

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0139

IN THE MATTER OF:

A.S.,

A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Sixth Judicial District Court,
Cascade County, The Honorable Brenda Gilbert, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court properly and within its discretion order the termination of Father's parental rights to his child based on clear and convincing evidence satisfying the statutory criteria?
2. Were Father's due process rights violated when Father appeared at the termination hearing by two-way video, rather than in person, due to his imprisonment at Montana State Prison and COVID-19 precautions?

STATEMENT OF THE CASE

Appellant Father, L.E.S., appeals from the district court's order and judgment terminating his parental rights to the Child, A.S. (D.C. Docs. 55, 57-58.)

This case is not subject to the provisions of the Indian Child Welfare Act. (See D.C. Docs. 1 at 2 (Aff. at 2); 2 at 1; 12 at 1, 3-4; 55 at 1, 6.)

A.S.'s birthmother is deceased and was not a party to these proceedings. (See D.C. Doc. 1 at 2 (Aff. at 2-3).)

The district court terminated Father's parental rights based on clear and convincing evidence that the required statutory criteria were satisfied: first, A.S. was adjudicated a youth in need of care; second, Father's appropriate, court-approved treatment plan was not complied with and was not successful;

and third, the conduct or condition of Father, rendering him unfit to parent, was unlikely to change within a reasonable time. (D.C. Doc. 55 at 5-6.) The court also concluded, as required by statute, that the “[c]ontinuation of the parent-child legal relationship will likely result in continued abuse or neglect.” (*Id.* at 6.)

The court considered Father’s criminal history, the fact that he was incarcerated at Montana State Prison (MSP) on four separate criminal charges, and that Father was arrested for one of those charges (possession of methamphetamine) approximately two months after his treatment plan was imposed. (D.C. Doc. 55 at 6.) The court also “considered the fact that when the Father, prior to being incarcerated, had the opportunity to comply with the Treatment Plan, knowing that his parental rights were at issue, the Father was unable or unwilling to comply with its requirements.” (*Id.*)

The district court gave “primary consideration to the physical, mental, and emotional conditions and needs of the child,” including his diagnoses for a number of emotional disorders. (D.C. Doc. 55 at 6-7.) The court concluded that the best interests of the Child would be served by termination of the parent-child legal relationship, based on clear and convincing evidence establishing that fact and based on the statutory presumption established by A.S. having been in “out-of-home placement for 22 of the last 22 months.” (*Id.* at 7.) Finally, the district court concluded that the Department had “used reasonable efforts to pursue reunification

and to avoid termination, but those efforts have not been successful due to the Father's conduct." (*Id.*)

STATEMENT OF THE FACTS

Removal, show cause, and adjudication

In April 2019, A.S. was 6 years old when the Department of Public Health and Human Services (the Department) removed him from Father's care for the fourth and final time. (*See* D.C. Doc. 1 (Aff.)) The Department reported an "extensive child welfare history" involving "concerns of alcohol and drug abuse, unsafe caregivers, [and inability] to parent due to incarceration." (D.C. Doc. 1 (Aff. at 3).) In his short life, A.S. had been placed in foster care three times already, pursuant to prior dependency and neglect (DN) cases filed by the Department in Lewis and Clark County. (*Id.*) During the course of those prior proceedings, A.S.'s mother died of a prescription drug overdose, while in the Child's presence. (*Id.*)

On April 9, 2019, A.S. was removed from Father's home and placed in a licensed foster home in Belgrade, Montana. (D.C. Doc. 1 (Aff. at 2, 4-5).) Father understood the Department's concerns about A.S., and suggested that there were extended maternal family members in New Hampshire that would be willing to

take the Child. (*Id.* (Aff. at 5).) The Department made enumerated reasonable efforts to prevent the removal. (*Id.*; *see* D.C. Docs. 2 at 2; 12 at 3.)

The Department filed a petition for emergency protective services (EPS), with the attached affidavit of child protection specialist (CPS) Christine Hoag, based on the physical neglect of A.S. by Father “due to his incarceration and leaving the child with unsafe people who were excessively drinking alcohol.” (D.C. Doc. 1 (Aff. at 2).) As with A.S.’s prior history and DN cases, the Department was concerned with “alcohol abuse by the caregivers, unsafe caregivers, inability to parent due to incarceration, and the condition of the home.” (*Id.* (Aff. at 5).) Protective services were necessary because there was substantial risk of physical neglect and/or psychological harm to A.S. if he were to remain in Father’s care—Father was “incarcerated, has extensive child welfare history including several previous removals due to the same pattern of behavior, he cannot provide safe and appropriate housing and may have untreated mental health concerns and/or drug and alcohol use that prevent him from safely parenting his children.” (*Id.* (Aff. at 5-6).)

CPS Hoag outlined in some detail the specific circumstances requiring removal and protective services. (D.C. Doc. 1 (Aff. at 3-5).) Basically, Father was arrested at the end of March, incarcerated in Lewis and Clark County, and left A.S. in the care of his girlfriend N.R. (*Id.*) N.R. had a serious alcohol problem—A.S.

said she drank “all the time, everyday” and N.R. admitted she drank “excessively and . . . daily”—and she got drunk and “left the child alone at the trailer to go get more alcohol. She was subsequently arrested for a DUI.” (*Id.*)

A.S. lived in a camper without a working bathroom or running water, and it was “very messy, lots of open containers of alcohol;” there was very little “clothing or things for the child, except a few pairs of underwear and one pair of pants and one shirt.” (D.C. Doc. 1 (Aff. at 3-5).) The owner of the property, J.B., provided water for them and let them use the bathroom in his house. (*Id.*) J.B. called law enforcement and asked for a welfare check at the camper because he suspected N.R. had been drinking and he had seen N.R. yell and argue with A.S., punch him, and make him “stand in the corner for over two hours for not telling her the truth about his homework.” (D.C. Doc. 1 (Aff. at 3-5).) N.R. left A.S. home alone, she went to get alcohol, and then officers pulled her over and arrested her for DUI. (*Id.*)

The district court granted EPS, finding that there was probable cause that A.S. had been abused and/or neglected and that his removal was necessary and in his best interests. (D.C. Doc. 2 at 1-2.) The court made specific findings of fact about the nature of the abuse and neglect, as set forth in the affidavit. (*Id.* at 2.) The court appointed counsel for Father, a GAL-CASA, and an attorney for the GAL-CASA. (D.C. Docs. 2 at 4-5; 3; 7-8; 30.)

Father stipulated to, and the district court ordered, adjudication of A.S. as a youth in need of care and the grant of temporary legal custody (TLC) to the Department. (Tr. at 4-7; D.C. Doc. 12 at 2-4.) Father had been released from jail and was living in his camper with his dad, “saving money until he needs to get a place.” (D.C. Doc. 7 at 4.) The CASA reported that A.S. was “very clean, polite, well fed and happy,” and seemed to have adjusted well to the foster placement in Belgrade. (*Id.*)

Treatment plan approval

On June 11, 2019, the district court approved Father’s treatment plan over the CASA’s objection. (Tr. at 9, 23-24; D.C. Docs. 13-15.) The CASA objected based on the prior history of reports, problems, and DN cases, this being the fourth removal of 6-year-old A.S. (D.C. Doc. 13 at 1.) The CASA also had become aware of an adult protective services report and investigation pertaining to Father’s father, and involving Father and the girlfriend, N.R. (*Id.* at 2; *see* Tr. at 18-22.)

The district court found and concluded on the record:

So, we have a father who[se] issues, primarily, appear to be addiction related. The Court has grave concerns about this being the fourth removal for a six year old child. That’s of great concern to the Court.

I think the treatment plan is pretty tight. It has protections in it beyond those that we normally see. The overarching principal that this Court has to consider is the policy in these cases, which is reunification. . . .

. . . .

So, I believe that the Court is bound to offer the father a treatment plan. I've reviewed this plan and believe that it is sufficient to meet the concerns that are raised in this case.

(Tr. at 23-24.) Understanding the concerns, however, the court admonished Father about compliance: "[T]he message that I would send to the father is that I see [this] as a zero tolerance type of a plan. If anything goes on that violates the terms of the treatment plan, it can be brought to the attention of the Court by anyone." (Tr. at 24.)

For his part, Father understood that the key things were his sobriety and avoiding criminal activity. (Tr. at 12.) Father had been released on probation, and CPS Kathi Ellison testified that she hoped she would get notice of any problems on a regular basis and not let communication "fall through the cracks." (Tr. at 13.) The Department had communicated, and Father and counsel understood, the precariousness of his situation:

[I]f he messed up, it wasn't going to be a long opportunity to do that, because of the prior history. . . . This treatment plan is a little more intense than your average treatment plan. It's pretty clear that the Department isn't really going to put up with a lot of backsliding.

(Tr. at 18.)

With that understanding, and with express acknowledgment of the conditions that resulted in A.S.'s removal, Father agreed to a number of goals and objectives of the treatment plan, including addressing chemical dependency and mental health issues, maintaining sobriety and mental health, acquiring the

necessary parenting and disciplinary skills, providing a safe and stable living environment, and providing the Department with necessary information. (D.C. Doc. 15 at 2.) The treatment plan required successful completion of eight distinct tasks, each of which contained specifications, timelines, and criteria for success:

- * obtain a current chemical dependency evaluation and follow all recommendations made by the evaluator;
- * complete a mental health assessment with a licensed clinician and follow all recommendations of the evaluation made by the clinician;
- * submit to random breathalyzer, urine analysis testing, and/or hair follicle tests at the CPS's request; no use or possession of any drugs except medications as prescribed to Father by a doctor;
- * reside in a safe home;
- * neither Father nor any person living in his home will be involved in any criminal activity and Father will keep the CPS informed;
- * maintain weekly contact with the CPS;
- * begin individual therapy with a Department approved counselor and will complete a minimum of eight sessions, with additional session if the counselor recommends;
- * adhere to a visitation schedule set up by the Department.

(*Id.* at 3-7.) The treatment plan also listed the services to be provided by the Department. (*Id.* at 7-8.)

Extension of TLC

About five months later, on November 14, 2019, the Department filed a petition for extension of TLC. (D.C. Doc. 16.) Father initially attempted to work on his treatment plan: he agreed to participate in the breathalyzer program through Compliance Monitoring, did some contract work as a custom fencer, was an active participant in visitation with his son, and completed chemical dependency and mental health assessments. (*Id.* (Aff. at 3.) Any progress on his treatment plan came to a halt, however, on August 2, 2019, when Father was incarcerated due to a probation violation for criminal possession of drugs. (*Id.*)

Father was released around October 7, 2019; he relocated to the Butte area, then reportedly secured employment as a line cook with an Anaconda restaurant and planned to relocate there. (D.C. Doc. 16 (Aff. at 3).) Father told CPS Ellison that he would like to pursue reunification with A.S. and stated that he wanted to continue to work on his treatment plan. (*Id.*) Father had also indicated that the maternal aunt of A.S., M.B., might be interested in obtaining guardianship of A.S., but M.B. made only limited contact with the Department. (*Id.*)

As of the date of the petition, CPS Ellison had not been able to ascertain if Father would face additional criminal charges, but anticipated there would be a probation revocation hearing at some time. (D.C. Doc. 16 (Aff. at 3).) CPS Ellison stated that Father had been unable to demonstrate that he could provide a safe and

stable home environment for A.S., as he was only “recently released from Detention and just beginning to resume work on his treatment plan goals.” (*Id.* (Aff. at 4).)

A.S. remained in the licensed foster care placement in Belgrade. (D.C. Doc. 16 (Aff. at 4).) A.S. had regular visitation with Father up until the time of Father’s incarceration in August. (*Id.*) Generally, A.S. looked forward to visits and appeared to be quite bonded, but he often exhibited challenging behaviors after a visitation ended. (*Id.*) A.S. attended elementary school in Belgrade. He was often oppositional and defiant in the classroom and sometimes in the foster home as well. (*Id.*)

The Department provided reasonable efforts, as found and concluded by the district court, including: investigation into the current report; review of prior reports/investigation; interview with collateral contacts; collaboration with law enforcement; referral to counselling services; referral to chemical dependency services; and gas vouchers for Father to travel to visitations. (D.C. Docs. 16 (Aff. at 4); 20 at 2-3.) In conclusion, the Department was requesting additional time for Father to complete some of the tasks on his treatment plan and to allow time for further assessment. (D.C. Doc. 16 (Aff. at 4).) To date, Father had not fully completed his treatment plan or demonstrated an ability to provide a consistently safe, stable, and appropriate home environment for a young child. (*Id.*) Father had

been unable to address any treatment plan goals while he was incarcerated for the previous two months, and his probation revocation hearing had not yet been held. (*Id.*)

The Department also needed additional time to further assess the permanency options for A.S. should Father become unavailable to parent. (D.C. Doc. 16 (Aff. at 4).) The Department made contact with A.S.'s maternal aunt as a possible placement resource, and had initiated a request for an Interstate Compact for Placement of Children (ICPC) home study. (*Id.*) The current foster home placement of A.S. was also interested in being considered as a long-term placement for A.S., and A.S. was becoming very bonded to them. (*Id.*)

The CASA recommended termination of parental rights, rather than extension of TLC, based on her investigation, extensive contacts, and eleven specific and detailed reasons enumerated in her report. (D.C. Doc. 18 at 3-8.)

At the December 10, 2019, hearing, CPS Ellison reiterated the delays in Father's treatment plan progress due to his incarceration on charges of possession of meth and, since his release, substantial physical injuries suffered when Father fell out of a truck when he was moving to Anaconda. (Tr. at 26, 29.) Father testified that he was "pretty hurt. . . . I broke six ribs off of my back, and I fracture[d] two vertebrae, my lung was collapsed[.]" (*Id.* at 33.) At the time of the

hearing, Father was still on oxygen, had “very, very limited” use of his right arm, and was not able to work. (*Id.* at 33-34.)

Father acknowledged the interruption in his work on the treatment plan, based on the recent incarceration and new possession charges—for which he was working on a plea agreement. (Tr. at 37.) He acknowledged the other outstanding criminal matters he needed to address, specifically the probation violation out of Lewis and Clark County. (*Id.* at 37-38.) According to Father, “Everything got put on hold and set back, because of my injuries.” (*Id.*)

Based on the petition, affidavit, testimony, and Father’s express lack of objection, the district court found that:

[Father had] not completed the treatment plan, and the record reflects that it’s been interrupted both by criminal charges and incarceration and, also, by recent injuries. It’s clear, I think, that the father . . . knows what he needs to do to kind of take the bull by the horns and get going on the treatment plan, again, and I want him to have more time to do that.

(Tr. at 38-39.) Specifically, the court found that Father needed time to complete tasks including “mental health assessment, addressing his chemical dependency issues and remaining legal issues.” (D.C. Doc. 20 at 2.)

The district court, therefore, granted the extension of TLC for a six-month period. (Tr. at 39; D.C. Doc. 20 at 3.) In doing so, the court made the following additional conclusions of law:

Father needs additional time to complete his appropriate, court-ordered treatment plan.

CFS has made reasonable efforts and provided reasonable services to the parent/s to make it possible for the child to safely return home, but these efforts and services have not yet been successful.

Extending CFS' Temporary Legal Custody of the above-named youth is in the child's best interests.

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.

(D.C. Doc. 20 at 3 (paragraph numbering omitted).) At the close of the hearing, the court inquired of Father if he had any questions about what he needed to do, to which Father replied, "No, I'm very clear on that." (Tr. at 39.)

Status hearing

Three months after extension of TLC, the Department reported that: "[Father] is substantially noncompliant with his treatment plan. I think he's had some health issues, and I think he's had some other criminal justice issues that are ongoing." (3/10/20 Tr. at 39-40.) According to the reports of CPS Ellison and the CASA, the Department would be pursuing permanency for A.S., and was considering termination or, possibly, a guardianship. (*Id.* at 40; *see* D.C. Docs. 21-22.)

Father was not present, but his attorney stated as follows:

The thing that's hard is I'm unlikely to be able to speak to [Father] until he's incarcerated—that's pretty much the next time he'll call me—but when I have talked to him about all of the possible options, here, in the past, but not had a definitive position from him. . . . I'm glad that [A.S.] is doing well, and I know that [Father] sincerely loves his son and his son loves him. I am hopeful that we can have a resolution where there's actual action on his part, but whether or not there will be, I don't know.

(3/10/20 Tr. at 40.) The district court accepted the reports, noted that Father now had “pending criminal cases in Anaconda, Lewis and Clark County, and Gallatin County,” and, thus, understood “the difficulty of maintaining contact with him.”
(*Id.*)

CPS Ellison reported that Father was ostensibly residing in Anaconda with his father and girlfriend, N.R.; he was not employed; he had experienced some health issues, including the previously reported accident as well as new injuries from a 4-wheeler rollover; he was in further legal trouble; he was not in compliance with testing; he was not maintaining contact with the Department or his probation officer; he had not had a face-to-face visit with A.S. in six weeks; and he was not “working on his treatment plan goals at all.” (D.C. Doc. 22 at 3.) CPS Ellison concluded and recommended that because Father was “not actively working on his treatment plan, [had] not been in touch with his Adult Probation Officer, and [his] legal status [was] uncertain,” the Department would be seeking more permanent options for A.S. through either guardianship or termination with

permanent placement. (*Id.* at 4.) The two placement options were the current foster family and a relative of A.S. (*Id.*)

The CASA confirmed that Father had not had a visit with A.S. and that “little if any progress [had] been made on [his] Treatment Plan.” (D.C. Doc. 21 at 1-2.) The CASA summarized Father’s current legal situation:

On or about 1/24/20, [Father] was arrested in Anaconda, charged with PFMA and drug paraphernalia. CASA is unaware of the outcome of that case.

[Father] had a sentencing hearing scheduled on February 4, 2020 for a sexual assault case out of Lewis and Clark District Court. He didn’t appear at this hearing. The Clerk of Court indicated he has three cases out of Lewis and Clark District Court, and there are two active arrest warrants.

He was to appear in Gallatin County District Court for a Change of Plea Hearing in his criminal possession of dangerous drugs case on February 10, 2020. The Gallatin County Attorney said he was incarcerated at that time, and they were unable to have him appear by video, so they continued the hearing until March 16, 2020.

(*Id.* at 1.)

Petition for termination

Three months later, on June 11, 2020, the Department filed a petition for termination of parental rights, with the attached affidavit of CPS Ellison. (D.C. Doc. 26.) The Department asserted that it had made the enumerated reasonable efforts to prevent the removal of A.S. and to reunify him with Father, including investigation into the report of child abuse and neglect; review of prior reports and

investigations; facilitating a treatment plan and services; interviews with collateral contacts; providing for visitation with A.S., including phone calls and face-to-face visits; and developing the appropriate treatment plan. (*Id.* (Aff. at 4).) Despite all efforts, Father's treatment plan compliance had not improved.

CPS Ellison set forth the ways in which Father had failed to successfully complete his treatment plan. (D.C. Doc. 26 (Aff. at 2-3).) First, Father had failed to maintain consistent contact with the Department; he had not provided consistent address or telephone contact information, and he had not done his every-other-week "check in" for the last six months. (*Id.* (Aff. at 2-3).) Second, Father had failed to complete required drug and alcohol testing, reestablish contact with the provider, or reschedule testing as was directed by the Department. (*Id.* (Aff. at 3).) Third, Father had failed to complete the no involvement in criminal activity task and goal; he had not provided an up-to-date report on pending criminal charges, arrests, or court rulings, or complied with reporting to probation and parole. (*Id.*) Ellison concluded, overall, that Father's treatment plan was unsuccessful because he had "not demonstrated that he can safely and appropriately parent his young son" and had "not met the overall goal of providing a safe and stable living environment for his son." (*Id.*)

CPS Ellison also asserted that Father's conduct and conditions that rendered him unfit, unable, or unwilling to give A.S. adequate parental care were unlikely to

change within a reasonable time. (D.C. Doc. 26 (Aff. at 3-4).) Father had long-term involvement with the Department, including three previous removals of A.S., and did not demonstrate an ability to maintain changes in his behavior. (*Id.*) Father had recently been sentenced in Lewis and Clark County to a period of ten years at MSP, with six years suspended, and had other charges pending in Gallatin County. (*Id.* (see 5/26/20 minute entry re sentencing, attached to affidavit).) Father “has continued to demonstrate an inability to maintain sobriety and consistency in his living situation,” let alone remain law abiding. (D.C. Doc. 26 (Aff. at 4).)

The CASA supported the Department’s petition for termination and reiterated the eleven-point history and rationale that had been submitted to the district court six months before. (D.C. Doc. 28 at 1-2; *see* Tr. at 28; D.C. Docs. 18-19.) The CASA explained:

[Father] has shown that he is unable or unwilling to give A.S. adequate parental care, and this is unlikely to change within a reasonable time. Father’s excessive use of a narcotic or dangerous drugs has affected his ability to care and provide for A.S. In addition, the Father has recently been sentenced to the Montana State Prison for 10 years, with six years suspended.

(*Id.* at 1.) The CASA also reported that “A.S. continues to have a very close bond with his foster parents, and is thriving in this home environment. He has also made great strides in school since he started attending a new school at the beginning of this year.” (*Id.* at 2.)

Continuances and Father's appearance at termination hearing

After the Department filed the petition for termination, Father was served while he was incarcerated at Gallatin County Detention Center. (D.C. Doc. 29.) The termination hearing was set for July 28, 2020. (D.C. Doc. 27.) Father moved to continue the hearing on July 8, 2020, and it was re-set for August 11, 2020. (D.C. Docs. 31-32.) On August 10, 2020, Father again moved to continue and the hearing was re-set to October 27, 2020. (D.C. Docs. 33-34.) The State moved to continue on October 20, 2020, because counsel was in quarantine due to COVID-related issues. (D.C. Doc. 37.) The court re-set the termination hearing for November 10, 2020. (D.C. Doc. 38.) On November 2, Father filed a Petition for Writ of Habeas Corpus. (D.C. Doc. 40.) The Court moved the termination hearing to December in order to allow the State to respond to that petition. (D.C. Doc. 41.)

The district court initially issued the writ, directing MSP to release Father for transport to Sweet Grass County for the limited purpose of attending the termination hearing in person. (D.C. Doc. 43.) However, the court later vacated the writ when presented with information regarding COVID-related issues that made

the Father's transport too risky. (*See* D.C. Docs. 44¹, 46-47, 55 at 2.) At the scheduled December 1, 2020, hearing, the court recounted:

[T]he State filed notice . . . of complications relative to the COVID situation at the prison and concerns about COVID exposure for the transport of [Father] over here from the prison, along with some legal authorities saying that the video appearance of the father would satisfy the Supreme Court's standards for a personal appearance.

[Father] objects to that notion. He wants to appear, personally, but after receiving that notice, yesterday, the Court did vacate the order pursuant to the writ of habeas corpus, and set this matter for a hearing with [Father] appearing by video. I've made that decision based upon the COVID concerns.

I'm also concerned about the length of time that [A.S.] has been in . . . out of home placement, and those standards that apply, as well.

(Tr. at 41-42.)

¹ The State relied, in part on, on this Court's prior memoranda of April 27 and May 22, 2020, for guidance directing district courts to "allow video appearance of attorneys, witnesses or parties whenever possible." (D.C. Doc. 44 at 1; *see* "Montana Courts protective measures coronavirus concerns" at <https://courts.mt.gov/>.) The State's motion for video testimony also included the affidavit of the Sweet Grass County Sheriff, who attested that where Father was housed at MSP (C Block) was "currently experiencing a substantial Covid-19 outbreak among the prison population and prison staff" and was, therefore, concerned "about the safety of myself and/or my deputies who would be required to provide transport," as well as "courthouse personnel and court staff." (D.C. Doc. 44 (Aff.).)

Father's counsel orally moved to continue the termination hearing in order to allow counsel more time to prepare and speak with the Father in MSP, which oral motion was granted. (Tr. at 44.) As the court related:

[I]f it was a matter of wanting more time to prepare and perhaps get to the prison . . . or to have telephonic conferences with [Father] to prepare for this hearing, I would grant a continuance of today's hearing for a period of up to sixty days. However, if at the end of the sixty days, if we're still in the same COVID type restrictions, I'm not saying that that would necessarily mean a personal appearance.

(Tr. at 43.) The court explained the rationale for its ruling as follows:

I'm trying to weigh the competing interests . . . we have a child that's been in care for a long time, but the parental rights . . . are fundamental and entitled to protection.

Part of what's going on . . . is a situation that's beyond the control of any of us with the restrictions that are in place, given the COVID 19 virus. So, I feel that a continuance, and having this reset within that sixty day period, is reasonable and protective of [Father's] rights.

(Tr. at 41-44; *see* D.C. Doc. 48.) The termination hearing was, accordingly, re-set for February 23, 2021, and did go forward on that date, with Father appearing by video without further objection. (D.C. Doc. 49, 51.)

Termination hearing

At the February 23, 2021, termination hearing, the district court "recount[ed], for the record . . . the procedural history of this petition." (Tr. at 47-48; *see* D.C. Doc. 55 at 2-3.) In accordance with the prior rulings, Father was

“appearing by video from MSP.” (Tr. at 46.) Father could hear the proceedings and the court could hear him, “loud and clear.” (Tr. at 46, 72-73.) Three witnesses testified at the termination hearing, two of them by video: Father’s former probation officer, Jaimee Szlemko (Tr. at 48-56), CPS Ellison (Tr. at 57-72), and Father (Tr. at 73-90).

Szlemko testified primarily about Father’s current custody status and his prospects for release in the future. Father was currently at MSP where he was serving four concurrent sentences on the following convictions: for the Lewis and Clark County criminal endangerment, 10 years at MSP with 6 suspended; for the Lewis and Clark County possession of dangerous drugs (methamphetamine), 5 years at MSP, all suspended (imposed on revocation); for the Deer Lodge County criminal endangerment, 4 years at MSP; and for the Gallatin County possession, 3 years with Department of Corrections (DOC). (Tr. at 49-50.) Szlemko testified that Father’s first eligibility for parole would be July 2, 2021, but his prison term will not expire until July 1, 2024. (Tr. at 51.) If Father were to make parole at some point in the future, Szlemko testified that the Parole Board would typically require that he be in “some type of environment that’s suitable to their needs, often that’s a prerelease, sometimes the prerelease follows treatment. If prerelease is not an option, often the Parole Board looks for people to be in a sober living environment, or some type of program in the community.” (Tr. at 52.) These type of “stepdown

placements” would not necessarily “allow for a parent to have their child with them”—prerelease would not—but the parolee could have phone and in-person contact. (Tr. at 54, 56.) Szlemko also testified that Father had previously been “amenable to supervision in the community”—although he had violations, those were generally resolved through sanctions. (Tr. at 55.) However, “[i]t was the new [criminal] charges that took [Father] out of the community.” (*Id.*)

CPS Ellison testified about the nature of A.S.’s abuse and neglect and initiation of the current case, the reasons for removal, Father’s treatment plan progress, his ability to change, and the Child’s best interests. (Tr. at 58-64.) Ellison testified that although Father “started off with the goal of working on his [treatment] plan . . . in the long term, he was not successful.” (Tr. at 59.) Father completed the tasks of getting chemical dependency and mental health assessments, but he had difficulties in completing drug testing—to the extent that he “just quit trying to contact” the provider. (Tr. at 59-60.) In addition, Father’s “mental health assessment and chemical dependency assessment both stated that it was important for him to have treatment, and to my knowledge, he has not ever obtained any treatment.” (Tr. at 70.) Ellison also did not believe that Father had completed individual therapy as required in the treatment plan, although the evaluator was trying to reach him to get information she needed for her evaluation. (Tr. at 72.)

Father was noncompliant in checking in with the Department on a regular basis: before Father's move to MSP, "he was in various detention centers, at least on four different occasions, and, of course, he would not be able to contact us frequently, during those times." (Tr. at 60.) Then after he moved to the Butte/Anaconda area, "it became very difficult for him to keep in touch with the Department. That was not something he did on a regular basis. I would call him, maybe leave a message, if I could, he might call back several days later, if at all. So, he was pretty inconsistent[.]" (Tr. at 60.)

In terms of involvement in criminal activity, Father was arrested on new possession of methamphetamine charges in August 2019, after his treatment plan had been signed. (Tr. at 61.) Another item on the treatment plan was to keep in touch with his probation officer, and Ellison testified that Father did not follow through with that on a regular basis. (*Id.*)

Ellison did not have any record that Father had acquired or maintained housing and a stable environment. (Tr. at 61.) Ultimately, the "overall goal of the treatment plan is to demonstrate that [Father] could safely and appropriately parent his son by providing a safe and stable living environment, and he has not demonstrated that to the satisfaction of the Department, due to his ongoing charges, the fact that he is currently in Montana State Prison," and without a certain parole date. (*Id.*) Ellison emphasized the three prior removals of A.S. "all

due to substance abuse, concerns of substance abuse and alcohol”—one had only to “review the case history to realize that [Father] has made some of the same choices on more than one occasion.” (Tr. at 62, 70.)

Ellison also testified that A.S. had been in foster care in excess of 15 out of 22 months, “so we need to move on to permanency.” (Tr. at 62.) A.S. continued to be placed in the same foster home in Belgrade as when he was initially removed, where he was doing very well. (Tr. at 62.) The Department’s current permanency plan would be to continue A.S.’s placement with the current foster family, and they had been studied for both “guardianship and adoption, and are willing to provide long term care for [A.S.]” (Tr. at 63.)

A.S. had “rather significant mental health diagnoses,” which was why he was in therapeutic foster care. (Tr. at 71.) The district court inquired and confirmed that those issues included “major depressive disorder, oppositional defiant disorder, attention deficit disorder, and disruptive behavior disorder.” (Tr. at 71-72.) Consequently, A.S. was provided with “a trained and licensed therapist that he sees on a weekly basis” and, essentially, “a team of people that regularly monitor [A.S.]” (Tr. at 70.)

Ellison testified about the Department’s reasonable efforts: “We offered and entered into a treatment plan with [Father]. We set up a visitation plan for him. We have set up the evaluations and paid for the assessments of chemical dependency

and mental health, and have tried to facilitate reunification, and, of course, offered [the] treatment plan[.]” (Tr. at 63.) Ellison also facilitated improved contact from the prison through phone calls and letter writing between Father and A.S. (Tr. at 66.)

Despite the efforts, Ellison did not believe that the conduct or condition rendering Father unfit or unable to parent was likely to change any time soon: “we have a history with the Department that supersedes the involvement in 2019. This has been going on since 2013. It, to me, is very clear that this conduct is not going to change in the short term.” (Tr. at 63.) Ellison testified that she believed the continuation of the parent-child relationship might lead to continued abuse or neglect. (Tr. at 63-64.) “I don’t believe that [Father] has demonstrated the capacity to successfully parent [his] son.” (Tr. at 64.) Ultimately, Ellison testified, it is “traumatic for children to be left in limbo for long periods of time,” and they “need safety and stability, and . . . want to know what their long term plan is.” (Tr. at 69.)

Father testified about the prior cases and removals he and A.S. had been involved in. (Tr. at 73-75.) He expressed that he had had “problems of my own” and “turned to drugs and alcohol.” (Tr. at 73, 75.) Father testified that he did “so good for three years and . . . threw it all away in a few months.” (Tr. at 87.) Father testified that “the State, this last time . . . says that I didn’t complete my treatment

plan, well, I didn't really have one. I did get in trouble, I was facing charges before then[.]" (Tr. at 75.)

Father testified about things he had supposedly done in prison "with regard to some other treatment plan tasks," some of which were aspirational or recommendations for possible treatment, things he had "asked" for or was "trying" to get into or had "applied" for—the "CAMPP Montana" program, individual therapy, "Connections/Corrections Program." (Tr. at 78-82.) Father had gotten back on his "mental health meds" and he had been engaged through phone calls and letters with A.S., as CPS Ellison testified. (Tr. at 77, 79-81.) Father was working in prison. (Tr. at 82-83.)

Father testified about his plans for release and "transition" back into the community, including "keeping himself busy," sobriety, housing, work, mental health issues, medications, and counseling—"I want to take everything that gives me a chance to succeed[.]" (Tr. at 82-86.) And Father tried to express why the district court should, essentially, trust him and give him another opportunity to change:

I'm paying my debt to society, and I think I can succeed. I truly believe I have the confidence to succeed, this time. I'm not going back to the same relationship. I'm starting – I want to work for me and A.S. [REDACTED] He don't got nobody but me, I mean, not family.

If you just talk to him, that's what he wants is his dad, and it's obvious that's what I want is my son. I laid this on the Court. I'm sorry I messed up, again. I'm only human. I didn't come with a good

chance of succeeding, ever, but each time it gets longer and longer, and I've done better and better.

I just want my son. I'm not a young man, you know. I want my son to know that I never gave up on him. I've give[n] up on myself, a couple times, but I never gave up on him. He's everything I got.

(Tr. at 87.)

After the termination hearing the district court made findings of fact supporting termination of Father's parental rights. (D.C. Doc. 55 at 3-5.) First, A.S. was adjudicated as a youth in need of care "based on the nature of the abuse and/or neglect which included Father being incarcerated and Father's significant other being incarcerated leaving no one to care for [A.S.] When no one returned to care for him, [A.S.] went to the neighbor's house for the night." (*Id.* at 3.)

Second, regarding the Child's best interests, the court found that A.S. had been in an out-of-home foster care placement for at least 15 of the most recent 22 months—"specifically, the Youth has been in out of home foster care since April 9, 2019, or 22 of the last 22 months." (D.C. Doc. 55 at 3.) The court also found:

The Youth is currently 8 years old. He has been removed from parental care four times in these 8 years. The first removal was in 2013, when he was removed from his Mother's care while his Father was in the WATCH program. The other three removals were after the death of the Youth's Mother and involved him being removed from his Father's care.

(*Id.*)

Third, regarding Father's current circumstances, the district court found that Father was "currently incarcerated at the Montana State Prison" and outlined the undisputed evidence of Father's sentences. (D.C. Doc. 55 at 3-4.) The court found that these sentences "are all running concurrently. [His] prison term expires in July 2024. [Father] will be parole eligible, at the earliest, on July 2, 2021. The testimony reflects that when [Father] is discharged, he will likely be placed in a pre-release setting." (*Id.* at 4.)

In addition, Father testified that he has a close bond with his son, he was taking parenting classes while in prison and other self-help classes, but he could not have visitors at MSP due to COVID. (D.C. Doc. 55 at 4.) Father testified that he was taking two medications relative to his mental health and he had been diagnosed with PTSD, ADD, Panic Disorder and Depression. (*Id.*) He testified that he had been sober since August 2, 2019, and incarcerated since April of 2020. (*Id.*) Regarding plans for transitioning into the community, the court found that Father "has a job in Anaconda at a restaurant and could live in a Sober Living house in Anaconda." (*Id.*)

Fourth, the district court made findings about Father's treatment plan compliance, based primarily on the testimony of CPS Ellison. (D.C. Doc. 55 at 4-5.) Pursuant to her testimony, Father "started off working on the Plan tasks and obtained his chemical dependency and mental health assessments, but in the

long-term was not successful.” (*Id.* at 4.) The court found that “[a]lthough [Father] has been incarcerated since April of 2020, he did have a period of ten months prior to his incarceration to comply with the requirements of his Treatment Plan.” (*Id.* at 5.)

Regarding specific treatment plan tasks, the district court found that Father was inconsistent in drug and alcohol testing, and “then he stopped testing” altogether. (D.C. Doc. 55 at 5.) The court found that Father “was not compliant with the requirement of checking in” with the Department, and he eventually “stopped checking in consistently.” (*Id.*) Father violated the treatment plan requirement of not being involved in criminal activity when, in August 2019, he was charged with a new possession of methamphetamine charge for which he was later convicted. (*Id.*) He was also “not compliant with the requirement that he keep in touch with Adult Probation and Parole.” (*Id.*) Father did not comply with the requirement of individual therapy. (*Id.*)

Finally, although not required to do so as a prerequisite for termination of parental rights, the district court found that the Department made reasonable efforts to avoid removal and pursue reunification of the family. (D.C. Doc. 55 at 5.) As the court recounted:

The removal followed a Priority One report that presented an emergency situation, as [Father] was incarcerated and left the child in the care of his girlfriend who was actively abusing alcohol. CFS offered [Father] a Treatment Plan and all of the services available to

comply with it. [Father] had chemical dependency and mental health evaluations. CFS provided testing for [Father]. CFS arranged for visits between [Father] and the child, which were no longer possible once [Father] was placed at MSP. While [Father] has been in MSP, CFS has been able to arrange for phone calls and letters between [Father] and the child.

(Id.)

SUMMARY OF THE ARGUMENT

The district court properly and within its discretion ordered the termination of Father’s parental rights to his child A.S. based on clear and convincing evidence satisfying the required statutory criteria.

Parents do not have a specific due process right to physical presence at termination hearings—in fact, the DN laws specifically provide for video appearances for testimony at “any time” in such proceedings. Father was provided with due process in this case—notice and opportunity to be heard at a meaningful time and in a meaningful manner—when he appeared, testified, observed, and participated in the termination hearing by video from MSP. Father’s video appearance was without technical difficulties, authorized by law, and warranted under public health precautions dictated by the COVID-19 pandemic—as found by the district court and pursuant to guidance from this Court.

ARGUMENT

I. The district court properly and within its discretion ordered termination of Father’s parental rights to A.S. based on satisfaction of the statutory criteria supported by clear and convincing evidence.

A. Standard of review and applicable law

This Court reviews a district court’s decision to terminate parental rights for an abuse of discretion, considering the applicable standards of Title 41, chapter 3, Mont. Code Ann. *In re D.D.*, 2021 MT 66, ¶ 9, 403 Mont. 376, ___ P.3d ___. The Court reviews conclusions of law for correctness. *Id.*

A court is authorized to terminate parental rights when (1) a child has been adjudicated as a youth in need of care; (2) an appropriate treatment plan approved by the court has not been complied with by the parent or has not been successful; and (3) the conduct or condition of the parent rendering him or her unfit is unlikely to change within a reasonable time. Mont. Code Ann. § 41-3-609(1)(f). Each factor must be supported by clear and convincing evidence. Mont. Code Ann. § 41-3-609(1).

In determining whether the conduct or condition of the parent is likely to change within a reasonable time, “the court shall enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parent[] renders the parent[]

unfit, unable, or unwilling to give the child adequate parental care.” Mont. Code Ann. § 41-3-609(2). In making this determination, the court must consider the parent’s emotional illness, mental illness, or mental deficiency, history of violent behavior, excessive use of intoxicating liquor or dangerous drugs, and present judicially ordered long-term confinement. Mont. Code Ann. § 41-3-609(2)(a)-(d).

Ultimately, the “chief concern is the best interests of the child.” *In re M.V.R.*, 2016 MT 309, ¶ 27, 385 Mont. 448, 384 P.3d 1058. Montana Code Annotated tit. 41, Ch. 3, pt. 6, provides the “procedures and criteria by which the parent-child legal relationship may be terminated by a court if the relationship is not in the best interest of the child.” Mont. Code Ann. § 41-3-602. The guiding principle in these cases is foremost and always the best interest of the child: “the district court is bound to give primary consideration to the physical, mental, and emotional conditions and needs of the [child], thus, the best interests of the [child] are of paramount concern in a parental rights termination proceeding and take precedence over the parental rights.” *In re A.T.*, 2006 MT 35, ¶ 20, 331 Mont. 155, 130 P.3d 1249 (quoting *In re E.K.*, 2001 MT 279, ¶ 33, 301 Mont. 328, 37 P.3d 690). A child’s best interests and need for permanent placement in a loving and stable home supersede the parent’s interests. *A.T.*, ¶ 20.

Thus, the Legislature has determined that the best interests of the child are the primary and paramount statutory standard for termination, and the overarching

concern throughout all abuse and neglect proceedings. Mont. Code Ann. §§ 41-3-602, 41-3-609(3) (district court shall give “primary consideration to the physical, mental, and emotional conditions and needs of the child.”), 41-3-102(5) (defining “best interests of the child”), 41-3-101(4) (the child’s health and safety are of paramount concern). Even in “making reasonable efforts at providing preservation or reunification services, the child’s health and safety are of paramount concern.” *Id.* at § 41-3-423(1).

In addition, “[i]f a child has been in foster care under the physical custody of the state for 15 months of the most recent 22 months, the best interests of the child must be presumed to be served by termination of parental rights.” Mont. Code Ann. § 41-3-604(1).

B. All of the required statutory criteria were established by clear and convincing evidence.

As to the first required criteria, there is no dispute on appeal that A.S. was adjudicated as a youth in need of care, having been found to have been abused and neglected. (*See* D.C. Docs. 12 at 2-4, 55 at 3, 5; Tr. at 4-7.) The nature of that abuse and neglect was never contested or disputed by Father: Father was in jail for one of several criminal cases against him; he left six-year-old A.S. behind to live in a messy camper, without adequate clothing, bathroom, or running water; he left A.S. in the so called “care” of his girlfriend, who drank to excess every day and was observed being abusive towards A.S.; and the Child wound up alone to fend

for himself after Father's girlfriend went out to get more to drink and was arrested for DUI.

That's where this case started. Twenty-two months later, it ended with Father in prison with a failed treatment plan and no demonstrated ability to change his situation or unfitness as a parent—along with an uncertain release date and any hope for parole still months away at the earliest. During that whole time, A.S. had been continuously placed in a loving and stable therapeutic foster home where his special needs were being met.

On appeal, Father spends seven pages arguing that the district court erred in finding and concluding that his treatment plan was not complied with and was unsuccessful (Appellant's Br. at 29-36), and a paragraph each—without citation to any legal authority—on arguing that the court erred when it concluded that his conduct or condition was unlikely to change and that the Child's best interests would be served by termination. (*Id.* at 36-37; *see id.* at 18-19.)

Regarding the failed treatment plan criteria, the record shows that Father made initial progress on some of the tasks, but within two months of signing the plan he was doing drugs again and was arrested. Then, Father's arrest and injuries from a couple of "accidents" slowed any progress to a standstill. At the time of extension of TLC, the Department established and the district court found that Father was not complying with the plan, but he was given more time to do so.

See Supra at 9-13. Three months later, Father was still noncompliant, embroiled in his criminal matters, living with the alcoholic girlfriend, and out of touch with his attorney and his probation officer—basically disengaged entirely from the process of doing the necessary work to reunify with his son. *See Supra* at 13-15.

Ultimately, as CPS Ellison testified and the district court found, the clear and convincing evidence presented at termination established that Father had not complied with the treatment plan and it was unsuccessful. (Tr. at 59-62, 70, 72; D.C. Doc. 55 at 5.) Despite this undisputed evidence satisfying the statutory criteria, Father argues for reversal because the treatment plan “became inappropriate” and the Department failed to make reasonable efforts after Father was imprisoned at MSP. In effect, Father is asking this Court to substitute its judgment for that of the fact-finder regarding the weight given to the evidence, and to consider whether the evidence presented could support a finding different from that made by the district court. *In re L.S.*, 2003 MT 12, ¶ 10, 314 Mont. 42, 63 P.3d 497.

Moreover, regarding “appropriateness,” this Court has consistently held that a parent who does not object to a treatment plan’s goals or tasks waives the right to argue on appeal that the plan was not appropriate. *See, e.g., In re X.B.*, 2018 MT 153, ¶ 24, 392 Mont. 15, 420 P.3d 538; *In re C.M.*, 2015 MT 292, ¶ 15,

381 Mont. 230, 359 P.3d 1081. Father never objected to any part of the treatment plan that he signed and stipulated to with the understanding that it was a “zero tolerance type of plan,” that it was meant to address the key problems of his sobriety and criminal activity, and that:

[I]f he messed up, it wasn’t going to be a long opportunity to do that, because of the prior history. . . . This treatment plan is a little more intense than your average treatment plan. It’s pretty clear that the Department isn’t really going to put up with a lot of backsliding.

(Tr. at 18; *see* Tr. at 39 (“very clear” what he needed to do).) *See Supra* at 6-8, 13.

Father’s argument also ignores the fact, as found by the district court, that Father had a “period of ten months prior to” going to MSP in which to comply with the treatment plan, yet he did not do so. (D.C. Doc. 55 at 5.)

Father’s argument that the Department failure of “reasonable efforts” caused Father’s treatment plan failure is similarly without support of legal authority. First off, whether the Department provided reasonable efforts under Mont. Code Ann. § 41-3-423(1) “is not a separate requirement for termination.” *In re C.M.*, 2019 MT 227, ¶ 22, 397 Mont. 275, 449 P.3d 806 (quoting *In re R.J.F.*, 2019 MT 113, ¶ 26, 395 Mont. 454, 443 P.3d 387); *In re C.M.G.*, 2020 MT 15, ¶ 13 n.3, 398 Mont. 369, 456 P.3d 1017 (“reasonable efforts is not, itself, a required finding for termination”). Furthermore, while reasonable efforts “may” be important in certain cases as a “predicate for finding” that parents’ conduct or condition is

unlikely to change within a reasonable time, *see In re R.L.*, 2019 MT 267, ¶ 26 n.5, 397 Mont. 507, 452 P.3d 890 (citations omitted), *C.M.*, 2019 MT 227, ¶¶ 16, 22, 397 Mont. 275, 449 P.3d 806, there is no authority to support Father’s argument that reasonable efforts are relevant to satisfaction of the failed treatment plan criteria for termination. Father has cited no cases applying a statutory “reasonable efforts” analysis at all, and there are no cases of this Court that apply such analysis to the treatment plan criteria.

Regarding Father’s “conduct or condition” and “best interest of the child” arguments—again, absent citation to any authority—there was ample evidence in the record to support the district court’s findings, conclusions, and order. CPS Ellison testified to both points and the court made commensurate findings and conclusions. (*See* Tr. at 61-64, 69-72; D.C. Doc. 55 at 3-7.)

II. Father was not deprived of fundamentally fair procedures when he appeared and testified at the termination hearing by video from Montana State Prison.

A. Standard of review and applicable law

Because the care and custody of a child is a fundamental liberty interest protected by fundamentally fair procedures, termination procedures must satisfy the Due Process Clause of the Fourteenth Amendment. *In re C.S.*, 2020 MT 127, ¶ 12, 400 Mont. 115, 464 P.3d 66. Whether a person has been denied his or her right to due process is a question of constitutional law, for which this Court’s

review is plenary. *In re T.S.B.*, 2008 MT 23, ¶ 20, 341 Mont. 204, 177 P.3d 429.

To establish a claim for violation of due process, a parent must demonstrate how the outcome would have been different had the alleged violation not occurred.

C.S., ¶ 13.

The key components comprising fundamentally fair proceedings are notice and an opportunity to be heard. *In re T.C.*, 2001 MT 264, ¶ 22, 307 Mont. 244, 37 P.3d 70. Due process is not a fixed concept, but a flexible doctrine that must be tailored to each situation to meet the needs and protect the interests of the parties involved. *In re B.P.*, 2001 MT 219, ¶ 31, 306 Mont. 430, 35 P.3d 291. The Court has repeatedly held that due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. *In re B.P.*, 2001 MT 219, ¶ 31 (citations omitted). The guiding principle is “that the parent not be placed at an unfair disadvantage during the termination proceedings.” *In re C.B.*, 2019 MT 294, ¶ 18, 398 Mont. 176, 454 P.3d 1195.

B. The district court was authorized by statute to take Father’s testimony by video from prison and was warranted in doing so pursuant to COVID-19 guidelines for public health and safety.

Father contends his rights under the Due Process Clauses of the Montana and federal constitutions were violated because he was not physically present at the termination hearing. Of course, the constitutional protections Father relies upon on appeal do not apply, simply because a DN proceeding “is not a criminal case.”

In re B.P., 2000 MT 39, ¶ 45, 298 Mont. 287, 995 P.2d 982; Mont. Code Ann. § 41-3-422(4) (petition brought under Tit. 41, ch. 3 is a civil action). Although a parent clearly has a “right to appear” and a “right to be heard” in a termination hearing, Mont. Code Ann. § 41-3-422(9)(a), neither the Montana Constitution nor the abuse and neglect statutes guarantee a parent the right to appear *in person*.

In fact, the statutes specifically and expressly provide that: “**A court may permit testimony by telephone, videoconference, or other audio or audiovisual means at any time in a proceeding pursuant to this chapter.**” Mont. Code Ann. § 41-3-110 (emphasis added). In addition, given the state of the COVID-19 pandemic, specific information about an outbreak in the cell block where Father was housed, and this Court’s guidance for safely handling trial court proceedings, the district court did not abuse its discretion in requiring Father to appear by video rather than be transported from MSP. (*See* D.C. Docs. 44, 47; Tr. at 41-44.)

Father has not shown that his termination hearing was fundamentally unfair because of his appearance by video or that the outcome of the proceeding would have been different if he had been personally present at the hearing. Father was represented by counsel. In light of requiring Father’s appearance by video rather than in person, the district court specially continued the termination hearing for an additional 83 days so that counsel had access to his client at MSP to prepare.

Counsel was very agreeable to those measures and did not reassert any objection to Father's video testimony at the termination hearing.

Father certainly had the opportunity to testify at termination and he did so at length and without any restrictions. Nothing in the record indicates any technical difficulties. On the contrary, the record shows that Father came across "loud and clear." Father's due process rights to appear and be heard were not violated. *See, e.g., In re L.N.*, 2014 MT 187, ¶ 20, 375 Mont. 480, 329 P.3d 598 (parents were provided notice, appointed counsel, permitted to engage in discovery, allowed to present testimony, and given the opportunity to cross-examine witnesses—according them fundamentally fair procedures).

CONCLUSION

This Court should affirm the district court's order and judgment terminating Father's parental rights to his Child, A.S.

Respectfully submitted this 22nd day of September, 2021.

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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 9,802 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Jonathan M. Krauss

JONATHAN M. KRAUSS