

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 21-0634

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IN THE MATTER OF

B.R.M. and B.F.M.

YOUTHS IN NEED OF CARE

**APPELLANT'S *ANDERS* BRIEF**

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On Appeal from the Fourth Judicial District Court, Missoula County, Hon.  
Shane Vannatta, Presiding.

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## STATEMENT OF THE ISSUES

- 1. Whether Appellant's counsel has met the criteria set forth in Mont. Code Ann. § 46-8-103 and *Anders v. California*, 386 U.S. 738 (1967) and be permitted to withdraw from this matter.**

## STATEMENT OF FACTS AND CASE

On or around June 23, 2020 the Department removed B.R.M. and B.F.M (hereinafter, Children) from parental care and petitioned the court for Emergency Protective Services, Adjudication of Child(ren) as Youth in Need of Care, and Temporary Legal Custody. (D.C. Doc. 1). In support of the petition, the Department alleged the parents exposed the Children to unsanitary and unsafe conditions in the home; including many cats living in the home with inadequate receptacles for animal feces, and feces on the floor of the home; the home being very cluttered with large piles of items which presented a danger to young children; concerns of substance use by both parents; lack of supervision; inability to meet the needs of the newborn baby including a lack of follow-through with infant support programs; inadequate supervision of the children, and parents sleeping through much of the day and being unable to supervise the children. *Id.*

The parents were served with the petitions and stipulated to the Petition on July 16, 2020 (See, Minute Entry, D.C. Doc. 11). Father

stipulated to the Petition, but did not agree with the allegations contained in the Petition. Father did not provide any written objections, testimony, or affidavits in support of his objection. On July 27, 2020, the court issued an order Adjudicating the Children as Youths in Need of Care and Granting the Department Temporary Legal Custody. (D.C. Doc. 12). Two extensions of Temporary Legal Custody were ordered throughout the case. (D.C. Docs. 31, 56).

On or around August 12, 2020, Father was served with a Motion to Approve and Order Parents' Treatment Plans and Authorize Disclosure of Information. (D.C. Doc. 13). Father filed an alternate treatment plan with the court. (D.C. Doc. 17). On or around August 25, 2020, Father filed a signed and stipulated treatment plan with the court, and the court ordered the stipulated treatment plan. (D.C. Docs. 18 – 20).

In April of 2021, the Department informed the Parents and the court of its intention to terminate parental rights as to the Children. (Minute Entry, D.C. Doc. 35). The Department cited lack of progress on the treatment plans, and the court urged the Parents to make progress on their treatment plan tasks. On June 29, 2021, a Petition for Termination of Parental Rights was filed with the court. (D.C. Doc. 39).

Testimony on the Petition was heard on July 15, 2021, and August 13, 16, and 23, 2021. (D.C. Doc 51, Minute Entry) Additional testimony was heard on September 24 and October 1, 2021. (D.C. Doc. 67, Minute Entry). Throughout the hearing, CFS introduced the following exhibits: Exhibit 1, Mother's drug test results from June 24, 2020 to July 27, 2020; Exhibit 2, Father's drug test results from June 24, 2020 to July 19, 2021; Exhibit 4 Recommendations from Mother's July 28, 2020 Chemical Dependency Evaluation with Glenn Cockrell; Exhibit 5, Recommendations from Mother's November 25, 2020 Chemical Dependency Evaluation with Jean Starr; Exhibit 6, Father's July 22, 2020 Chemical Dependency Evaluation with Glenn Cockrell; Exhibit 7, Certified pleadings from Father's criminal case DC-08-52 from Ravalli County District Court; Exhibit 8, Certified pleadings from Father's criminal case TK-15-9171 from Missoula Municipal Court; Exhibit 9, Spreadsheet summary of Mother's drug test results; Exhibit 11, Mother's June 14, 2021 SUDS assessment with Ashley Shoemaker; Exhibit 12, Mother's and Father's latest drug test results as of August 13, 2021; Exhibit 14, Email from Mother to LAC Juli Bardgett; Exhibit 15 Father's Instant drug test results from September 23 and 24, 2021; Exhibit 16, Mother's drug test results from August 5, 2021 through September 9,

2021; and Exhibit 17, Father's drug test results from August 4, 2021 through September 13, 2021.

Father objected to introduction of Exhibit 3, Affidavit of Department worker Kristin Hallesy in support of the Termination Petition. Changes were made to Exhibit 10, Spreadsheet summary of Father's drug test results, to reflect a "missed" test on June 7, 2021 was corrected to "shy bladder/unable to provide;" and, Joe Sickles, Toxicology Program Manager for Compliance Monitoring Systems, testified Father submitted an instant test the next day which was negative for methamphetamine. Father requested Exhibit 10 reflect that result.

The Exhibits, and testimony in support of the Exhibits, show throughout the pendency of the case, Father tested positive for methamphetamine and THC at regular enough intervals to doubt Father had maintained sobriety. During the gap in termination hearing proceedings from August 23, 2021 and October 3, 2021 Father tested positive for methamphetamine on 4 of the 11 tests and THC on 9 of the tests.

Father's stipulated treatment plan required that he not use or possess alcohol or drugs not prescribed by a doctor. (D.C. Doc. 19). Father was also required to obtain a chemical dependency evaluation and follow the recommendations of the evaluation. Father had completed an evaluation

with Glenn Cockrell (Exhibit 6), and had engaged in outpatient chemical dependency counseling with Mr. Cockrell throughout the case. On Direct examination, Father testified he had a problem with methamphetamine, and had not been clear of methamphetamine throughout the case; including throughout the termination proceedings. (Term. Hrg. 10/1/21: 127:2 – 128:15). Father testified Mr. Cockrell was not adequately addressing his addiction and enrolled himself in the Stepping Stones program. (*Id.*). Father would have his first meeting with a Stepping Stones counselor following the conclusion of termination proceedings. (*Id.* 129:1-3)

Mother struggled with her own addiction issues and engaged multiple rehabilitation programs throughout the proceedings. Each program resulted in relapse. (Term. Hrg. 08/13/21, p. 139).

The district court held Mother and Father, “demonstrated an ability to learn parenting instruction material, to repeat the material, and to even demonstrate it if someone is right there observing them.” (D.C. Doc. 80, Order Terminating Parental Rights, ¶ 119). “Mother and Father have well-intentioned attitudes toward parenting but are inhibited from acting upon their good intentions. (*Id.*)” The court cited the parent’s inability or unwillingness to repair portions of the home or clean debris from the home and yard which posed a danger to the children. (Term. Hrg. 08/13/2021, pp.

77, 128). Ultimately, the yard was cleaned with the help of resources coordinated by the CASA, Ms. Butts Johnson.

Following the hearing, the court ordered the termination of Father's parental rights. Among other reasons, the district court cited Father's "inveterate drug use" and his unwillingness to apply to Family Treatment Court or seek a higher level of treatment until after the termination hearings were under way. (Termination Order, p. 116). Father's testimony supported the court's conclusion. (Term. Hrg. 10/1/21: 127:2 – 128:15). The district court found the Department exercised reasonable efforts to reunify the family and provide Father with referrals to treat his chemical dependency problem; including participation in drug treatment court. Father's testimony supported the court's conclusion. (Term. Hrg. 10/1/21: 177:21 – 178:5). The district court concluded Father's chemical dependency problem was unlikely to change in a reasonable amount of time. Father testified that he had not completed treatment throughout the 15 months of proceedings, and had only recently acknowledged that he "needed help," and could not achieve sobriety on his own. (Term. Hrg. 10/1/21: 181:17 – 183:4).

Following the termination of parental rights, Father filed a timely appeal.

## ARGUMENT

### **I. COUNSEL FOR FATHER SHOULD BE PERMITTED TO WITHDRAW FROM THIS CAUSE IN ACCORDANCE WITH *ANDERS V. CALIFORNIA* AND MONTANA CODE ANNOTATED § 46-8-103.**

An appellant is guaranteed the right to fair representation by counsel through the Sixth and Fourteenth Amendments of the United States Constitution. *Anders v. State of California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400 (1967). The State of Montana protects these same rights through Article II §§ 16 and 17 of the Montana Constitution, and Mont. Code Ann. § 41-3-425(2019). Counsel for an appeal should advocate on behalf of his client; however, if after a conscientious examination of the facts and law of the appeal counsel finds the case to be wholly frivolous, he should advise the Court and request permission to withdraw. *Anders*, 386 U.S. at 744.

In seeking permission to withdraw, counsel must protect the rights of the client by accompanying his motion to withdraw with a brief referencing anything on the record which might arguably support an appeal. *Id.* Counsel must provide a copy of the motion and brief to the appellant and the Court must afford the appellant time to respond to the motion and brief. *Id.* Further, the memorandum or brief must include a summary of the procedural

history of the case and any jurisdictional problems with the appeal along with citations to the record and the law related to each issue. *Id.*

An *Anders* Brief is not intended to force counsel to argue against his client; rather, it is meant to assist the Court with review of the case. *Anders*, 86 U.S. at 745. After receipt of the Motion and Brief the court, not counsel, then conducts a full examination of the proceedings to decide whether or not the case is wholly frivolous. *Anders*, 386 U.S. at 744. An *Anders* Brief is intended to assist the court in a vigorous review of the law and record with the assistance of references and legal authorities provided by counsel. *Id.*

After conducting a diligent review of the District Court record, hearing transcripts and applicable law in this matter, counsel has not discovered any non-frivolous issue appropriate for appeal. Without arguing against his client, counsel is obligated to maintain candor with the Court and provide this brief pursuant to the requirements provided in *Anders* and any relevant Montana law.

## **II. THE RECORD MAY SUPPORT FATHER'S ASSERTION THAT THE DISTRICT COURT ERRED WHEN IT TERMINATED HIS PARENTAL RIGHTS.**

### **A. Standard of Review**

“This Court reviews a district court order terminating parental rights for abuse of discretion. “*In re J.J.L.*, 2010 MT 4, ¶ 14, 355 Mont. 23, 27, 223 P.3d 921, 924. “The test for an abuse of discretion is “whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice.” *In re K.J.B.*, 2007 MT 216, ¶ 22, 339 Mont. 28, 36, 168 P.3d 629, 635.

This Court reviews a district court’s findings of fact to determine whether they are clearly erroneous and conclusions of law to determine whether the court correctly interpreted and applied the law.” *In re A.N.W.*, 2006 MT 42, ¶ 28, 331 Mont. 208, 130 P.3d 619. “Findings of fact are clearly erroneous if they are not supported by substantial evidence, the trial court misapprehends the effect of the evidence, or a review of the record convinces the Court that a mistake has been made.” *Matter of M.J.W.*, 1998 MT 142, ¶ 7, 289 Mont. 232, 234, 961 P.2d 105, 106.

## **B. Discussion**

“The right to parent is a fundamental liberty interest and an order terminating the right must be supported by clear and convincing evidence.” *In re M.N.*, 2011 MT 245, ¶ 14, 362 Mont. 186, 190, 261 P.3d 1047, 1051; Mont. Code Ann. 41-3-609(1)(d)(2019). 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

established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure—that is, it must be more than a mere preponderance but not beyond a reasonable doubt

*In re E.Z.C.*, 2013 MT 123, ¶ 22, 370 Mont. 116, 121, 300 P.3d 1174, 1178

The court may order a termination of the parent-child legal relationship upon finding the child has been adjudicated a youth in need of care; an appropriate treatment plan has not been complied with by the parent; and, the conduct or condition of the parent rendering them unfit is unlikely to change within a reasonable time. Mont. Code Ann. § 41-3-609(1)(f).

Here, Father may argue that the greater weight of evidence supported a conclusion that termination was not appropriate. Father may also argue the department failed to provide reasonable reunification efforts; or, that Father's enrollment in Stepping Stones for addiction treatment was sufficient grounds to determine the conduct rendering father unfit to parent would change within a reasonable amount of time.

**III. THE RECORD MAY SUPPORT FATHER'S ASSERTION THE DISTRICT COURT ABUSED ITS DISCRETION IN TERMINATING HIS PARENTAL RIGHTS.**

### **A. Standard of Review.**

“The test for an abuse of discretion is “whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice.” *In re K.J.B.*, 2007 MT 216, ¶ 22, 339 Mont. 28, 36, 168 P.3d 629, 635.

### **B. Discussion.**

The decision to terminate parental rights is within the discretion of the District Court. The relevant statutes state: “The court *may* order the termination of the parent child relationship. . .” (Mont. Code Ann. § 41-3-609). Given this permissive language, the District Court has the discretion to deny the Department’s petition to terminate parental rights.

Father may argue that the District Court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason when it ordered the termination of parental rights based on Father’s chemical dependency issues, living conditions, or Mother’s continued chemical dependency issues.

## **CONCLUSION**

A diligent examination of the District Court record and research on the applicable law leads counsel to conclude that Appellant Father’s appeal

has no merit. The Court should grant the undersigned's motion to withdraw as counsel on direct appeal pursuant to the framework set forth in *Anders*.

Respectfully submitted this 06 day of June, 2022.

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By: /s/ Daniel V. Biddulph  
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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 point; is double-spaced except for footnotes and for quoted and indented material; and the word count is calculated by Microsoft Word for Windows is 2526 words, excluding Table of Contents, Table of authorities, Certificate of Service, & Certificate of Compliance.

## CERTIFICATE OF SERVICE

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**APPENDIX**

Findings of Fact, Conclusions of Law, and Order Terminating Parental  
Rights and Granting Permanent Legal Custody.....App. A

## CERTIFICATE OF SERVICE

I, Daniel Vance Biddulph, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 06-06-2022:

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