IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0632

IN MATTER OF:

M.D.F. and C.R.F.,

Youths in Need of Care.

ANDERS BRIEF

On Appeal from the Montana Eleventh Judicial District Court, Flathead County, the Honorable Robert B. Allison, Presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……...…iii

STATEMENT OF THE ISSUE……..……..1

STATEMENT OF THE CASE ……..……..……. 1

STATEMENT OF THE FACTS……..…….. 3

ARGUMENTS……9

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 …..……..…....9

II. THE RECORD MAY ARGUABLY SUPPORT FATHER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL……...……..10

A. Standard of Review……..…..10

B. Discussion……..…....10

Father may argue that he received ineffective assistance of counsel when Trial Counsel did not object to the treatment plan.

III. THE RECORD MAY ARGUABLY SUPPORT FATHER'S ASSERTION THAT THE TRIAL COURT ERRED WHEN IT TERMINATED HIS PARENTAL RIGHTS……..…13

A. Standard of Review……13

B. Discussion……..…14

Father may argue the Court incorrectly found that his treatment plan was appropriate.

CONCLUSION ...……....……15

CERTIFICATE OF COMPLIANCE ……...……16

APPENDIX ...…….……..…….…...17

TABLE OF AUTHORITIES

CASES

U.S. Supreme Court

Anders v. California,
386 U.S. 738 (1967) ……...……...1, 9-10, 11

Penson v. Ohio,
488 U.S. 75, 81–82 (1988) ……..……10

Montana Supreme Court

In re A.S.,
2004 MT 62, 320 Mont. 268, 87 P.3d 408……..…11, 12, 13

In re A.T. and J.T.,
2003 MT 154, 316 Mont. 255, 70 P.3d 1247……..……14

In re C.M.C.,
2009 MT 153, 350 Mont. 391, 208 P.3d 809……. ……...12-13

In re Custody of C.F.,
2001 MT 19, 304 Mont. 134, 18 P.3d 1014…….13

In re. D.B.,
2004 MT 371, 325 Mont. 13, 103 P.3d 1026……...15

In re K.J.B.,
2007 MT 216, 339 Mont. 28, 168 P.3d 629 ……..…..….14

In re. K.L.N.,
2021 MT 56, 403 Mont. 342, 482 P.3d 650…….....15

In re X.M.,
2018 MT 264, 393 Mont. 210, 429 P.3d 920……...15

OTHER AUTHORITIES

Montana Code Annotated (2021)

§ 46-8-103 ……..……....1, 10

Montana Code Annotated (2019)

§ 41-3-443……..……..14

§ 41-3-446……..……..15

§ 41-3-609 ……..……..…..…… 14

Montana Constitution

Art. II. § 17……..12

United States Code

42 U.S.C. § 12131…….……..15

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

Appellant R.F. (Father) appeals the Flathead County District Court Order terminating his parental rights to two children, C.R.F. (a girl, now age 7) and M.D.F. (a boy, now age 4) (D.C. Doc. 145, Attached as App. A.)[1] . Another older child, C.F. is not the subject of this appeal.

In August 2016, the Department of Public Health and Human Services, Child and Family Division (the "Department") became involved with C.R.F. when it was reported that C.F. was punished by making him leave the house and walk down a rural road by himself at the age of six. When Mother and Father were observed, the Department felt that Mother lacked skills to parent, often resorting to yelling, punishing, and forcing the children to behave while Father offered no support. (D.C. Doc. 1.)

[1] All references are to DN 16-72(B), C.R.F., which is identical in relevant respects to M.D.F., DN 18-101(B).

The Department filed a *Petition for Emergency Protective Services (EPS) and Adjudication of Child as a Youth in Need of Care (YINC)* on August 12, 2016. (D.C. Doc. 1.) From there, Father stipulated to EPS and Temporary Legal Custody (TLC) and to his first Treatment Plan (D.C. Doc. 9, 12, 15.) Father stipulated to extend TLC in March 2017, and to a second Treatment Plan in September, 2017. The third child, M.D.F., was born in October 2017. Father contested a third extension of TLC in April 2018, which was granted after a brief hearing. (D.C. Doc. 47.) The case was then dismissed with successful reunification in October 2018. (D.C. Doc. 54.)

A renewed petition for EPS was filed in December 2018 when Mother was in a catastrophic car accident and Father was unable to parent the children alone. (D.C. Doc. 55.1.) Father stipulated to EPS, TLC, and to reinstating the treatment plan still in place for C.F. (D.C. Doc. 64.) Father stipulated to an extension in August, 2019, again in January, 2020, in July, 2020, and in February 2021. (D.C. Docs. 78, 89, 97, 105.) In March, 2021, the Department proposed a revised permanency plan now showing termination of parental rights, to which Father objected. (D.C. Doc. 115.) The Department filed a *Petition for Termination of Birth Mother's and Birth Father's Parental Rights* in July 2021 and a contested hearing took place over two days on November 8 and 9, 2021. (D.C. Docs 118, 141, 142.) After

hearing from seven witnesses (six on behalf of the Department and one on behalf of Mother), the District Court terminated parental rights under Mont. Code Ann. § 41-3-609(ii)(f) on the basis that though Father had completed his treatment plan, the treatment was not successful and Father would not be able to parent in a reasonable time if given additional services. (D.C. Doc. 145.) Father timely appeals.

STATEMENT OF THE FACTS

The Department became involved with this family when it received reports of physical abuse and neglect of the older child, C.F. (D.C. Doc. 1.) It was reported that C.F. had difficult behaviors (aggression, yelling, stealing, talking back) and that Mother was unable to handle these behaviors, often yelling, spanking, swearing at C.F., or sending him out of the house to walk a mile to his grandmother's house. Community members shared concerns for C.F.'s treatment and for how Mother may have been treating the smaller toddler, C.R.F. When trying to help the parents with parenting skills, the Department observed both Mother and Father struggling to understand parenting principles such as explaining to children why behavior is unacceptable versus spanking. Upon further investigation, the Department found the children to be dirty, hungry, and more community members confirmed concerns that C.F. was parented with corporal punishment and

fear rather than parenting skills. The Department then removed the children in July, 2016. (D.C. Doc. 1.) Father stipulated to the Department's request for TLC.

The Department set up services with parents such as Safe Care, AWARE, Parents as Teachers, and Youth Dynamics. (D.C. Doc. 1.) Father stipulated to a treatment plan that addressed concerns that Father and Mother had an abusive relationship with one another, and that Father lacked understanding of parental responsibility and child safety. (D.C. Doc. 15.) Father was required to take a psychological evaluation, attend therapy, to take a variety of parenting classes, and to work with a parenting coach. (D.C. Doc. 15.)

Father obtained a psychological evaluation soon after with Dr. Edward Trontel. Dr. Trontel opined that Father displayed clear cognitive deficits, borderline intellectual functioning, verbal comprehension in the first percentile, and that he struggled with problem solving. His opinion was that in order to safely parent Father would need in-home intervention for a long period of time. (D.C. Doc. 145.) Father began seeing a therapist. (D.C. Doc. 18.) Father participated in regular visits with the children, parenting classes, and visit coaching. (D.C. Doc. 18.) The children were quickly returned on a trial home visit, but later removed, remaining in the home between February

3, 2017 and August 10, 2017. (D.C. Doc. 41.) The children were removed because of a report that Father kicked C.F. and was driving erratically with the children in the car, and because of the poor prognosis received from the parenting evaluation from Dr. Robert Page. (D.C. Doc. 41.)

Father obtained a second evaluation that included a mental health and parenting evaluation with Dr. Robert Page in August 2017. Dr. Page found that Father displayed a barely adequate understanding of intervention, communication, and parenting of children, putting him at elevated risk for potential child abuse. (D.C. Doc. 145.) Dr. Page recommended in depth parenting education at a level Father could understand, with individual coaching and therapy. Dr. Page determined that Father's anxiety interfered with parenting. (D.C. Doc. 145, Hr'g. Tr. 31-34 August 8-9, 2021 (8/8-9/21 Tr.).)

Father made progress on the first treatment plan, and C.R.F. was returned on a second trial home visit by herself since her behaviors were less difficult to manage than C.F.'s. However, the Department continued to hear concerns of domestic violence and for some substantive parenting concerns; therefore, ordered a second treatment plan which added domestic violence counseling and more particular parenting classes and follow up on the recommendations described in the evaluation. (D.C. Doc. 35.) Father began

seeing John Buttram together with Mother to address domestic violence within their relationship beginning in 2017, where he and Mother made good progress. (D. C. Doc. 145.) The third child, M.D.F., was born in October 2017 and he was allowed to remain in the parents' care.

Because of both parents' compliance with treatment, and the extensive services still in place that would continue after the Department was no longer active on the case, the Department dismissed the case as to C.R.F. in October, 2018. (D.C. Doc. 53.) Father however was accused of partner family member assault and was asked to leave by Mother on October 26th.

Shortly thereafter, Mother was in a catastrophic car accident leaving Father to care for the children alone. The children were removed from Father in November 2018 on a voluntary basis when he was tasked with trying to figure out how he could provide child care and care for the children alone without Mother's help. When he acknowledged he would be unable to put this together, the children were officially removed in December 2018 pursuant to a renewed petition for TLC. (D.C. Doc. 55.1.)

Father stipulated to TLC and to continuing to work on the treatment plan that was already in place in C.F.'s case which was still ongoing. Unlike Mother, Father was coherent and in court the date of this stipulation. (D.C. Doc. 64.)

Father continued to work on all aspects of the treatment plan, including further visit coaching, parenting classes, and therapy. Father obtained a third psychological evaluation with Dr. Paul Silverman. Dr. Silverman's results were consistent with prior evaluations, finding Father had borderline intellectual functioning and an intellectual development disorder. Dr. Silverman found Father to have limited insight into parenting and limited engagement or understanding of his children in particular. He engaged in unsafe behaviors such as leaving out a sharp can lid even during the evaluation. Dr. Silverman predicted that Father's condition would be unlikely to improve given all of the interventions that had already been in place. (D.C. Doc. 145.) Dr. Silverman recommended that Father would need to address his lack of sleep (working graveyards), anxiety and depression, and that he needed help feeling less pressure as a sole provider. (8/8-9/21 Tr. 161-167.)

Father received visit coaching throughout the case from Bear Logic. Staff at Bear Logic observed a continual need to assist parents with parenting including basic safety measures such as keeping an eye on the children. Both parents would become overwhelmed with the environment and could lose track of the children, for example, by getting overwhelmed

with the soft serve machine causing an overflow of ice cream while losing track of the children. (D.C. Doc. 145.)

TLC was extended four times to allow Father additional time to absorb the lessons from visit coaching and therapy. However, in July 2021, the Department requested termination of parental rights. The Department opined that even though Father had completed the tasks on his treatment plan, the treatment was not successful. (D.C. Doc. 116.)

At a hearing on the petition, the District Court heard from all three psychologists who had evaluated Father, Bernadette McDonald from Bear Logic, Department Child Protection Specialist Jodi Black-Fucci (CPS Fucci), and Mother's therapist. CPS Fucci admitted that the Department did not take steps to implement several of the recommendations made by Dr's Trontel, Page, and Silverman. The Department made no effort to ensure that any of the parenting classes, evaluation feedback sessions, or parenting coaching was done at Father's reading or understanding level. The Department did not direct the treatment team to assist Father first with his anxiety and sleeplessness, which interfered with his ability to absorb any of the parenting lessons. And the Department had not invited the parents to attend any appointments or school functions so that they could be more engaged with their children. (8/8-9/21 Tr. 207-215.)

In closing, Father's counsel argued that the treatment plan was not appropriate if it was not leading to success for Father. Since the interventions were not offered at Father's reading or understanding level, the Department was not providing reasonable accommodations under the Americans with Disabilities Act (ADA). Father's counsel argued that Father should be given additional time with services more particularly tailored to his needs. (8/8-9/21 Tr. 329-333.)

The District Court ruled that Father had complied with treatment but that the treatment was unsuccessful. Father would not be able to parent within a reasonable time, and it would be in the children's best interests that parental rights be terminated. The District Court stated that this was the first he had heard about any concerns with the ADA or the treatment plan despite numerous updates and extensions of TLC. (D.C. Doc. 145, 8/8-9/21 Tr. 350.) Father's rights were terminated.

ARGUMENTS

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 the Sixth Amendment of the United States Constitution. *Anders,* 386 U.S. 738, 744

(1967). When appellant's counsel "finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." *Id*. 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. *Id.* 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. *Id.*

The State of Montana has codified the requirements of *Anders*. 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. *Id*. A memorandum discussing any issues that arguably support an appeal must accompany counsel's motion. *Id.* 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. *Id*. 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 FATHER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

Termination of parental rights involves liberty interest in parenting that this Court must protect. When the State seeks to terminate a parent's liberty interest in the care and custody of his child, due process requires that the parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, 87 P.3d 408. Fundamental fairness at termination proceedings requires that a parent be represented by counsel. *Id*. Thus, whether a person has been denied his right to due process is a question of constitutional law. *Id*. at ¶ 9. Review of questions of constitutional law is plenary. *Id*. at ¶ 9.

B. Discussion.

Father may argue that he received ineffective assistance of counsel when Trial Counsel did not object to the treatment plan.

The Due Process Clause of the Montana Constitution, Article II, Section 17, provides that a parent involved in the termination of her parental rights is entitled to effective assistance of counsel. *In re A.S.*, ¶¶ 12, 20. In *In re A.S.*, this Court set out the standard for evaluating the effectiveness of counsel in dependent neglect (DN) cases. *Id*. at ¶¶ 26-28. Effectiveness of counsel in these cases "should be evaluated by the following non-exclusive factors:

> 1) Training and experience. Specifically whether counsel has experience and training in representing parents in matters and proceedings under the [DN statutes] and whether counsel has a verifiably competent understanding of the statutory and case law involving the [DN statutes].
>
> 2) Advocacy. ...whether counsel has adequately investigated the case; whether counsel has timely and sufficiently met with the parent and has researched the applicable law; whether counsel has prepared for the termination hearing by interviewing the State's witnesses and by discovering and reviewing documentary evidence that might be introduced; and whether counsel has demonstrated that he or she possesses trial skills, including making appropriate objections, producing evidence and calling and cross-examining witnesses and experts.

Id at ¶ 26. Additionally, a parent may not sustain an ineffective assistance of counsel claim when the parent cannot demonstrate prejudice as a result of the ineffective assistance. *In re C.M.C.*, 2009 MT 153, ¶ 30, 350 Mont. 391,

208 P.3d 809. The factors denoted above are to be considered nonexclusive benchmark criteria for evaluating assistance of counsel in termination proceedings. *In re A.S.*, ¶ 27. If trial counsel prejudicially damages a parent's case, this violation of the parent's right to due process will warrant reversal. *In re C.M.C.*, ¶ 30.

Father may argue that Trial Counsel prejudicially damaged his case when she did not raise the issue of the ADA and the inappropriate delivery of treatment until the last day of his case.

III. THE RECORD MAY ARGUABLY 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's order terminating an individual's parental rights for abuse of discretion. *In re Custody of C.F.*, 2001 MT 19 ¶11, 304 Mont. 134, 18 P.3d 1014. 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. *Id*. 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. *Id.* 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.

Father may argue the Court incorrectly found that his treatment plan was appropriate.

An order terminating an individual's right to parent his children must be supported by clear and convincing evidence that the each of the statutory criteria for termination have been met. *In re A.T. and J.T.*, 2003 MT 154, ¶ 10, 316 Mont. 255, 70 P.3d 1247. This must include evidence that the Youth has been adjudicated a Youth in Need of Care, an appropriate treatment plan has been approved by the court and has not been complied with, and the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time. Mont. Code Ann. §41-3-609(f).

A treatment plan may be ordered when the parent admits the allegations of an abuse and neglect petition; the parent stipulates to the allegations of abuse or neglect, or the court has made an adjudication that the child is a youth in need of care. Mont. Code Ann. § 41-3-443(1). A treatment plan must identify the conditions that resulted in the abuse or neglect of the child and must address the requirements that must be established for safe return of the child to the family. Mont. Code Ann. § 41-

3-446(2). If a parent is disabled, the treatment plan must consider the parents' abilities and must be customized to meet the parent's particular needs. *In re X.M.*, 2018 MT 264, ¶ 19, 393 Mont. 210, 429 P.3d 920 (internal citations omitted.) The requirement to customize a plan to assist a disabled parent complies with the requirement that the Department provide reasonable accommodations for disabled parents under the ADA. *In re. K.L.N.*, 2021 MT 56, ¶25, 403 Mont. 342, 482 P.3d 650 (referencing Title II of the ADA, 42 U.S.C. § 12131(1).)

This Court will consider whether a treatment plan was appropriate only when objections were raised in the trial court, and from there will evaluate whether the parent was represented by counsel, whether the parent stipulated to the plan, and whether the plan addressed the particular circumstances facing both the parent and child. *In re. D.B.*, 2004 MT 371, ¶44, 325 Mont. 13, 103 P.3d 1026.

Father may argue that while the tasks may have been appropriate in the treatment plan, the services were not delivered to Father in a way he could understand, violating the ADA and *K.L.N.*.

CONCLUSION

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

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

Respectfully submitted this 27th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *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.

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APPENDIX

Findings of Fact, Conclusions of Law, and Order Granting Termination of Birth Mother and Birth Father's Parental Rights with Permanent Legal Custody and Right to Consent to Adoption (C.R.F. DN 16-072(B) .. App. A

Findings of Fact, Conclusions of Law, and Order Granting Termination of Birth Mother and Birth Father's Parental Rights with Permanent Legal Custody and Right to Consent to Adoption (C.R.F. DN 18-101(B) .. App. B

CERTIFICATE OF SERVICE

I, Meri Kathleen Althauser, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 06-27-2022:

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