IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA 21-0540

IN THE MATTER OF:

R.J.E., A.C.R., P.G.R. AND J.B.R.

Youths In Need Of Care.

APPELLANT'S OPENING BRIEF

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

APPEARANCES:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Montana Code Annotated

Montana Cases

STATEMENT OF THE ISSUE

The sole issue on appeal is whether the district court committed reversible error when it determined the Department was not required to provide reunification services to C.E.

STATEMENT OF THE CASE

Mother and Appellant C.E. , appeals the Orders, entered October 4, 2021 by the Montana's Thirteenth Judicial District Court, Yellowstone County, terminating her parental rights to R.J.E. (seven years old), A.C.R. (six years old), P.G.R. (four years old) and J.B.R. (three years old), (Appendix A) The rights of the children's putative birth fathers were also terminated.

Procedural History

The case originated April 19, 2017, when the Yellowstone County Attorney filed a Petition for Emergency Protective Services (EPS), Adjudication as Youth In Need of Care (YINC), and Temporary Legal Custody (TLC) for R.J.E. (born November 22, 2013), A.C.R. (born July 30, 2015) and P.G.R. (born December 5, 2016) on behalf of the Department of Health and Human Services (the Department), supported by the Affidavit of CPS Loretta Williams. (DC540-01,02, DC542-01,02, DC543-01,02)[1] The Department advised the district court the

[1] Four Yellowstone County District Court cases (DN 17-154, DN 17-155, DN 17-156 and DN 18-16) were separately appealed. The four appellate cases (DA 21-540, DA 21-541, DA 21-542 and DA 21-543) have been consolidated under cause number DA 21-540. Citations to the record from below will be prefixed by the relevant

children were not Native American and ICWA did not apply. (*Id.*) The district court granted EPS and set a show cause hearing. (DC540-04)

After four continuances, the district court held the show cause, adjudication and disposition hearing on January 8, 2018. (DC540-026) Appellant and birth mother C.E. and putative birth father C.R. stipulated to adjudication. (*Id.*) The district court adjudicated R.J.E., A.C.R. and P.G.R. as YINC and awarded the Department TLC. (*Id.*) January 9, 2018 the district court entered its order, adjudicating the children YINC, granted TLC to the Department and ordered the Department to prepare a treatment plan. (DC540-027)

January 12, 2018 the Department filed a Petition for EPS, Adjudication as YINC and TLC for J.B.R., a newborn child. (DC541-001, 002) According to CPS Jessica Moorehead, J.B.R. was born on January 7, 2018, and his birth was reported to the Department on January 9, 2018. (DC541-001) February 5, 2018 the district court held a show cause hearing at which C.E. stipulated to adjudication of J.B.R. as YINC, and EPS. (DC541-007) counsel for the Department asserted that C.E. had "treatment plans pending in other matters" and that the treatment plan would be same for the current cases. (*Id.*, 2/15/2018 Hrg. Tr. 5:1-6)

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appeal number. (e.g. DC540-01 references the first district court pleading in DA 21-540) Because the pleadings are largely identical, all citations to the record from below will be from DA 21-540, except as otherwise noted.

August 9, 2018 the Department filed a petition for permanent legal custody and termination of C.E.'s parental rights. (DC541-043) When the matter came before the district court for hearing on November 5, 2018, the Department requested the petition for termination of parental rights be amended to a petition for extension of TLC. (DC540-057) The district court granted the request and granted an extension of TLC, entering a written order on November 16, 2018. (DC540-058)

August 14, 2018 the Department filed a motion to approve a proposed treatment plan regarding J.B.R. (DC541-016) C.E. did not sign the proposed plan and it is not asserted that she had reviewed the proposed treatment plan. (*Id.*) The district court approved the plan on August 28, 2018. (DC541-018) April 22, 2019 the Department filed a single, court-approved treatment plan for C.E. in all four cases which was signed by the Department CPS, C.E. and the district court. (DC541-068) September 26, 2019 the Department filed Motions to Dismiss in all four cases, which the district court granted the same day. (DC540-074, 076)

April 21, 2020 the Department filed Petitions for EPS, Adjudication as YINC and TLC for all four children. (DC540-077) April 22, 2020 the district court granted EPS and set a show cause hearing. (DC540-080) May 11, 2020 the district court held a show cause hearing at which the parents stipulated to EPS. (DC540-086) May 26, 2020 the Department filed a Petition for Determination that

Preservation and Reunification Services Need Not Be Required. (DC540-088) June 26, 2020 the district court held an adjudication and disposition hearing at which C.E. requested a contested hearing. (DC540-092) October 23, 2020, after four continuances of hearing on the petition regarding reunification, the Department filed an amended petition. (DC540-092, 095, 098, 099, 105)

January 11, 2021, after one more continuance, the district court heard testimony and argument on adjudication of the children as YINC and the Department's petition for a determination that preservation and reunification services need not be provided. (DC540-115) March 29, 2021 the district court entered its decision that the Department need not make further efforts to reunify C.E. with her children. (DC540-118)

April 15, 2021 the Department petitioned for termination of C.E.'s parental rights to all four children. (DC540-119) September 13, 2021 the district court heard testimony and argument on the petition. (DC540-142) November 4, 2021 the court entered its orders terminating C.E.'s parental rights to R.J.E., A.C.R., P.G.R., and J.B.R. (Appendix A) C.E. filed her notice of appeal November 1, 2021.

Facts of the Case

Affidavit of CPS Loretta Willems – April 18, 2017. April 18, 2017 the Department filed Petition for Emergency Protective Services, Adjudication as Youth in Need of Care and Temporary Legal Custody for R.J.E., A.C.R. and

P.G.R. (DC540-002, DC542-002, DC543-002) The petition was supported by the affidavit of CPS Loretta Willems. (DC540-001)

CPS Willems states that, on April 8, 2017, the Department received a report that A.C.R. was "found at Rose Park without adult supervision and law enforcement was called to the scene." (DC540-001) The child was identified by a neighbor, who directed law enforcement to her home. (*Id.*) Law enforcement is alleged to have reported that, after several attempts knocking on the door and ringing the doorbell, the natural father, C.R., answered the door. (*Id.*) C.R. said he was "under the weather" and had been sleeping on the couch. (*Id.*) The responding officer later told CPS Willems the complainant said they had A.C.R. in their care for about an hour before law enforcement arrived. (*Id.*)

CPS Willems attests that, on April 10, 2017 she went to the home, rang the doorbell for about 15 minutes before peering through the window where she was an infant lying on the sofa. (DC540-001) According to CPS Willems she called law enforcement and continued knocking on the door until they arrived. (*Id.*) C.R. answered the door, and told CPS Willems he had been in the shower and had not heard the doorbell. (*Id.*) CPS Willems says C.R. had damp skin and wet hair. (*Id.*)

C.R. told CPS Willems that the birth mother, C.E. was in custody for failing to serve a house arrest. (DC540-001) C.R. identified the sleeping infant as P.G.R. and said his other two children, R.G.E. and A.C.R. were with their paternal

grandmother. (*Id.*) C.R. repeated his statement that he had been ill on April 8, 2017, and had been was sleeping upstairs, unaware that A.C.R. had left the home.

April 12, 2017, CPS Willems returned to the home and, after "approximately five minutes of knocking," C.E. came to the door. (DC540-001) CPS Willems attests C.E. "had an ashy/grey color to her skin and it appeared moist. Her hands were shaking; she would not make eye contact, her speech was slow and sometimes slurred. C.E.'s pupils were contracted even in shadow."

Neil Freidel is reported to have arrived to administer a drug test for C.R. who was on DOC supervision for possession of dangerous drugs. (DC540-001) C.R. tested positive for amphetamine and methamphetamine. (*Id.*) C.E. declined to be tested. (*Id.*) CPS Williams placed all three children in EPS.

At the Department, A.C.R. was found to have a rash and bug bites on her legs and stomach. (DC540-001) P.G.R. is reported to have "mats in her hair." (*Id.*) On April 13, 2017 P.G.R.'s foster mother reported drainage from the child's ear that was subsequently found to be an ear infection. (*Id.*) The foster mother reported the four-month-old child had missed her 30 day well baby checkup and had not seen a doctor since December 2016. (*Id.*) Twenty-one-month-old A.C.R. was reported to have last seen a doctor at her 15 month checkup, and was diagnosed with an ear infection. (*Id.*) A.C.R. had previously been treated for a staph infection, and according to CPS Willems, "it was felt both A.C.R. and P.G.R. were

exhibiting symptoms of a staph infection." (*Id.*) R.J.E. was diagnosed with the flu and "some signs of possible staph infection." (*Id.*)

April 14, 2017 CPS Willems spoke with a pediatric social worker who told her A.C.R. and P.G.R. had been diagnosed with ear infections and R.G.E. had been diagnosed with influenza. (DC540-001) All three children were reported to be showing "symptoms of a staph infection" and were behind in vaccinations. (*Id.*) CPS Willems went on to detail six previous reports to Department involving C.E., none of which were substantiated. (*Id.*)

Show Cause Hearing re R.J.E., A.C.R. and P.G.R. – January 8, 2018. After nearly nine months and four continuances, the district court held a show cause hearing. (DC540-026) Both natural parents were present and stipulated to YINC and TLC, C.E. (*Id.*) Disposition consisted of Department counsel telling the district court that he believed the parents would be "perhaps looking to receiving their treatment plans sooner than later," to which the court replied, "Okay, Thank you. All right." (1/8/2018 Hrg. Tr. 2:16-21)

The parents then addressed the district court about their inability to have communication with CPS. (1/8/2018 Hrg. Tr. 4:14, et seq.) C.E. and C.R. reported that the CPS assigned to their case was frequently unavailable, reportedly because "her kids are sick all the time, so she doesn't go to work…. I call her… at least once a week, her boss, her boss's boss, and we left messages…. They don't call me

back, ever, about anything…. We've met her a total of like four times, five times in the nine months that we've been doing this…. I can't even get a referral…." (*Id.* 4:16-5:1.)

The district court told the parents, [W]e're going to pretend like today is a new day, because going round and round has gotten you nowhere… and it's not going get our case moved forward…. I mean, we're getting a lot accomplished today. We're getting show cause, adjudication and disposition done. And you're going to get a treatment plan, and you'll be in good contact." (1/8/2018 Hrg. Tr. 13:6-19)

February 2, 2018 the Department filed Motions to Adopt Proposed Treatment Plan for C.E. in the cases regarding the three older children.[2] (DC540-29) The proposed treatment plan is not signed by C.E., but there is a handwritten annotation that it was "provided to parent + counsel in meeting. did not sign." (*Id.*) February 20, 2018 the district court signed the proposed treatment plan for C.E. in each case. (DC540-031)

Affidavit of CPS Jessica Moorehead – January 12, 2018. J.B.R. was born to C.E. and C.R. on January 9, 2018. (DC541-001) CPS Moorehead says the Department received an emergency report that C.E. had delivered a child and was

[2] R.J.E., A.C.R. and P.G.R.

receiving substance abuse treatment for Subutex. (Id.) C.E. tested negative for Subutex, but CPS Moorehead reports the umbilical cord was sent for drug testing. (Id.) According to CPS Moorehead "Both parents will receive a court-approved treatment plan and services coordinated in an attempt to resolve the child protection concerns." (Id.) CPS Moorehead reports J.B.R. was not being discharged from the hospital because, according to nursing staff, "he is showing withdrawal symptoms due to exposure to long-term opiate use."

Disposition Hearing re J.G.R. – March 26, 2018. Department counsel advised the district court that J.B.R. was in the hospital with a staph infection and that the Department was reviewing video to determine whether one of the parents had caused the infection during supervised visitation. (*Id.* 3;23-6) C.E. and C.R. arrived, and Department counsel repeated the prospective allegations against them, conceding that they had not been informed of the concerns prior to the hearing. (*Id.* 6:14-24)

C.E. reported that A.C.G. had been taken to the doctor twice when she developed staph infections from diaper rashes, and she was told it was an allergic reaction to urine. (3/26/2018 Hrg. Tr. 7:12-20) C.E. when she was similar bumps on J.B.R. when she changed his diaper after a bowel movement:

> I had called Loretta in and told her. I pointed out the little dots, and I said, "These right here are staph." I made sure to let her know, and the superintendent – I believe Deb is her name – came in and took

> pictures of them, but nobody had picked at them or anything like that, but as soon as I saw them, I made sure to let Loretta and them know, because I had dealt with this prior with my two-year-old as well, she had gotten staph like three different times on her butt when she was still in diapers.

(*Id.* 8:6-16)

Deposition of CPS Courtney Knutson – August 9, 2018. CPS Knutson filed an affidavit in support of the Department's motion for permanent legal custody and termination of the parental rights of C.E. and C.R. to R.J.E., A.C.R. and P.G.R. (DC540-042, 043) CPS Knutson alleges both parents were uncooperative and refused to participate in drug testing, parenting classes, communication and were hostile and aggressive toward Department workers and foster parents. (DC540-042) CPS Knutson alleges C.E. was not in compliance with any portion of her treatment plan except coming to visitation with diapers and appropriate snacks and clothing, and keeping the Department advised of any new criminal matters.[3] (*Id.*)

CPS Knutson concludes, "The Department continues to have concerns regarding C.E. suspected ongoing drug abuse, refusal to comply with drug testing, as well as anger and violence issues in regard to both parents. The parents have not been able to demonstrate their desire to work toward reunification, their desire to become and remain clean from all substances, or how to appropriately parent."

[3] There were none.

(DC541-042) The district court set the matter for hearing on November 5, 2018. (DC540-045)

Termination and PLC Hearing – November 5, 2018. Department counsel advised the district court that, "based on the parents' engagement with the Department of late, which I'm happy to report is going very well, the Department… is requesting to amend its petition for PLC to a petition for an extension of TLC as to R.J.E., A.C.R. [and] P.G.R…." (11/5/2018 Hrg. Tr. 3:13-19)

Affidavit of CPS Lacey Herbst – September 26, 2019. CPS Herbst provided affidavits in support of the Department's Motions to Dismiss. (DC540-074, 075) CPS Herbst states the children have been on "Trial Home" since April and May 2019. (DC541-075) According to CPS Herbst, "The Department has conducted many announced and unannounced home visits, transported the children to and from daycare multiple times for birth parent with no major concerns. The Department also has seen the children at their daycare. Birth Mother has appropriate housing and employed full time." (Id.) CPS Herbst reports there are no current child protection concerns and that the GAL does not object to dismissal. (Id.) The district court immediately entered the orders to dismiss. (DC540-076)

Affidavit of CPS Ashley Gates-Lanphear – April 21, 2020. April 21, 2020 the Department filed new petitions for EPS, YINC and TLC for all four children. (DC540-077, DC541-046, DC542-066, DC543-066) CPS Lanphear provided

affidavits in support of the Department's second petitions (DC540-078, DC541-047, DC542-067, DC543-067)

CPS Lanphear states that, on March 5, 2020, the Department received a report that C.E. and C.R. left all four children alone in a vehicle with the windows rolled down and the doors unlocked. (DC540-078) CPS Lanphear further attests that, on April 15, 2020, she received a report that C.E. and C.R. had been witnessed fighting in their front yard and in the presence of their children. (*Id.*) According to CPS Lanphear, law enforcement reported that C.E. was in possession of a methamphetamine pipe and had admitted to using the drug two days earlier. (*Id.*) Upon questioning, R.L.E. reportedly told CPS Lanphear that the parents "got in a fight outside. (*Id.*) A.C.R. and R.L.E. were reported to have said C.E. and C.R. "both fight with their hands and their words." (*Id.*) A.C.R. reportedly said, "Dad hit Mom in the face." (*Id.*) When asked how he held his hand, A.C.R. is alleged to have held her hand open and said, "His hand was like this."(*Id.*) CPS Lanphear says the home was messy, but she did not observe any safety concerns. (*Id.*) CPS Lanphear reports there was adequate food in the kitchen and refrigerator. (*Id.*)

According to CPS Lanphear, on April 16, 2020 the foster parents reported the children said they were "left home alone a lot, do not eat dinner very much, and are always thirsty." (DC540-078) The foster parents alleged that P.G.R. was

exhibiting what they termed "sexualized behavior…" moving her hips like she was humping something and saying 'oh baby, oh baby.'" (*Id.*)

Affidavit of Lindsey Brunner – May 26, 2020. CPS Lindsey Brunner swore an affidavit in support of the Department's petition for determination that preservation and reunification services need not be provided. (DC540-088, 089) In addition to repeating previous allegations, CPS Brunner reports that, since April 12, 2017, R.L.E. was in Department care for 775, A.R.C. was in Department care for 810 days and P.G.R. was in Department care for 810 days. (DC540-089) CPS Brunner reports that, since his birth on January 7, 2019, J.B.R. had been in Department care for 447 days. (Id.) CPS Brunner also reports that, upon dismissal of the Department's first custody, the children were in the parents' care for 162 days before being removed the second time. (Id.)

Adjudication and Disposition Hearing – August 24, 2020. CPS Brunner addressed the district court, stating that the counselor seeing the children "feels that it is not in the kid' best interest right now to see mom or dad in person, or by video, or any contact at all. (8/24/2020 Hrg. Tr. 9:0-25) C.R. requested that an assessment be done "with me and the kids at a visit where a psychiatrist could see me interact with my kids instead of just saying…. I just don't see how they can make that decision without ever seeing me interact with my children." (Id. 10:15-20) The district court responded that, "…it's hard to get, like therapeutic parenting visits and

things put together." (Id. 11:10-12)

Hearing on Reunification Services – January 11, 2021. Judge Mary Jane Knisely presided over the Hearing. (DC540-115) Both parents were present. (*Id.*)

After detailing highlights of her 7 years of experience, clinical therapist Megan Owen testified regarding her treatment of all four children. (1/11/2021 Hrg. Tr. 7:13, et seq.) Ms. Owens said, when she began therapy, R.L.E. was 6 years old, A.C.R. was 4 years old, P.G.R. was 3 years old and J.B.R. was 2 years old. (*Id.* 9:20-23) Ms. Owens said she was currently providing services for R.L.E. and A.C.R., but had stopped trying to counsel the two younger children because "they really need to be in person…." (*Id.* 10:1-5)

When asked if she saw anything noteworthy in the children's appearance or condition, Ms. Owens said she didn't, and described them as "typical kiddos." (1/11/2021 Hrg. Tr. 11:13-18) Ms. Owens said she diagnosed R.L.E. with posttraumatic stress disorder, chronic, as well as adjustment disorder, with anxiety. Based on "chatting with [the foster parent], the CPS worker to get a history of the case, as well as an assessment I did of R.L.E." (*Id.* 15:20-16:3) Ms. Owens said she recommended that he have "zero ongoing contact with the individuals that have caused his childhood trauma." (*Id.* 16-18-20) Ms. Owens testified R.L.E. would "need a lot of work with trusting relationships and trusting adults. He is going to

need a lot of work with boundaries…. And then, he is still very disrespectful, at times toward women figures….” (*Id.* 17:22-18:10)

Ms. Owens testified she also diagnosed A.C.R. with posttraumatic stress, disorder, chronic, as well as adjustment disorder, with anxiety. (1/11/2021 Hrg. Tr. 18:11-17) Ms. Owens testified A.C.R. “does a lot of chewing and biting of… the inside of her cheeks and her lips….” (*Id.* 18:19-22) Ms. Owens said A.C.R. would chew on a wide range of nonfood items including pencils, pens and erasers. (*Id.* 18:24-19-2) “And she's always going. She can't handle having things be quiet. She wants noise and she wants stimulation at all times, which, for a kiddo her age, is an anxiety response as well.” (*Id.* 19:1-5)

Ms. Owens testified she also diagnosed P.G.R. with posttraumatic stress, disorder, chronic, as well as adjustment disorder, with anxiety. (1/11/2021 Hrg. Tr. 21:13-17) Ms. Owens said P.G.R.’s primary symptom was aggressiveness. (*Id.* 21:19)

Like all three of his siblings, Ms. Owen diagnosed J.B.R. with posttraumatic stress, disorder, chronic, as well as adjustment disorder, with anxiety, though she noted she may change the diagnosis because the two-year-old was being aggressive and having “tantrums and outbursts.” (1/11/2021 Hrg. Tr. 22:9-24)

In conclusion, Ms. Owens specifically recommended the four children have no contact with either parent. (1/11/2021 Hrg. Tr. 22:22-25) On cross-examination, Ms. Owens testified she knew that the natural parents caused the children's anxiety and stress, " Based on my observation of the kiddos during our sessions, their storytelling and their art work, the way that they are playing, the things that they are telling me in sessions." (*Id.* 23:17-23) When asked to specify what she termed "traumatic events," Ms. Owens said R.L.E. "described not having enough food to eat, and not being talked to nicely. He has avoided all topics related to his birth mom and C.R. That's all I have for R.L.E." (*Id.* 24:18-25) With respect to the younger children, Ms. Owens said she made her diagnoses based on "play therapy. I don't talk to kids about their experiences. I more observe their play, and they teach me in that way about their experiences…." (*Id.* 25:17-25) Ms. Owens said she came to her specific diagnoses, in large part, "based on the timeline and the background that I got from foster mom and from CPS of how long he was actually with his biological parents; and the diagnosis itself of posttraumatic stress disorder came from all of those things as well. Chatting with foster mom, CPS worker, CPS worker supervisor, watching and observing his play. All of those things contributed to that diagnosis." (*Id.* 267-28) When asked if the symptoms Ms. Owens reported could be attributed to being removed from their parents' care, she replied, "I would say anything is possible, but it is very unlikely." (*Id.* 28:2-6)

Findings of the District Court – March 29, 2021. In the Order entered March 29, 2021 the district court recounted the relevant testimony of the witnesses and made the following pertinent Findings of Fact in support of its decision that reunification efforts were not required:

1. The history of prior reports that were unsubstantiated or closed without findings will not be considered by the court in its determination regarding the need to provide reunification efforts.
2. On April 8, 2017, the Department received a report alleging physical neglect by mother and father. The children had been in the care of father as mother was incarcerated at that time. A.C.R. was found wandering Rose Park alone.
3. On April 12, 2017, the children were removed after father had tested positive for methamphetamine and mother refused to submit to drug testing.
4. The three older children were placed out of home from April 12, 2017 through July 1st, 2019.
5. The youngest child, J.B.R, was born January 13, 2018.
6. On July 1, 2019, the children began a trial home visit with the parents.
7. On September 26, 2019, the cases were dismissed as it was believed parents had successfully completed their treatment plans.
8. On March 5, 2020, approximately nine months after the trial home visit began and approximately six months after the cases had been dismissed, the Department received a report that the children had been left unattended in a vehicle with the windows rolled down and the doors unlocked.
9. On April 15, 2020, the Department received a report that C.R. and C.E. had been fighting in their front yard and in the presence of the children.
10. Gates-Lanphear and Goodman testified, and the affidavit alleged, that the report indicated mother had been in possession of a methamphetamine pipe on April 15, 2020. Mother's testimony at the hearing corroborated this.
11. Gates-Lanphear and Goodman testified, and the affidavit alleged, that

the report indicated mother had been in possession of a methamphetamine pipe on April 15, 2020. Mother's testimony at the hearing corroborated this.

12. CPSS Goodman testified that the children reported that the parents had been fighting, including a physical altercation. The affidavit and the testimony of the witnesses indicate that putative father admits there was an argument, but that it did not involve a physical altercation. This is inconsistent not only with what was reported to the Department by law enforcement and the children, but also inconsistent with mother's own testimony that she poked or pushed father.

13. According to the affidavit and the testimony of the witnesses, the parents deny having been living together at the time of the April 15, 2020 incident. However, the testimony of each parent admits that mother had been at the house prior to the altercation, both shortly before the incident and several days prior. Mother's testimony admitted that she had used methamphetamine three days prior. She also testified that she had been at the house three days prior.

14. Mother's testimony admitted that she had left the children unattended in a vehicle on March 9, 2020.

15. On April 15, 2020, the children were removed from the mother and putative father and placed into emergency protective custody under emergency circumstances.

16. Foster parent Sheanna Reiser testified that when the A.C.R., P.G.R. and J.B.R. were returned to her in April 2020, all of the children were extremely aggressive with one another, hitting and scratching each other, particularly when one child was given something to eat or drink. A.R.'s hair had been cut short as she had been pulling her hair out and she had sores in her mouth from chewing her cheeks. A.R. had scabs and sores from picking at her skin.

17. LCPC Megan Owen testified that R.L.E. was diagnosed with post-traumatic stress disorder, chronic as well as adjustment disorder with anxiety, and that his symptoms are severe and cause a distinct interference with his daily functioning.

18. Ms. Owen testified that A.C.R. was diagnosed with post-traumatic stress disorder, chronic as well as adjustment disorder with anxiety, and that her symptoms are severe and cause a distinct interference with her daily functioning.

19. Ms. Owen testified that P.G.R. and J.B.R. are diagnosed with post-traumatic stress disorder, chronic as well as adjustment disorder with anxiety, and that their symptoms are clinically significant.
20. Ms. Owen testified that she recommended the children have no contact with the individuals who caused them childhood trauma.

(App. B, DC540-118, Order Determining that Reunification Efforts Need Not Be Provided, March 29, 2021)

STANDARDS OF REVIEW

A natural parent's right to care and custody of a child is a fundamental liberty interest which must be protected by fundamentally fair procedures. *In re J.N.*, 1999 MT 64, ¶12, 293 Mont. 524, 977 P.2d 317. When the State seeks to terminate a parent's fundamental liberty interest in the care and custody of a child, due process requires the parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, 2004 MT 62, ¶12, 320 Mont. 268, 87 P.3d 408. Whether a person has been denied his or her right to due process is a question of constitutional law. *Id.* at ¶9 The Montana Supreme Court's review of questions of constitutional law is plenary. *In re A.S.*, ¶9 (citing *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290) For a parent to prove violation of due process, he or she must demonstrate how the outcome would have been different had the alleged due process violation not occurred. *In re B.J.J.*, 2019 MT 129, ¶13, 396 Mont. 108, 443 P.3d 488 (citing *In re A.N.W.*, 2006 MT 42, ¶38, 331 Mont. 208, 130 P.3d 619).

Beyond due process concerns, the Montana Supreme Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re K.A.*, 2016 MT 27, ¶19, 382 Mont. 165, 365 P.3d 478.

Upon appeal of a district court's findings of fact, conclusions of law, and order terminating a parent's parental rights, the Montana Supreme Court does not substitute its judgment as to the strength of the evidence for that of the district court. *In re A.N.W.*, 2006 MT 42, ¶29, 331 Mont. 208, 130 P.3d 619. Rather, the Court reviews findings of fact to determine if they are clearly erroneous, conclusions of law for correctness, and the evidence found by the district court to determine whether, on the whole, a preponderance of the evidence is definite, clear, and convincing. *In re B.J.J.*, ¶10.

A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces the Court a mistake was made. *In re J.B.*, 2016 MT 68, ¶10, 383 Mont. 48, 368 P.3d 715.

To reverse a district court's evidentiary ruling for an abuse of discretion, the Court "must determine the district court either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *In re I.M.*, 2018 MT 61, ¶13, 391 Mont. 42, 414 P.3d 797 (citing *In re O.A.W.*, 2007 MT 13, ¶32, 335 Mont. 304, 153 P.3d 6).

The Court may, at its discretion review an issue not raised before the district court for plain error if the issue implicates a fundamental right and not reviewing the asserted error may result in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the proceedings or compromise the integrity of the judicial process. *State v. Daniels*, 2003 MT 247, ¶20, 120, 317 Mont. 331, 77 P.3d 224, *In re M.K.S.*, 2015 MT 146, ¶¶13-14, 379 Mont. 293, 350 P.3d 27. The Court employs plain error review sparingly, on a case-by-case basis. *In re J.S.W.*, 2013 MT 34, ¶16, 369 Mont. 12, 303 P.3d 741.

SUMMARY OF THE ARGUMENT

The district court committed reversible error when it determined the Department need not provide reunification services to C.E. Even by the broad standard set forth in recent precedent, there was not clear and convincing evidence that C.E. had "subjected each child to the aggravating circumstance of chronic, severe neglect as provided in Mont. Code Ann. §43-3-423(2)(a). (DC540-118, Appendix B) The children were removed from the parents' care on two occasions. Neither parent was referred to treatment for drug abuse on either occasion. On the first removal, the Department failed to provide a treatment plan until 10 months after removal[4], filed for termination of parental rights six months after the

[4] The three older children were removed from the home on April 19, 2017. The district court ordered the Department to provide a treatment plan on January 9, 2018, and filed an approved treatment plan on February 20, 2018.

treatment plan was approved[5], and returned the children to the parents' care 13 months later.[6] On the second removal, the Department immediately sought to be relieved of its obligation to provide reunification services based solely on the two removals.

A simple reading of the district court's findings of fact shows four isolated instances of alleged parental neglect. While disturbing, they are neither severe nor chronic. Even if ever allegation was completely unchallenged, they do not justify the district court's decision that reunification services need not be provided.

ARGUMENT

Mont. Code Ann. §41-3-423(2)(a) and §41-3-423(4) provide that, a district court may make a finding that the Department need not make reasonable efforts to provide preservation or reunification services if the court finds, by clear and convincing evidence, that the parent has…. subjected a child to aggravated circumstances including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child.

Clear and convincing evidence is "simply a requirement that a preponderance of the evidence be definite, clear and convincing, or that a particular

[5] August 9, 2018.

[6] September 26, 2019.

issue must be established by a preponderance of the evidence or by a clear preponderance of the proof." *In re A.J.W.*, 2010 MT 42, ¶15, 355 Mont. 264, 227 P.3d 1012.

The district court's findings of fact and conclusions of law summarize the court's evaluation as to whether the Department has met its burden of proof that a preponderance of the evidence is definite, clear, and convincing." *In re B.J.J.*, 2019 MT 129, ¶10, 396 Mont. 108, 443 P.3d 488.

Discrete instances of neglect, when viewed within a consistent pattern of similar behavior, provide a clear basis by which a district court can find "chronic, severe neglect." *In re M.N.*, 2011 MT 245, ¶30, 362 Mont. 186, 261 P.3d 1047.

In this case, there were no allegations of physical abuse or severe physical neglect. There is no allegation the children were kept in unsanitary conditions, were persistently unclean or suffered from malnutrition or severe illness beyond those routinely experienced by small children.[7] There were only four alleged incidents of neglect or indirect abuse. The incidents of neglect were attributed to poor parental attention and the indirect abuse occurred as a result of one or more of the children to a parent under the influence of drugs. There is no allegation of long-term or persistent drug abuse by either parent.

[7] There were concerns about possible staph infections, but the only verified staph infection was suffered by J.B.R, and was brought to the attention of the foster parents by C.E. when she identified it during a supervised visit.

In it's Order Determining That Reunification Efforts Need Not Be Provided, the district court concludes the "parents and children have a long history of involvement with the Department." While this appears to be objectively true, it overlooks the fact that, for a large portion of that involvement, the Department was unresponsive to the parent's treatment needs - failing to provide a treatment plan for over ten months after the first removal and repeatedly changing course with every new CPS worker.

While it is true that the Department was "involved" for 38 of the preceding 45 months, that involvement was not consistent, responsive or supportive. If it had been, the parents would have received treatment plans sooner and would have had better results at the conclusion of the first removal. The district court was in error when it laid all the blame for the failure on the parents and relieved the Department of its obligation to provide reunification services after the second removal.

The district court cites *In re C.S.* as legal justification for its decision. But the cases are eminently distinguishable in both the severity of the neglect and abuse suffered by the child and the reunification services previously provided by the Department.

> Prior to this cause, the Department had previously removed C.S. on three occasions. C.S. was first removed on May 8, 2015. Mother then completed a treatment plan and C.S. was returned to her and the cause was closed December 10, 2015. In May 2016, the Department received a report of domestic violence involving Mother, and C.S.

> was again removed from her care on May 5, 2016. Mother again completed a treatment plan and C.S. was returned to her care on April 10, 2017, and that cause was then closed. Within weeks, Mother relapsed on methamphetamine. C.S. was removed for a third time in June 2017. That cause was closed on August 31, 2018, after Mother completed inpatient treatment, and C.S. later returned to Mother's care. On December 5, 2018, the Department received another report alleging Mother was using methamphetamine and domestic violence was occurring in her home. C.S. was again removed from Mother's care.

In re C.S., 2020 MT 127, ¶3, 400 Mont. 115, 464 P.3d 66.

The difference between *In re C.S.* and this case is like the difference between lightning and a lightning bug. The parent in C.S. repeatedly subjected her children to severe neglect and abuse due to a serious methamphetamine addiction and domestic violence. While C.E. admitted to pushing C.R. in the chest during an argument, and the children – under prompting by CPS – intimated the parents "fought with words and hands," there was no substantive evidence to support a finding the children were exposed to domestic violence in the home to an extent it could be construed as severe or ongoing abuse. And, while it was admitted by both parents that they had – on one occasion each – used drugs in the presence of their children, there was no substantive evidence of frequent, ongoing or severe drug use by either parent. If there was such evidence, one must ask why neither parent was referred to drug treatment during the first removal.

The district court also cites as factual, the opinions of LCPC Owens. Ms. Owens provided four identical diagnoses based solely on the information provided

to her by the foster parents, the information provided to her by the Department and her treatment sessions with the children. When pressed for a specific instance of six-year-old R.J.E.'s "severe trauma," Ms. Owen replied that he said he sometimes didn't get enough to eat and that he wasn't always treated nicely. Ms. Owen later said she was going to consider a new diagnosis of two-year-old J.B.R. because he was being aggressive and throwing tantrums. Based on Ms. Owen's criteria, every six-year-old boy and two-year-old boy must be considered traumatized.

Of even greater concern is Ms. Owen's recommendation that the children not be allowed any contact with their parents. C.R. properly suggested to the court that the only way to determine whether the children were traumatized by their parents – as opposed to being repeatedly removed from their family home – would be for a psychologist or behavioral therapist to observe the children with their parents. Where the fundamental right of a parent to his or her child is at stake, such an effort should certainly have been made before denying the parents reunification services.

CONCLUSION

The Department did not do its job during the course of the first removal. Consequently, the parents did not succeed once the children were returned to their care. Instead of ordering the Department to promptly and diligently provide a treatment plan and reunification services after the second removal, the district

court erroneously determined that no further reunification services were required. Despite that, even if every finding of fact was undisputed – which it was not – the district court's finding that the C.E. subjected her children to chronic or severe abuse or neglect was not supported by clear and convincing evidence. The incidents cited in the court's findings of fact simply do not rise to the level of chronic or severe abuse or neglect. The district court committed reversible error. C.E. respectfully requests the Order Determining That Reunification Efforts Need Not be Provided be reversed, and that matter be remanded for further proceedings.

Respectfully submitted this March 1, 2022.

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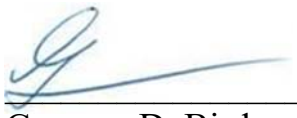
CERTIFICATE OF COMPLIANCE

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 not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



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CERTIFICATE OF SERVICE

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