IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-444 (c)

IN THE MATTERS OF:

A.N., J.G., and A.G.,

Youths in Need of Care.

REPLY BRIEF OF APPELLANT MOTHER

On Appeal from the Montana Sixteenth Judicial District Court, Custer County, The Honorable Michael B. Hayworth, Presiding

APPEARANCES:

ROBIN MEGUIRE
P.O. Box 1845
Great Falls, MT 59403
robin@meguirelaw.com

ATTORNEY FOR S.N.
MOTHER/APPELLANT

DANIEL BIDDULPH
Peppertree Law, PLLC
P.O. Box 8861
Missoula, MT 59807
dan@peppertreelaw.com

ATTORNEY FOR C.G.
FATHER/APPELLANT

AUSTIN KNUDSON
Montana Attorney General
CORI LOSING
Assistant Attorney General
Attorney General's Office
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
cori.losing@mt.gov

WYATT GLADE
Custer County Attorney
1010 Main Street
Miles City, Montana 59301

ATTORNEYS FOR PETITIONER
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Appellant respectfully submits the following reply to the Response Brief of the Appellee.

ARGUMENT

The State maintains that the district court did not abuse its discretion in terminating Mother's parental rights to her three children. Specifically, it argues that Mother's treatment plan was appropriate and that, regardless, Mother failed to preserve the issue for appellate review. The State also insists that the Department acted in good faith and that Mother was not deprived of due process or other fundamentally unfair procedures. It discounts the effect of any COVID-19 restrictions on Mother's constitutional rights and rejects any prejudicial conflict of interest for its attorney who previously represented the children.

As argued below, the State's arguments are without merit, not supported by the record, and should be rejected by the Court, with Mother's parental rights, restored.

I. MOTHER'S RIGHTS WERE TERMINATED IN THE ABSENCE OF REASONABLE EFFORTS AND AN APPROPRIATE TREATMENT PLAN.

A. This Issue is Reviewable on Appeal.

The State does not dispute that a district court must make predicate findings that a treatment plan was "appropriate" and that the Department made "reasonable efforts" at reunification. Rather, it argues that Mother has waived appellate review

of these issues because she did not object below.

First, Mother is entitled to challenge the district court's termination findings on appeal. She was not required to object to the Treatment Plan at the time it was approved by the district court, because the essence of her argument is that the Department should have considered and incorporated subsequent events, such as Dr. Peterson's opinions and the sibling sexual assault incident, and/or not faulted her for failing to meet objectives related to these events which were never included or incorporated into her Treatment Plan.

The Department's duty to effectuate an appropriate treatment plan does not end once the court has approved it. *In re T.D.H.*, 2015 MT 244, ¶ 47, 380 Mont. 401, 356 P.3d 457. The Department must also "in good faith, assist a parent in completing" the "treatment plan." *In re R.J.F.*, 2019 MT 113, ¶ 28, 395 Mont. 454, 443 P.3d 387. Mother could not have objected at the time the Plan was adopted, because she could not have foreseen the Department's failure to appropriately implement and facilitate the Plan. Mother is entitled to challenge on appeal, the district court's ultimate determination in its Termination Order that Mother's Treatment Plan was appropriate and that the Department acted in good faith and made reasonable efforts.

During the termination hearing, the record is clear that Mother challenged the Department's failure to consider how her cognitive disabilities, related to her

mental health diagnosis of ADHD, affected her ability to complete aspects of her Treatment Plan. Mother also argued that the Department did not ensure effective communication and sharing of information of Mother's providers, which also impacted her ability to comply with her Treatment Plan. Mother also objected to requiring things of her related to the sibling sexual assault incident without first making it a part of her Treatment Plan.

A party on appeal may "make further arguments within the scope of the legal theory advanced in the district court" or refine arguments it presented at the district court level. *See State v. McDowell*, 2011 MT 75, ¶ 22, 360 Mont. 83, 253 P.3d 812. A party may also bolster its overall theory with additional authority and argument. *Becker v. Rosebud Operating Servs*., 2008 MT 285, ¶ 18, 345 Mont. 368, 191 P.3d 435 ("specific arguments" were not required because the "overall theory or claim" had not "significantly changed"); *Whitehorn v. Whitehorn Farms, Inc*., 2008 MT 361, ¶ 23, 346 Mont. 394, 195 P.3d 836 (allowing argument because "while clearly a change in emphasis, [wa]s not an entirely new theory"); *Sleath v. West Mont*, 2000 MT 381, ¶ 35, 304 Mont. 1, 16 P.3d 1042 (party "simply represent[ed] further legal support for [an] issue").

Regardless, Mother also urged for plain error review of any issue not deemed properly preserved on appeal as her fundamental parental rights were prejudicially impacted by these errors, as established below.

B. Mother's Treatment Plan was not Appropriate and the Department did not Make Reasonable Efforts.

The State maintains that Mother has not alleged that she has been diagnosed with any "cerebral dysfunctions" with "serious learning deficits." (State's Brief at pg. 27). This is wholly inaccurate as that is precisely what Mother alleged in her Opening Brief. And while the State attempts to limit the Department's obligations to only parents who possess low cognitive intelligence and therefore argues that the Department was not required to consider Dr. Peterson's opinions or communicate them to other providers, this is not accurate. The Department was required to consider Mother's specific needs related to her ADHD diagnosis and its implications for her ability to process and learn new information.

The State does not necessarily dispute that the Department failed in this regard, but argues that even if other providers had been made aware of Dr. Peterson's opinions, the providers testified it would not have altered their services or "changed their course" of treatment. (State's Response Brief at pg. 30). Not all providers stated this, and regardless, this is not a basis to affirm the district court's findings as the Department still failed in its duty to implement and effectuate an appropriate treatment plan for Mother, which adversely impacted her ability to demonstrate to the district court her ability to change within a reasonable time.

Notably, in this regard, the State did not address in its Response Brief Mother's argument that the statutory presumption in favor of termination provided

for by § 41-3-604, MCA (when the children have been in foster care for 15 of the last 22 months) does not support a termination decision when the parent alleges an inappropriate treatment plan and/or that the Department did not make reasonable efforts at reunification. *In re D.B.*, 2007 MT 246, ¶ 40, 339 Mont. 240, 168 P.3d 691 (citing § 41-3-604, MCA). Rather, it simply ignored this legal argument and cited the statutory presumption as a basis to affirm the district court's termination order. (State's Brief at pg. 41).

It is Mother's position that since her Treatment Plan was not appropriate, and the Department did not make good faith or reasonable efforts in ensuring her completion, the presumption in favor of termination does not apply. The Department was required to consider Mother's special learning needs and modify and/or accommodate the same. It was also required to impose time deadlines for Mother. This argument was also not addressed and wholly ignored by the State in its Response Brief. *In re D.B.* ¶ 37

Because the record does not contain clear and convincing evidence of the Department's efforts in this regard, the district court's decision to terminate Mother's rights must be reversed. *In re D.B.*, ¶ 35. The Department wholly failed in its burden to develop an appropriate treatment plan for Mother and thereafter make a good faith effort at implementation and assisting Mother in its completion. *In re D.B.*, ¶¶ 29-30; *In re R.J.F.*, ¶¶ 28-29.

C. Mother's Rights Were Terminated Based Solely on Speculative Evidence of Methamphetamine Use.

A positive drug test or a series of positive drug tests should not be used as the sole determining factor in determining parental rights when no additional safety concerns are present. *In re R.J.F.*,¶ 29, fn. 10 (citing Drug Testing in Child Welfare, National Center on Substance Abuse and Child Welfare (2010), https://perma.cc/TCA2-4GWY). The State conceded during the termination hearing that Mother's home was safe. Methamphetamine use as detected by sweat patch drug testing was the determinative factor considered by the district court in ordering termination, despite other evidence in the record that Mother was not using, such as "self-reports, and observations of behavioral indicators." *Id*.

The Department too relied solely on speculative drug test results and ignored other evidence in the record to support a finding that Mother was not using methamphetamine. Her providers testified that they did not believe Mother was using methamphetamine or other illicit drugs. Mother herself testified she was not using methamphetamine. A district court's order terminating a parent's fundamental rights "must be supported by clear and convincing evidence." *In re M.N., J.N., Jr., and R.N.*, 2011 MT 245, ¶ 14, 362 Mont. 186, 261 P.3d 1047 (citation omitted).

As cited in Mother's Opening Brief, there is ample scientific evidence that prescription medications can yield a positive methamphetamine result. And while

the State discounts such scientific studies, it offers no reason the Court cannot take judicial notice of such scientific facts. The scientific literature also supports the unreliability of transdermal sweat drug patches, of which the Court also take judicial notice.

Indeed, other courts have concluded that current transdermal sweat patch drug testing technology is not always reliable and that other courts have recognized the unacceptably strong potential for false positive test results, especially for prior abusers who have recently ceased use. *United States v. Snyder*, 187 F. Supp. 2d 52, 59 (N.D.N.Y. 2002) ("the sweat patch is not perfect and the potential for erroneous results clearly exists"); *see also*, Chawarski, M.C., et al., *Utility of Sweat Patch Testing for Drug Use Monitoring in Outpatient Treatment for Opiate Dependence*, Journal of Substance Abuse Treatment, 33:4, pgs. 411-415, (Dec. 2007); Joseph A. Levisky, et. al., *Drug Deposition in Adipose Tissue and Skin: Evidence for an Alternative Source of Positive Sweat Patch Tests*, 110 Forensic Science International, pgs. 35-46 (1999).

The State maintains that Mother "cannot claim now, on appeal" that scientific studies support a judicial determination of unreliability because "[s]ubstantial, credible evidence supported the district court's findings that [Mother's] methamphetamine use rendered their conduct or condition unlikely to change within a reasonable time." (State's Response Brief at 34). This is not

accurate. There was no credible evidence of Mother's methamphetamine use. Her providers testified that she did not appear to be using drugs. She testified she was not using methamphetamine. The only evidence of Mother's alleged methamphetamine use was the sweat patch results, the results of which are not "clear and convincing" evidence of Mother's methamphetamine use.

The district court erroneously put the onus on Mother to prove the false positive results of her sweat patch tests, but it is the Department's duty to assist parents in completing their treatment plans and make a good faith effort in doing so. Mother should not be required to prove the validity of tests imposed by the Department. especially when the false positive results could be attributed to prescription medications the Department required her to take in order to address her mental health issues.

This Court should conclude that clear and convincing evidence did not support the district court's termination decision, which was based in large part on Mother's alleged continued methamphetamine use, when the reliability and accuracy of such results is questionable.

II. MOTHER WAS DEPRIVED OF FUNDAMENTALLY FAIR PROCEDURES.

Again, the State argues that Mother's arguments regarding COVID-19 and the prosecutor's conflict of interest were not properly preserved for appeal, but does not dispute that both situations existed throughout the proceedings in the

district court. Counsel for Mother did argue to the district court that the pandemic presented challenges to Mother, especially considering her ADHD and cognitive disabilities, and the constraints of virtual visitation.

To the extent the Court deems the issue not properly preserved, Mother requests plain error review on the basis that both situations deprived of her fundamentally fair procedures, to her prejudice. While the State claims that Mother has not shown prejudice by the pandemic's restrictions, this is simply not true. Mother cited to federal legislative findings establishing the same, and also argued that online Zoom meetings and the associated reduction in actual parenting time restricted her ability to learn and/or apply the redirection skills to the satisfaction of the Department. Any mother, and especially this Mother, whose children have been removed for a lengthy period of time would be hard-pressed to demonstrate improvements and bonding via a virtual platform.

Moreover, Mother merely urged deference by the Court to Mother's parental rights, in light of the rest of the record of this case, including the district court's acknowledgement that Mother's case was a close call. Mother does not seek reversal of the district court's decision based solely on the pandemic or the prosecutor's conflict of interest, but these situations compounded the prejudice to Mother in light of the entire record and the errors discussed above.

The combined mistakes which occurred in this case cannot be ignored in light of Mother's constitutional rights to parent her children, and to a fundamentally fair procedure for the State's deprivation of that right. This Court should determine that such plain, cumulative error, justifies reversal of the district court's termination decision.

CONCLUSION

Based on the foregoing, Mother's parental rights should be restored. Her rights were terminated in the absence of an appropriate treatment plan facilitated by reasonable efforts, on the basis of speculative unreliable drug use, and without fundamentally fair procedures.

Respectfully submitted this 18th day of May, 2022.

ROBIN A. MEGUIRE
meguirelaw.com
P.O. Box 1845
Great Falls MT 59403
(406) 442-8317
robin@meguirelaw.com

/s/ Robin A. Meguire
ROBIN A. MEGUIRE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 less than 5,000 words, excluding Table of Contents, Table of Authorities, and Certificate of Compliance.

/s/ Robin A. Meguire
ROBIN A. MEGUIRE

CERTIFICATE OF SERVICE

I, Robin Amber Meguire, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-18-2022:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: S. N., C. G.
Service Method: eService

Kathryn Fey Schulz (Govt Attorney)
215 North Sanders
P.O. Box 201401
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Daniel Vance Biddulph (Attorney)
PO Box 8861
Missoula MT 59807
Representing: C. G.
Service Method: eService

Cori Danielle Losing (Govt Attorney)
215 North Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Wyatt A. Glade (Attorney)
1010 Main Street
Miles City MT 59301
Representing: State of Montana
Service Method: E-mail Delivery

Electronically Signed By: Robin Amber Meguire
Dated: 05-18-2022