisely, Presiding

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GUARDIAN AD LITEM

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## **STATEMENT OF THE ISSUES**

Did the district court properly exercise its discretion in terminating Appellant/Father's parental rights after correctly concluding that reunification services were unnecessary for Appellant/Father, based upon clear and convincing evidence that Father had subjected his children to chronic, severe neglect, which resulted in serious bodily injury to one child, and significant developmental delays for all the children?

## **STATEMENT OF THE CASE**

On March 14, 2018, the State filed a Petition for Emergency Protective Services, Adjudication as a Youth in Need of Care and Temporary Legal Custody of T.N.B. (Cause No. DN 18-90), S.M.B. (Cause No. DN 18-91), and A.M.B. (Cause No. DN 18-92).<sup>1</sup> (D.C. Docs. 1-2.) T.N.B. was eight months old, S.M.B. was about two-and-a-half years old, and A.M.B. was about one-and-a-half years old. K.T. (Mother) and N.B. (Father) are the natural parents of T.N.B., S.M.B. and A.M.B. (D.C. Doc. 1, in every cause number.) The Department of Public Health

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<sup>1</sup> Although the record is nearly identical in each cause number, the document numbers do not correspond perfectly in each case. The Appellant refers to all documents from DN-18-90 (*In re T.N.B.*), so for the ease of the Court, the State will do the same. For purposes of this appeal, the Court has consolidated the three DN causes of action from the district court under this cause number for Father's appeal. (See April 14, 2020 Order consolidating the three district court cause numbers and separating Mother's and Father's appeals into separate appeal case numbers.)

and Human Services (DPHHS) assumed emergency custody of the children on March 9, 2018, after A.M.B. sustained life-threatening brain injuries that required his immediate transport to Salt Lake City, Utah. (D.C. Doc. 1 in every cause number; 12/6/18-12/7/18 Hearing Transcript [12/6/18 Tr.] at 53.)

The district court held a show cause hearing on March 26, 2018. The parents appeared and did not to contest that probable cause existed requiring the immediate protection and removal of the children. (D.C. Doc. 10.) The court held an adjudicatory hearing on May 21, 2018. Mother and Father appeared with separate counsel and stipulated to the court adjudicating the children as youths in need of care. The court adjudicated the youths as youths in need of care. (D.C. Doc. 15.) The State subsequently filed a Petition for Determination that Preservation or Reunification Services Need Not be Provided for Mother and the children pursuant to Mont. Code Ann. § 41-3-423(2). (D.C. Docs. 16-17.) The State alleged that Mother had committed an aggravated assault against a child. (*Id.*)

The district court held a hearing on this petition on December 6 through December 7, 2018. (12/6/18 Tr.) Following the hearing, the court concluded that, pursuant to Mont. Code Ann. § 41-3-423(2)(c), DPHHS did not need to make efforts to provide preservation or reunification services to Mother because the court found that mother had committed an aggravated assault against A.M.B. (D.C. Doc. 49.)

The State moved to terminate Mother's parental rights to all three children. (D.C. Doc. 52.) On August 12, 2019, the court held a hearing on the termination petition, after which it terminated Mother's parental rights to all three children. (8/12/19 Tr.; D.C. Doc. 76.) Mother appealed, and this Court affirmed the order terminating her parental rights. *See In re the Matter of T.N.B.*, 2020 MT 143N, 400 Mont. 560, 464 P.3d 102.

The State also filed a Petition for Determination that Preservation and Reunification Services Need Not be Provided for Father and the children pursuant to Mont. Code Ann. § 41-3-423(2). (D.C. Docs. 52-53.) On September 9, 2019, the court held a hearing on the State's petition, after which it concluded that, pursuant to Mont. Code Ann. § 41-3-423(2), DPHHS did not need to provide reunification services to Father in an effort to reunite him with the children because Father had committed neglect of one of the children that resulted in serious bodily injury and father had subjected the children to chronic neglect. (D.C. Doc. 98.)

The court held a termination of parental rights hearing on February 7, 2020, after which it terminated Father's parental rights to all three children. (D.C. Doc. 102, attached to Appellant's Br. as App. A.)

## **STATEMENT OF THE FACTS**

Father met Mother in November 2014. They quickly began a serious relationship. Mother immediately got pregnant with S.M.B. A.M.B. was born less than a year later, and T.N.B. was born ten months after A.M.B. (2/7/20 Tr. at 12.) Mother and Father lived together but were never married. (12/6/18 Tr. at 38.)

Prior to Father's relationship to Mother, he was married to another woman and has a son from the marriage who was nine years old. (9/9/19 Tr. at 149.) Father saw his son every other weekend. (*Id.* at 158.)

In 2016, while Mother was pregnant with A.M.B., DPHHS removed S.M.B. from Mother's care while Father was in jail for Partner and Family Member Assault against Mother. DPHHS removed A.M.B. from the parents' care when he was born. (*Id.* at 24.)<sup>2</sup> Father admitted that at the time of the children's removal he had a history of substance abuse. (2/7/20 Tr. at 25.) Father's substance of choice was methamphetamine. Mother's substances of choice were methamphetamine and alcohol. Father and Mother cooperated with DPHHS's intervention, were reunited with the children, and the State dismissed its petition. (12/6/18 Tr. at 38-39.) Father indicated that he had maintained his sobriety prior to A.M.B.'s life-threatening

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<sup>2</sup> Without objection, the district court took judicial notice of the prior dependency and neglect proceedings in DN 16-198 and DN 16-361. (2/7/20 Tr. at 25.)

injuries, but with his knowledge Mother had resumed consuming alcohol. (*Id.* at 39.)

Father generally left for work around 7 a.m. (*Id.* at 21-22.) Father estimated that he worked close to 60 hours a week. (*Id.* at 39.) Mother did not work outside the home and was the children's sole caretaker while Father was at work. (*Id.* at 22-23.) Typically, the girls were awake when Father arrived home from work, but Mother was usually attempting to put A.M.B. in bed or A.M.B. was already in bed. (*Id.*)

When Father arrived home from work on March 7, 2018, Mother had already put A.M.B. to bed. Mother never made the other children go to bed as early as A.M.B. (*Id.* at 24.) Father explained:

I believed that [Mother] treated [A.M.B.] unfairly, that she was quick to get angry with him much more so than with the girls. I believe that [Mother] was dismissive of him and borderline neglectful; and on several occasions, with several arguments, I attempted to leave with him, and she would become violent or threatening, and I also had nowhere to go with [A.M.B.] and no way to care for him while I went to work so it was a very difficult situation.

(*Id.*) When Father arrived home, Mother was drinking wine. (*Id.* at 26.)

Father believed that Mother and the three children were still sleeping when he left for work the morning of March 8, 2018. (*Id.* at 22.) Nothing seemed out of the ordinary. (*Id.* at 27.) Father left work on March 8, 2018, a few minutes after 5 p.m. He called Mother to let her know he was leaving for home. Mother told

Father that she was outside smoking a cigarette. Mother reported that S.M.B. had flipped into A.M.B.'s playpen and was "kicking the snot" out of him. Mother ran inside because A.M.B. was crying. Mother said she picked him up, and A.M.B. immediately fell asleep on her shoulder. (*Id.* at 28.)

Father arrived home about nine minutes later. Mother was standing in the doorway with A.M.B. limp in her arms. Mother was hysterical. Father asked her if she had called 911. She responded no, which Father thought was bizarre. Father took A.M.B. from Mother and instructed her to call 911. Father took A.M.B. into the living room and started performing CPR. Father continued CPR for about 10 minutes, until the paramedics arrived. A.M.B. had been unconscious and not breathing when Father arrived home. (*Id.* at 29.) Medical personnel life-flighted A.M.B. to St. Vincent's Hospital in Billings. (*Id.* at 30.) The rest of the family went to the hospital in the family vehicle. (*Id.*)

At the hospital, Mother was emotionally detached and showed no awareness that her son was gravely injured and might not survive. Rather than expressing concern for A.M.B., Mother expressed concern that her daughters might end up in foster care. (*Id.* at 32-33.)

The weekend before these events, Father had expressed concern to Mother about A.M.B.'s physical appearance. Father was worried that A.M.B. might be malnourished, and his skin was mottled and bruised. Father told Mother he wanted

to take him to the emergency room that night. Mother talked Father out of going to the emergency room, and promised she would schedule A.M.B. for a regular appointment with his physician. (*Id.* at 35-36.) Mother never did so. (*Id.* at 36.)

Dr. Smith is board-certified in pediatrics and radiology. (*Id.* at 7-8.)

Dr. Smith described his credentials, in part, as follows:

I've worked with a number of agencies and government agencies in issues of child abuse and neglect for the last almost 40 years. We started the Iowa child abuse program with regional centers around; I've worked with law enforcement and human resources in about 20 states; I do consult also for the FBI and the Armed Services; I've reviewed approximately a thousand cases of potential child abuse and neglect—not all were child abuse and neglect, some were, some weren't—and have testified approximately 120 times in cases of child abuse and neglect.

I've published approximately 25 peer-reviewed articles, and probably four or five book chapters on the matter of child abuse and neglect, particularly in terms of imaging on child abuse and neglect. I'm considered an expert in head injury, particularly.

(*Id.* at 8-9.)

Dr. Smith explained that on March 8, 2018, A.M.B. sustained severe, life-threatening head injuries, which will most likely result in permanent disability.

(*Id.* at 10.) When A.M.B. arrived at the hospital, the bleeding in his head was severe enough to cause his brain to be displaced from the right side to the left. His cortical vein, one of the big veins that drains the blood from the surface of the brain, was torn. (*Id.*)

A.M.B. suffered from herniation of the temporal lobe of his brain, meaning:

. . . when the brain swells and is displaced by a mass, the brain and brain stem go through several narrow areas from the spinal cord up, and if there is a sufficient brain swelling, the brain actually herniates back down through this area and that causes considerable damage to the tissues of the brain, particularly in [A.M.B.]’s case, the middle or mesial, meaning towards the mid portion of his temporal lobe on the right.

(*Id.* at 11.)

Upon A.M.B. sustaining the head trauma, he would have been symptomatic right away. (*Id.* at 15.) The furthest back in time A.M.B. could have sustained the injury was midday. (*Id.*)

A.M.B. underwent emergency surgery to open his head and take the parietal bone down so the surgeon could see the source of the bleeding and repair it. After the surgeon successfully did so, A.M.B. was emergently transferred to Salt Lake City, Utah, for follow up care. (*Id.* at 11-12.) It is difficult to predict the lifelong impact of A.M.B.’s traumatic brain injury, but Dr. Smith could say with certainty that A.M.B. “will never be the same as he would have been had he not suffered this injury.” (*Id.* at 12.)

The explanation Dr. Smith received for A.M.B.’s life threatening injuries was that his 30-month-old sister had kicked or hit A.M.B. in the head. Dr. Smith explained that a 30-month-old child could not have inflicted these severe injuries upon A.M.B., even if the 30-month-old sibling had struck A.M.B. in the head with

a baseball bat. (*Id.* at 12-13.) The 30-month-old sister striking A.M.B. with a plastic toy could not have caused A.M.B.'s injuries. (*Id.* at 16.)

Also, A.M.B. could not have caused these injuries to himself. The extent of his injuries would have resulted from something like A.M.B. falling several stories, A.M.B. being unrestrained during an auto accident that caused his body to fly and hit something like the dashboard, or a horse kicking A.M.B. in the head. (*Id.* at 15-17.) A.M.B.'s injuries could have resulted from an adult forcefully slamming him into a window frame, an adult kicking or beating A.M.B. in the head, or an adult forcefully banging A.M.B.'s head on a hard object like the floor. (*Id.* at 17.)

A.M.B. had also sustained a relatively fresh fracture to his right arm. There was no history of or explanation for this fracture. The fracture could have occurred at the same time as the head trauma or could have occurred within two weeks of the head trauma. (*Id.* at 13.) It would have been evident to A.M.B.'s primary caretaker that there was an issue with A.M.B.'s arm. For example, dressing A.M.B. would have been painful for him, and would have resulted in A.M.B. being fussy or crying. (*Id.* at 14.)

Father recalled that the weekend before A.M.B.'s head injury, Father had been walking A.M.B. around the floor, when A.M.B. toppled. Father grabbed A.M.B.'s right arm to help him up, and A.M.B. pulled his arm back and yelped. (*Id.* at 36.)

If A.M.B. had not received medical treatment on March 8, 2018, he would have died. (*Id.* at 16.)

Child protection specialist Kasia Harvey went to St. Vincent's hospital on March 8, 2018, and photographed A.M.B.'s injuries before he was transported to Salt Lake City. (Tr. at 85-87; State's Exs. E-1 to E-3.) Harvey then met with the other two children. Both children were very dirty. Their feet were covered in dirt, and they had dirt under their fingernails. Both children wore dirty clothing and both children smelled strongly of urine. S.M.B.'s hair was very matted. (*Id.* at 89.) S.M.B. was two and a half years old but was nonverbal, unable to say simple words. When Harvey spoke to S.M.B., it did not appear that S.M.B. was comprehending anything that Harvey was saying. (*Id.*)

When Harvey spoke with Father, he expressed some ongoing concerns he had about Mother and A.M.B. Mother did not pay much attention to A.M.B., but she did interact with the other two children. Mother primarily kept A.M.B. in his crib or in his playpen. Father had noticed bruising on A.M.B., but thought it was normal, age-appropriate bruising. Father also disclosed that Mother had started consuming alcohol again. Father explained that when Mother got up in the middle of the night to feed their youngest daughter, he awakened to find Mother drinking wine or some other alcoholic beverage. (*Id.* at 94-96.)

When Harvey spoke with Mother, Mother stated that, prior to discovering A.M.B.'s injuries, she had stepped outside to smoke a cigarette. While she was outside, A.M.B. began crying. Mother immediately went inside and observed S.M.B. in A.M.B.'s playpen. Mother said S.M.B. was kicking A.M.B. and hitting him with a toy. Mother picked A.M.B. up to comfort him, and he immediately fell asleep on her shoulder. Mother did not think anything of it until A.M.B. suddenly went limp and stopped breathing. (*Id.* at 96-97.) When Harvey told Mother that it did not seem possible that a two-and-a-half-year-old child could have caused A.M.B.'s traumatic brain injury, Mother responded, "Well, that is what happened. No one is hurting him." (*Id.* at 97.)

Child protection specialist Spela Bertoncelj confirmed the State's prior involvement with the family because of the parents' drug use. After the parents had completed their treatment plans and maintained sobriety for a year, Child and Family Services moved to dismiss its youth in need of care actions. (*Id.* at 99-100.)

On March 8, 2018, Detective McCave of the Yellowstone County Sheriff's Office went to Mother's and Father's residence after learning of A.M.B.'s injuries. (*Id.* at 52.) Detective McCave identified photographs taken at the residence capturing what officers had seen upon their arrival. (*Id.* at 56, 62-63, 67, 69-70; State's Exs. A-1 to A.4, B-1 to B-6, C-1 to C-8, D-1 to D-4) Detective McCave

had observed a playpen in the living room. There were plastic toys inside the playpen. (*Id.* at 57.)

Mother told Detective McCave that when she went out for a cigarette there were not any toys in the playpen. (*Id.* at 58.) Mother speculated to Detective McCave that S.M.B. must have climbed into the playpen with A.M.B. while she was outside smoking. When Mother came inside, S.M.B. was lying down in the playpen thrashing her feet. There was also a plastic walker inside the playpen. (*Id.* at 60.)

Father acknowledged that he and Mother had fights that usually ended in him leaving the house so he would not “be dragged off to jail.” (2/7/20 Tr. at 21.) Father stated that Mother’s anger was always directed at him. Prior to A.M.B.’s traumatic brain injury, he never thought Mother was abusing or neglecting any of the children. He stated that he felt Mother was dismissive of A.M.B. and kept him in his playpen too much of the time, but he never thought he was leaving A.M.B. in a physically dangerous circumstance. (*Id.* at 20-21.)

Father did not believe that prior to March 8, 2018, Mother had ever abused or neglected any of the children. Father stated that Mother was violent and threatening towards him but not towards A.M.B. or the other children. (2/7/20 Tr. at 27.) Father acknowledged that at the time A.M.B. sustained his life-threatening injuries he was aware that Mother had been drinking alcohol again, but Father did

not realize how much Mother was drinking and trying to hide it from him. (*Id.* at 29.)

Father did not testify at the hearing on the State's motion to consider whether it needed to provide reunification services to Father. (*See* 9/9/19 Tr.) At the hearing, pediatrician Dr. Notario explained that she is a doctor at the Billings Clinic Pediatric Complex Care Program. Doctors who work at the Pediatric Complex Care Program care for children with special needs who have multiple medical problems. A.M.B. is one of Dr. Notario's patients. (*Id.* at 9.) Dr. Notario explained that when A.M.B. discharged from the hospital in Salt Lake City, he needed physical therapy, speech therapy, and occupational therapy. A.M.B. now suffers from seizures, so he also sees a neurologist who monitors his seizure medication. A.M.B. also needs eye surgery. (*Id.* at 12.)

Dr. Notario explained that it is difficult to pinpoint the long-term effects of A.M.B.'s traumatic brain injury. He may have lasting physical manifestations such as difficulty moving small muscles, difficulty with executive functioning, and difficulty with coping and judgment. These may be lifelong impairments. Currently, A.M.B. has difficulty with moving the left side of his body, including his hand and foot. He has difficulty swallowing and he has behavioral outbursts. (9/9/20 Tr. at 13.) An Early Childhood Intervention (ECI) specialist evaluated A.M.B.'s delays. (*Id.*; State's Ex. B, admitted at Hearing.) The evaluation,

occurring seven months after A.M.B.'s life-threatening brain injury, showed that A.M.B. is delayed in all aspects of communication. His caregiver will need training to work cooperatively with all of A.M.B.'s medical providers. (*Id.* at 15-16.) Dr. Notario sees A.M.B. every six months. Father has never attended one of A.M.B.'s doctor appointments. (*Id.* at 20.)

Dr. Goodman, a neurosurgeon, is also one of A.M.B.'s physicians. (9/9/19 Tr. at 22-23.) Dr. Goodman explained that A.M.B. suffered permanent damage to the right hemisphere of his brain. There is no way to fix the damage. Doctors may need to remove some islands of bone surrounding A.M.B.'s brain and put in a synthetic implant. Since the implant will not grow with A.M.B., he will need further surgeries to replace the synthetic implant. A.M.B. also has a large soft spot that doctors will need to fix through surgery with a piece of plastic designed to perfectly match the defect. (*Id.* at 29-31.) Dr. Goodman sees A.M.B. every few months. (*Id.* at 38.)

Megan Owen is a therapist in private practice who has been providing therapy to S.M.B. since February 2019. (9/9/19 Tr. at 40-41.) Owen has diagnosed S.M.B. with chronic post-traumatic stress disorder (PTSD) and adjustment disorder with anxiety. Owen acknowledged that the latter diagnosis is common for children who have been removed from their biological parents and placed in foster care.

(*Id.* at 43.) During play therapy sessions, Owen works with S.M.B. on healthy boundaries, forming attachments, and processing trauma. (*Id.* at 42.)

During therapy sessions, Owen has made observations that support a history of past neglect, including that when Owen started working with S.M.B., S.M.B. was four years old but she behaved as if she were 18 months old. S.M.B. was also completely nonverbal and had poor boundaries. (9/9/19 Tr. at 44.) Based upon Owen's work with S.M.B., she believed there was a "good chance" that S.M.B. had been neglected. (*Id.* at 45.) Owen elaborated:

I know that when I first saw her, she experienced symptoms and behaviors that were congruent with somebody who has been neglected. When that neglect and trauma took place in her short life, I wouldn't venture to guess.

(*Id.* at 50.) Owen viewed her role as helping S.M.B. process trauma. (*Id.* at 49.)

S.M.B. needs ongoing therapy and would also benefit from occupational therapy because her gross motor skills are not typical for a four-year-old. From her caretaker, S.M.B. requires nurturing typical for an 18-month-old rather than a four-year-old. (*Id.* at 45, 51.) During the time that Owen has provided therapy to S.M.B., S.M.B. has made progress in her verbal skills. (*Id.* at 46.)

Father has never contacted Owen for a report on S.M.B. (*Id.* at 46.) During part of the summer of 2019, S.M.B.'s therapy sessions occurred right after visits with Father. During these sessions, Owen observed that S.M.B. would not share toys as she would normally, and she was aggressive during play therapy. For

example, S.M.B. would mold up sand, get a play knife, and stab at the sand over and over. (*Id.* at 52.)

Registered nurse Kristin Bonner is a case manager for a program called Kids First that performs medical case management for children in foster care. (9/9/19 Tr. at 55.) On April 16, 2018, Bonner completed a developmental evaluation of S.M.B. (*Id.* at 58.) The evaluation considered five categories of development, including communication, gross motor skills, fine motor skills, problem solving abilities, and personal/social interactions. (*Id.* at 59; State's Ex. D.) Because S.M.B. had apparent deficits in three of the five categories, Bonner referred S.M.B. to ECI for a more complete developmental assessment. (*Id.* at 60.)

S.G. is S.M.B.'s and T.N.B.'s foster mother, who has cared for the children since March 13, 2018. (9/9/19 Tr. at 67.) When S.M.B. came into S.G.'s care, she was not certain the last time S.M.B. had had a bath and her hair was dreadfully matted together. T.N.B. also had matted hair and a bald spot on the back of her head indicative of her spending a lot of time on her back. S.G. found it odd that S.M.B. seemed not to have any emotional connection to her younger sister. It was apparent that S.M.B. was developmentally behind in verbal skills and behavioral norms for a child of her age. S.M.B. was prone to tantrums. (*Id.* at 67-68.)

S.G. immediately observed that S.M.B. did not know how to use a fork or spoon. During her first dinner with S.M.B., it did not seem like S.M.B. was

swallowing enough. When S.G. was getting S.M.B. ready for bed, she realized that S.M.B. had pocketed food from dinner in her cheek area. It was next to impossible for S.G. to get the food out of S.M.B.'s mouth so she could get her teeth brushed. (9/9/19 Tr. at 70.) S.M.B. would hoard food in her pillow or in her coat pockets. S.G. came up with a plan for S.M.B. to have a cup of Cheerios to carry around with her so she knew she always had access to food. (*Id.* at 71.) It took S.G. several months to get S.M.B. to stop hoarding food and/or rushing through eating so she could get more food. (*Id.*) When S.M.B. saw S.G. throw out food that was spoiled or expired, S.M.B. had a meltdown. (*Id.* at 72.)

S.M.B. is now four years old, but her emotional state is closer to a two-year-old's. When S.M.B. feels that everything is out of her control, she screams, cries, throws a fit, lashes out, and hits whoever is in the vicinity. S.G. has found that if she hugs S.M.B. until she calms down, then she can reason with her. (*Id.* at 74.)

S.M.B. also had no sense of proper boundaries. When in public, S.M.B. easily would have left with a stranger. (9/9/19 Tr. at 74.) S.G. described S.M.B.'s observable developmental delays when she first arrived in S.G.'s home:

[S.M.B.] didn't play, she didn't play with dolls, she didn't know anything about like girly things, like hair accessories and shoes and playing dress-up, none of that stuff, she didn't have any of those imaginary play times. And when I would try to set those things up, she had no idea what they were for.

If we were trying to build something with Legos, she would look at it like it was cool and she would stare at it, but that's all she would do.

When I would try to ask her questions like, Can you put your arm through the sleeve? She would just stand there and stare at her shirt or her coat because she had no idea what that meant. And so I'd have to show her what it means to put your arm through the sleeve.

Words, at two and a half she only knew about maybe five words, two were the only—there were only two words that I could clearly make out, and that was pizza and please. And other than that, everything else was just gibberish.

*(Id. at 75-76.)*

When the ECI specialist began working with S.M.B., S.M.B. did not understand basic things such as holding a crayon or identifying herself in the mirror. Since then, S.M.B. has achieved all the goals the ECI specialist established for her, and she is now attending preschool with Head Start. (9/9/19 Tr. at 77-78.) S.M.B. is doing very well in preschool. *(Id. at 79.)*

S.M.B. was not potty trained when S.G. began caring for her. S.G. successfully potty trained S.M.B. before she turned four years old. (9/9/19 Tr. at 91-92.) S.M.B. also experienced nightmares, and she struggled to get to sleep, but S.G. continues to work on resolving these problems. *(Id. at 94-95.)* T.N.B., on the other hand, tended to sleep too much for an eight-month-old, but S.G. has gradually worked on T.N.B.'s sleep schedule. *(Id. at 96-97.)*

W.N. has been A.M.B.'s foster mom since she picked him up in Salt Lake City on May 3, 2018. A.M.B. was about one-and-a-half years old. (9/9/19 Tr. at 101-02.) A.M.B. had a feeding tube, although she could give him things to drink through a straw. A.M.B. only spoke about three words, and he was relearning to

crawl. A.M.B. had never learned to walk prior to his traumatic brain injury.

A.M.B. also suffered from insomnia. (*Id.* at 102.) At the time of W.N.'s testimony,

A.M.B. had just turned three. W.N. reported:

He's doing amazing. He's counting and learning his ABCs and talking up a storm, walking, but he does have orthotics for that. He's in OT and PT currently.

(*Id.* at 103.) A.M.B. is about a year behind developmentally in most areas. Also,

A.M.B. makes gains followed by setbacks. For example, in June he lost all his

words that he had learned, so W.N. started again from ground zero. Like S.M.B.,

A.M.B. has no sense of proper boundaries. He will willingly climb into a stranger's

lap and kiss the stranger. (*Id.* at 104.)

A.M.B. currently sees about five different doctors and regularly attends occupational therapy and physical therapy. Father does not routinely attend these appointments. (9/9/19 Tr. at 107.) Father did attend one doctor appointment with A.M.B. and struggled to keep A.M.B. under control. (*Id.* at 108)

Although Father did not testify at the hearing on whether DPHHS would have to provide reunification services for Father (*see* 9/9/19 Tr. at 165), Amy Maetche, who supervised Father's weekly visits with his children testified on Father's behalf. (*Id.* at 129.) Maetche began supervising those visits on September 14, 2018. The visits were three hours long, one day per week. (*Id.* at 131.) Out of 50 weeks, Father missed seven visits. Maetche believed that Father loved his

children and generally did a good job during the visits. (*Id.* at 135.) But Maetche recognized that the highest form of supervision occurred during Father's visits with the children and her observations only applied to what happened during that supervised time. Outside of her facility, Maetche stated, she was unable to comment on what would happen. (*Id.* at 141.)

Father's mother, L.B., also testified on Father's behalf. (9/9/19 Tr. at 147.) L.B. is a registered nurse in Rockford, Illinois, with a certification in Pediatric Advanced Life support. (*Id.* at 148-49.) L.B. acknowledged that, after spending a week in the family home, she had concerns about how Mother parented A.M.B. because A.M.B. spent most of his time in his crib or in his playpen. L.B. acknowledged that she might have previously referred to A.M.B.'s playpen as his jail cell. (*Id.* at 156.) L.B. never discussed her concerns with Mother because she was a "very confrontive person" who angered easily. (*Id.* at 161.) Instead, L.B. discussed them with her son, so he could address them with his wife. Father later told her that he tried to address her concerns with Mother, but it just ended in an argument. (*Id.*)

L.B. further acknowledged that, as a nurse, if she saw a child who was filthy, with severely matted hair and smelling of urine, she "would think about what was going on." (*Id.* at 157.) L.B. was aware that S.M.B. and A.M.B. had previously been removed from Father's and Mother's care but she was not certain why the

children had been removed. When she asked her son about it, he responded that it was “complicated or something.” (*Id.* at 159.)

Father did testify at the termination of parental rights hearing. When DPHHS’s attorney asked him how he thought A.M.B. had sustained his life-threatening injuries, Father stated, “Now, I think that—that [Mother] probably did it.” (2/7/20 Tr. at 30.) When asked if Father had missed things that should have been red flags for him to act on, Father responded:

No, it’s not fair to say that. I’m not expected to read someone’s mind. I’m not expected to know that someone is going to snap. That is—that is not reasonable.

(*Id.*) He stated that he could not imagine a circumstance in which he would not protect his children. (*Id.* at 17.)

Father testified at the termination hearing that on the day A.M.B. suffered his traumatic brain injury the family’s home smelled of urine because he had emptied the diaper genie into the kitchen garbage before he left for work that morning. (2/7/20 Tr. at 18.) Father explained that because his children are mixed race, their hair is very curly and difficult to manage. (*Id.* at 19.) Father claimed that after the emergency medical providers left with A.M.B. on March 8, 2018, he bathed both of the girls before the family left for the hospital because S.M.B. had “peed all over herself.” (*Id.* at 55.)

Father believed that Mother kept A.M.B. in the playpen too much, but thought A.M.B. would soon be big enough to climb out of the playpen himself. (*Id.* at 20.) He also tried to talk with Mother about his concern, but it always ended in a big fight. (*Id.* 21.) Father also testified that, in the weeks leading up to Mother's assault on A.M.B., the situation that had caused him concern seemed to be improving. He surmised that maybe Mother was putting on "her best face." (*Id.* at 40.) But Father also recalled an incident when he was holding A.M.B. and attempting to leave with him. Mother grabbed A.M.B., so rather than risk A.M.B. getting injured he left with his other son who was visiting. Mother was angry, but his concern about her anger was not about the children. Rather he was concerned Mother would call the police and make accusations against him. (*Id.* at 44.) Father acknowledged that in hindsight, in the week leading up to A.M.B.'s traumatic brain injury, A.M.B. "may have" suffered. (*Id.* at 59.)

Father acknowledged that on the day DPHHS removed the children from him and Mother, the girls' hair was "a mess." (2/7/20 Tr. at 47.) Father stated the girls had diaper rash because of their sensitive skin. (*Id.*) Father testified that the girls had no anxiety, but admitted he was concerned about S.M.B.'s speech. Father said he had tried to work with her on her verbal skills. (*Id.* at 47-48.)

Father married another woman in December 2019. (2/7/20 Tr. at 52-53.) He never informed his caseworker that he got married because he saw no reason to do so. (*Id.* at 53.)

### **SUMMARY OF THE ARGUMENT**

The most compelling evidence that these children suffered chronic neglect in their Father's care is the evidence that existed on the day that Mother inflicted A.M.B.'s life-threatening traumatic brain injury. Mother inflicted the injury and, even though Father was at work at the time Mother inflicted the blows to A.M.B., Father, by his own admission, knew four things: Mother was angry and volatile, Mother forced A.M.B. to exist in his crib or in his playpen, Mother had resumed consuming alcohol, and A.M.B.'s physical appearance told Father that something was wrong. Father was also aware that, at 18 months old, A.M.B. could not yet walk, and his older sister, S.M.B., was basically nonverbal. Father did nothing to address any of these issues, and to this day maintains that there was nothing he could have done to protect A.M.B. from his traumatic brain injury or to care for his three children. He was content to allow Mother to carry the load of parenting while he earned the family income. To this day, he is still not certain that Mother inflicted A.M.B.'s injuries.

When S.M.B. arrived in foster care, she was almost completely nonverbal, she suffered from nightmares, she did not know how to play, she was not potty trained, and she hoarded food. S.M.B. seemed to have no bond with her younger sister T.N.B., who herself spent the majority the time sleeping.

A.M.B. was still recovering from his traumatic brain injury when he arrived in his foster home. A.M.B. requires constant supervision and has a long list of medical providers who care for him.

All the children have flourished in foster care. They have learned to speak, sing, walk and play. They are learning about healthy boundaries and how to process their past trauma. Father has not only been content to let the foster parents carry this load, but he also has failed to recognize why there is a load to carry.

A.M.B.'s life-threatening brain injury opened up a window for the outside world to view how these three small children were existing. A.M.B.'s traumatic brain injury shed light on the three children's chronic neglect. There is overwhelming evidence that these children suffered chronic neglect at the hands of both Mother and Father because, to take Father at his word, he either knew he should take action and he did not, or he saw no reason to take action. Either way the result is the same—chronic neglect that resulted in life-threatening injuries to a small child who will bear the burden of those devastating injuries for the rest of his

life. Fortunately, these children have each demonstrated what they can accomplish when they are not suffering from chronic neglect.

Termination of Father's parental rights to the children was in their best interest.

## **ARGUMENT**

### **I. The standard of review**

This Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re K.A.*, 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478. The State has the burden of proving by clear and convincing evidence that the statutory criteria for termination have been satisfied. In the context of parental rights cases, clear and convincing evidence is the requirement that a preponderance of the evidence be definite, clear, and convincing. *In re K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 381 P.3d 691. The requirement "does not call for unanswerable or conclusive evidence." *Id.*, quoting *In re B.H.*, 2001 MT 288, ¶ 16, 307 Mont. 412, 37 P.3d 736. This Court reviews a district court's findings of fact for clear error and conclusions of law for correctness. *In re M.V.R.*, 2016 MT 309, ¶ 23, 385 Mont. 448, 384 P.3d 1058. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the

evidence, or if review of the record convinces the Court a mistake has been made.

*In re E.Z.C.*, 2013 MT 123, ¶ 19, 370 Mont. 116, 300 P.3d 1174.

**II. The district court properly exercised its discretion in terminating Father's parental rights to all three children pursuant to Mont. Code Ann. § 41-3-609(1)(d).**

**A. Applicable law**

Generally, DPHHS must make reasonable efforts to reunify families that the State has separated. Mont. Code Ann. § 41-3-423(1). But a court may make a finding that DPHHS need not make reasonable efforts to reunify families if the court finds that the parent has:

(a) subjected a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse or sexual abuse or chronic, severe neglect of a child;

....

(d) committed neglect of a child that resulted in serious bodily injury or death[.]

Mont. Code Ann. § 41-3-423(2)(a) and (d).

Here, the State moved to terminate Father's parental rights pursuant to Mont.

Code Ann. § 41-3-609(1)(d), which provides:

(1) The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence, except as provided in the federal Indian Child Welfare Act, if applicable, that any of the following circumstances exist:

. . . .

(d) the parent has subjected a child to any of the circumstance listed in 41-3-423(2)(a) through (2)(e)[.]

**B. Substantial, credible evidence supports the district court's termination of Father's rights based upon chronic neglect that resulted in serious bodily injury of one child and significant developmental delays in the children.**

Father attempts to distance himself from Mother's conduct in this case to portray himself as a hard-working provider who could not possibly have known that *Mother* was neglecting his children or that she would physically abuse one of the children, causing a life-threatening injury that resulted in permanent brain damage. Father asserts that the district court's finding that the children suffered chronic neglect in their parents' care was based upon "woulda-coulda-shoulda speculation." (Appellant's Br. at 27.) The record, including Father's own statements and testimony, does not support Father's assertion.

Prior to this action, DPHHS removed S.M.B. and A.M.B. from Father and Mother due to their methamphetamine use. After successfully completing a treatment plan, DPHHS returned the children to Father and Mother. Upon returning the children to the parents' care, only two adults knew what was happening in the family home—Father and Mother. Father stated that he had maintained his sobriety, but with his knowledge Mother had resumed consuming alcohol. Father claimed that Mother must have been hiding from him how much

she was drinking, although Father also testified to waking up in the middle of the night to find Mother consuming wine. Father did nothing to address this issue.

After A.M.B.'s life-threatening injuries, Father admitted that he had had concerns about how Mother treated A.M.B. Father stated Mother had been dismissive of A.M.B. and primarily kept A.M.B. in his crib or his playpen. Father portrayed himself as the victim of Mother's anger and ill temper and, thus, he was unable to do anything to address Mother's treatment of A.M.B. Father expressed more concern for his own wellbeing than for A.M.B.'s wellbeing. Father explained that he could not get on Mother's bad side because she would then call the police and make up allegations of domestic violence against him. Yet, despite Mother's volatility and anger, Father maintained that he had no way of knowing that Mother would ever strike one of the children.

After a week-long visit, Father's own mother, L.B., referred to A.M.B.'s playpen as his jail cell. She discussed her concerns with her son. Father responded that he had tried to address this situation, but it only made Mother angry, so there was nothing he could do. Father surmised that soon A.M.B. would be able to climb out of his playpen or crib on his own, suggesting that then the problem would be resolved. A.M.B., at 18 months old, did not have the ability to protect himself. Father was the adult, and despite Mother's unpleasantness towards him, it was still incumbent upon Father, who admittedly knew that Mother was angry and volatile

and had resumed drinking, to protect his son's safety and wellbeing. Instead, Father turned a blind eye to the circumstances, content to assume that he had fulfilled his sole duty to his children by earning the family's income. The outcome for A.M.B. is tragic. Fortunately, A.M.B. survived his traumatic brain injury, but he sustained permanent damage to the right hemisphere of his brain and will suffer the consequences, most likely for the rest of his life.

Even at his termination hearing, Father had not completely accepted that Mother had caused these terrible injuries to her 18-month-old child. He hedged by testifying that Mother *probably* had inflicted A.M.B.'s traumatic brain injury. At the same time, Father testified that he could not imagine a circumstance in which he would not protect his children. The record establishes, though, that Father did not protect A.M.B., even though there were obvious warning signs, including A.M.B.'s physical appearance. Father claimed that, in the weeks prior to Mother inflicting A.M.B.'s life-threatening brain injury, he wanted to take him to the emergency room because his skin looked mottled and he had a lot of bruising on his body. But Mother protested and Father acquiesced. Mother promised to make a doctor appointment for A.M.B. and Father was content to leave it at that. When Mother failed to follow through, Father took no action.

Additionally, A.M.B. was 18 months old and could not yet walk and was nonverbal. Likewise, his older sister, S.M.B., had a very limited vocabulary. Father

claimed that he had worked with S.M.B. to teach her words, but seemed unconcerned by her lack of progress and development. Father insisted that his daughters' severely matted hair was an inevitability, and their diaper rash was due only to sensitive skin. Father offered that, on the day of A.M.B.'s injuries, their house smelled of urine because he had just emptied the diaper genie into the kitchen garbage. He also claimed that, after a helicopter flew his son to the hospital, he gave both of his girls a bath before proceeding to the hospital with the girls and Mother. It is difficult to imagine that, after performing CPR on his son until medical providers arrived, Father then delayed the family's departure to the hospital to bathe his other two children.

Also, the social worker and the foster mother described the girls as being filthy and smelling of urine. The social worker described the children's clothes as dirty and both girls' feet being covered in dirt, and that they had dirt under their nails. At two-and-a-half years old, S.M.B. was nonverbal. When the social worker spoke with her it did not appear that S.M.B. could comprehend anything she was saying.

The children's time in foster care only highlighted their significant delays and other issues. S.M.B.'s therapist diagnosed her with post-traumatic stress disorder. Based upon the therapist's work with and observations of S.M.B., the therapist thought it likely that S.M.B. had suffered from neglect. She also

discussed the behavior shifts she saw in S.M.B. when S.M.B.'s therapy sessions were scheduled after her visits with Father, when S.M.B. demonstrated anger during her play therapy sessions by repeatedly stabbing molded sand with a play knife.

When S.M.B. arrived at her foster home, she hoarded food in her cheeks, in her pillowcase, and in her pockets. It was traumatic for S.M.B. to see her foster mother throw out food even though it was spoiled. S.M.B. was not potty trained. S.M.B. seemed to have no connection with or concern for her younger sister and had a very limited vocabulary. The foster mother could only clearly understand two words—pizza and please. S.M.B. did not really know how to play or use her imagination and did not understand the basics of dressing herself. S.M.B. had great difficulty falling asleep at night and suffered from nightmares. Her younger sister, on the other hand, was content to sleep an amount of time unwarranted by her age of eight months old.

The record establishes that all the children have flourished in their foster homes. S.M.B. is attending preschool with favorable reports. At four years old, she is finally potty trained and is progressing in therapy. T.N.B. is meeting all her developmental milestones. A.M.B. is walking, talking, and singing, despite his traumatic brain injury. Although caring for A.M.B. is extremely demanding, his foster mother has excelled. Meanwhile, Father has been content to let the foster

mothers carry the load for all the children, just as he was previously content to let Mother do so.

Father offers that he proved his parenting ability by favorable reports during his supervised visits once a week for three hours. But the person who supervised the visits cautioned that her observations only applied to the safe, controlled setting of those visits. She could not predict what would occur outside of the confines of that controlled environment.

Father devotes a large portion of his brief to arguing that there was insufficient evidence that any of his children were neglected. He then states, “Even if K.T. had subjected the children to chronic or severe neglect,” he was not culpable. (Appellant’s Br. at 31.) Father’s belief that he has no culpability for the children’s severe, chronic neglect is precisely why he cannot parent them. Father does not believe his children suffered from neglect, but even if they did, it was not his fault. Presumably, if Father’s new wife neglected his children while he worked 60 hours a week, that would not be Father’s fault either.

It is the policy of the State of Montana to provide for the protection of children whose health and welfare may be adversely affected and threatened by those responsible for the children’s care and protection. *In re J.B.*, 2015 MT 342, ¶ 12, 381 Mont. 525, 362 P.3d 859, citing Mont. Code Ann. § 41-3-101(1)(a). “The ‘district court is bound to give primary consideration to the physical, mental, and

emotional conditions and needs of the children.” *Id.*, quoting *In re C.J.K.*, 2005 MT 67, ¶ 14, 326 Mont. 289, 109 P.3d 232. As this Court has also recognized, “Children need not be left to ‘twist in the wind’ before neglect may be found chronic and severe.” *In re M.N.*, 2011 MT 245, ¶ 29, 362 Mont. 186, 261 P.3d 1047. Here, A.M.B.’s life-threatening brain injury ironically freed all three children from their chronic neglect. The district court’s finding that under Father’s care all three children were subjected to chronic neglect that resulted in serious bodily injury to one child, and to developmental delays, is supported by substantial credible evidence. The district court properly exercised its discretion in terminating Father’s parental rights to all three children.

**C. There was no statutory requirement for the court to conclude that the conduct or condition rendering Father unfit to parent was unlikely to change within a reasonable time because the State did not petition to terminate parental rights under Mont. Code Ann. § 41-3-609(1)(f).**

Father next argues that the district court incorrectly concluded that the conduct or condition rendering him unfit to parent was unlikely to change within a reasonable time. Although the district court did render such a conclusion, it was not statutorily required to do so because the State petitioned to terminate Father’s rights under Mont. Code Ann. § 41-3-609(1)(d), rather than Mont. Code Ann. § 41-3-609(1)(f) which provides termination is appropriate when:

(f) the child is an adjudicated youth in need of care and both of the following exist:

- (i) 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
- (ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

To terminate the parent-child relationship, the court must find by clear and convincing evidence that *any* of the criteria enumerated in Mont. Code Ann. § 41-3-609(1) exist. *In re T.S.B.*, 2008 MT 23, 341 Mont. 204, 177 P.3d 429, citing *In re M.J.W.*, 1998 MT 142, ¶ 16, 289 Mont. 232, 961 P.2d 105.

In *T.S.B.*, this Court held that an adjudication hearing is not required when petitioning to terminate parental rights under Mont. Code Ann. § 41-3-609(1)(d). Common sense dictates that the other requirements under Mont. Code Ann. § 41-3-609(1)(f) did not apply either. For example, it would be absurd for the State to be required to prove that the court had approved an appropriate treatment plan and the parent did not successfully complete the treatment plan when the court has already entered an order that DPHHS need not provide reunification services.

Even so, there is evidence in the record to support the district court's unnecessary conclusion. Father's refusal to accept any responsibility for the children's chronic neglect, which resulted in a life-threatening, permanent injury to one of the children, demonstrates that the conduct or condition rendering him unfit to parent his children will not change within a reasonable time. Father does not believe his children were chronically neglected. As such Father does not believe

there is any change he needs to make. Although statutorily the district court did not need to make this conclusion, the conclusion is still supported by the evidence.

### **CONCLUSION**

The State requests that this Court affirm the order of the district court terminating Father's parental rights to all three children.

Respectfully submitted this 13th day of November, 2020.

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## **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 8,429 words, excluding cover page, table of contents, table of authorities, signatures, certificate of service, certificate of compliance, and appendices.

/s/ Tammy K Plubell  
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