IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0622

IN THE MATTER OF:

S.M.,

A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Second Judicial District Court,
Butte-Silver Bow County, The Honorable Robert J. Whelan, Presiding

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Whether Mother was denied due process when the court continued the adjudication hearing "as to" Mother and later erroneously determined Mother had stipulated to adjudication.

STATEMENT OF THE CASE

S.M. was two and a half years old when he was placed in foster care because his biological mother, T.M. (Mother), was arrested for violating her probation and there were concerns she was using methamphetamine and/or having mental health problems. (Doc. 2.)[1] The court adjudicated S.M. as a youth in need of care "as to" Father and continued the hearing "as to" Mother several times. (4/29/20 Tr.; 5/20/20 Tr.; 6/3/20 Tr.; 6/17/20 Tr.; Docs. 19, 21-22, 34-35.) When the court later entered an adjudicatory order "as to" Mother, it did so on the mistaken belief that Mother had stipulated. (Doc. 30.) The court granted temporary legal custody (TLC) to the Department of Public Health and Human Services, Child and Family

[1]S.M.'s birth father (Father) was not located during the pendency of this matter and his parental rights were terminated on January 27, 2021. (1/27/21 Tr; Docs. 46-47, 55.)

Services Division (DPHHS) and also approved a treatment plan for Mother. (Docs. 19, 30, 38.) Mother failed to complete any task on her plan and did not see S.M. after he was placed in foster care. (Doc. 59.) Mother also failed to attend court proceedings or maintain contact with her attorneys and the child protection specialists (CPSs). (*Id*.; 7/1/20 Tr.; 7/15/20 Tr.; 8/26/20 Tr.; 12/2/20 Tr.; 1/27/21 Tr.)

In March 2021, DPHHS petitioned for termination of parental rights (TPR) alleging three legal theories for TPR: abandonment; prior involuntary termination of parental rights; and failed treatment plan. (Doc. 59.) Following the TPR hearing the court terminated her parental rights. (6/9/21 Tr. (Hr'g); Docs. 77, 86, 88.)

STATEMENT OF THE FACTS

Beginning in 2009, DPHHS was alerted to concerns with Mother's parenting capacity. (Doc. 59.) In August 2009, S.M.'s half-sibling, A.H., was placed in foster care when Mother was arrested for disorderly conduct following a domestic dispute with the father, who was drinking and needed mental health intervention. (*Id*.) DPHHS provided Mother a treatment plan but, despite two years of intervention services, Mother did not complete her plan and her rights to A.H. were involuntarily terminated on September 15, 2011. (*Id*., attached Ex. A.)

S.M. was born in late 2013 and within a few months, Mother gave temporary guardianship of S.M. to her grandmother (Grandmother) when she was again incarcerated. (Docs. 2, 59.) When Mother regained custody of S.M., Mother allegedly struck the two-year old and DPHHS intervened and implemented services for Mother. (*Id*.) Unfortunately, within four months, in October 2016, Mother left S.M. with Grandmother for several weeks. (*Id*.) Mother admitted to relapsing and gave Grandmother power of attorney over S.M. (*Id*.) Over the next year, DPHHS received more reports of concern about Mother's ability to care for S.M., but the agency did not formally intervene. (*Id*.)

At the end of February 2020, no one knew where either S.M. or Mother were, and S.M. was listed as a missing person. (Doc. 2.) There was also reported concerns that Mother was using methamphetamine based on her bizarre behaviors. (*Id*.) On March 2, 2020, the Anaconda Police Department reported that S.M. had been located and Mother was being held for a probation violation. (*Id* at 4-5.) The child protection specialist (CPS) who responded noted that S.M. had a severe fever and cough and took him to the emergency room where he tested positive for influenza. (*Id*.) S.M. described seeing Mother using needles to inject something in her body. (*Id*.)

The CPS met with Mother at the jail and noted she had stitches down the left side of her head and visible bruising on her face. (Doc. 2 at 5.) When the CPS

informed Mother that S.M. was being removed and placed with his aunt, Mother became very upset and made nonsensical comments. (*Id*.) The CPS could not tell if her incoherent statements were caused by recent drug use and/or mental health issues. (*Id*.)

DPHHS filed a petition for emergency protective services (EPS), adjudication, and TLC on March 12, 2020. (Docs. 1-2.) The next day the court granted EPS and directed Mother to appear for the April 6, 2020 pretrial conference and April 8, 2020 show cause hearing. (Doc. 3.) The court's order also appointed a public defender to represent Mother and on March 25, 2020, Eleanor Maloney entered a notice of appearance for Mother. (Doc. 7.)

The whereabouts of Father were unknown, so DPHHS served Father by publication with notice of the show cause hearing. (Docs. 4-6, 8.) Maloney appeared on Mother's behalf and requested the hearing be continued. (4/8/20 Tr.; Doc. 10.) Maloney told the court that she believed Mother wanted to contest DPHHS's intervention, but explained she had been unable to confirm that with Mother as her attempts to reach her had been unsuccessful. (*Id*.) The court continued the hearing to April 29, 2020. (*Id*.; Doc. 11.)

On April 24, 2020, DPHHS moved to continue the hearing because attempts to personally service Mother had been unsuccessful and additional time was needed to perfect service upon Mother through publication prior to the hearing.

(Docs. 12-14.)[2] CPS Cynthia Outland submitted an affidavit explaining her diligent, yet unsuccessful, attempts to locate Mother. (*Id.*) The court granted DPHHS's requests and set a hearing for May 20, 2020. (Docs. 15-16.)

The April 29, 2020 hearing remained on the court's calendar and both parents' assigned attorneys and S.M.'s guardian ad litem (GAL) appeared for the hearing. (4/29/20 Tr.) Maloney stated she had established contact with Mother and advised the court that Mother had intended to appear, but was recently placed on a 14-day quarantine. (*Id.*) When Maloney requested a 4-week continuance, DPHHS objected, noting that it intended to proceed to "adjudication based upon the publication for the birth father" and further reminded the court that Mother had not been served yet. (*Id.*) The court agreed with DPHHS and denied Mother's motion given that it was not proceeding on adjudication on Mother. (*Id.*) Maloney offered no further argument. (*Id.*)

Father's counsel explained she had no contact information for Father and no basis upon which to object, or agree with, DPHHS's requested relief. (4/29/20 Tr.) DPHHS presented testimony from Outland. (Tr.) Outland explained that she had been called to the jail on March 2, 2020, because Mother was being placed on a probation hold and she took S.M. for medical care. (*Id.* at 7.) After Outland

[2]DPHHS's motion mistakenly listed April 8, 2020 as the hearing date that needed to be continued. (Doc. 12.)

explained that she did not believe Mother was still in jail, counsel for DPHHS transitioned his line of questioning to inquire only about Father, and Outland explained Father's whereabouts were unknown so he could not care for S.M. (*Id*.)

Outland then described how S.M. was doing and her efforts to set up visitations between S.M. and Mother. (Tr. at 7-9.) When she began to describe her attempts to contact Mother to set up visits, Maloney interjected and stated

> I object to dealing with anything to do with birth mother as her continuance was recently denied and she has not been served. To preserve her right to challenge, I would ask that she not be discussed for purposes of today's hearing.

(Tr. at 10.) The court directed DPHHS to "confine this matter to the birth father." (*Id*.)

At the conclusion of testimony, the court stated it "will adjudicate this minor as a youth in need of care and grant temporary legal custody to the department for up to six months with regards to birth father. We will address birth mother once she is properly served." (Tr. at 11.) No objection was raised by Mother. (*Id*.)

The court's May 4, 2020 written order was specifically captioned "RE: BIRTH FATHER" and noted the basis for adjudication was "unavailable parent." (Doc. 19.) While the language of the order did not consistently include reference "as to Father," it stated that the "disposition[al] hearing will be conducted at the

time of the birth mother's adjudication hearing." (*Id*. at 4.) However, the order also appeared to grant TLC for a period of six months. (*Id*.)[3]

The May 20, 2020 hearing remained on the docket and proof of service upon Mother by publication was filed on May 19, 2020. (Doc. 23.) However, Maloney filed a motion to continue the hearing, because of Mother's "financial and other barriers," including the fact she did not have a phone. (Doc. 21.) Without objection, the court continued the hearing to June 3, 2020. (Doc. 22.)

Mother appeared in person for the June 3, 2020 hearing. (6/3/20 Tr.) Maloney advised the court that Mother stipulated to EPS and requested the adjudicatory hearing be continued for 30 days so Mother could meet with CPS "to develop appropriate plans for moving forward and take into consideration her needs, as well as her religious convictions." (Tr.) Maloney believed that the parties would reach a "stipulation to adjudication, disposition and treatment plan." (*Id.*)

DPHHS opposed continuing the hearing, noting that Mother's hearing had already been continued several times. (6/3/20 Tr.) The court noted how long the matter had been lingering. (*Id.*) Maloney referred again to Mother's "specific religious concerns" and, after confirming that Mother had been served, added that

[3]It appears from this record that the term "dispositional hearing" was used to refer to approval of treatment plans, not the hearing contemplated by Mont. Code Ann. § 41-3-438.

she would need time to subpoena witnesses for a hearing. (*Id.*) The court granted Mother's motion, but continued the hearing only two weeks. (*Id.*)

The day before the continued hearing, Maloney filed a motion to withdraw, citing "irretrievable breakdown in communications." (Doc. 25.) Mother appeared in person for the June 17, 2020 hearing and Maloney appeared by Zoom. (*Id.*) The court granted Maloney's motion and directed the Office of Public Defender to appoint new counsel for Mother. (*Id.*; Doc. 26.)

When the court stated it would continue the adjudication hearing, counsel for DPHHS mistakenly asserted that Mother had stipulated to adjudication at the prior hearing and that the issue at hand was only disposition. (6/17/20 Tr.) However, counsel for DPHHS also stated he did not object to continuing the hearing. (*Id.*) Mother explained she was confused about all the terminology, and the court assured her a new attorney would be appointed to represent her and continued the hearing to July 1, 2020. (Tr.) Mother asked about getting to see S.M., and CPS Ryan Sas told Mother to contact him. (*Id.*)

Although DPHHS had agreed to continue the hearing, on June 29, 2020, the court issued a written order adjudicating S.M. as a youth in need of care, "as to" Mother. (Doc. 30.) The order stated that Father was not present at the hearing but had been "adjudicated on April 29, 2020." (*Id.* at 1.) The order mistakenly asserted that Mother had stipulated to adjudication and also listed Maloney as

counsel for Mother, despite the fact it had granted Maloney's motion to withdraw. (*Id*.) The court found the basis for adjudication was "physical neglect due to a lack of an available parent to care for the child." (*Id*. at 2.) The order appeared to grant TLC "as to" Mother until December 3, 2020, and set a dispositional hearing for July 1, 2020. (*Id*.)

Michelle Maltese filed a notice of appearance on behalf of Mother on June 22, 2020, and appeared for the July 1, 2020 hearing, but Mother did not. (Doc. 26; 7/1/20 Tr.) On Maltese's motion, the matter was continued to July 15, 2020. (*Id*.) Mother failed to appear for the July 15, 2020 hearing. (7/15/20 Tr.) During open discussion with the court, Maltese agreed that the court had "adjudicated the birth mother" and added that Mother had stipulated through Maloney. (*Id*.)

Sas testified about DPHHS's intentions regarding treatment plans for the parents. (Tr.) Sas explained Mother's plan would include components related to mental health, chemical dependency (CD), safe/stable housing, and contact with DPHHS. (*Id*.) Sas advised the court that he had made multiple, unsuccessful attempts to contact Mother and she had not returned his calls. (*Id*.) The court set a treatment plan hearing for August 12, 2020, which was continued to August 26, 2020. (Docs. 34-35.)

Mother did not appear for the August 26, 2020 hearing, but Maltese was present and advised the court she had sent the plan to Mother and Mother had no objections. (8/26/20 Tr.; Hr'g at 27.) Maltese further advised the court that Mother might request that the case be transferred to Billings. (*Id*.) Outland testified that, like Sas, Mother had not contacted her. (*Id*.) After reviewing the proposed plan and hearing Outland's testimony, the court approved Mother's treatment plan. (*Id*.; Doc. 38.) The court advised Maltese to tell Mother to immediately begin working on her treatment plan. (*Id*.) Mother's plan directed her to, among other things, maintain weekly contact with DPHHS and listed the address and phone number for the agency. (*Id*.)

The only attempts at complying with her plan that Mother made were signing up for couple's counseling in October 2020 (but within two months, she stopped attending), signing up for UA testing (but she never submitted to any tests), and attending one meeting with DPHHS on October 21, 2020 (during which she and her boyfriend admitted to recent methamphetamine use). (Hr'g at 9-10; Doc 41.) Mother married her boyfriend on November 6, 2020, and they were living in a camper that had no running water or heat. (*Id*.) Within days of the marriage, her husband and his sister assaulted Mother and she went to the local shelter. (*Id*.)

On November 19, 2020, DPHHS petitioned to extend TLC since Mother had not complied with her plan. (Docs. 40-41.) Mother had failed to maintain consistent contact with DPHHS and had not seen S.M. (*Id*.)

Mother did not appear for the December 2, 2020 extension of TLC hearing. (12/2/20 Tr.) Maltese stated she had not had contact with Mother but emailed her the petition and notice of hearing. (*Id*.) CPS Ciana Dale described how Mother was not complying with her treatment plan and added that Mother's husband had a significant history of domestic violence and S.M. said he was afraid of him. (*Id*.) Dale reported that S.M. was doing very well in his aunt's care and was working with Youth Dynamics Incorporated. (*Id*.) The court extended TLC. (*Id*.; Doc. 44.)

In late January 2021, S.M.'s GAL submitted a report to the court. (Doc. 54.) The GAL explained that in the 11 months S.M. had been in foster care, Mother had called him once and had never seen him in person. (*Id*.) The GAL advocated for Mother's parental rights to be terminated and supported S.M.'s current kinship foster placement becoming his adoptive family. (*Id*.)

At the end of March 2021, DPHHS filed a TPR petition alleging three theories of termination: abandonment; aggravated circumstances (prior involuntary TPR); and failed treatment plan. (Docs. 58-59.) Mother had not completed any aspect of her treatment plan. (Hr'g at 6-16.) For the past year, Mother contacted DPHHS only eight times, made no effort to see S.M., and failed

to follow through with phone visits DPHHS arranged. (*Id*.) Attempts to personally serve Mother with the TPR petition were unsuccessful, so DPHHS perfected service upon her through publication. (Docs. 68-72.)

Dale and Mother testified at the TPR hearing and, on June 22, 2021, the court issued its order terminating Mother's parental rights under all three TPR theories. (Hr'g; Doc. 77.) The court later issued two nunc pro tunc orders making the same essential findings and conclusions. (Docs. 86, 88.)

STANDARD OF REVIEW

This Court reviews a district court's decision to terminate a person's parental rights for an abuse of discretion. *In re D.D.*, 2021 MT 66, ¶ 9, 403 Mont. 376, 482 P.3d 1176. A court abuses its discretion if it terminates parental rights based on clearly erroneous findings of fact, erroneous conclusions of law, or otherwise acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *D.D.*, ¶ 9.

"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 A.B.*, 2020 MT 64, ¶ 23, 399 Mont. 219, 460 P.3d 405. When determining whether substantial credible evidence supports the district court's findings, this Court reviews the evidence in

the light most favorable to the prevailing party. *In re C.B.*, 2019 MT 294, ¶ 13, 398 Mont. 176, 454 P.3d 1195.

Whether a district court violated a parent's right to due process in a termination proceeding is a question of constitutional law subject to plenary review. *C.B.*, ¶ 13.

SUMMARY OF THE ARGUMENT

The district court terminated Mother's parental rights pursuant to three independent TPR theories: abandonment; aggravated circumstances (prior involuntary termination); and failed treatment plan. This Court may affirm the TPR order based on all, or one, of these TPR theories.

Mother does not dispute that S.M. had been "determined" to be a youth in need of care for the purposes of TPR pursuant to abandonment and aggravated circumstances. The district court was presented with clear and convincing evidence that Mother's actions made it reasonable to believe that she did not intend to resume care of S.M. Mother had a history of leaving S.M. in the care of others and signing over custody to them. When Mother was jailed on March 2, 2020, that was the last day she saw S.M. Mother failed to maintain contact with her attorneys and DPPHHS and did not attend any hearings for nearly a year. Mother made no overtures to try to see S.M. and, at most, had one phone call with him for the next

18 months. The district court did not abuse its discretion when it concluded Mother had abandoned S.M.

The district court also did not abuse its discretion when it terminated Mother's parental rights under Mont. Code Ann. §§ 41-3-609(1)(d), -423(2)(e), because the record supports that Mother's parental rights to A.H. had been involuntarily terminated in 2011 and the conduct/condition that rendered her unable/unfit to parent A.H. had not changed in 2020 when S.M. was removed. The district court's findings adequately addressed the statutory requirements, but if this Court deems the findings as lacking, it may apply the doctrine of implied findings to affirm the court's TPR order under this theory. In the alternative, this Court could remand the matter with instructions for the court to enter more detailed findings and specific conclusions since the record supports that it was not an abuse of discretion to terminate Mother's rights under subsection (1)(d).

Finally, since Mother's due process claims related to adjudication are not compelling, this Court may also affirm the court's TPR order relevant to Mont. Code Ann. § 41-3-609(1)(f). Mother does not contest the court's findings and conclusions that she failed to successfully complete an appropriate treatment plan and the conduct/condition rendering her unable/unfit to parent was unlikely to change in a reasonable period of time. Using due process arguments, Mother challenges only the court's adjudicatory order because it denied her motion to

continue the April 29, 2020 hearing and later erroneously determined that Mother had stipulated to adjudication.

While the court should not have conducted an adjudicatory hearing "as to" Father, by continuing the hearing "as to" Mother, the court preserved Mother's notice and opportunity to refute DPHHS's allegations. Moreover, Mother has not established how she was prejudiced by the court continuing the hearing. Next, although the court mistakenly took the word of DPHHS counsel that Mother had stipulated and Maltese's erroneous confirmation of the same, Mother has not demonstrated how she was prejudiced. Given the overwhelming evidence of Mother being unavailable/uninterested in parenting S.M., Mother cannot establish that S.M. would not have been adjudicated a youth in need of care had a contested hearing been held. The court's mistaken assumption that Mother stipulated to adjudication was a harmless error at most. Thus, this Court may affirm Mother's TPR order on failed treatment plan as well as the other two TPR theories.

ARGUMENT

I. Applicable theories of TPR

A court may terminate parental rights to non-Indian children if clear and convincing evidence establishes one of seven TPR options. Mont. Code Ann. §§ 41-3-609(1)(a) through (f), and -422(5)(a)(iv). Each of these grounds

"represents a separate and independent basis for termination." *In re M.J.C.*, 2014 MT 122, ¶ 11, 375 Mont. 106, 324 P.3d 1198.

To terminate a parent's rights under subsection (1)(f), the child must have been adjudicated a youth in need of care. Mont. Code Ann. § 41-6-609(1)(f)(i). To terminate a parent's rights under subsections (1)(a) through (1)(e), a district court must only make a "determination" that a child is abused or neglected. *In re T.S.B.*, 2008 MT 23, ¶ 34, 341 Mont. 204, 177 P.3d 429; *C.B.*, ¶ 25.

Here, DPHHS asserted three alternative TPR theories: (1) Mother had abandoned S.M.; (2) Mother's parental rights to another child had been involuntarily terminated and the circumstances of that termination remained relevant to her inability to adequately care for S.M.; and/or (3) Mother failed to successfully complete an appropriate treatment plan and the conduct/condition rendering her unable/unfit to parent was unlikely to change in a reasonable period of time. (Doc. 59 (citing Mont. Code Ann. §§ 41-3-609(1)(b), (d), (f)).)[4]

[4]Mother's challenge to S.M.'s adjudication (*see* Opening Brief (Br.) at 20-29.) is addressed below at Section IV. Mother does not, however, challenge that the district court had "determined" S.M. had been/was abused or neglected as required under subsections (1)(b) and (1)(d). Thus, she has waived appellate review of the same. *See* Mont. R. App. P. 12(3) ("The reply brief must be confined to new matter raised in the brief of the appellee."); *State v. Sattler*, 1998 MT 57, ¶ 47, 288 Mont. 79, 956 P.2d 54 (appellant may not raise legal issue for first time in reply brief).

The district court's TPR order concluded that all three TPR theories were established. (Doc. 88.) When a district court relies on more than one statutory basis in terminating a parent's rights, any one basis, if correctly relied upon, is sufficient to support termination and the alternate bases are then moot. *In re S.T.*, 2008 MT 19, ¶ 15, 341 Mont. 176, 176 P.3d 1054. Therefore, this Court may affirm the court's TPR order under either one of these three TPR theories.

II. The district court did not abuse its discretion when it terminated Mother's parental rights based on abandonment.

A court may terminate the parent-child legal relationship if clear and convincing evidence establishes that "the child has been abandoned by the parent[]." Mont. Code Ann. §§ 41-3-609(1)(b), -423(2)(e). Abandonment means "leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future." Mont. Code Ann. § 41-3-102(1)(a)(i). No requisite time frame applies to this part of the definition of abandonment. *In re Matter of A.E.*, 255 Mont. 56, 60, 840 P.2d 572, 575 (1992).

In its order, the district court found that clear and convincing evidence established that

> Mother left [S.M.] under circumstances that make reasonable the belief that she does not intend to resume care of [S.M.] in the future because [Mother] has not had any contact with the child since removal of the child twelve months ago [and Mother] was offered time with [S.M.] but has not yet taken the opportunity. [Mother]

> has not visited [S.M.] or contacted [S.M.] or his care givers for over 12 months. There have ben [sic] no attempts at visitation.

(Doc. 88 at 2-3.) The court made similar findings related to Mother failing to comply with her treatment plan component regarding seeing/contacting S.M. (*Id*. at 3-4.)

Mother has not established that the court misinterpreted the effect of the substantial evidence that showed Mother failed to exhibit outward intent to care for S.M. Nor does the record establish that the district court made a mistake.

Mother's appeal fails to appreciate that this Court reviews the evidence in the light most favorable to the prevailing party and is "'not in a position to evaluate the evidence for a different outcome; [it] determine[s] only whether the court abused its discretion.'" *A.B.*, ¶ 40. It is well-established that 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.K.*, 2015 MT 116, ¶ 31, 379 Mont. 41, 347 P.3d 711 (defining clear and convincing evidence); *In re A.N.W.*, 2006 MT 42, ¶ 28, 331 Mont. 208, 130 P.3d 619 (Court will not reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence for that of the district court).

Mother had a history of leaving S.M. for long periods of time with other caregivers and made little to no overt acts that would lead a CPS or the court to

believe she was ready and interested in parenting S.M. The district court was presented with clear and convincing evidence of Mother's actions/inactions that left it reasonable to believe she did not have an interest in parenting S.M. *See In re K.P.M.*, 2009 MT 31, ¶¶ 25-27, 349 Mont. 170, 201 P.3d 833 (mother abandoned child when she "failed to manifest any intention she would someday resume physical custody or make permanent legal arrangements for [her child]"); *In re T.H.*, 2005 MT 237, ¶¶ 29-33, 328 Mont. 428, 121 P.3d 541 (TPR by abandonment affirmed when Mother left town, had minimal contact with her children, and no contact with her social worker); *In re M.J.W.*, 1998 MT 142, ¶¶ 16-17, 289 Mont. 232, 961 P.2d 105 (father's failure to parent, with minimal intermittent contact and visitation, made reasonable the belief that father did not intend to resume care of the child in the future); *M.J.C.*, ¶ 12 (clear and convincing evidence supported abandonment finding when father made no attempt to visit child and little effort to establish relationship or provide any sort of care/support).

Mother's reference to the June 17, 2020 hearing where she asserted she wanted to see her son does not overcome the overwhelming evidence that she chose not to engage with DPHHS or make efforts to contact or even see S.M. In April 2020, Maloney could not locate Mother and DPHHS had to serve Mother by publication. In May 2020, Maloney continued the hearing because Mother did not have a phone. When Mother finally appeared for a hearing in June 2020, she fired

her attorney causing the matter to be continued again. While Mother did claim she wanted to see S.M. during the June 17 hearing, she did not follow up with the CPS as directed. Mother did not appear for the next four hearings and did not follow through with DPHHS's offer of a phone visit for S.M.'s birthday.

While Mother claimed she made efforts to contact CPS and the kinship caregiver, testimony from the CPSs and GAL report undermines her claims. The district court was free to accept or reject Mother's version of events. The credibility of witnesses is exclusively within the factfinder's province. *In re M.F.B.*, 2001 MT 136, ¶ 19, 305 Mont. 481, 29 P.3d 480. This Court may not substitute its "evaluation of the evidence for that of the trial court, or pass upon the credibility of witnesses." *In re J.M.W.E.H.*, 1998 MT 18, ¶ 34, 287 Mont. 239, 954 P.2d 26.

Mother's two moves to Billings, possible interest in transferring the case to Billings, and statement she wanted to move forward and regain custody did not establish she intended to resume care of S.M. because her actions did not support her words. Moreover, Mother's attempt to blame DPHHS for not "setting up visits" is misplaced. As the CPSs explained, Mother's lack of contact with them made setting up services difficult and Mother failed to participate in the phone visit the CPS did set up.

The court's findings were supported by substantial, credible evidence and Mother has not established they were clearly erroneous. *A.B.*, ¶ 23; *In re H.T.*, 2015 MT 41, ¶ 10, 378 Mont. 206, 343 P.3d 159 (Court will not "disturb a district court's decision on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion"). Mother has not established that the court "misapprehend[ed] the effect of the evidence" or that "a mistake was made." *A.B.*, ¶ 23.

Viewing the evidence in the light most favorable to DPHHS, Mother has not demonstrated that the district court "act[ed] arbitrarily, without employment of conscientious judgment, or exceed[ed] the bounds of reason resulting in substantial injustice" when it concluded that clear and convincing evidence established that Mother had left S.M. under circumstances that made it reasonable to believe she did not plan to resume the care of S.M. *See D.D.*, ¶ 9. Since Mother has not established that the court abused its discretion in terminating her rights based on abaondonment, this Court may affirm the district court TPR order without considering Mother's challenges to the other two TPR theories. *S.T.*, ¶ 15.

III. The district court did not abuse its discretion when it terminated Mother's parental rights based on Mother's prior involuntary termination.

A court may terminate the parent-child legal relationship if clear and convincing evidence establishes that the parent has "had parental rights to the child's sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue." Mont. Code Ann. §§ 41-3-609(1)(d), -423(2)(e).

Mother alleges the court's findings were inadequate and it omitted a specific conclusion of law relevant to subsection (1)(d). (Br. at 34-37.) Mother further argues there was insufficient evidence to establish TPR based on her prior termination because the prior TPR order was not admitted into evidence and DPHHS did not formally request the court to take judicial notice of the document. (*Id*.) Mother's arguments are not compelling, and she has not carried her burden to establish the district court committed reversible error.

A. Sufficiency of the evidence

Contrary to Mother's claim, the district court did not need to wait for DPHHS to formally request the court to take judicial notice of the prior TPR order before it could consider it. As this Court has explained

> termination under § 41-3-609(1)(d), MCA, *requires* a court to take judicial notice of prior terminations and the facts and circumstances

> surrounding those orders. *See* M. R. Evid. 201, 202. A district court, *by necessity, must take judicial notice* of prior terminations if it is to determine whether those terminations are relevant to the parents' ability to care for the child currently at issue.

T.S.B., ¶ 35 (emphasis added).

It was undisputed that on September 13, 2011, the Thirteenth Judicial District Court issued an order terminating Mother's parental rights to A.H. in Cause No. DN-09-055 (hereinafter, "2011 TPR Order"). DPHHS attached that order to its affidavit in support of TPR so Mother was on notice the court may take judicial notice of its contents. A district court has discretion to take judicial notice of facts or law whether a party requests it or not and at any time of the proceeding. *See* Mont. R. Evid. 201(c), (f) and 202(c), (f).

The 2011 TPR Order constituted sufficient evidence to meet the first prong of subsection (1)(d) (Mother had a prior involuntary termination). The record also contains sufficient evidence to establish the second prong: that the circumstances related to Mother's prior termination had not changed. *See In re I.T.*, 2015 MT 43, ¶ 13, 378 Mont. 239, 343 P.3d 1192 (noting that "[c]ircumstances surrounding previous involuntary terminations remain 'relevant,' 'unless the circumstances have changed'").

In *A.P.*, the district court terminated the mother's parental rights to A.P.'s sibling in March 2007 because she failed to successfully complete her treatment plan. *In re A.P.*, 2007 MT 297, ¶¶ 8-12, 340 Mont. 39, 172 P.3d 105 (mother

unable to achieve a healthy mental status, learn to adequately parent, establish and maintain adequate, safe housing, or maintain a relationship with her children through visitations). The district court order terminating the mother's rights to A.P. was affirmed because the prior circumstances (*i.e.*, failed every goal of treatment plan; continually allowed inappropriate men to live in her home; child was sexually assaulted by a man mother had allowed in the home) were relevant to the mother's ability to safely parent A.P. *A.P.*, ¶¶ 29-30.

In *I.T.*, this Court affirmed termination of the mother's parental rights pursuant to Mont Code Ann. §§ 41-3-609(1)(d) and -423(2)(e), when her prior termination was based on chemical dependency issues that she failed to address through her treatment plan and in the current case she continued to use drugs. *I.T.*, *supra* ¶¶ 14-16. In *C.B.*, this Court also affirmed the termination order based on a prior termination when the mother had four prior terminations that were based on failure to address her substance abuse issues and inability to care for her children, and those same issues remained with her ability to parent C.B. *C.B.*, ¶ 35. As this Court noted, "a parent is not to be afforded multiple chances to remedy the same problems at the expense of an abused or neglected child's welfare." *I.T.*, ¶ 13 (citation omitted).

Here, the district court correctly concluded that S.M. should not have to wait any longer for Mother to choose to address her ongoing parenting deficiencies. The

evidence contained in the 2011 TPR Order combined with Dale's testimony and Mother's admissions at the TPR hearing established that Mother's conduct/condition that remained unchanged between 2009 and 2011 remained relevant to her inability to adequately parent S.M.

Mother's 2009 treatment plan was implemented to assist Mother with addressing substance abuse, mental health, and housing instability. However, despite two years of intervention in A.H.'s case, Mother failed to complete chemical dependency treatment, continued to use drugs, missed multiple UA tests, was repeatedly incarcerated, and did not establish a safe/stable home for A.H.

S.M.'s case was initiated for these same reasons. Mother was arrested and was using drugs. Mother's 2020 treatment plan was nearly identical to the plan she failed to complete in A.H.'s case. And, just as in A.H.'s case, Mother did not address her substance abuse or mental health issues, failed to submit to UA tests, and did not establish a stable home for S.M.

The record contained clear and convicting evidence that, just as in *A.P.*, *I.T.*, and *C.B.*, Mother's circumstances in 2020 and 2021 remained unchanged from the circumstances surrounding, and underlying, the termination of her parental rights in 2011. *See In re K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691 (clear and convincing evidence is "simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be

clearly established by a preponderance of the evidence or by a clear preponderance of the proof. This requirement does not call for unanswerable or conclusive evidence").

Based on the totality of the record and viewing the evidence in the light most favorable to the prevailing party, the district court was presented with definite, clear, and convincing evidence of Mother's prior termination and that the circumstances from A.H.'s case remained unchanged. As this Court has recognized, Mother should not be "afforded multiple chances to remedy the same problems" at S.M.'s expense. *See I.T.*, ¶ 13.

B. Sufficiency of the court's order

Mother faults the district court for not issuing more specific findings and reiterating its determination that her 2011 TPR Order remained relevant to her inability to adequately parent S.M. in its conclusions of law. However, this argument cannot overcome the fact that this Court presumes that a district court's decision is correct and will not disturb it on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion. *A.B.*, ¶ 23.

As established, substantial evidence supports that Mother had her parental rights to A.H. involuntarily terminated in 2011 and the circumstances of that case

remained relevant to her inability to adequately care for S.M. Mother's argument fails to establish the court's decision was incorrect.

However, even if this Court determines the district court's findings were lacking, it may apply the doctrine of implied findings. *See In re A.S.*, 2016 MT 156, ¶ 21, 384 Mont. 41, 373 P.3d 848. "[U]nder the doctrine of implied findings, [this Court] may consult hearing transcripts in addition to the written findings. This doctrine holds that where 'findings are general in terms, any findings not specifically made, but necessary to the determination, are deemed to have been implied, if supported by the evidence.'" *In re J.B.*, 2006 MT 68, ¶ 25, 383 Mont. 48, 368 P.3d 715.

Mother cannot overcome, nor has she refuted, the record that clearly established the reasons A.H. was removed from her care and the issues she failed to address, despite agency intervention, to be reunited with A.H. Nor does Mother dispute that she failed to successfully complete her treatment plan which contained the same tasks and goals as her 2009 plan. The absence of more specific findings of these undisputed facts and repeated conclusions of law dealing with the same constitute, at most, harmless error. As this Court has consistently stated it "will not reverse a district court's ruling by reason of an error that 'would have no significant impact upon the result.'" *H.T.*, ¶ 10.

In the alternative, this Court could remand this matter with instructions to the district court to enter more specific conclusions of law and findings that, as established above, are supported in the record. *See In re L.D.*, 2018 MT 60, 391 Mont. 33, 414 P.3d 768 (remanded with instructions to make determination of applicability of Indian Child Welfare Act (ICWA) and, if appropriate, re-enter judgment based on the merits of its prior findings of fact and conclusions of law); *H.T.*, *supra* (when court applied the wrong standard of proof to a TPR hearing involving ICWA, Court vacated the order and remanded the matter "for entry of a new order to address whether the evidence established beyond a reasonable doubt, as required by 25 U.S.C. § 1912(f), that continued custody of H.T. by Mother likely would result in serious emotional or physical damage to the child.").

Since Mother has not established the court abused its discretion in terminating her parental rights based on Mont. Code Ann. §§ 41-3-609(1)(b) (abandonement) or (1)(d) (prior involuntary termination), this Court may affirm the district court TPR order without considering Mother's due process claim with regard to adjudication. *S.T.*, ¶ 15.

IV. The district court did not abuse its discretion when it terminated Mother's parental rights based on a failed treatment plan.

The third TPR theory the district court terminated Mother's rights upon was Mont. Code Ann. § 41-3-609(1)(f). Relevant to those conclusions, it is undisputed that the court approved an appropriate treatment plan for Mother and that Mother failed to complete any task/goal of that plan. It is also undisputed that the district court correctly determined that the conduct/condition rendering Mother unfit/unable to parent was unlikely to change in a reasonable period of time.

The only legal conclusion relevant to Mont. Code Ann. § 41-3-609(1)(f) that Mother challenges is S.M.'s adjudication as a youth in need of care. (Br. at 20-29.) Mother asserts the adjudicatory order was infirm because her due process rights were violated when the court denied her motion to continue the April 29, 2020 hearing and when the court later mistakenly presumed she had stipulated to adjudication. (*Id*.)

A parent's right to the care and custody of a child is a fundamental liberty interest, which must be protected by fundamentally fair procedures. *In re A.H.*, 2015 MT 75, ¶ 25, 378 Mont. 351, 344 P.3d 403. "Due process is not a fixed concept but a flexible doctrine which must be tailored to each situation to meet the needs and protect the interests of the parties involved." *C.B.*, ¶ 18. Fundamentally fair proceedings are composed of two key factors: notice and opportunity to be heard. *Id.* "[T]o establish a claim for violation of due process, he or she must

demonstrate how the outcome would have been different had the alleged due process violation not occurred." *Id.*

A. Order denying Mother's motion to continue April 29, 2020 hearing

Mother asserts that her due process rights were violated when the court denied her motion to continue the April 29, 2020 hearing and proceeded to adjudicate S.M. "as to" Father. (Br. at 20-26.)

The State agrees that it is improper for a court to adjudicate a child "as to" each parent. Dependent Neglect matters are relevant to individual children and are captioned as such. "A child is not determined to be a Youth in Need of Care 'as to' anyone. The child is adjudicated a Youth in Need of Care because he or she is being, or [has] been, abused, neglected, or abandoned." *In re J.S.L.*, 2021 MT 47, ¶ 25, 403 Mont. 326, 481 P.3d 833 (citing *In re K.B.*, 2016 MT 73, ¶ 19, 383 Mont. 85, 368 P.3d 722). Show cause and adjudicatory hearings should not be conducted "as to" an individual parent's rights.

While the State agrees the court should have conducted separate hearings "as to" the parents, the record here does not support Mother's claim that the court's error deprived her of fundamentally fair procedures.

Mother argues that by proceeding to adjudication "as to" Father instead of continuing the adjudicatory hearing, the court adjudicated S.M. without giving her the opportunity to refute DPHHS's allegations about the basis for adjudication.

(Br. at 23.) This argument ignores that the court specifically continued the adjudication "as to" Mother based on her objections and only accepted testimony relevant to Father's acts/omissions. By specifically adjudicating only "as to" Father and ordering that the adjudicatory hearing "as to" Mother was continued to May 20, 2021, the district court preserved Mother's right to notice and opportunity to respond to DPHHS's allegations.

While the district court should not have phrased the April 29, 2020 hearing as adjudication "as to Father," Mother's due process rights were not violated. Nor has Mother established how she was prejudiced by the court denying her motion to continue since it specifically continued the adjudicatory hearing for her, and she was given multiple opportunities to appear and refute DPHHS's allegations at subsequent hearings.

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Although the State agrees the district court should not have adjudicated S.M. "as to" one parent, under the facts presented here, Mother's due process rights were not violated when the court continued adjudication "as to" Mother.[5]

B. Presuming Mother stipulated

Mother's second due process claim correctly points out that the parties and the court mistakenly believed Mother had stipulated to adjudication. (Br. at 26-29.) The record does not support the court's June 29, 2020 findings that Mother stipulated to adjudication. (Doc. 30.) Mother's new counsel accepted the court's erroneous determination and Mother did not appear at any of the subsequent hearings to point out the error. *See H.T.*, ¶¶ 16-18 (when court mistakenly presumed parent stipulated to adjudication, it was required to conduct a hearing pursuant to Mont. Code Ann. § 41-3-437.)

[5]This case highlights the confusion created by adjudicating a child or granting TLC "as to" each individual parent (which this Court has repeatedly warned district courts against doing). Nonetheless, district courts have continued this erroneous practice when one parent stipulates to the relief sought while the other parent requests a contested hearing or when service was perfected on only one parent (*e.g.*, like here, where DPHHS had a legitimate interest in proceeding to adjudication on April 29, 2020 because it had perfected service on Father). However, a parent's right to due process (notice and opportunity to be heard) should not equate to conducting separate proceedings "as to" the parent. Rather, depending on the circumstances, a district court may proceed with the hearing and either enter that parent's default (if service was perfected and they failed to appear) or accept the parent's stipulation, reserve ruling on adjudication, continue the hearing (to allow the other parent more time or to perfect service), and order that EPS remain in effect.

By making the erroneous finding that Mother stipulated and failing to conduct an adjudicatory hearing, Mother was denied the opportunity to refute or stipulate to adjudication. However, Mother has not established that had the court not erroneously presumed she had stipulated to adjudication that the outcome would have been different. *See C.B.*, ¶ 18 (violation of due process requires appellant to "demonstrate how the outcome would have been different had the alleged due process violation not occurred"). Additionally, as this Court concluded in *H.T.*, a procedural error such as what occurred here is subject to harmless error analysis. *H.T.*, ¶ 21 (Court has "held consistently that a district court may protect a child's best interest despite procedural errors that would have no impact upon the result").

Here, DPHHS alleged both parents physically neglected S.M. because they were unavailable to parent. It is undisputed that Mother was unavailable to parent because she was arrested on March 2, 2020. Notably, after S.M.'s removal, Mother lost contact with DPHHS and her whereabouts were unknown. In fact, Mother had to be served by publication in May 2020. Mother stipulated to EPS through counsel at the June 3, 2020 hearing and Maloney indicated Mother's likely stipulation at the next hearing. Although Mother appeared for the June 17, 2020 hearing, she was no longer represented by Maloney and the matter was continued

so new counsel could be appointed. Yet Mother failed to appear for the next several hearings and did not maintain contact with DPHHS or her counsel.

Under the unique facts of this case, the record establishes that in the very least, Mother was unavailable to parent S.M. from March to May 2020. Accordingly, had the court conducted an adjudicatory hearing for Mother in June or July 2020, DPHHS could have presented a preponderance of the evidence that Mother was unable to parent, which supports the court's order adjudicating S.M. as a youth in need of care based on physical neglect.[6]

As with any due process claim, even if the parent was denied notice or opportunity to respond to DPHHS's allegations, the parent must demonstrate that had the error not occurred, the outcome would have been different. *C.B.*, ¶ 18. Here, Mother cannot establish that S.M. would not have been adjudicated a youth in need of care if the court would not have mistakenly believed she had stipulated and instead conducted a hearing. The undisputed, objective facts in the record support that a preponderance of the evidence established S.M. was a youth in need of care because in early March 2020 Mother was not available to parent S.M. due

[6]In making this argument, the State is not suggesting an adjudicatory hearing is not necessary as long as objective evidence supports a finding a child is a youth in need of care. It is only under the unique facts presented and procedural posture of this case that the State advances this reasoning to establish that here, Mother was not prejudiced and/or any error was harmless.

to incarceration and after release from jail Mother chose not to make herself available to parent S.M.

As this Court has consistently stated, although a parent must be afforded fundamentally fair procedures at all stages of termination proceedings, a child's physical, mental, and emotional needs are paramount in any determination. *In re X.M.*, 2018 MT 264, ¶ 21, 393 Mont. 210, 429 P.3d 920 (citing Mont. Code Ann. § 41-3-101(7)). As this Court has explained,

> Although we have often stated that statutory procedures must be strictly observed in cases involving abused and neglected children, we have also held that a district court may protect a child's best interests despite procedural errors. This approach is consistent with the Legislature's recognition that, even when administering strict timelines, a district court must be guided by the best interests of the child and give primary consideration to those interests. Sections 41-3-432(1)(c), -438(7), MCA.

A.H., ¶ 28 (internal case citation omitted) (Court declined to consider alleged due process violation since trial court not given chance to address and because it "will not reverse due to an error that 'would have no significant impact upon the result;'" (*Id.*, ¶ 29) case lasted two years; unlikely that expediting the proceedings by approximately three months would have led to a substantially different outcome).

Mother was not prejudiced by the court's error and the court's error may be deemed harmless. Therefore, the court's order adjudicating S.M. as a youth in need of care should not be reversed and its subsequent order terminating Mother's

parental rights pursuant to Mont. Code Ann. § 41-3-609(1)(f) should be affirmed as Mother failed to successfully complete her treatment plan and the conduct/condition rendering her unfit to parent was unlikely to change in a reasonable period of time.

CONCLUSION

This Court should affirm the district court's order terminating Mother's parental rights to S.M. on any one of the three TPR theories.

Respectfully submitted this 16th day of May, 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 8,277 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

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