

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0540

IN THE MATTER OF:

R.J.E., J.B.R., A.C.R., and P.“Z.”G.R.,

Youths in Need of Care.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it terminated Father's parental rights.

STATEMENT OF THE CASE

The Montana Department of Public Health and Human Services, Child and Family Services Division (Department) removed R.J.E., A.C.R., and P.“Z.”G.R. from the youths' mother, C.E. (Mother) and Appellant, A.C.R.'s and P.“Z.”G.R.'s presumed natural father, C.R. (Father),¹ on April 12, 2017. (Doc. 1.)² J.B.R. was born in early 2018 and placed in protective care with his siblings. (Cause No. DN-18-016, Docs. 1, 14, 16-19; 3/26/18 Tr.) Without objection, all four children were adjudicated as youths in need of care and treatment plans were approved for Mother and Father (collectively “Parents”). (1/8/18 Tr.; Docs. 27, 31, 33.) By August 2018, Parents had not completed their treatment plans, resulting in the Department petitioning for termination of parental rights (TPR). (Docs. 42-43.) Parents, however, subsequently began to engage with services, and the Department

¹ C.R. was identified as a putative father for R.J.E. and J.B.R. but did not submit to paternity testing. The district court terminated C.R.'s parental rights as a named putative father and any and all unknown putative fathers in R.J.E.'s and J.B.R.'s cases. (Doc. 144; DN 18-016, Doc. 113.)

² Unless otherwise indicated, citations to the record will be to *In re R.J.E.*, Cause No. DN-17-154.

agreed to continue temporary legal custody. (Docs. 64-66.) By May 2019, the Department began transitioning the children to Parents' care, and all four cases were dismissed in September 2019. (Docs. 76, 78.)

However, beginning in March 2020, the Department received reports regarding the children that necessitated removal of the children again from Parents on April 15, 2020. (Docs. 77, 78.) Though Parents stipulated to emergency protective services, the adjudicatory and dispositional hearings were continued several times. (Docs. 87, 93, 98, 104, 108.1.) During that time, the Department petitioned for the district court to determine that preservation and reunification services need not be provided. (Docs. 88-89, 105.).

At the conclusion of the January 11, 2021 hearing, the district court adjudicated the children as youths in need of care and granted TLC. (1/11/21 Tr.; Doc. 117.) On March 29, 2021, the district court ordered that the Department need not provide reunification efforts. (Doc. 118.) In response, the Department filed a second TPR petition on April 15, 2021. (Docs. 119-120.) Following the September 13, 2021 termination hearing, the district court terminated Parents' rights. (9/13/21 Tr.; Doc. 144.)

STATEMENT OF THE FACTS

In April of 2017, Parents' household included three children, Mother's son, R.J.E. (age 3), and Mother's and Father's biological children, A.C.R. (age 21 months), and P."Z."G.R. (age 4 months). (Doc. 1; DN-17-0155, Doc. 1; DN-18-0156, Doc. 1.) Even though Father is not the biological father of R.J.E., Father thought of R.J.E. as his son and Father's other children did not know that R.J.E. was not Father's biological son. (1/11/21 Tr. at 113-14.) Though Father has three other children who are in the care of their respective mothers, Father only has contact occasionally with one of the children. (*Id.* at 115.)

On April 8, 2017, the Department received a report regarding the family when 21-month-old A.C.R. was found wandering alone at a park. (Doc. 1 at 3.) Law enforcement learned the reporters had A.C.R. in their care for over an hour before they called for assistance. (*Id.*) Officers had to inquire with adults in the surrounding area to determine where A.C.R. lived. (*Id.*) And when law enforcement knocked on Father's door, it took several minutes for Father to answer. (*Id.*) At that time, Mother was detained at the Yellowstone County Detention Facility. (*Id.*) Officers noted Father was "sweating and looked like he had just woken up." (*Id.*) Father was also unaware that R.J.E. had left and gone to the neighbors. (*Id.*) Law enforcement alerted the Department, but when Child Protection Specialist Loretta Willems (CPS Willems) knocked on Father's door,

he did not answer. (*Id.*) Despite CPS Willems leaving a card instructing Father to call her, Father did not do so. (*Id.*)

CPS Willems went to the family residence on April 10, 2017, and again no one answered the door, despite CPS Willems ringing the doorbell for approximately 15 minutes. (*Id.*) CPS Willems peaked through the living room window and observed an infant lying on the sofa without an adult present. (*Id.*) CPS Willems subsequently contacted law enforcement to assist in gaining access to the home and continued to knock and ring the doorbell. (*Id.*)

It was not until the same officer from the April 8 incident arrived and knocked on the door that Father eventually answered and claimed he had been in the shower. (*Id.*) Only P.“Z.”G.R. was present in the home at that time; R.J.E. and A.C.R. were at Father’s mother’s home. (*Id.*) CPS Willems noticed that Father’s “speech was slow and deliberate.” (*Id.*) Father refused to submit to drug testing upon CPS Willems’s request and denied he had any drug problems. (*Id.*) CPS Willems thereafter learned that Father was being supervised by the Department of Corrections due to a possession of dangerous drugs conviction. (*Id.* at 4.) Father’s probation officer agreed that Father should submit to a drug test. (*Id.*)

CPS Willems returned to the residence on April 12, 2017, at 10:30 a.m. (*Id.*) The curtains to the house had been shut and CPS Willems knocked on the door for

approximately five minutes before Mother answered. (*Id.*) Mother complained that CPS Willems “did not have to knock so loud,” and would not allow CPS Willems to enter the home. (*Id.*) CPS Willems instantly noticed signs that Mother was under the influence of drugs, including that Mother’s skin appeared ashy or grey in color, her hands were shaking, her speech was slowed and slurred, she would not make eye contact, and her pupils were contracted even in a shadowed area. (*Id.*) Father submitted to his probation officer’s request for drug testing, which came back positive for amphetamine and methamphetamine. (*Id.*) Mother refused to submit to testing and CPS Willems placed the children into protective custody. (*Id.*)

At the time of removal, CPS Willems observed A.C.R. soothing P.“Z.”G.R., who was crying, “in the way a mother would soothe their child.” (*Id.*) CPS Willems further observed a rash and bug bites on A.C.R.’s legs and stomach. (*Id.*) P.“Z.”G.R. had notable “mats in her hair.” (*Id.*) And shortly after the removal, CPS Willems learned that all three children showed “symptoms of staph infection” and had “delayed immunization schedules.” (*Id.* at 6.) A.C.R. and P.“Z.”G.R. were diagnosed with ear infections and R.J.E. was diagnosed with influenza. (*Id.* at 5.) R.J.E. also reportedly was observed trying to feed A.C.R. and P.“Z.”G.R. and to “make sure that they had everything they needed instead of him sitting down and eating.” (1/11/21 Tr. at 78.)

The next day, Parents met with CPS Willems. (Doc. 1 at 5.) CPS Willems observed “pick marks on [Father’s] face and track marks on his arms.” (*Id.*) Mother again refused to submit to drug testing. (*Id.*) The adjudicatory and dispositional proceedings were continued several times and, during that period, Parents refused to engage with the Department or to attend or timely appear for scheduled meetings. (Doc. 65 at 20-21.) Also during that time, Parents were “excessively aggressive and combative with [CPS Moorhead], including leaving voicemails with obscene language.” (*Id.* at 30.) Moreover, during the summer of 2017, Mother and Father both had reportedly been aggressive with the children’s foster mother, which included cornering foster mother in her car in the parking lot of the Family Support Network. (*Id.* at 22.)

While Parents continued to reject offered services and avoid the Department, the children were thriving in their foster care placements. (Doc. 65.) For instance, in June 2017, R.J.E.’s speech therapist remarked that R.J.E. “is a different kid since coming into care,” noticing that R.J.E. had a better attitude and more motivation to work with the therapist. (Doc. 65 at 22.) At that time, R.J.E.’s therapist determined he did “not meet the Medicaid guidelines for Serious Emotional Disturbance diagnosis.” (*Id.* at 7.) However, the foster parents noted some concerning behaviors by the children, including heightened anxiety when being dropped off for visits and night terrors. (*Id.* at 21.) R.J.E. also told his foster

mother that she did not need to get a babysitter because he and his siblings were left alone all the time. (*Id.*)

When Mother gave birth to J.B.R. on January 9, 2018, Mother reported she had been “receiving Substance Abuse Treatment [with] Subutex,” but she failed to provide a prescription establishing that fact. (Doc. 65 at 18; DN-18-0016, Doc. 1 at 2.) Based on Parents’ lack of engagement, and their children being in care since April 2017, the Department removed J.B.R. (Doc. 65 at 18.) All four children were adjudicated as youths in need of care and the district court approved treatment plans for Parents in February 2018. (1/8/18 Tr.; Docs. 27, 31, 33; Cause No. DN-18-0016, Doc. 14.)

Around this time, Parents’ parenting classes had been cancelled due to repeated no-shows, they continued to be noncompliant with drug testing, and Father missed three intake appointments for a chemical dependency evaluation. (Doc. 65 at 18.) Parents also continued to act aggressively towards the foster family and had reportedly driven their vehicle into the wrong lane of oncoming traffic towards foster mother’s vehicle, causing foster mother to drive down an alley to avoid a collision. (*Id.*)

In March 2018, R.J.E. and P.“Z.”G.R. had to be hospitalized due to severe staph infections. (*Id.* at 16.) P.“Z.”G.R.’s infection had worsened in response to someone picking at a sore on her diaper line with dirty fingernails during Parents’

visit. (*Id.*) By June 2018, Father had only submitted to urinalysis testing four times, though all four samples tested negative for all substances. (*Id.* at 14.) Parents continued to not engage fully with their respective treatment plans, resulting in the Department petitioning for termination of parental rights on August 14, 2018. (Docs. 42-43.)

However, when the parties convened for a termination hearing on November 5, 2018, the Department reported that Parents had been engaging with their treatment plans. (11/5/18 Tr. at 3.) As a result, the district court granted the Department's request to amend the termination petition to a petition for extension of temporary legal custody. (*Id.*) The Department further reported that it was developing a plan to transition the children to Parents' care on a trial home visit. (*Id.* at 4.)

By early 2019, Father had been complying with his treatment plan, but Mother still struggled in complying consistently with hers. (Doc. 65 at 4.) The Department, however, continued to note tensions between Mother and Father. (*Id.* at 3-7.) Namely, concerns regarding the children witnessing Mother and Father arguing and cussing during visits were frequently reported to the Department. (*Id.* at 4.) Father also continued to demonstrate frustration in his communications with the Department. (*Id.* at 4-6.) The Department ultimately informed Parents that Phase II treatment plans would be provided to both Mother and Father. (*Id.* at 4.)

Parents signed the Phase II treatment plans, which the district court approved on April 11, 2019. (Docs. 68, 69.)

By May 27, 2019, Parents “were doing just enough” that the Department could no longer justify keeping the children in an out-of-home placement. (1/11/21 Tr. at 60.) The Department, therefore, started returning the children in phases to Parents’ home on a trial home visit. (Doc. 75 at 1.) During the trial home visit, the Department, however, received two reports. (1/11/21 Tr. at 60.) One of the reports alleged that J.B.R. “fell into a pool” and “bystanders had to pull him out” as Mother was not around. (*Id.*) The other report raised “concerns that [R.J.E.] was having severe behavioral issues at school since he had been returned home.” (*Id.*)

In June 2019, Father tested positive for methamphetamine. (*Id.* at 149.) Father stated that the positive test was “a false positive,” because Father “didn’t do any meth.” (*Id.* at 130.) Father stated that “maybe somebody sweated on [him].” (*Id.*) No other concerns were raised during the remainder of the trial home visit, and the district court granted the Department’s motion to dismiss the four actions on September 26, 2019. (Doc. 76.)

Approximately six months later, on March 5, 2020, the Department received a report, again raising concerns of lack of supervision. (Doc. 78 at 3; 1/11/21 Tr. at 35.) Mother allegedly “had left all four children alone in a vehicle with the windows rolled down and the doors unlocked” while she went into Walgreens.

(Doc. 78 at 3; 1/11/21 Tr. at 35, 158.) A.C.R. stated that “they were in the car for a long time, and she had to go to the bathroom” so she “got out of the car in a parking lot.” (1/11/21 Tr. at 21.) That same day, the Department attempted to locate the family, but was provided the wrong address. (*Id.* at 35.) Mother, however, did not return any of the Department’s phone calls. (*Id.*)

The Department received another report on April 15, 2020. (*Id.* at 36.) This report raised concerns of domestic violence between Mother and Father in front of the children, who reported seeing Father hit Mother open handedly. (Doc. 78 at 3; 1/11/21 Tr. at 36-37.) When law enforcement arrived on the scene, they found a meth pipe in Mother’s possession, and Mother subsequently admitted to using meth two days prior on Easter Sunday when she was with Father and the children. (Doc. 78 at 3; 1/11/21 Tr. at 38, 160, 196.)

The Department removed the children on April 15, 2020, and filed for emergency protective services, adjudication, and temporary legal custody. (Docs. 77-78.) A.C.R., P.“Z.”G.R., and J.B.R. were placed in their previous foster placement and R.J.E. was placed in separate placement. (1/11/21 Tr. at 76.) Within the first hour of A.C.R., P.“Z.”G.R., and J.B.R.’s placement, the foster parents observed changed behaviors from the last time the children had been placed there from 2017 to 2019. (1/11/21 Tr. 79.)

The foster mother had provided P.“Z.”G.R. with a cup of water, which instigated a fight between all three children. (*Id.* at 80.) The children choked, fought, and bit each other. (*Id.*) As the foster mother explained, it was almost as if the children “thought that cup of water would be the very last cup of water they were ever going to see.” (*Id.*) Similarly, the children would take food from the cabinets in the middle of the night, “hoarding [the food] in their room.” (*Id.* at 81.)

Although Parents had stipulated that sufficient evidence existed warranting the children’s removal on April 15, 2020, both remained “unwilling to work with the Department.” (5/11/21 Tr.; 1/11/21 Tr. at 43; Doc. 87.) Parents did not communicate regularly with the Department, remained aggressive with the Department, and refused to submit to drug testing. (1/11/21 Tr. at 43.) Father’s aggression with the Department proved so severe that CPS Gates-Lanphear testified that she felt threatened by Father’s behavior. (*Id.* at 45.)

By August 2020, A.C.R., P.“Z.”G.R., and J.B.R.’s foster parents had to seek a temporary restraining order against Parents. (*Id.* at 85-86.) The placement alleged that Parents had been frequently “stalking [their] child care facility.” (*Id.* at 86.) And then later Parents moved one block away from the placement’s home and they “had some issues there.” (*Id.*) Parents had also followed the placement “in public and stalk[ed them] when [they] were at stores with the children.” (*Id.* at 87.)

Following the second removal, the foster mother reported that she had observed the children expressing a lot of anxious behaviors, including “picking and chewing and pulling their hair out.” (*Id.* at 82.) As a result, the children participated in counseling and play therapy with Megan Owen, LCPC. (*Id.* at 9.) After evaluating the children and obtaining collateral information from the Department and foster parents, Owen diagnosed all four children with chronic posttraumatic stress disorder and adjustment disorder with anxiety. (1/11/21 Tr. at 7-32; Doc. 115, Exs. 1-3.) While they were diagnosed with similar disorders, the children exhibited different symptoms. (*Id.*)

Owen noted that R.J.E. initially presented with severe symptoms of anxiety that “cause a distinct interference with his daily functioning.” (Doc. 115, Ex. 1.) Specifically, Owen remarked that R.J.E. “is fidgety, struggles to regulate his emotions and his body, and he frequently displays negative behaviors due to an inability to properly cope with adversity.” (*Id.*) After Owen’s initial intake and first session with R.J.E., Owen recommended that R.J.E. have no “ongoing contact with the individuals that have caused his childhood trauma.” (1/11/21 Tr. at 16.)

In January 2021, Owen explained R.J.E.’s progress: he “is getting along with peers much more successfully; he is [] using his coping skills . . .; he’s done a lot of different specific activities that he can utilize when [he’s] feeling anxious, or when he’s feeling like he wants to avoid certain situations.” (*Id.* at 17.) R.J.E.,

however, remained “very disrespectful at times towards women figures” and requires “a lot of work with trusting relationships and trusting adults.” (*Id.*)

Like R.J.E., A.C.R. presented with severe symptoms of anxiety. (Doc. 115, Ex. 2.) Owen explained that A.C.R. exhibits her anxiety by doing “a lot of chewing and biting of . . . inside of her cheeks and her lips. She will sit there and chew on them until they are just raw and sometimes even bleeding they are so bad.” (1/11/21 Tr. at 18.) Nor could A.C.R. “handle having things be quiet. She wants noise and she wants stimulation at all times.” (*Id.* at 19.) Owen remarked that A.C.R.’s peers have observed the physical damage caused by A.C.R.’s anxiety, which has caused A.C.R. to experience additional anxiety. (Doc. 115, Exhibit 2.) Owen recommended that A.C.R. have no contact with Parents, noting that A.C.R. conveyed that she was fearful when her parents simply drove by the daycare yard where she was playing and that she had to be taken inside. (Doc. 115, Ex. 2; 1/11/21 Tr. at 10-11.) Owen initially had doubts that A.C.R. “was going to be ready for kindergarten,” but after being in the stable and secure foster home, “she started kindergarten and loves it.” (1/11/21 Tr. at 20.) And, as of January 2021, A.C.R. was not acting as “aggressive with her siblings.” (*Id.*)

Owen explained that telehealth therapy sessions were not implemented with P.“Z.”G.R. and J.B.R. based on their ages. (*Id.* at 21-22.) Owen also explained that, initially, P.“Z.”G.R. presented as aggressive and “had food hoarding issues.”

(*Id.* at 21.) P.“Z.”G.R. also reportedly “frequently experiences sleep disturbances including night [terrors] and bed wetting.” (Doc. 115, Ex. 3.) P.“Z.”G.R. further suffers from “extreme distress when separated from [foster mother]” and “struggles with listening and following directions at an age appropriate level.” (*Id.*)

Similarly, J.B.R. displayed “aggressive behavior,” which included “tantrums and outbursts.” (1/11/21 Tr. at 22.) J.B.R. also “struggles to follow basic instruction at an age appropriate level.” (Doc. 115, Ex. 3.) And, like P.“Z.”G.R., J.B.R. suffers from sleep disturbances. (*Id.*) Like R.J.E. and A.C.R., Owen ultimately recommended that P.“Z.”G.R. and J.B.R. have no contact with the “individuals that have caused [their] childhood trauma.” (1/11/21 Tr. at 16, 22.) As Owen explained, all four children need to remain “in a safe, healthy, and appropriate home” that provides them “with consistent love and nurturing.” (Doc. 115, Ex. 1-3.)

In response to Owen’s testimony, Father stated that the basis of the diagnosis for each child was that they had been removed from his home more than once. (1/11/21 Tr. at 152.) According to Father, the “problems” the children currently had did not exist in the family’s home. (*Id.*) Though Mother explained that A.C.R., “has always chewed on the inside of her mouth and on her lips until they were just raw,” Mother ultimately agreed with Father that Owen’s diagnoses of each child were wrong, stating that “I think that kids are really just kids.” (*Id.* at 179, 181.)

Owen stated that “it is very unlikely” that the children’s behaviors and symptoms were a result of the Department removing them from Mother’s and Father’s care. (*Id.* at 28.) Owen further testified that, given the children’s ages, developmental levels, and emotional intelligence, it was “not probable” that even with continued therapy with the children she would recommend contact with Parents based on their past trauma. (*Id.* at 30-31.)

Despite Owen testifying that all four children would continue to require and benefit from therapy, Mother stated that she would not continue to enroll the children in therapy or counseling. (*Id.* at 181.) Mother ultimately requested that the district court return the children to Father’s care. (*Id.* at 174.) Mother explained that she “would like to be held accountable for [her] actions . . . because [her] children are now suffering, dealing with [her] consequences.” (*Id.*)

Mother testified that she did not have any safety concerns with the children being in Father’s care. (*Id.*) However, Father continued to exhibit an aggressive and uncooperative attitude towards the Department. For instance, during a court recess on January 11, 2021, Father approached Child Protection Specialist Supervisor (CPSS) Goodman and stated: “Oh, so I see you’re very close with [foster mother], how inappropriate.” (*Id.* at 66.) Father then “[g]ot chest to chest with” CPSS Goodman before telling her that “[she] should be ashamed of [herself].” (*Id.*) CPSS Goodman had to request Father’s attorney to “tell his client

to not address [her] in any way.” (*Id.*) Furthermore, despite his assurances that he had stopped using drugs, Father’s hair follicle collected after the January 11, 2021 hearing tested positive for methamphetamine. (1/11/21 Tr. at 140; 9/13/21 Tr. at 17.)

At the conclusion of the January 11, 2021 hearing, the district court adjudicated the children as youths in need of care and granted temporary legal custody to the Department. (1/11/21 Tr. at 205-10; Doc. 117.) As part of its ruling, the district court admonished Father for his hostile and volatile behaviors and cautioned him against ever acting in a threatening manner against the CPS. (1/11/21 Tr. at 205.) The district court then focused on Parents’ refusal to participate in drug tests and ordered that they submit to hair follicle tests. (*Id.* at 205-06.) The district court also rejected Father’s claim that his prior drug test was positive because someone had sweated on him. (*Id.* at 207.) Finally, the district court admonished Parents for not communicating with the CPS and expressed concern with their failure to work with the people who were trying to help. (*Id.* at 2-6.)

On March 29, 2021, the district court issued its written order relieving the Department of its statutory obligation to provide reasonable efforts to reunify Parents with the children. (Doc. 118.) The district court highlighted the history of lack of supervision in this case, substance use, and Parents’ reluctance, and

sometimes refusal, to work with or communicate with the Department. (*Id.* at 2-3.) The district court then emphasized the inconsistencies in the testimony between Mother, Father, and the Department at the hearing. (*Id.*) For instance, the Department reported that the children explained “parents had been fighting, including a physical altercation,” which Father denied despite Mother admitting that “she poked or pushed father.” (*Id.* at 3-4.) And, despite Parents denying residing together at the time of the incident, Mother and Father both testified that they were residing together for a few days before and a few days after April 15, 2020. (*Id.* at 4.)

The district court then found that the Department had made continual efforts to engage parents in services after the second removal. (*Id.* at 5.) Parents, however, “[had] failed to stay in regular communication with the Department and [had] not availed themselves of drug testing.” (*Id.*) The district court noted that Mother admitted leaving the children unattended in the car on March 9, 2020, and that she admitted using methamphetamine on Easter Sunday when she was in the residence with the children and Father. (*Id.* at 4.)

The district court reiterated Owen’s evaluations and diagnoses of the children and noted the differences in the children between the 2017 removal and the 2020 removal. (*Id.* at 4-6.) Namely, that following the 2020 removal the children had engaged in extremely aggressive behaviors and had displayed severe

signs of anxiety, and that since being in foster care, the children had made great progress working with Owen and being in their current placements. (*Id.*)

Ultimately, the district court found that the Department had been involved for 38 of the past 45 months, that little time had passed between the dismissal and the removal, and that sufficient evidence existed that Parents had subjected the children to severe, chronic neglect. (*Id.* at 8-9.)

The district court subsequently took judicial notice of its Order Determining that Reunification Efforts need not be Provided as the basis for its Order Terminating Parental Rights and Granting Permanent Legal Custody issued on October 4, 2021. (Doc. 144.) The district court terminated Parents' parental rights pursuant to Mont. Code Ann. §§ 41-3-609(1)(d) and (f), and -609(4)(a), noting that a treatment plan was not required because it had determined no reasonable efforts were required. (*Id.* at 3-5.) The district court gave primary consideration to the children's best interests and well-being, particularly their emotional and mental health needs resulting from childhood trauma and chronic abuse and neglect. (*Id.*) The district court found that each parent's conduct/condition that rendered him/her unfit/unable/unwilling to parent was unlikely to change and noted their substance abuse history and history of violence. (*Id.*) Finally, the district court found that the children had been in foster care for more than 15 of the most recent 22 months and

applied the statutory presumption that termination was in the children's best interests. (*Id.* at 7.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it terminated Father's parental rights to R.J.E., A.C.R., P."Z."G.R., and J.B.R. without requiring the Department to pursue reunification efforts. Substantial evidence supports that Father chronically neglected the children. The children were removed twice: the first time based on concerns of methamphetamine use and lack of supervision in April 2017, and the second time based on concerns of lack of supervision, methamphetamine use, and domestic violence in April 2020. Following the 2017 removal, A.C.R. was observed to act as a parent to P."Z."G.R., and R.J.E. acted as a parent to both A.C.R. and P."Z."G.R. And R.J.E., A.C.R., and P."Z."G.R. presented with signs of serious medical neglect. Following the 2020 removal, A.C.R., P."Z."G.R., and J.B.R. aggressively fought each other over a cup of water and were observed hoarding food in their bedroom from the foster placement's cupboards. And all four children exhibited symptoms of anxiety that ranged from tantrums to self-harm, resulting in all four children being diagnosed with chronic posttraumatic stress disorder and anxiety. Based on the entirety of the record, the

children’s unique individual needs and circumstances supported that Father had subjected the children to chronic, severe neglect.

ARGUMENT

I. Standard of review

This Court reviews for abuse of discretion a district court’s decision to terminate a person’s parental rights. *In re A.B.*, 2020 MT 64, ¶ 23, 399 Mont. 219, 460 P.3d 405. The district court abuses its discretion when it acts “arbitrarily, without employment of conscientious judgment, or exceed[s] the bounds of reason resulting in substantial injustice.” *Id.*

This Court reviews for correctness the district court’s conclusions of law. *In re R.L.*, 2019 MT 267, ¶ 12, 397 Mont. 507, 452 P.3d 890. This Court reviews the district court’s factual findings to determine if they are clearly erroneous. *Id.* The appellant bears the burden of establishing that the district court’s factual findings are clearly erroneous. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825. “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.” *R.L.*, ¶ 12. This Court reviews “the evidence in the light most favorable to the prevailing party

when determining whether substantial credible evidence supports the district court's findings." *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715.

II. The district court did not abuse its discretion when it terminated Father's parental rights after determining that the Department need not provide future efforts towards reunification.

Montana Code Annotated § 41-3-609 sets forth the criteria available to a district court to terminate a parent's right to maintain the care and custody of their child. Typically, before the Department requests termination of parental rights, the Department "must engage in reasonable efforts to reunify the family." *In re C.S.*, 2020 MT 127, ¶ 16, 400 Mont. 115, 464 P.3d 66 (citing Mont. Code Ann. § 41-3-423(1)). Montana Code Annotated § 41-3-609(1)(d), however, authorizes the district court to terminate parental rights without the Department providing reasonable efforts so long as the district court finds "that the parent has subjected a child to the circumstance listed" at Mont. Code Ann. § 41-3-423(2). *C.S.* ¶ 16. This provision does not contain an exhaustive list of conduct that constitutes aggravated circumstances, affording "the district courts some discretion in determining whether the evidence presented merits a finding of an aggravated circumstance." *In re Custody & Parental Rights of D.S.*, 2005 MT 275, ¶ 17, 329 Mont. 180, 122 P.3d 1239.

This Court defines “chronic” as “marked by long duration, by frequent recurrence over a long time, and often by slowly progressing seriousness.” *In re M.N.*, 2011 MT 245, ¶ 27, 362 Mont. 186, 261 P.3d 1047 (citing *Webster’s Third New International Dictionary* 402 (G & C Merriam Co. 1961)). As this Court has concluded, “chronic, severe neglect of a child” includes “psychological neglect.” *D.S.*, ¶¶ 22-23.

In *D.S.*, the birth mother had a history of drug use, including using methamphetamine while pregnant with *D.S.*, incarceration, and drug treatment. *D.S.*, ¶¶ 6-9, 10. Throughout the mother’s periods of incarceration and attempts at treatment from February 2002 to September 2003, *D.S.* was shuffled between different relatives. *Id.* ¶ 24. His uncertainty about caregivers occurred at an age when *D.S.* needed to form strong bonds and experience stability, and thus impeded his development. *Id.* ¶ 25. *D.S.*’s mother testified she had become emotionally unavailable to her child. *Id.* ¶ 29.

D.S. ultimately was diagnosed with reactive attachment disorder and anxiety that were connected to the inconsistent caregiving he received and his feelings of insecurity and lack of safety in his surroundings. *Id.* ¶ 26. After living with his foster family, *D.S.* became happier, calmer, and more trusting of adults. *Id.* ¶ 30. This Court affirmed the district court’s ruling that the birth mother had subjected *D.S.* to chronic, severe emotional neglect based on a year and a half of leaving

D.S. without stable caregivers and the significant emotional and behavioral problems he exhibited. *Id.* ¶ 31.

This Court again applied the relevant definitions from Mont. Code Ann. § 41-3-102 when it addressed the aggravated circumstances of a parent's pattern of conduct that constituted chronic, severe neglect in *In re M.N.*, 2011 MT 245, 362 Mont. 186, 261 P.3d 1047. In *M.N.*, both parents had a significant history with the Department—including the father, who had not completed his treatment plan during his 2005 case involving his older children who were then placed with their mother (a different than mother in *M.N.*). *Id.* ¶ 2. In 2007, the Department intervened with the family based on concerns with the mother's limited cognitive functions and the filthy conditions of the home at that time. *Id.* The Department provided services to the parents on how to maintain a safe home for an infant, and instructions on family and behavioral skill building. *Id.*

In October 2008, a social worker visited the home and found it to be below minimum safety standards and unsafe for sibling J.N., then 15 months old. *Id.* ¶ 4. Visits made in the following months revealed the condition of the home had deteriorated further. *Id.* Extensive services were provided over a 14-month period to improve the parents' basic life skills and parenting skills, and to teach them to maintain a safe and clean home. *Id.* ¶ 5. In January 2010, the Department determined the parents had met the minimal standards during the preceding

six months, held two family meetings to ensure the parents would continue services, and dismissed the case. *Id.* ¶ 6.

However, two months later, the parents stopped all services and, shortly thereafter, J.N. was admitted to the hospital with a depressed skull fracture. *Id.* ¶¶ 6-7. The home was found in poor condition, with a notably foul smell, food stains on the floor and counters, and an “extremely dirty” highchair caked with food, and the mother had offered M.N. a bottle covered in mold. *Id.* ¶ 8. The Department sought determination that reasonable efforts to reunify were not required and that termination of parental rights should be ordered. *Id.* ¶ 11.

This Court affirmed the district court’s order terminating the parents’ rights, stating:

We conclude the District Court was within its discretion in finding the parents’ history, combined with the neglect which precipitated the filing of the 2010 petition, amounted to recurring instances over a long time, or chronic neglect. The pattern of conduct reflected an unsafe and unsanitary home, a serious and unexplained head injury to their child, failure by the parents to attend therapy treatments for the children, and cancellation of important family based services. *This Court considers those repeated problems to be severe. 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.”*

Id. ¶ 30 (emphasis added). In making its decision, this Court stated that the facts in *D.S.* were not “considerably more extreme than those in the current case,” and concluded “the parents’ actions amounted to ‘chronic, severe neglect’ because they

occurred over a long duration, were frequently recurring, and became more and more serious, culminating in a major injury to a toddler.” *Id.* ¶ 29. This Court also stated that “[c]hildren need not be left to ‘twist in the wind’ before neglect may be found chronic and severe.” *Id.*

This Court further held, “[m]other’s inability to parent . . . is a recurring, chronic problem based on her mental capacity, and her behavior over a three-year period proved her inability to successfully parent her three children.” *Id.* ¶ 27. The Court applied the “usual and ordinary meaning” of the term “chronic” to interpret the intent of the statute. *Id.* ¶ 27. The district court’s reliance on the parent’s history, including patterns of conduct, was deemed relevant in making its determinations. *Id.* ¶ 29

Just as *D.S.* and *M.N.* support that the Department in the instant matter clearly established the chronic nature of abuse or neglect, so, as the district court noted, does *In re C.S.*, 2020 MT 127, 400 Mont. 115, 464 P.3d 66. Father’s assertions otherwise disregard the extensive record of services provided by the Department to reunify Father after he chronically subjected the children to severe neglect. (Appellant’s Br. at 15-25.)

In *C.S.*, the Department had removed C.S. from the child’s mother’s care four times from 2015 to 2018. *C.S.* ¶ 4. The first time, C.S. was removed on May 8, 2015, based on concerns of methamphetamine use, and the case was

dismissed on December 10, 2015, after mother had completed a treatment plan. *Id.* Nearly five months later, the Department removed C.S., again based on concerns of substance use. *Id.* The Department sought dismissal of the second case in April 2017 after C.S.’s mother had completed her treatment plan. *Id.* Two months later, the Department removed C.S. again due to mother’s methamphetamine use. *Id.* The third case involving C.S. was dismissed on August 31, 2018, following mother’s completion of inpatient treatment. *Id.* Less than four months later, the Department had to remove C.S. again based on concerns of Mother using methamphetamine and domestic violence occurring in the home. *Id.* The Department filed a petition, in relevant part, requesting that the district court make a finding of no reasonable efforts and subsequently terminate C.S.’s mother’s parental rights. *Id.* ¶ 4.

By the time of the termination hearing, C.S.’s mother had completed the MCDC treatment program and had been “in compliance with her treatment program.” *Id.* ¶¶ 6-7. During the fourth case, C.S.’s mother had arranged for most of her treatment services except for the Department paying for mother’s drug patch. *Id.* ¶ 7. Though the Department acknowledged that this was the “most engaged” C.S.’s mother had been, the Department still emphasized mother’s three-time cyclical pattern: the Department would intervene following her relapse and return the child following mother completing treatment only to have to remove

the child again after she relapsed. *Id.* Ultimately, the Department remarked that C.S.’s mother’s history with the Department cast doubt on whether she could “successfully parent over an extended period of time” as mother seemingly could only maintain sobriety under Department supervision. *Id.*

On appeal, C.S.’s mother challenged the district court relieving the Department from providing reunification efforts, arguing that “the conduct alleged by the Department did not rise to the level of chronic, severe neglect.” *Id.* ¶ 17. Namely, C.S.’s mother asserted that the evidence presented did not establish that “C.S[.] was not provided for in the home, that he was dirty or unkempt, or that [m]other’s relapse occurred when C.S. was present.” *Id.* This Court, however, found that C.S.’s mother had repeatedly subjected C.S. to abuse or neglect based on her “admission at the outset of this cause that she had relapsed and that domestic violence occurred in her home,” which remained consistent with her history of “ongoing substance use and violence occurring in her home.” *Id.* ¶ 18. It also found that mother’s history of substance use and violence occurring in the home had noticeably impacted C.S.: C.S. would become “increasingly aggressive and his behaviors [would] decline when in [m]other’s care.” *Id.* As a result, this Court determined that the district court did not abuse its discretion when it terminated C.S.’s mother’s parental rights after finding that she had subjected C.S. to chronic, severe neglect. *Id.*

Like C.S.'s mother's assertions, here, Father's assertion that he did not subject the children to chronic, severe neglect proves unpersuasive. The Department first removed R.J.E., P."Z."G.R., and A.C.R. from Parents' care in April of 2017, based, in part, on concerns of lack of supervision. At the time of removal, Mother exhibited signs that she was using substances, but she refused to submit to drug testing, and Father tested positive for methamphetamine use. The children presented with severe staph infections that required medical attention, were behind on their vaccinations, P."Z."G.R. and A.C.R. had untreated ear infections, and R.J.E. had been diagnosed with influenza. The foster placement observed R.J.E. acting as a parent to P."Z."G.R. and A.C.R., ensuring that his two younger siblings were provided food and cared for before allowing himself to eat.

Instead of engaging with the Department, Father exhibited varying levels of aggression toward social workers assigned to the children's cases and with the foster placement. Father resisted all efforts to engage him in any services offered through his treatment plans. It was only after the Department petitioned for termination of Parents' rights, just before the termination hearing, that Parents began to work on their treatment plans. In response, the Department requested the district court grant an extension of temporary legal custody to allow for more time to reunify the children with Parents rather than terminate Parents' rights.

As the Department moved towards implementing a trial home visit, concerns remained regarding Parents' ability to parent the children absent supervision. The Department further noted that Mother and Father continued to argue in front of the children. And Father, after R.J.E. had returned home, tested positive for methamphetamine. The Department implemented a Phase II treatment plan for Parents to address the lingering concerns. By the summer of 2019, like D.S.'s parents, Parents, here, had displayed a minimal level of parenting that warranted the return of all four children to the home on a trial home visit.

During the trial home visit, the Department received two reports. One of the reports raised concerns of lack of supervision when bystanders had to assist J.B.R. after he fell into a pool and no parent was present. Another report raised concerns that R.J.E. was having behavioral problems in school after being returned to Parents. After the second report, no additional, documented concerns were raised to the Department and the district court granted dismissal of the four cases in September 2019.

Like in *C.S.*, here, the Department removed the children approximately six months after the district court had dismissed these cases. And like in *C.S.*, here, the concerns leading to the children's removal were the same concerns present during the Department's involvement from 2017 to 2019: lack of supervision, domestic violence, and substance use. The Department received a report in March 2020

raising concerns that Mother had left the children in a vehicle at Walgreens for an undisclosed period of time and A.C.R. had left the vehicle because she had to use the bathroom. Less than one month later, law enforcement intervened after the children witnessed Mother and Father engage in domestic violence. At that time, law enforcement discovered a methamphetamine pipe on Mother's person and Mother admitted to using methamphetamine two days prior. Mother was residing with Father and the children at the time.

When the children returned to the foster placement, the foster parent noted they had regressed, were acting aggressively, and even battled over a glass of water. The foster parent further observed the children grabbing food from cupboards in the middle of the night and hoarding the food in their bedroom. The children also displayed severe anxious behaviors that resulted in them attending counseling with Owen and ultimately being diagnosed with chronic posttraumatic stress disorder and adjustment disorder with anxiety. Almost immediately, Owen recommended that the children not have contact with Parents. And, while treating the children, Owen concluded it was "not probable" that even with continued therapy with the children she would recommend contact with Parents because of the trauma they suffered under their care. (1/11/21 Tr. at 30-31.)

The Department continued to offer services to Parents despite not yet implementing treatment plans based on its request for the district court to make a determination that no reasonable efforts needed to be provided. Neither Parent engaged fully or consistently in chemical dependency services. Parents remained aggressive with the foster placement, resulting in the foster placement being issued a temporary order of protection against Parents. And Father continued to act aggressively towards the Department, even acting threatening towards CPSS Goodman during a recess at the January 11, 2021 hearing. Testing later confirmed Father's continued use of methamphetamine.

Parents further failed to grasp the severity of their conduct and the impact that conduct had on the children. Parents alternated between blaming the children's mental diagnoses on the Department removing the children twice and on the children just being kids. Father's lack of understanding or accountability was fully evidenced by his insistence that the two removals caused the children's behavioral problems and his claim that "the problems they are having now, I did not see that when they were home." (1/11/21 Tr. at 152.)

Based on the extensive evidence presented, the district court did not err when it found that clear and convincing evidence supported that Mother and Father had subjected each child to chronic severe neglect. Like in *C.S.*, the Department had provided reasonable efforts through two treatment plans from 2017 to 2019,

reunifying the children in 2019, and by offering services following the 2020 removal. Furthermore, like in *C.S.*, the concerns regarding Parents’ ability to safely parent the children remained the same from 2017 through 2021. And, finally, like in *C.S.* and *D.S.*, the children, here, exhibited improvements in their behaviors while not in Parents’ care. *See* Mont. Code Ann. §§ 41-3-102(7)(a)(i) and (ii) (“[c]hild abuse or neglect” includes actual or substantial risk of psychological harm), 41-3-102(21)(a)(i) (“psychological harm” includes inflicting or allowing infliction of psychological abuse or neglect), and 41-3-102(23)(a) (“[p]sychological abuse or neglect” is severe maltreatment that is “injurious to the child’s emotional, intellectual, or psychological capacity to function”). *See also* *D.S.*, ¶¶ 22-23 (“chronic, severe neglect of a child” includes “psychological neglect” under Mont. Code Ann. § 41-3-423(2)(a)).

Father’s argument that the length of the case, in comparison to the cases noted above, supports that Father did not subject the children to chronic, severe neglect is without merit. As this Court has explained, “[d]iscrete 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.’” *M.N.* ¶ 30. In 2017, the Department removed the children based on concerns of methamphetamine use and lack of supervision. During the trial home visit in 2019, Father tested positive for methamphetamine and the Department received a report

that J.B.R. had fallen into a pool with Mother not nearby. In 2020, the Department removed the children based on concerns of lack of supervision and methamphetamine use. Father continued to use methamphetamine.

Father's argument that the lack of supervision reports mainly involved Mother is likewise unpersuasive. In 2017, R.J.E. and A.C.R. left the home while under Father's supervision. In 2019 and 2020, Father had just as much responsibility to ensure the safety of the children as Mother did, which included ensuring the safety of the children from Mother. The evidence does not support that Father took any steps to ensure the children were left with an appropriate, safe caregiver. This was further supported by the fact he left Mother with the children on April 15, 2020, despite the fact she had recently ingested methamphetamine.

Nor is Father's argument compelling that the district court erred in determining that he had subjected the children to chronic, severe neglect because the district court relied, in part, on Owen's opinion that the children should not have contact with Parents. (Appellant's Br. at 24-25.) A district court has discretion to weigh witness testimony and evaluate witness credibility and this Court will not "substitute [its] evaluation of the evidence for that of the trial court, or pass upon the credibility of witnesses." *In re A.K.*, 2015 MT 116, ¶ 31, 379 Mont. 41, 347 P.3d 711. Even if there are differences in opinion among the

professionals concerning a required finding, it “does not preclude a trial court’s determination that clear and convincing evidence exists to support a finding of fact.” *In re M.F.B.*, 2001 MT 136, ¶ 19, 305 Mont. 481, 29 P.3d 480.

However, this Court has repeatedly held that it is not in the position to evaluate the evidence for a different outcome. *In re the Parenting of C.J.*, 2016 MT 93, ¶ 19, 383 Mont. 197, 369 P.3d 1028. “In non-jury trials, witness credibility and the weight to be given to witness testimony is squarely within the province of the district court.” *In re C.M.*, 2019 MT 227, ¶ 21, 397 Mont. 275, 449 P.3d 806. When reviewing a district court’s findings this Court does not consider whether the evidence could support a different finding, nor does it substitute its judgment for that of the factfinder regarding the weight given to the evidence. *In re A.N.W.*, 2006 MT 42, ¶ 28, 331 Mont. 208, 130 P.3d 619.

Here, the district court did find that Owen “recommended the children have no contact with the individuals who caused them childhood trauma.” (Doc. 118 at 6.) The district court’s reliance on Owen’s testimony did not absolve the Department from meeting its burden that clear and convincing evidence supported that Father had subjected the children to chronic, severe neglect. And no credible evidence was presented to refute Owen’s conclusions about the children’s current and future mental health needs or that all four suffered from posttraumatic stress and anxiety as a result of Mother’s and Father’s abusive and neglectful parenting.

Rather, the district court appropriately weighed the evidence presented, which included Owen's testimony. And not only did Owen articulate, either in her testimony or through her evaluations admitted as exhibits during the January 11, 2021 hearing, about the children's various symptoms and diagnoses, but Owen's testimony regarding the children was also supported by the testimony of the Department's social workers, the foster mother, and Mother herself.

The cumulative testimony established that Father had subjected the children to chronic, severe neglect. As the district court found, the Department had been involved for 38 of the most recent 45 months. During that time, the children had been removed twice. Following the 2017 removal, the children had shown extensive signs of limited, to no, prior medical treatment. R.J.E. and A.C.R. both showed signs of parentification by attending to the needs of P.C.R. And, while R.J.E. showed marked improvement in various therapies while in foster care after the 2017 removal, his behaviors regressed while in Parents' care during the trial home visit. Following the 2020 removal, noticeable changes in the children's behaviors were observed by P."Z."G.R., A.C.R., and J.B.R.'s foster placement. The foster mother noted that A.C.R. had engaged in self harm behaviors, the three children had hoarded food in their bedroom, and they had aggressively fought each other over a cup of water. Mother even admitted that A.C.R. had always chewed on the inside of her mouth until it was raw, but failed to appreciate or understand

that it was a symptom of severe anxiety. The district court did not abuse its discretion when it relied on Owen's unrefuted testimony in support of its finding that the Department need not make reasonable efforts toward reunification.

The record likewise established that Parents' behaviors and actions damaged the well-being of the children. At least three times, the children were left unsupervised. The oldest children took on parenting roles for their younger siblings. The children resorted to hoarding food. The children displayed severe symptoms of anxiety that ranged from tantrums and sleep disturbances to self-harm. The children showed tremendous progress in foster care, where they each were placed in an appropriate, stable, and safe home with caregivers who consistently nurtured them. Based on the entirety of the record, the children's unique needs and circumstances support that the neglect Father subjected them to was chronic. In sum, the district court's findings that Father had subjected the children to chronic, severe neglect were supported by substantial evidence; the district court did not misapprehend the effect of the evidence; and review of the record does not leave a definite and firm conviction that the district court erred when it relieved the Department of its obligation to provide reunification efforts.

Nor did the district court err nearly six months later when it determined that clear and convincing evidence supported termination of Parents' rights. At the time

of the termination hearing, the Department testified that no improvement had been made after the district court issued its order determining no reunification efforts needed to be provided by the Department. And, in fact, the day of the no reasonable efforts hearing, Father's hair follicle tested positive for methamphetamine, despite Father, at that hearing, stating that he hadn't used methamphetamine for two years. The record supported that Parents subjected the children to chronic, severe neglect, that Parents' conduct would be unlikely to change in a reasonable time, and that the children's best interests supported termination of Parents' rights. The district court did not abuse its discretion.

III. The district court did not err when it determined that termination of Father's parental rights was presumed to be in the children's best interests.

Since the Department's first intervention, R.J.E. had been out of the home for 775 days, A.C.R. and P."Z."G.R. for 810 days, and J.B.R. for 447 days, and when the district court conducted the termination hearing, the children had been in an out-of-home placement for 16 months. (1/11/21 Tr. at 59.) Montana's legislature implemented the following statutory presumption for children in dependent neglect proceedings: "[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); *A.B.*, ¶ 32; *In re X.B.*, 2018 MT 153, ¶ 32, 392 Mont. 15, 420 P.3d 538. This presumption is rebuttable. *In re S.C.L.*, 2019 MT 61, ¶ 14, 395 Mont. 127, 437 P.3d 122.

The record establishes, and Father does not dispute, that the children had been in an out-of-home placement for more than 15 months. Therefore, termination of Father's parental rights was presumed to be in the children's best interests and Father did not present sufficient evidence to the district court to overcome this presumption.

CONCLUSION

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

Respectfully submitted this 8th day of April, 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 8,812 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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