IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0314

IN THE MATTER OF:

S.P.,

A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable John W. Parker, Presiding

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Whether Father preserved his due process claims for appeal and, if so, whether he was afforded fundamentally fair procedures.

STATEMENT OF THE CASE

In late 2017, the Department of Public Health and Human Services, Child and Family Services Division (DPHHS) was granted emergency protective services (EPS), adjudication of a youth in need of care, and temporary legal custody (TLC) of S.P. (age 1) whose biological parents are W.P. (Father) and K.S. (Mother). (Docs. 2, 15-16, 22, 24, 96.) In its initial petition, DPHHS stated it had no reason to know that S.P. was an Indian child as defined by the Indian Child Welfare Act (ICWA). (*Id*.) Nothing during the proceedings altered that fact. At no time did Father challenge that determination.

S.P. was placed in foster care after she was removed from Mother. (Docs. 11, 24, 28, 31, 38, 41, 42-43, 45.) DPHHS determined that based on his criminal history of violence there were imminent safety risks with placing S.P. with Father, the noncustodial parent (NCP). (*Id*.) Father refused DPHHS's immediate request

that he address those concerns through evaluations and continued his treatment plan hearing for over a year. (*Id*.) Father's treatment plan was finally approved in December 2018 and TLC was extended twice. (Docs. 52, 54, 57, 59.) Father was arrested for assaulting his wife and was charged in federal district court in Georgia and eventually pled guilty. (Docs. 47, 96.) DPHHS petitioned for termination of parental rights (TPR) in August 2019. (Doc. 62.) The TPR hearing was continued multiple times over an eight-month period. (Docs. 72, 77, 83, 89, 92, 93.) Following the May 1, 2020 hearing, the court terminated both parents' rights. (Doc. 96.)

STATEMENT OF THE FACTS

Before and after Mother gave birth to S.P. concerns were levied about her capacity to parent given her history of Fetal Alcohol Syndrome. (Doc. 1.)[1] When S.P. was just four months old, Father allegedly tried to strangle Mother while she was holding S.P. (Doc. 22.1, Ex. 3 (hereinafter, Depo.) at 26.) A restraining order was implemented against Father to protect both Mother and S.P. and Father was allowed only supervised visits with S.P. (*Id.*; Doc. 44.) In May 2017, Father

[1] The facts contained herein will be focused on Father's appeal. Please see the State's Response Brief to Mother's Opening Brief filed on November 2, 2020 for additional facts and context to the proceedings.

applied with Youth Dynamics to supervise his visits with S.P. (*Id*.) In his application, Father reported he had received mental health services in the past for anger management. (*Id*.)

On July 14, 2017, DPHHS received a Priority One report that Mother and S.P. were sleeping on the street in hot temperatures, lacked adequate water/food, and S.P. was exposed to known sex offenders. (Doc. 1.) The protection plan implemented by Child Protection Specialist (CPS) Mariesa Wallis was unsuccessful and S.P. was placed with maternal grandparents (Grandparents) on August 21, 2017. (Doc. 1; 10/24/17 Tr.)

When S.P. was removed from Mother, Wallis did not know where Father was and did not locate him prior to DPHHS filing its initial petition. (Depo.) Wallis continued trying to locate Father over the next several weeks. (*Id*.) As part of her investigation, Wallis learned Father had a pending Partner/Family Member Assault (PFMA) charge out of Toole County and a restraining order precluded Father from seeing Mother and he could only see S.P. if supervised. (*Id*., Doc. 46.) Wallis also discovered that Father had a criminal history involving assaults and domestic violence (*e.g*., assault with a dangerous weapon in Oklahoma (2008); domestic battery, and violation of a protective order in Florida (2014)). (*Id*.) Eventually, Wallis located and made contact with Father after searching through social media and government assistance search engines. (*Id*.)

Father was served with the petition and notice of the show cause hearing on September 14, 2017. (Doc. 11.) Five days later, Father and his wife met with Wallis and CPS Supervisor, Ryan Ball. (Depo.) At that meeting, the parties discussed getting Father involved in S.P.'s life. (*Id.*) Based on his criminal history of violent offenses, Wallis requested Father "undergo an assessment for domestic violence and anger management." (*Id*.) Unbeknownst to DPHHS, Father video recorded their meeting. (*Id*.)

Father did not appear at the September 25, 2017 show cause hearing. (09/26/17 Tr.; Doc. 11.) Father's appointed counsel, Helge Naber, was present and moved to continue the hearing. (*Id*.) Without objection, the hearing was continued for a month. (*Id*.)

Father went to the DPHHS office on October 2, 2017, and again videoed the interactions unbeknownst to the agency. (Depo.) Father then posted the videos he took at DPHHS on Facebook and posted an inappropriate and threatening message on Wallis' personal Facebook. (*Id*.) As a result, Father was issued three citations for privacy in communications violations. (Docs., 22.1, 46.)[2]

[2] Father's motion for the district court to assume jurisdiction over the three privacy in communications citations was granted on March 6, 2018. (Docs. 22.1, 32.) Nothing else appears in this record concerning these citations.

At the continued show cause hearing, the parents appeared with counsel and both stipulated to adjudication and Father explained he was not asking for S.P. to be placed with him. (10/24/17 Tr.; Doc. 16.) The dispositional hearing was set for November 21, 2017, but Father filed a motion to continue that hearing because he was ordered to appear in Toole County Justice Court on that same day for his PFMA. (Doc. 17.) In his motion to continue the dispositional hearing, Father preemptively opposed any treatment plan being proposed for him. (*Id*.) The show cause hearing was reset to December 5, 2017. (Doc. 18.) Josie Knapstad replaced Wallis as the CPS for this family at the end of November 2017, and arranged weekly visits for Father and S.P. at Youth Dynamics. (Depo.)

Father deposed Wallis on December 4, 2017. (Depo.) During the deposition, Wallis detailed Father's violence-related criminal history that she discovered and documented, as well as the existence of the restraining order for both Mother and S.P. that stemmed from an alleged PFMA when Father tried to strangle Mother while she held S.P. (*Id*.) Wallis described how this information was part of her case assessment and explained that Father's "pattern of behavior is concerning" especially when there were older and recent incidents. (*Id*.) Wallis explained that DPHHS must ensure NCPs "don't have any conditions occurring in their lives that would put the child at risk, so we did look into [Father]." (*Id*. at 20.) Wallis asked Father to obtain a mental health assessment related to his

domestic violence/anger management so they could further assess placing S.P. with him. (Depo.)

Naber reviewed the proposed treatment plan and asked Wallis why she included mental health components to which Wallis answered,

> Because he has a history of assault and domestic violence is harmful to children and domestic violence would be the result of an inability to manage one's emotions, therefore mental health being unstable. So, if we evaluate that and we can address those concerns, he could parent his child.
>
> . . . .
>
> In order to determine if there's no risk, it is necessary to make sure that that parent is no longer suffering from any condition which would result in them having violent behavior in the future.

(Depo. at 41-42.)

Although Wallis explained she could not speak to the newly assigned CPS's decision about S.P.'s placement, Wallis explained she did not place S.P. with Father

> [b]ecause he hadn't completed the evaluations that we asked him to do as of a preliminary to rule out that he was currently violent or capable of violence against his daughter. [And] [b]ecause we have an order of protection and with [S.P.] listed as one of the individuals being protected from your client.

(*Id*. at 48.) Wallis explained DPHHS will not override an order precluding contact stemming from a criminal case. (*Id*.) Father's counsel also asked Wallis if the case was an ICWA case and Wallis responded it was not. (*Id*.)

Father did not appear at the December 5, 2017 dispositional hearing, where DPHHS asked the court to approve the parents' proposed treatment plans. (12/5/17 Tr.; Doc. 24.) Mother agreed with her plan. (*Id*.) Naber asked to continue the hearing for 45 days pending production of the deposition transcripts. (*Id*.) The court granted the motion, but warned Naber that could shorten the amount of time Father would have to meet the terms of his treatment plan. (*Id*.)

Because of the ongoing case with S.P., when her half-sister (K.L.N.) was born in early 2018, DPHHS sought and was granted adjudication and TLC. (Cause No. DN 18-008 Docs. 1, 22, 95; 07/17/18 Tr. at 8.) Based on K.LN.'s birth father's tribal affiliations, DPHHS had reason to know K.L.N. may be an Indian child so ICWA was followed in K.L.N.'s case. (*Id*.) Although the cases were "companion cases" and their hearings were conducted together, the fact that ICWA was applied in K.L.N.'s case had no effect on DPHHS's or the court's lack of any reason to know S.P. was an Indian child.

Neither birth parent was present at the February 6, 2018 hearing. (02/06/18 Tr.) Father's counsel stated it was not feasible for Father to drive from Missoula to Great Falls for visits and requested DPHHS secure a different visitation provider, but reiterated he was not asking DPHHS to consider placing S.P. with him. (*Id*.)

Father did not appear for the March 6, 2018 hearing. (03/06/18 Tr.) When DPHHS requested the court approve Father's proposed treatment plan, Naber requested a continuance which was granted. (*Id*.)

In the June 4, 2018 extension of TLC petition, Knapstad reported she still had no knowledge S.P. was an Indian child and explained Mother was working on her treatment plan, but Father refused to comply with any of DPHHS's requests for evaluations and had stopped doing visits. (Docs., 36, 38.) Father told Knapstad and CPS Supervisor Cami Stone that he would only work on the plan ordered by Judge Jensen (standing master in the parent's custody proceeding), despite both workers explaining the plans were not the same. (*Id*.; 05/01/20 Tr. at 21.) Father also said he planned to live-stream his visits with S.P. over the internet and refused to allow DPHHS to supervise the visits. (*Id*.) Father did not appear at the June 5, 2018 hearing and Naber stipulated to extending TLC. (*Id*.)

Father did not appear at the August 7, 2018 hearing. (08/07/18 Tr.; Doc. 42.) DPHHS explained it was considering a guardianship in S.P.'s case, but maintained that Father's treatment plan must still be approved. (*Id*.) Naber objected to the court approving the plan and asked for a contested hearing. (*Id*.)

On August 11, 2018, Father was at Fort Gordon in Georgia where his wife was stationed, and he assaulted her when she would not have sex with him. (Doc. 47.) His wife reported that Father subdued her by hitting her and placing his hands

around her neck, causing bruising/abrasions, and then digitally penetrated her. (*Id*.) Father was charged with assault and on August 24, 2018, U.S. Marshalls took custody of Father in Montana and transported him to Georgia. (*Id*.)

The August 28, 2018 hearing had to be continued because immediately prior, Father filed a motion to dismiss the case and place S.P. with him. (Docs. 44-45; 08/28/18 Tr.) The basis for Father's motion was that "there are no allegations against him" in the original petition. (*Id*.) DPHHS opposed Father's motion, asserting that it was premature and ignored his documented history of violence. (Doc. 46.) DPHHS also described Father's refusal to obtain evaluations concerning his history of violence. (*Id*.) DPHHS asserted it was not appropriate to place S.P. with Father at that time given his consistent unwillingness to address the concerns raised and especially S.P.'s vulnerable age. (*Id*.) Two days later, DPHHS filed notice of Father's pending federal assault charges. (Doc. 47.)

At the December 3, 2018 hearing, Naber withdrew Father's motion to dismiss and conditionally stipulated to his proposed treatment plan pending discussions with Father who was in federal custody. (12/03/18 Tr.; Doc. 52.)[3] No objections were filed.

[3] The order approving Father's treatment plan was combined with the order in K.L.N.'s case and mistakenly stated both children were Indian and that ICWA applied to their cases.

Father was still in federal custody as of the March 12, 2019 status hearing and both parents stipulated to extending TLC in early June 2019. (03/12/19 Tr.; 06/04/19 Tr.; Doc. 55-56, 59.)[4] In June, Naber reported that Father's fitness to proceed had been raised in his federal case. (*Id*.)

On August 19, 2019, DPHHS petitioned for TPR. (Doc. 62.) As of that date, S.P. had been in out-of-home care for 23 of the most recent 23 months. (*Id*.) In the supporting affidavit, Knapstad averred there was still no reason to know that S.P. was an Indian child. (*Id*.) DPHHS was granted leave to serve Father with the TPR petition by publication because as of August 19, 2019, DPHHS did not know his whereabouts. (Docs. 60, 62, 64, 68.) Knapstad contacted Father's counsel who reported that the last time he was aware of Father's whereabouts was four months ago, when he was at a treatment facility in North Carolina. (*Id*.) Father was eventually personally served with the petition. (Doc. 79.)

At the September 3, 2019 status hearing, Naber reported that Father remained incarcerated on his federal charge and his trial was set for October 2019. (09/03/19 Tr.; Doc. 73.) Teresa Larson replaced Knapstad as the CPS for this family in September 2019. (05/01/20 Tr. at 33.)

[4] DPHHS's affidavit in support of TLC extension combined both children and a scrivener error mistakenly noted that requests for verification were sent for S.P. when in that same paragraph the CPS stated it was only K.L.N. who "may be an Indian child." (Doc. 56, Aff. at 3.)

On the first day of the TPR hearing, Naber stated he had no witnesses to present but concurred in Mother's request that DPHHS consider a guardianship. (09/24/19 Tr.; Doc. 78.) DPHHS presented two witnesses and the matter was continued. (*Id*.)

In October 2019, Father pled guilty to the charges in federal district court and was sentenced to time served and one year of probation. (01/07/20 Tr.; Doc. 91.)

At the continued TPR hearing in December 2019, Mother requested the court order the parties to participate in alternative dispute resolution to explore the option of guardianship. (12/03/19 Tr.) Father was on supervised release and asked to continue the TPR hearing set for January 7, 2020, because he planned to be back in Montana by March 2020, and he wanted time to secure his mental health records. (*Id*.; 01/07/20 Tr.; Docs. 90, 91.) The court granted the motion and continued the hearing but did not rule on the motion for alternative dispute resolution. (*Id*.)

Over DPHHS's objection, the February 25, 2020 hearing was continued to March, 31, 2020. (02/25/20 Tr.) However, because of COVID-19, that hearing was also continued. (03/31/20 Tr.; Doc. 94.) Naber reported at that hearing that Father was still in Georgia. (*Id*.)

The TPR hearing was finally held on May 1, 2020. (05/01/20 Tr.; Doc. 96.) Father did not appear. (*Id*.) Naber was present and reported that Father had not contacted him. (*Id*.) Larson and Stone testified about Father's refusal to engage in initial evaluations related to placement concerns as well as offered services related to his treatment plan. (Tr. at 19-27, 29-31, 38-42, 50-54.) They also described Father's hostile and defiant behaviors throughout the case. (*Id*.) Larson learned that following an evaluation in Georgia, Father was referred to a psychiatrist based on exhibited features of anti-social personality disorder and sociopathic behaviors (*i.e.*, disregard for the safety of others). (*Id*.) Father told Larson the evaluator was wrong. (*Id*.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it terminated Father's parental rights under non-ICWA standards. At no time did either DPHHS or the court have reason to believe S.P. was an Indian child, so ICWA was not triggered. The district court's lack of initial inquiry about S.P.'s Indian child status constituted harmless error at most since Father points to no evidence that S.P. was an Indian child so the outcome would not be different had the court inquired.

For the first time on appeal, Father alleges (1) the court did not properly review DPHHS's decision not to initially place S.P. with him and (2) that since

DPHHS did not allege S.P. suffered abuse/neglect at the hands of Father, the court could not adjudicate S.P. as a youth in need of care or approve Father's treatment plan. Father's failure to raise these alleged mistakes and any perceived due process violation precludes appellate review of those issues. Father's attempt to convince this Court to nonetheless review these issues through plain error review is unavailing.

It would not "result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial, or compromise the integrity of the judicial process" if this Court did not consider Father's due process allegation that DPHHS failed to present evidence about its consideration of Father for S.P.'s initial placement to the district court because it is not statutorily required. Once DPHHS is granted EPS, that agency "shall determine" the appropriate placement for a child absent objection. Here, Father explicitly declined to have S.P. placed with him. And, while a year later he challenged DPHHS's intervention, he withdrew that challenge. Moreover, Wallis's deposition fully explained the process DPHHS undertook to consider Father for initial placement and that the agency followed its policy in making the determination.

Since children are not adjudicated as youths in need of care "as to" individual parents, no "serious mistake" was made, and Father's second due process complaint does not warrant invocation of plain error review. The

adjudication of a child properly focuses on what that child has experienced. A person's fundamental right to parent is not subverted by this statutory process because immediately following adjudication, the district court must determine the proper disposition for the child at which time the parties have the opportunity to be heard and advocate for custody of the child.

At the dispositional hearing, the court will consider the positives and negatives of each parent (*e.g.,* their "fitness to parent") and may choose to place the child with the NCP and dismiss the case. Alternatively, to grant TLC, the court must conclude that placing the child with either parent would cause harm to the child or be detrimental to the child's well-being. Because neither the adjudicatory nor dispositional provisions require the court to make a finding "as to" the NCP, Father has not established a serious mistake was made or how not reviewing his claims will end in injustice or compromise the integrity of the judicial process.

Even if this Court chooses to review Father's claims, the record undisputedly establishes Father had notice and opportunity to be heard on S.P.'s initial placement, her adjudication, the court's order approving his treatment plan and TPR. At no time during these proceedings was Father placed at an unfair disadvantage. Moreover, Father cannot establish how, given the facts of this case, particularly his conviction of assaulting his wife during the pendency of S.P.'s case, that he was prejudiced by DPHHS or the court.

STANDARD OF REVIEW

This Court reviews a district court's decision to terminate a person's parental rights for an abuse of discretion which "occurs when the district court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice." *In re A.B.*, 2020 MT 64, ¶ 23, 399 Mont. 219, 460 P.3d 405.

This Court "will not reverse a district court's ruling by reason of an error that 'would have no significant impact upon the result.'" *In re H.T.*, 2015 MT 41, ¶ 10, 378 Mont. 206, 343 P.3d 159.

Whether a district court violated a parent's right to due process in a termination proceeding is a question of constitutional law subject to plenary review. *In re C.B.*, 2019 MT 294, ¶ 13, 398 Mont. 176, 454 P.3d 1195.

I. The district court did not abuse its discretion by treating S.P.'s case as non-ICWA.

A. Law relevant to ICWA applicability

The Indian Child Welfare Act reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an "Indian child" from his/her family. 25 U.S.C. § 1902; *In re J.J.C.*, 2018 MT 317, ¶ 14, 394 Mont. 35, 432 P.3d 149. To be considered

an Indian child, the child must be either (1) an enrolled tribal member; or (2) eligible for enrollment in tribe and have a biological parent who is an enrolled member. § 1903(4). Only a tribe may confirm/refute whether a child meets the definition of Indian child. *J.J.C.*, ¶ 14.

Application of ICWA is triggered if "the court knows or has reason to know that an Indian child is involved." § 1912(a); ICWA Regulations (Regs.) 25 C.F.R. § 23.11(a). The Regulations offer some guidance for making this determination. For instance, the district court is directed to "ask each participant . . . whether the participant knows or has reason to know that the child is an Indian child [and] instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child." Regs. § 23.107(a). The Regulations also set forth examples of sufficient "knowledge" to trigger ICWA. *See* § 23.107(c). Finally, once a court "has reason to know," the child is an Indian child, ICWA is triggered pending confirmation from the named tribe. *See* § 23.107(b) (emphasis added).

B. At no time during these proceedings did DPHHS or the district court have reason to know S.P. was an Indian child.

Father's ICWA challenge is purely a procedural claim. Father faults the district court for not "inquiring" with Mother and Father at the beginning of the

case about possible tribal affiliations. (Br. at 14-17.)[5] Father then somehow reasons that, despite the complete absence of any evidence suggesting S.P. was an Indian child, it was error for DPHHS not to present Qualified Expert Witness testimony at adjudication or provide "active efforts." (Br. at 17-24.)

Father's appeal rests entirely with the faulty belief that DPHHS and the district court had reason to know that S.P. was an Indian child. The only information relating to a Native American Tribe was presented in K.L.N.'s case based on her father's tribal affiliations. The record is void of any suggestion that S.P. or either of her parents had any tribal affiliation. *See* § 1903(4).

The point at which a court "has reason to know" a child is an Indian child is described at § 23.107(c); none of those factors were present here. Therefore, § 23.107(b) (directive to treat case as ICWA once have reason to know) does not apply. Father's argument attempts to turn this Regulation on its head and treat all children as Indian children, regardless of the absence of any facts demonstrating reason to know the child is an Indian child. This is not what ICWA, or the Regulations, require.

[5]Father's attempt to incorporate Mother's ICWA-related arguments is improper and unavailing since Mother's arguments were related to *K.L.N.,* whose Indian child status based on *her birthfather* was undisputed.

C. Omission of initial inquiry re: ICWA was harmless

Father's ICWA related claims stem from his complaint that the district court did not inquire with the parties at the initial show cause hearing about whether anyone had knowledge that S.P. was an Indian child. At most, this omission constitutes harmless error similar to the situations in *J.J.C.* and *In re S.R.*, 2019 MT 47, ¶ 26, 394 Mont. 362, 436 P.3d 696 (district court's initial failure to comply with initial ICWA inquiries was harmless since children not Indian children).

In *J.J.C.*, two siblings were not Indian children while there was reason to believe their half-sibling was an Indian child. *J.J.C.*, ¶ 4. However, the CPS submitted three identical affidavits that included the statement that "[t]o the best of my knowledge and belie[f] the child is an Indian child." *J.J.C.*, ¶ 5. The appellant argued this meant ICWA should have been applied. *J.J.C, supra*.

This Court disagreed, observing that affidavit was the only documentation suggesting the two siblings were Indian children and noting that during the following two years of intervention, no additional information was presented that the children were Indian children. *J.J.C.*, ¶ 17. In affirming the TPR orders that did not apply ICWA, this Court concluded that "[e]ven if the [prior affidavits] were sufficient to meet the reason to know threshold, Mother . . . has not alleged

that the children are enrolled members of a tribe, or that she or the children's fathers are enrolled." *J.J.C.*, ¶ 18.

Just as in *J.J.C.*, Father offers no argument or factual basis that S.P. is an Indian child and that ICWA actually applies. Instead, Father seeks to use a technical misstep, that would have no impact on the outcome, to reverse the TPR order. However, just as this Court held in *S.R.*, that is insufficient.

As this Court has repeatedly stated, "no civil case shall be reversed by reason of error which would have no significant impact upon the result; if there is no showing of substantial injustice, the error is harmless." *In re L.M.A.T.*, 2002 MT 163, ¶ 21, 310 Mont. 422, 51 P.3d 504. This Court has applied the harmless error analysis to ICWA cases. *See, e.g.*, *In re J.S.*, 2014 MT 79, ¶¶ 20-22, 374 Mont. 329, 321 P.3d 103; *H.T.*, ¶¶ 19-21 (when parent made no objection to failure to conduct adjudicatory hearing, she waived appeal on that issue, and "error did not undermine the fundamental fairness of the proceedings and reversing the termination order on this ground [was] not justified"); *In re M.S.*, 2014 MT 265A, ¶¶ 15, 22-25, 376 Mont. 394, 336 P.3d 930 (inadequate proof of notice in ICWA case subject to harmless error analysis). *See also In re D.N.*, 218 Cal. Ct. App. 4th 1246, 1251 (Cal. Ct. App. 2013) ("[d]eficiencies in ICWA inquiry and notice may be deemed harmless error when, even if proper notice had been given, the child would not have been found to be an Indian child").

Father provides no cogent authority or argument to invalidate the district court proceedings under Montana Law or ICWA. Father cannot establish that, even if an additional inquiry would have been made, S.P. meets the definition of Indian child. The omitted initial ICWA-inquiry had no impact upon the result and is an insufficient basis upon which to reverse the TPR order.

II. Father's due process claims were not preserved for appellate review.

Father argues the district court violated his due process rights when it terminated his parental rights based on abandonment and failed treatment plan. Neither argument is meritorious. Moreover, Father failed to preserve his due process claims stemming from DPHHS's decision not to immediately place S.P. in his care and the order approving a treatment plan for him following adjudication.

First, Father is incorrect that the district court terminated his rights based on abandonment. (Br. at 35-38.) While the court's findings about Father included language often related to abandonment, in its conclusions of law, the court cited only Father's failure to successfully complete his treatment plan as the basis for TPR. (Doc. 96 at 13.) It was K.L.N.'s father whose rights were terminated under both theories, not Father. (*Id*. at 13-14.)

Second, Father did not present the claims he now raises to the district court. Father never asserted that DPHHS failed to follow its own policy and plead its

initial placement decision to the district court. Nor did Father argue the court could not implement a treatment plan for him because S.P. was not adjudicated "as to" him. Moreover, Father did not assert any due process violations, the cloak under which he now attempts to present his unpreserved claims.

To preserve a claim or objection for appeal, "an appellant must first raise that specific claim or objection in the district court." *In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38. Generally, this Court does not consider issues raised for the first time on appeal. *C.B.*, ¶ *14; In re T.W.D.*, 2009 MT 207, ¶ 28, 351 Mont. 233, 210 P.3d 177 (Court "reluctant to fault a district court for failing to address alleged deficiencies that were not brought to its attention at a time when any deficiencies could have been cured").

Not only did Father fail to challenge S.P.'s placement or adjudication or his treatment plan; Father explicitly acquiesced to those events. This Court "will not put a district court in error for an action to which the appealing party acquiesced or actively participated. *In re A.A.*, 2005 MT 119, ¶ 26, 327 Mont. 127, 112 P.3d 993 ("It is a long held principle that acquiescence in error takes away the right of objecting to it." (citing § 1-3-207, MCA)).

At the October 2017 show cause hearing, Father specifically informed the court he was not challenging DPHHS's placement determination. In February 2018, Father reiterated he was not seeking placement. While Father did file a

motion to dismiss in August 2018, he withdrew that request three months later. At no other time did Father challenge DPHHS's decisions not to place S.P. with him or request a placement hearing pursuant to § 41-3-440, MCA.

When Father stipulated to adjudication, Naber stated that: "there is no allegations against [Father]. So he stipulates to cause and adjudication … without admitting any particular fact." (10/24/17 Tr.) Father also stipulated to TLC and his treatment plan. *See In re A.L.P.*, 2020 MT 87, ¶ 17, 399 Mont. 504, 461 P.3d 136 ("parent who does not object to a treatment plan waives the right to argue on appeal that the plan was not appropriate"). Father raises no ineffective assistance of counsel (IAC) claims related to those stipulations.

This Court will not fault a district court for alleged errors it was not allowed to consider or rectify as well as alleged due process violations which were also not preserved for appeal. *In re A.H.*, 2015 MT 75, ¶ 28, 378 Mont. 351, 344 P.3d 403 (Court declined to consider due process claim the trial court was not made aware of and "will not reverse due to an error that 'would have no significant impact upon the result'").

The only way this Court should consider Father's appeal is through the doctrine of plain error review. However, Father has not met his burden to invoke this rarely invoked appellate review device. (Br. at 38-39.)

B. Plain error review is not appropriate

This Court invokes plain error review sparingly, on a case-by-case basis. *In re B.J.J.*, 2019 MT 129, ¶ 27, 396 Mont. 108, 443 P.3d 488; *H.T.*, ¶ 14. To justify plain error review, Father must firmly convince this Court a serious mistake occurred involving a fundamental right and that failing to review the alleged error will "result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial, or compromise the integrity of the judicial process." *B.J.J.*, ¶ 27. "A mere assertion that a constitutional right is implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine." *In re J.S.W.*, 2013 MT 34, ¶¶ 15-17, 369 Mont. 12, 303 P.3d 741; *B.J.J.*, ¶ 28.

This Court has invoked plain error review of dependent neglect (DN) proceedings on limited occasions. *See C.B.*, ¶¶ 14-15 (plain error invoked to review TPR proceedings when appellant alleged five separate due process violations); *In re M.O.*, 2003 MT 4, 314 Mont. 13, 62 P.3d 265 (Court excused pro se parent's failure to object to termination of her parental rights noting case was "muddled throughout" and "the extraordinarily confusing nature of [a hearing to continue temporary investigative authority]" and "misinformation repeatedly provided to mother by the district court"). This Court has considered an issue on appeal despite no contemporaneous objection when the matter fell under ICWA in

few cases. *See In re K.B.*, 2013 MT 133, ¶ 22, 370 Mont. 254, 301 P.3d 836 ("failure to comply with ICWA notice requirements may be raised for the first time on appeal"); *In re J.M.*, 2009 MT 332, 353 Mont. 64, 218 P.3d 1213 (considered alleged error for not definitively establishing Indian child status prior to adjudicating child as youth in need of care).

More often than not, this Court declines to invoke plain error review in DN appeals. *See, e.g., In re S.C.*, 2005 MT 241, ¶ 35, 328 Mont. 476, 121 P.3d 552 (Court determined alleged error did not cause substantial prejudice so plain error review unwarranted); *In re D.A.*, 2008 MT 247, ¶¶ 33-34, 344 Mont. 513, 189 P.3d 631 (due process claim not reviewed under plain error when court's TPR findings supported by sufficient evidence); *H.T.*, ¶ 21 ("although the court erred by not holding a proper adjudicatory hearing prior to the termination of Mother's parental rights, this error was not 'plain' or obvious;" failure to assert a timely objection or raise the issue constituted a waiver of that issue); *In re J.E.L.*, 2018 MT 50, 390 Mont. 379, 414 P.3d 279 (admission of hearsay evidence concerning mother's discharge from CD treatment did not prejudice outcome of proceedings; plain error review not warranted); *J.S.W., supra* (plain error not warranted when appellant did not demonstrate her right to testify was violated when court limited time she could address the court and did not establish failure to review would result in miscarriage of justice); *B.J.J., supra* (parent had counsel

throughout proceedings and proffered no ineffective assistance of counsel claim; parent given full opportunity to contest allegations and stipulated to treatment plan and appropriateness).

Here, Father has not established that serious mistakes occurred. Nor does Father demonstrate that if his claims are not reviewed, it will "result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial, or compromise the integrity of the judicial process." *B.J.J.*, ¶ 27.

C. Consideration of placing S.P. with NCP

Father argues that DPHHS failed to "take the necessary steps to investigate Father, nor did it allege or provide sufficient evidence of any abuse or neglect by Father or that placement with Father would pose an imminent safety risk to S.P." (Br. at 32.) At the crux of this claim, like his argument concerning adjudication and his treatment plan, is the mistaken belief that a district court must make findings that each parent abused/neglected a child prior to allowing DPHHS to intervene. As discussed more below at Section II.D., that is not how Montana's DN provisions are structured. In all DN proceedings, the health, well-being, and safety of the child is the primary focus.

As this Court has repeatedly explained, while family integrity is a constitutionally protected interest, "that family unity need not be preserved at the

expense of the child's best interest. *In re E.A.T.*, 1999 MT 281, ¶ 32, 296 Mont. 535, 989 P.3d 860; *see also* Mont. Const. art. II, § 15; *In re S.L.M.*, 287 Mont. 23, 951 P.2d 1365 (1997) (minors "enjoy all the fundamental rights of an adult"); § 41-3-101(1)(d), MCA (in DNs "a child is entitled to assert the child's constitutional rights"). As this Court declared: "The right to maintain the family unit is not absolute and although the children's best interests and welfare generally are served by maintaining the family unit with custody retained by the natural parents, *the children's best interest and welfare, not that of the natural parent, is the paramount consideration*." *E.A.T.*, ¶ 32 (emphasis in original). "It is the policy in Montana to protect children whose health and welfare may be threatened by those persons responsible for their care, but this protection must be provided in a manner that preserves the family environment, *if possible*." *In re C.J.*, 2010 MT 179, ¶ 23, 357 Mont. 219, 237 P.3d 1282) (citing §§ 41-3-101(1)(a) and (b), MCA) (emphasis added)).

By focusing first and foremost on a child's safety and well-being, the DN statutes do not subvert a parent's fundamental right to parent. In all DN proceedings, parents are provided notice and opportunity to refute claims against them and argue they are the better placement option for the child. The issue of placement may also be raised by a parent through § 41-3-440, MCA (party may seek judicial review of DPHHS's placement decisions).

Unless and until a parent challenges DPHHS's placement determination, Montana's Legislature has declared that DPHHS "shall determine the appropriate placement for a child alleged to be or adjudicated as a youth in need of care." *See* § 41-3-440, MCA. The authority to place a child is granted to DPHHS when a court grants EPS pursuant to §§ 41-3-301, 427, MCA. Therefore, once EPS is granted, DPHHS determines the appropriate placement for a child, unless a parent challenges the agency's decision and requests judicial review of the placement. During that review the parties would present evidence/argument and the court would issue its ruling.

Therefore, Father's claim—that DPHHS failed to present evidence in support of its decision not to immediately place S.P. with Father—is unavailing because there are no statutory provisions that require a district court to issue findings of fact or conclusions of law concerning DPHHS's placement decision before disposition (unless a motion under § 41-3-440, MCA is filed). Moreover, Father's argument inappropriately equates an alleged violation of an agency policy as synonymous with violating a statute. Thus, Father cannot establish a "serious mistake" requiring plain error review was even made.

Father bases his claim on this Court's discussion about DPHHS's policy regarding the placement with a NCP in *In re B.H.*, 2020 MT 4, 398 Mont. 275, 456 P.3d 233 and *In re E.Y.R.*, 2019 MT 189, 396 Mont. 515, 446 P.3d 1117.

However, those cases are distinguishable as they concerned IAC claims, not alleged statutory violations. Moreover, interpretation of DPHHS's policy was not the issue presented in either *E.Y.R. or B.H.* and little to no record was developed concerning DPHHS's interpretation and application of its policy regarding NCP placement issues. Rather, in those cases, this Court referred to DPHHS's policy to point out arguments that the attorneys for the NCPs in those cases could have made on their clients' behalf.

In *E.Y.R.* and *B.H.,* this Court did not hold DPHHS lacks discretion in making placement decisions. Those holdings establish that the attorneys were ineffective for not challenging DPHHS's decision-making by asking for a placement hearing (*i.e*., § 41-3-440, MCA). The remaining portion of the opinions describe what evidence may be presented at such a hearing. Nothing in those holdings diminish DPHHS's discretion in determining the appropriate placement for a child or impose a new hearing requirement concerning placement, absent a motion by the parents.

The State recognizes this Court has suggested that pursuant to due process principles, if DPHHS has a concern about a child's safety if placed with a NCP, "it must plead those concerns and prove them to the court." *B.H.*, ¶ 37. *See* DPHHS Policy § 304-1 (good cause not to place with NCP). Father skews this statement as creating a new procedural requirement in DN cases. Rather, this Court's

references to DPHHS's policies in *B.H.* and *E.Y.R.* were as persuasive authority for evaluating the NCP's attorneys' performances. The interpretation/application of DPHHS's policy was not before this Court.

The State respectfully asserts that this Court's statement implying DPHHS must proactively present evidence of its decisions regarding placement prior to disposition was not dispositive of the issue before the Court in *B.H.* and, therefore, qualifies as dicta. *See, e.g., State v. Otto,* 2012 MT 199, ¶ 17, 366 Mont. 209, 285 P.3d 583 ("Dictum is not binding upon this Court as controlling precedent, and it is not persuasive authority for this Court in resolving the issue before us.").

The plain language of the DN statutes does not require specific proactive pleading about placement or judicial review of that decision prior to disposition and courts are not allowed "to insert what has been omitted or to omit what has been inserted." *E.A.T.*, ¶ 33 (citing § 1-2-101, MCA). Moreover, an agency's policies are not binding law, and violation of an agency's policies alone do not give rise to a constitutional violation as violation of a legislatively imposed law may.

Father asserts that this Court has "*required* proceedings to comply with [DPHHS's] Policy Manual." (Br. at 25 (citing *In re R.J.F.*, 2019 MT 113, ¶ 17, 395 Mont. 494, 443 P.3d 387) (emphasis added).) This is not an accurate statement of the law or this Court's holding in *R.J.F.* First, ¶ 17 of *R.J.F.* involves

recitation of the facts. Second, even if Father intended to cite ¶ 37, he misconstrued this Court's statement as applying to all of DPHHS's policies in all circumstances. Rather, in *R.J.F.*, and as part of its evaluation of the quality of efforts made by DPHHS, this Court stated, "[w]hile reasonable efforts do not require herculean efforts, they do require the Department to 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." *R.J.F.*, ¶ 37. Policies are not binding or on equal footing with statutes, administrative rules, or even regulations. And this Court has not held otherwise.

Accordingly, although Father has asserted his fundamental right to parent is at issue, he cannot establish that a serious mistake occurred because neither DPHHS nor the court violated a statute. Father has also failed to demonstrate that failing to review his complaint about DPHHS's decision not to initially place S.P. with him will "result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial, or compromise the integrity of the judicial process." *B.J.J.*, ¶ 27.

From the beginning of the case until August 2018, Father explicitly advised the court he was not requesting S.P. be placed with him and he stipulated to adjudication and TLC. And, although he filed a motion to dismiss in the fall of

2018, he withdrew it by December and never again asked the court for a contested placement hearing. Thus, there was no basis or requirement for DPHHS to present its documentation and reasoning behind the decision not to place S.P. with her NCP.

Finally, Wallis' deposition establishes that DPHHS did follow its policy when it investigated NPC for good cause not to place and, based on evidence obtained, requested Father participate in evaluations to further assess a placement option. Father has not carried his burden to establish the standards of plain error review. Merely asserting that his fundamental right to parent was implicated is insufficient to invoke this sparingly use doctrine of appellate review.

D. A child is not adjudicated as a youth in need of care "as to" individual parents.

Father asserts that plain error review is appropriate because "[t]erminating a parent's rights in the absence of any allegation of abuse, neglect, or unfitness, is akin to convicting a defendant absent any charge." (Br. at 39.) Father's argument is based on a faulty premise that a child is deemed a youth in need of care "as to" individual parents.

Father's argument inappropriately advances a procedural misnomer this Court has explicitly rejected: show cause and adjudicatory hearings are not conducted "as to" an individual parent's rights. *See In re K.B.*, 2016 MT 73, ¶ 19, 383 Mont. 85, 368 P.3d 722 (hereinafter, *K.B. 2016*); *C.B.*, ¶ 19 n.5 (rejecting

appellant mother's due process claim when the district court adjudicated C.B., as mother claimed, "as to" the father). As this Court has explained, "[a] child is not determined to be a Youth in Need of Care 'as to' anyone. The child is adjudicated a Youth in Need of Care because he or she is being, or have been, abused, neglected, or abandoned." *K.B. 2016*, ¶ 19.

Father's reliance upon isolated statements in *E.Y.R.* and *B.H.* is unavailing. The question of whether a child should be adjudicated "as to" each parent was not before this Court in those cases. Rather, those cases identified arguments that the appealing parents' attorneys had failed to assert, thereby prejudicing them. The State respectfully asserts that dicta from those decisions conflict with *K.B. 2016* and the plain language of the statutes and, thus, should not control.

This Court undermined the *K.B. 2016's* explicit holding in dicta contained in *B.H.* and *E.Y.R.* For instance, in *E.Y.R.*, this Court suggested that after one parent's rights are terminated, in order to maintain jurisdiction through TLC, "the [district] court must determine that [the] [c]hild is a youth in need of care on the basis of [f]ather's abuse or neglect." *E.Y.R.*, ¶ 46 (citing *In re J.B.*, 278 Mont. 160, 162-64, 923 P.2d 1095, 1098-99 (1996) hereinafter *J.B. 1996*.); *B.H.*, ¶¶ 40, 42 ("absent a finding of abuse and neglect or dependency on the part of *that* parent" court may not rely on best interests of child to deprive parent of custody) (emphasis added). However, the rationale from *J.B. 1996* that this Court relied

upon in *E.Y.R.* and *B.H.*, was directly rejected by this Court in *K.B. 2016* and confirmed in *C.B.*

This Court stated in *J.B. 1996* that, despite the fact the court adjudicated J.B. as a youth in need of care based on the mother's conduct, in order to have the jurisdictional authority to grant TLC, the district court must determine the child is a youth in need "on the basis of evidence of [the father's] abuse or neglect" and faulted the court for not considering "allegations of child abuse or neglect on the part of [the father]. *J.B. 1996*, 278 Mont. at 162-64, 926 P.2d at 1098-99. This Court specifically rejected this reasoning in *K.B. 2016*, explaining that "there is no requirement that a parent be an 'offending' parent before a court may make decisions regarding the best interests of a child suspected of having been abused or neglected." *K.B. 2016*, ¶ 14. Under *K.B.'s* clear language, and as confirmed in *C.B.*, *supra*, determinations of a child as abused or neglected and/or as a youth in need of care are not made "as to" individual parents; they are based upon the circumstances to which the child was subjected <u>without attributing those circumstances to one parent or another</u>.

This holding aligns with the basic tenant of statutory construction; "[t]he role of courts in applying a statute has always been 'to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.'" *E.A.T.*, ¶ 33. "Statutory language must be

construed according to its plain meaning and if the language is clear and unambiguous, no further interpretation is required." *Id*. As *K.B. 2016* and *C.B.* confirm, even if no contemporaneous allegations of current abuse/neglect are levied against a NCP, that does not alter the factual basis, and legal authority, to *adjudicate* a child as a youth in need of care.

It is crucial to note that adjudication does not subvert a NCP's fundamental right to parent. Adjudication is the step validating DPHHS's intervention. Whether that intervention will continue and, if so, to what extent, is determined at the next step, disposition. In addition, the district court will also address the proper placement for the child at disposition.

Each parent is given notice of disposition and the opportunity to advocate a disposition that places the child in their care and/or cease DPHHS intervention. *See e.g*., §§ 41-3-438(3)(a), MCA (leave child with parent from whom removed with conditions; (3)(b) (order DPHHS to evaluate NCP for placement); (3)(c) (temporarily place child with NCP but keeping case open); (3)(d) (place child with NCP superseding custodial orders and dismiss the case); (3)(f) (grant TLC to DPHHS).

Therefore, at disposition, the NCP may present his/her argument and evidence in support of placing the child with them and whether the case should be dismissed with the NCP obtaining custody or if DPHHS should remain involved.

Likewise, if DPHHS seeks to maintain its involvement without placing the child with the NCP and ask for TLC, it must establish by a preponderance of the evidence that reasonable efforts were made and "dismissing the petition would create a substantial risk of harm to the child *or* would be a detriment to the child's physical or psychological well-being." *See* § 41-3-442(1), MCA (emphasis added).

It follows that if a NCP has asked for the child to be placed with him/her, in order for the court to grant TLC to DPHHS, the court must determine that placing the child with the NPC would either (1) "create a substantial risk of harm to the child" or (2) "be a detriment to the child's physical or psychological well-being." The plain language defining TLC does not require a finding that a NCP subjected a child to abuse or neglect as defined at § 41-3-101, MCA. Father's argument to the contrary is unsupported. The DN statutes provide notice and opportunity for a parent to advocate for their right to parent the child while balancing the child's right to a healthy, nurturing, and safe upbringing.

Here, it was undisputed that S.P. was physically neglected and exposed to unreasonable risks and, therefore, was a youth in need of care. The presence or absence of allegations against Father was not relevant to that determination and the district court did not err when it adjudicated S.P. Moreover, and critical to whether this Court should exercise plain error, is that Father's explicit stipulation

to adjudication recognized *K.B. 2016* holding: that regardless of whether allegations were made about him, there were sufficient facts and legal authority to adjudicate S.P.

Since S.P. was properly adjudicated, pursuant to § 41-3-443(1)(c), MCA, the district court had authority to approve treatment plans for the parents.

A district court may order a treatment plan if one of the following occur:

> (a) the parent or parents admit the allegations of an abuse and neglect petition;
>
> (b) the parent or parents stipulate to the allegations of abuse or neglect pursuant to 41-3-434; *or*
>
> (c) the court has made an adjudication under 41-3-437 that the child is a youth in need of care.

§ 41-3-443(1), MCA (emphasis added). Under the plain language of this statute, a parent does not have to admit allegations or stipulate to allegations of abuse or neglect for the court to order a treatment plan. A court may order a treatment plan once a child is adjudicated a youth in need of care. Neither provision states that the court must make findings "as to" which parent abused or neglected the child.

Under the facts presented, Father has not demonstrated the district court made a serious mistake when it adjudicated S.P. and approved his treatment plan. Nor has Father established that failing to review this alleged mistake will "result in a manifest miscarriage of justice, leave unsettled the question of the fundamental

fairness of the trial, or compromise the integrity of the judicial process." *B.J.J.*, ¶ 27.

Nonetheless, should this Court choose to consider Father's due process arguments, he has not established how he was denied fundamentally fair procedures that prejudiced him.

III. Father was afforded fundamentally fair procedures.

The right to the care and custody of a child is a fundamental liberty interest, so "fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during the termination proceedings." *In re A.R.*, 2004 MT 22, ¶ 11, 319 Mont. 340, 83 P.3d 1287. While a parent's fundamental right to parent must be protected by fundamentally fair procedures, "a child's best interest takes precedence over parental rights." *In re A.K.*, 2015 MT 116, ¶ 20, 379 Mont. 41, 347 P.3d 711.

The "[k]ey components of a fair proceeding are notice and an opportunity to be heard." *B.J.J.*, ¶ 13. "For a parent to establish a claim for violation of due process, a parent must demonstrate how the outcome would have been different had the alleged due process violation not occurred." *B.J.J.*, ¶ 13.

"[D]ue process is not a fixed concept. Rather, it is a flexible concept which must be 'tailored to each situation in such a way that it meets the needs and

protects the interests of the various parties involved.'" *In re B.P.*, 2001 MT 219, ¶ 31, 306 Mont. 430, 35 P.3d 291 (parent must be given opportunity to be heard but not at the expense of children whose best interests are of paramount focus in abuse and neglect proceedings); *In re D.B.J.*, 2012 MT 220, ¶ 27, 366 Mont. 320, 286 P.3d 1201 ("[T]he process that is due in any given case varies according to the factual circumstances of the case and the nature of the interests involved.").

Even if this Court considers Father's unpreserved due process claims, he failed to establish how those alleged errors placed him at an unconstitutionally "unfair disadvantage." *In re A.N.W.*, 2006 MT 42, ¶ 34, 331 Mont. 208, 130 P.3d 619. The record demonstrates that Father had "an equal opportunity to present evidence and scrutinize the State's evidence" and, thus, was not denied fundamentally fair procedures. *B.J.J.*, ¶ 13; *In re M.W.*, 2001 MT 78, ¶ 25, 305 Mont. 80, 23 P.3d 206.

A. DPHHS discharged its obligation to consider Father for placement while also ensuring the safety and well-being of S.P.

Father alleges DPHHS failed to follow its policy regarding NCP and faults the agency for not obtaining court approval of its decision not to immediately place S.P. with him. His arguments are without merit as DPHHS did not violate any statutory provision. Nor did DPHHS fail to follow its policy. Moreover, Father cannot establish how he was denied the opportunity to challenge DPHHS's placement decision, thus denying him due process.

As established above, there is no statutorily required findings of fact or conclusions of law for the court to enter regarding a child's *initial placement*. The EPS and adjudicatory statutes focus on the reasons for *removal*. That does not leave a parent without an option to challenge the placement. In addition to making an oral objection at the show cause hearing or other proceeding, there is a specific statute for a parent to seek judicial review of DPHHS's placement determinations. *See* § 41-3-440, MCA. Moreover, the question of a youth in need of care's proper placement is usually determined at the dispositional hearing. *See* § 41-3-438(3), MCA. It is at this juncture that consideration of the parent(s) as placement options takes place.

Here, Father explicitly advised the court and DPHHS he did not want S.P. placed with him for nearly the first year of DPHHS involvement. Father was given notice and opportunity to present any objections to DPHHS's actions. Father was represented by counsel who appeared and advocated on his behalf and deposed the CPS. Moreover, Father's claim ignores a crucial fact: when DPHHS first intervened, a court order precluded Father from having unsupervised contact with S.P. Father also ignores that the record establishes DPHHS did follow its policies.

When Naber deposed Wallis in December 2018, he was fully apprised of DPHHS's efforts to investigate Father for placement and the factual basis on which DPHHS chose not to immediately place S.P. with Father. DPHHS offered Father

the opportunity to address the identified safety concerns by asking him to participate in evaluations to address his history of violence. Father refused. Father also delayed approval of his treatment plan which included similar requests. Father then committed a violent assault against his wife.

The district court was privy to the details of DPHHS's consideration of the NCP for placement, including Wallis' investigation and the evidence of good cause not to immediately place with Father (*i.e.*, criminal history of violent offenses; court order not allowing unsupervised contact with child; and the fact Father did not want S.P. placed with him). Wallis' deposition further established that DPHHS immediately requested Father to participate in evaluations related to his history of violence as a means of continued assessment of placing S.P. in his care.

Father was not denied "an equal opportunity to present evidence and scrutinize the State's evidence." Father was never placed at an "unfair disadvantage." DPHHS met its obligation to consider Father for placement and his due process rights were not violated.

B. Implementation of Father's treatment plan was permitted following adjudication and required under reasonable efforts

Father claims that since DPHHS did not allege he directly abused or neglected S.P., she could not be adjudicated a youth in need of care, which then means the court could not order him to complete a treatment plan. As a result of this alleged statutory violation, Father asserts his due process rights were violated.

As established above, Father's argument concerning an "as to" adjudication is meritless; thereby collapsing his house-of-cards theory. Father's claim that unless the court found S.P. suffered abuse/neglect at his hands he could not be ordered to complete a treatment plan is refuted by the plain langue of the DN provisions. As this Court has observed,

> While a child may initially be removed for one specific reason, it is proper for the Department to determine other causes of abuse and neglect during the proceedings because the purpose of the proceedings is to protect the child. If the Department were limited to the reason the children were first removed, the Department would be unduly restricted in actually helping the children. At the same time, . . . parents are entitled to proper notice before their rights are terminated.

In re T.D.H., 2015 MT 244, ¶ 30, 380 Mont. 401, 356 P.3d 457.

Father's argument also overlooks DPHHS's obligation to provide reasonable efforts to DN parents. *See* § 41-3-423(1), MCA (DPHHS "shall make reasonable efforts" which include "development of individual written case plan"). Father stipulated to adjudication and explicitly advised the court he was not requesting S.P. be placed with him. In addition, he agreed to TLC. Accordingly, DPHHS was statutorily required to provide Father with a treatment plan.

There is no evidence that Father was denied notice of DPHHS's requested relief or the opportunity to be heard. Father was afforded fundamentally fair procedures.

CONCLUSION

This Court should affirm the district court's order terminating Father's parental rights.

Respectfully submitted this 16th day of December, 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 9,799 words, excluding certificate of service and certificate of compliance.

/s/ Katie F. Schulz
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CERTIFICATE OF SERVICE

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