

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0116

IN THE MATTERS OF

D.P., A.P., and A.P.,

Youths in Need of Care.

ANDERS BRIEF

On Appeal from the Montana Second Judicial District, Silverbow County,
the Honorable Robert Whelan, Presiding.

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STATEMENT OF THE ISSUE

Whether counsel for the Appellant should be permitted to withdraw from this cause in accordance with the criteria established in *Anders v. California*, 386 U.S. 738 (1967) and Montana Code Annotated § 46-8-103 (2021).

STATEMENT OF THE CASE AND FACTS

Appellant Mother, D.P., (Mother) appeals the Silverbow County District Court's (District Court) order terminating her parental rights to her three children. (D.C. Doc. 92.¹) The Child and Family Services Unit of the Department of Health and Human Services (the Department) filed a *Petition for Emergency Protective Services, Adjudication as Youth in Need of Care (YINC) and Temporary Legal Custody (TLC)* on June 27, 2019. The *Petition* was based on the investigation into reports of physical neglect of the children. (D.C. Doc. 1.) In the supporting affidavit, Child Protection Specialist (CPS) Jodi Burk stated that the father had been arrested and was unable to care for the children and that Mother had not been in the home since February of 2019. The children tested positive for methamphetamine through the hair follicle tests performed on them. While Mother was not in the home nor was her conduct the basis for the children's removal, CPS

¹ All references to the District Court record are to DN 19-56, unless otherwise noted.

Burk requested Mother complete a drug test, which Mother was unable to provide. Both parents had a previous termination of their parental rights to another child in May of 2019. (D.C. Doc. 2.)

The Show Cause hearing was set for July 31, 2019, beyond the statutorily required 20 days. Mother was served by publication. (D.C. Docs. 3, 4-6.) Mother was present with her counsel at the Show Cause Hearing. A contested hearing date was requested and set for September 9, 2019. (D.C. Doc. 14.)

At the contested Show Cause Hearing on September 9, Mother was again present with her counsel and agree to stipulate to the Department's requested relief. Mother noted that she was anxious to discuss the children's placement and that she did not agree with all the information contained in CPS Burk's affidavit. (9/9/19 Transcr. at 5:22-6:2, 6:16-17.) CPS Burk testified that the children had been placed in stranger foster care in Deer Lodge after bouncing between homes in Great Falls and Kalispell. (9/9/19 Transcr. at 9:1-4.) She also noted that the parents were having supervised visits in Anaconda. (9/9/19 Transcr. at 9:13-14.) The Department noted its plan to provide the parents with treatment plans and the District Court set a treatment plan hearing for October 2, 2019. (D.C. Doc. 65.) Based on the

parties' stipulations, the District Court adjudicated the children as YINCs and granted the Department TLC for a period of six months. (D.C. Doc. 22.)

Mother was not present at the treatment plan hearing on October 2. (D.C. Doc. 24.) However, Mother's counsel stated she had gone over the proposed treatment plan with Mother but wanted the Department to provide testimony about some issues with the plan. (10/2/19 Transcr. at 4:21-25.) CPS Beck testified that the Department wanted at least six months of clean urinalysis (UA) tests, even if there were no positives due to Mother's previous substance abuse issues. (10/2/19 Transcr. at 6-7.) Additionally, Mother's counsel wanted CPS Beck to explain why Mother's visits were only one and a half hours, especially given the fact that the younger children were only two years old. CPS Beck testified that Mother needed time to develop a "good relationship" with the children and that she struggled in interactions with the eldest child. (10/2/19 Transcr. at 8.) Following Beck's testimony, the District Court did not alter the visitation schedule saying Mother needed to "develop a good relationship" with the children but the Court did want to see the visits increase after a period of time. Furthermore, the District Court did not believe six months of drug testing was inappropriate but informed Mother's counsel to make a motion if Mother

tested negative for three months. (10/2/19 Transcr. at 10.) The Court went on to approve the proposed treatment plan for Mother.

Mother's approved *Treatment Plan* was filed on October 3, 2019. Under this plan, Mother was required to complete the following tasks: A chemical dependency (CD) evaluation; random drug testing; a mental health (MH) evaluation, and family therapy, if deemed appropriate. Mother was also expected to attend all visitations with her children, complete a Circle of Security parenting class, maintain a drug-free residence, have safe and stable housing, meet with the CPS twice a month and have weekly phone calls, and sign releases of information. (D.C. Doc. 25.)

On March 9, 2020 the Department filed a *Motion to Continue TLC Until Hearing*. (D.C. Doc. 31.) The Court granted this *Motion* and on August 4, 2020, a full five months later, the Department finally filed its *Petition to Extend TLC*. (D.C. Docs. 32, 34.) In the supporting affidavit, CPS Sas reported,

[Mother] has made great strides in completing her treatment plan. At this time the Department would like to see her maintain her housing. The Department foresees an in-home plan can soon be developed for the children. The Department would like to see the parents engage with providers to address [D.P.'s] heightened needs. This can be achieved by working with Department approved providers if/when [D.P.] and her siblings are placed in their home.

D.P. had recently been placed in Shodair Children's Hospital due to her behaviors. (D.C. Doc. 35.)

The Court held a hearing on this *Petition* on August 12, 2020. The parents stipulated to the extension of TLC. (D.C. Doc. 41.) Mother's counsel requested a Family Engagement Meeting so "we can get moving along and get all the parties on the same page." (8/12/20 Transcr. at 4:16-20.) Based on the parties' stipulation, the District Court extended TLC for a period of six months. (D.C. Doc. 42.)

The children's Guardian *ad Litem* (GAL) filed a *GAL Report Re Status and Placement Brief* on September 17, 2020. She reported that D.P., the eldest child who had been previously placed in Shodair, was struggling. The visits her with parents were difficult and D.P. has requested visits with Mother be suspended. The GAL stated, "Mother's behavior continues to be explosive at times, even resulting in a small bruise on one of the little sisters in recent weeks. Mother recently requested a restraining order against father and then dropped it, leaving concerns about the couple's stability. Mother continues to favor one twin over her other daughters even during visits." (D.C. Doc. 47.)

On February 10, 2021 the Department filed another *Petition to Extend TLC*. (D.C. Doc. 52.) The supporting affidavit was authored by CPS

Supervisor (CPSS) Ciana Dale. D.P., the oldest child, remained in group care. CPSS Dale reported that Mother was no longer required to do a CD evaluation because of length of negative UA tests. However, Mother was still asked to do random UA tests and had missed many. She had also tested positive for THC and alcohol and, once, amphetamines. Regarding MH services, Mother had done three marriage counseling sessions but no individual sessions because she stated she did not believe she needed therapy. (D.C. Doc. 58.)

Under the parenting tasks of her treatment plan progress, CPSS Dale admitted that Mother usually did well during visitation, that she sometimes focused too much on one of the twins, instead of both, but this had been addressed and was getting better. CPSS Dale was going to begin monitoring visits so there were no more discrepancies with information about how visits were going. She noted that Mother was not keeping in consistent communication with the Department. (D.C. Doc. 53.) At the hearing on the *Petition*, held on March 3, 2021, Mother stipulated the extension of TLC. (D.C. Doc. 57.) The District Court then extended TLC for another period of six months. (D.C. Doc. 58.)

The District Court held a permanency plan hearing on June 30, 2021 after the Department had filed a *Motion for Permanency Hearing*. (D.C.

Doc. 60.) CPSS Dale reported that the proposed permanency plan for the children was still reunification, but at the hearing she testified that the parents were “struggling”, and the Department was looking at filing for termination of their parental rights. (D.C. Doc. 61, 6/30/21 Transcr. at 6-7.) CPSS Dale did note that visits between Mother and the children continued to go well and that Mother consistently attended visitation. (6/30/21 Transcr. at 9-10.) The District Court ordered the permanency plan of reunification and admonished counsel to tell parents this was their "last chance." (6/30/21 Transcr. at 11.)

On August 27, 2021 the Department filed a *Petition for Termination of Parental Rights and Permanent Legal Custody re Birth Mother (Termination Petition)*. The Department alleged that Mother had failed to successfully complete her treatment plan and the conduct or condition rendering her unfit to parent was unlikely to change in a reasonable time. (D.C. Doc. 70.) In the supporting affidavit, CPSS Dale reported on Mother’s treatment plan progress. Regarding the CD tasks, Mother had tested positive for methamphetamine and THC on February 17, 2021. At this point, the Department requested a CD evaluation. Mother submitted to the CD evaluation on March 17, 2021, but stated to the evaluator that she had never used drugs. Therefore, the CD evaluator could not recommend treatment

regardless of the Department's collateral information. Mother had signed up for the random UA program on October 19, 2019. She was asked to provide 93 samples from October 19, 2019- August 15, 2021. According to CPSS Dale, Mother had not shown up for 68 of the 93 requested samples. Mother provided 25 UA tests that were all positive for either THC, amphetamines, methamphetamines, or alcohol. Between the period of April 14, 2021 and July 24, 2021 Mother had provided two UA tests.

Mother completed a MH evaluation with diagnosis of Borderline Personality Disorder. Dale alleged that, following this, Mother was hesitant to engage in MH services. Mother and the father began couples counseling in March 2021 with negative results. Regarding her individual therapy, CPSS Dale reported that, in May 2021 when Mother was notified that the Department would be seeking termination of parental rights, she contacted Western Montana Mental Health Center and set up mental health services with Lucas Woodhead. However, Mr. Woodhead reported to CPSS Dale in July that he had not seen Mother since her initial assessment meeting.

Mother had visitation one time per week with her children. CPSS Dale noted that Mother did well engaging with her children. She would bring an activity and was able to keep her children entertained. However, Mother had not completed a Circle of Security Parenting Class.

In terms of housing, Mother had previously been living with the father until the father obtained an Order of Protection against Mother due to incidents of domestic violence. CPSS Dale believed Mother was living with her sister. Mother's communication with the Department had been sporadic. CPSS Dale said that Mother did not call her at the arranged times and had not been to a meeting in-person with Dale since May of 2021. When Mother did call, CPSS Dale reported that she would try to work through barriers to Mother being successful but lamented that Mother's contact was not consistent enough to do this. CPSS Dale alleged that Mother's conduct or condition rendering her unfit to parent was her mental illness, and the volatile and unhealthy relationship with the father. (D.C. Doc. 72.)

The District Court held a hearing on the *Termination Petition* on January 24, 2022. CPSS Dale was the only witness for the Department. Dale provided updates on Mother's alleged lack of treatment plan progress, including that Mother had been called for 114 UA tests, she had not showed for 94 of them and her last UA was done on July 12, 2021. (1/24/22 Transcr. at 9:23-25.) Overall, Dale testified that Mother had not been successful in completing the CD tasks of her treatment plan because her "behaviors have still been indications that I believe she is possibly using." (1/24/22 Transcr. at 10:13-19.)

Dale testified that Mother did complete her MH evaluation and was diagnosed with borderline personality disorder and was recommended to attend therapy regularly and work with medication management. (1/24/22 Transcr. at 11:2-6.) At the time of the termination hearing, Dale not aware of whether Mother was taking medication or not. (1/24/22 Transcr. at 11:23-12:1.) Additionally, Mother's engagement with therapy had been sporadic. However, Mother had attended seven therapy sessions since August 2021. (1/24/22 Transcr. at 12:2-11.) Despite the recent consistency with individual therapy, CPSS Dale still testified that Mother had failed the MH tasks of her treatment plan. (1/24/22 Transcr. at 12:20-13:5.)

Likewise, CPSS Dale testified that Mother had failed the parenting tasks of her treatment plan, noting that she had not completed a parenting class. Mother was consistent in attending her visits though and was engaged with the children while with them. (1/24/22 Transcr. at 13:10-24, 16:25-17:3.) Dale was uncertain of Mother's housing situation at the termination hearing, stating that she believed the parents were still living together but that the parents "refused" to provide her information about their housing. (1/24/22 Transcr. at 17:9-16.)

CPSS Dale did not believe Mother had been cooperative with her and she had not heard from Mother since May of 2021. (1/24/22 Transcr. at

17:21-18:1.) CPSS Dale stated that Mother's treatment plan, overall, had been unsuccessful and she did not believe Mother could parent in a reasonable time or that her conduct/condition could change within a reasonable time. She also believed termination of parental rights to be in the best interests of the children. (1/24/22 Transcr. at 19-20.)

Cindie Kalan-Green, visit coach and family development specialist for Anaconda Family Resource Center, testified about her observations of Mother. (1/24/22 Transcr. at 73:24-25.) Kalan-Green had observed Mother for four hours a week for months and noted that even though the oldest child was very rude, disrespectful, and inappropriate with her, Mother did a good job of redirecting this behavior. (1/24/22 Transcr. at 74:22-75:2.) She also noted that working with Mother went well; testifying that, at first, she was very defensive, but then she was able to open up and listen to advice and to try new things. (1/24/22 Transcr. at 80:11-17.) Kalan-Green also testified about being removed from working on Mother's case by the Department. She said her involvement with the family ended in January of 2021 because she was told she had "crossed some boundaries" when she did not report an incident of domestic violence in front of the kids. However, Kalan-Green was clear this incident had never actually happened because the kids were not present during the altercation she witnessed between the parents.

(1/24/22 Transcr. at 84-84.) Along these same lines, Kalan-Green had offered to do the parenting classes that Mother was asked to do but was told by the Department she was not allowed to provide that service. (1/24/22 Transcr. at 85.) In general, Kalan-Green's impression of Mother was that she was great with the kids and very protective. (1/24/22 Transcr. at 84:15-20.)

Mother testified on her own behalf about the struggles she encountered in trying to complete her treatment plan. She stated that she would reach out to Dale for help and she would be left hanging. She said she felt like she and her case were not important. (1/24/22 Transcr. at 100-102.) She also said she had requested family therapy with oldest child numerous times but this was never arranged. (1/24/22 Transcr. at 103:13-23.) When asked about the Department's belief that she would not be able to successfully parent within a reasonable time, Mother said, "I disagree. I believe that all I need is a little bit more time to find housing. I had everything in place that I absolutely needed. I can tell you right now I've never worked so hard in my life, as hard as I have over the last two years for my kids to prove to the State and to the department and to the judge that I am a good mom and that I deserve this shot at fixing myself, my kids, I mean, our family." (1/24/22 Transcr. at 107:13-20.) At the conclusion of all

testimony, the District Court took the matter under advisement. (D.C. Doc. 90.)

On February 8, 2022 the District Court issued its *Findings of Facts, Conclusions of Law and Order Terminating Parental Rights and Granting Permanent Legal Custody Re Birth Mother*. In this *Order*, the Court found that Mother failed to successfully complete her court ordered treatment plan. The Court stated that Mother has not taken “any steps” to alleviate the concerns related to removal and found that she would be unlikely to appropriately parent in a reasonable time. Additionally, the District Court found that termination of Mother’s parental rights was in the children’s best interests. (D.C. Doc. 92.)

Mother filed a timely *Notice of Appeal*. (D.C. Doc. 97.)

ARGUMENT

I. COUNSEL FOR MOTHER 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 the Sixth Amendment of the United States Constitution. *Anders v. California*, 386 U.S. 738, 744 (1967); see also Mont. Const. art. II, § 17. When appellant’s counsel “finds [her] case to be wholly frivolous, after a conscientious examination of it, [s]he should so advise the court and request permission to withdraw.”

Anders, 386 U.S. at 744. To ensure protection of this right, counsel seeking to withdraw must accompany her motion to withdraw with a brief that references anything in the record that might arguably support an appeal.

Anders, 386 U.S. at 744. A copy of the brief should be provided to the appellant and the appellant must be afforded the time to respond to counsel's motion and brief. *Anders*, 386 U.S. at 744.

The State of Montana has codified the requirements of *Anders* at Mont. Code Ann. § 46-8-103(2). If counsel concludes that an appeal would be frivolous or wholly without merit after reviewing the entire record and researching the applicable law, counsel must file a motion with the Montana Supreme Court requesting permission to withdraw. Mont. Code Ann. § 46-8-103(2). A memorandum discussing any issues that arguably support an appeal must accompany counsel's motion. Mont. Code Ann. § 46-8-103(2). The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, along with appropriate citations to the record and the law bearing on each issue. Mont. Code Ann. § 46-8-103(2). An *Anders* brief is intended to assist the appellate court in determining that counsel has conducted the required detailed review of the case and that the appeal is so frivolous that counsel's motion to withdraw should be granted. *Penson v. Ohio*, 488 U.S. 75, 81-82 (1988). The

requirements of an *Anders* brief are not meant to force counsel to argue against her client. *Anders*, 386 U.S. at 745.

After conducting diligent research of the record and applicable law in this matter, counsel has not found any non-frivolous issues appropriate for appeal. Without arguing against her client, counsel for the Appellant is compelled by her ethical duty of candor before this Court to provide the Court with this brief in accordance with the requirements of *Anders*.

II. THE RECORD MAY ARGUABLY SUPPORT MOTHER'S ASSERTION THAT THE DISTRICT COURT ERRED WHEN IT TERMINATED HER PARENTAL RIGHTS.

A. Standard of Review

This Court reviews a district court's order terminating an individual's parental rights for abuse of discretion. *In re J.J.L.*, 2010 MT 4, ¶ 4, 355 Mont. 23, 223 P.3d 921. To do so, this Court first reviews the district court's findings of fact to determine whether they are clearly erroneous and conclusions of law to determine whether they are correct. *In re D.B.*, 2007 MT 246, ¶ 18, 339 Mont. 240, 168 P.3d 691. Findings of fact are clearly erroneous if they are not supported by substantial evidence, the court misapprehends the effect of the evidence, or a review of the record convinces the Court that a mistake has been made. *In re M.J.W.*, 1998 MT 142, ¶ 7, 289 Mont. 232, 961 P.2d 105. 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, 168 P.3d 629.

B. Discussion

Pursuant to Montana statute, the requirements for termination of parental rights are the child is adjudicated as a YINC and *both* the following exist: an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time. §41-3-609(f), MCA (emphasis added). These findings must be supported by clear and convincing evidence. §41-3-609(1) MCA. “In the context of parental rights cases, clear and convincing evidence is the requirement that a preponderance of the evidence be definite, clear, and convincing.” *In re R.J.F.*, 2019 MT 113, ¶20, 395 Mont. 454, 443 P.3d 387. Further, a District Court "must adequately address each applicable statutory requirement" before terminating an individual's parental rights.” *In re A.T.*, 2003 MT 154 ¶10, 316 Mont. 255, 70 P.3d 1247.

Determining the likelihood of whether a parent is going to change within a reasonable time is akin to predicting the future, which is impossible.

As a result, this determination is made largely based on parent's past conduct as that information is available for analysis. Specifically, the parent's engagement and progress with their treatment plan is indicative of a parent's likelihood to change. The more progress and more engaged a parent is with their treatment plan, the more likely the parent will change within a reasonable time.

Testimony at the termination hearing was that Mother had completed a CD evaluation, a MH evaluation and was recently engaged in therapy. Additionally, Mother had always been consistent with her visits with the children and those reports were always positive. Mother was engaged with the children and was able to respond appropriately to the negative behaviors her oldest child often presented with. Mother testified that she did not feel supported and often felt judged by the Department, and this made any contact with her workers challenging for her. Given this evidence, this Court could find that the Department did not prove my clear and convincing evidence that Mother was unlikely to change in a reasonable time.

CONCLUSION

A thorough examination of the record and research of the applicable law seems to compel a conclusion that Appellant Mother's appeal has no

merit. This Court should grant the undersigned's motion to withdraw as counsel on direct appeal.

Respectfully submitted this 15th day of June 2022.

By: /s/ Shannon Hathaway

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's *Anders Brief* is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

/s/ Shannon Hathaway
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APPENDICES

Order on Termination of Mother’s Parental Rights as to D.P.A

Order on Termination of Mother’s Parental Rights as to A.P.B

Order on Termination of Mother’s Parental Rights as to D.P.C

CERTIFICATE OF SERVICE

I, Shannon Colleen Hathaway, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 06-15-2022:

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