IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0263

IN THE MATTER OF:

A.B.W. and D.L.W.,

Youths In Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Amy Poehling Eddy, Presiding

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STATEMENT OF THE ISSUES

1. Whether Mother's due process rights were violated as a result of a missing court recording from the second day of the adjudication hearing.

2. Whether Mother's treatment plan required her to engage in chemical dependency (CD) treatment and, if not, whether the district court abused its discretion in terminating Mother's parental rights based, in part, on Mother's failure to engage in CD treatment.

STATEMENT OF THE CASE

On June 19, 2020, the Department of Health and Human Services, Child and Family Services Division (Department), removed A.B.W. and D.L.W. from D.S.M.'s (Mother) care for the third time in two years. (Docs. 1, 16, 46.)[1] Mother historically had CD and mental health (MH) issues, but the children were removed from her care in June 2020 for medical neglect. (Docs. 46, 75.) The children were adjudicated as youths in need of care (YINC) after a contested adjudication hearing. (Doc. 75.) The record from the second day of the two-day adjudication hearing is not available.

[1] These cases involve siblings and their respective district court files are nearly identical; thus, unless otherwise indicated, citations to the record will be to *In re A.B.W.*, Cause No. DN-18-087.

The district court ordered Mother to complete a treatment plan. (Doc. 73.)[2] Temporary Legal Custody (TLC) was continued twice without objection to allow Mother additional time to work on her plan. (Docs. 106, 131.) Mother was not successful in completing her plan and, following the termination of parental rights (TPR) hearing, the court terminated Mother's parental rights. (04/07/22 Tr. (Hr'g); Doc. 181.)

STATEMENT OF THE FACTS

Mother's involvement with the Department began in April 2018 after allegations arose that D.L.W.'s father, T.W., was making sexual advances toward Mother's then-14-year-old daughter, M.M. (Doc. 1, Aff. at 3.) M.M. moved out of the house to live with her maternal grandmother and the Department stopped its involvement with the family. (*Id.* at 4.) A few months later, in August 2018, the Department again became involved after Mother's then-boyfriend, J.M., who was on probation, tested positive for methamphetamine. (*Id.*)

Mother and the Department agreed to a voluntary protection plan and A.B.W. and D.L.W. were placed with a family friend. (Doc. 1, Aff. at 4.) At that time, Mother admitted to methamphetamine use. (*Id.*) Mother was also struggling

[2] T.W.'s and A.B.W.'s father's parental rights were also terminated, but they did not appeal.

with suicidal ideation. (*Id.*) The Department referred Mother to Compliance Monitoring Systems (CMS) to complete drug testing, but Mother did not comply. (*Id.*) Mother excused her failure to test by claiming she had been drugged with an unknown substance in the past that caused her to test positive. (*Id.* at 5.) The Department placed A.B.W. (20 months old) and D.L.W. (9 months old) with a family friend and petitioned for emergency protective services (EPS) and TIA.

On November 21, 2018, Mother stipulated to the Court granting TIA to the Department for a period of 90 days. (Doc. 12.) On February 19, 2019, the Department filed a motion to dismiss, citing Mother's abstention from drugs and compliance with other Department requirements. (Doc. 14.) Thereafter, the district court dismissed the case. (Doc. 15.)

On February 7, 2020, Child Protection Specialist (CPS) Caleb Peterson (Peterson) contacted Mother after receiving a report that alleged her boyfriend, J.H., had punched her in the eye with a closed fist. (Doc. 16, Aff. at 5-6.) Peterson observed Mother appeared to be under the influence, but Mother denied use. (*Id.*) Peterson and Mother worked out a protection plan for the children where they would reside with a friend. (*Id.* at 6-7.)

Mother provided a urine sample at CMS, but the sample was spilled prior to testing and Mother refused to provide another sample. (Doc. 16, Aff. at 7.) Around the same time, Mother lost her residence. (*Id.* at 8.) The Department filed a Petition

for EPS, Adjudication of Children as YINC, and TLC, alleging Mother subjected A.B.W. and D.L.W. to physical neglect. (Doc. 16 at 2.)

At the time of the May 22, 2020 show cause hearing, Peterson no longer worked at the Department and was not available to testify. (5/22/20 Tr. at 28.) The court dismissed the petition, citing a lack of reliable information from the Department. (*Id.* at 62-63.)

Three weeks after the dismissal, D.L.W. was treated at the North Valley Medical Center for an abscess on his neck that was caused by an untreated tooth infection. (Docs. 46, Aff. at 4, 75 at 2.) The tooth went untreated because Mother failed to take D.L.W. to a dental appointment. (Doc. 75 at 2.) Mother's failure to get D.L.W. treatment resulted in D.L.W. needing emergency surgery. (*Id.*)

CPS AJ Gamma (Gamma) observed D.L.W. also had a rash on his face, ear, and hand that was caused by a bacterial infection. (Doc. 46, Aff. at 4.) Gamma reported Mother could not explain why she did not seek medical care for the rash. (*Id.*) Gamma stated D.L.W. remained hospitalized for three days after the surgery because he needed IV antibiotics. (*Id.* at 8.)

On June 19, 2020, CPS Gamma visited D.L.W. in the hospital. (Doc. 46, Aff. at 8.) When Gamma could not locate Mother at the hospital, she went to her residence where she observed three adults yelling and passing an unresponsive toddler back and forth. (*Id.* at 8-9.) Gamma called 911 and pulled her vehicle up to

the scene. (*Id.*) Gamma observed Mother approach her vehicle while screaming at her to get out of the way. (*Id.*) Gamma averred that Mother hurriedly explained A.B.W. was not breathing and she was taking her to the emergency room. (*Id.*) Mother then got into her vehicle with A.B.W. and drove away. (*Id.*) Gamma did not follow Mother out of concern Mother would act in a more erratic manner and cause more danger to A.B.W. (*Id.*)

Gamma traveled to the hospital emergency room. (Doc. 46, Aff. at 11-12.) While looking for A.B.W. and Mother, Gamma learned Mother had returned to the hospital without A.B.W. and attempted to discharge D.L.W. against medical advice. (*Id.* at 12; Doc. 75 at 2.)

Gamma reported Mother refused to disclose A.B.W.'s whereabouts and claimed she was going to fly A.B.W. out of Montana on a private plane. (Doc. 46, Aff. at 12-13.) Mother would not confirm A.B.W. was okay after her medical emergency from earlier in the day. (*Id.* at 13.) Deputies located A.B.W. later that day at a residence in Bigfork. (*Id.*)

Gamma retrieved A.B.W. and transported her to the emergency room. (Doc. 46, Aff. at 13.) Gamma learned Mother had not taken A.B.W. to receive any medical care after the earlier incident. (*Id.*) Gamma reported A.B.W. was diagnosed with a bladder infection and her fever spiked to 103.8 degrees

Fahrenheit. (*Id.*) As a result of Gamma's investigation, the Department petitioned for EPS, adjudication of the children as YINC, and TLC. (Doc. 46.)

The district court held an adjudication hearing beginning on Friday, August 28, 2020. (*See* Doc. 75.) On the first day of the hearing, the Department called Nicolle Roth (Roth), a pediatric social worker at Kalispell Regional Hospital, to testify. (08/28/20 Tr. at 6.) Roth observed D.L.W. with sores on his face, fingers, and ears when he came to the hospital for emergency surgery. (*Id*. at 8.) Mother told Roth the Department was harassing her, which was why she delayed bringing D.L.W. to the hospital. (*Id.* at 9.) Roth testified Mother wanted to take D.L.W. out of the hospital and transfer him to a hospital in Nashville, Tennessee, in order to circumvent Department involvement. (*Id.* at 11.) Mother reported to Roth she was going to leave A.B.W. with some friends and she would be back around 2:30 p.m. (*Id.* at 13.) Roth testified Mother did not come back to the hospital as planned. (*Id.*)

Roth testified that, later that evening, Mother's boyfriend, J.H., came and tried to take D.L.W. (08/28/20 Tr. at 13-16.) The Department and hospital security were notified and J.H. left, only to return with Mother a short time later. (*Id.* at 16.) Roth reported she was surprised to see Mother because J.H. had said Mother was not at the hospital. (*Id.*)

Mother told Roth about Gamma coming to her house earlier in the day while A.B.W. was "choking on something and she couldn't breathe. . . ." (08/28/20 Tr. at 17.) Roth asked Mother if she took A.B.W. to the hospital, but Mother would not tell her where A.B.W. was located. (*Id.*) Roth testified she was concerned Mother would prioritize avoiding Department intervention over the medical needs of her children. (*Id.* at 18-19.)

On August 31, 2020, the parties reconvened to continue the hearing. (Doc. 75 at 2.) The Department called Dr. Samantha Dooley (Dr. Dooley) and Gamma. (*Id.*) Mother testified on her own behalf via two-way video, but terminated the connection during cross-examination and did not reappear. (*Id.*) The district court made detailed findings of facts in its Order Adjudicating Children as YINC and Granting TLC. (Doc. 75.)

In its order, the district court summarized Dr. Dooley's testimony. (Doc. 75 at 2.) Dr. Dooley testified the hospital had initiated the call to the Department out of concerns Mother was neglecting D.L.W.'s medical needs. (*Id.*) Dr. Dooley noted Mother had missed taking D.L.W. to a dentist appointment and it was always a concern when parents missed appointments. (*Id*.) Dr. Dooley was also concerned about the state of D.L.W.'s rash, his underimmunization, and Mother's delay in seeking medical care. (*Id*.) Dr. Dooley stated D.L.W.'s abscess was the result of a significant infection and that it could cause severe complications if left untreated.

(*Id.*) Dr. Dooley opined Mother had medically neglected D.L.W. and that her attempt to discharge him against medical advice would have placed him at further risk of harm. (*Id.*)

After hearing the evidence, the district court adjudicated A.B.W. and D.L.W. as YINC. (Doc. 75 at 3.) The court concluded the "nature of the abuse/neglect . . . is medical and physical neglect as more particularly described in [Gamma's] Affidavit." (*Id.* at 5.) The court granted TLC to the Department for a period of six months. (*Id.*)

On September 18, 2020, the district court held a treatment plan hearing where the court discussed the requirements of the Department's proposed treatment plan with Mother. (09/18/20 Tr.) Mother reported she understood the Department would want to monitor her for "drugs and alcohol." (*Id.*) Mother offered that she wanted to go to Peggy's House, a sober living facility in Kalispell, because she could be monitored for drug use there. (*Id.*) At the end of the hearing, the district court approved the treatment plan "as submitted" by the Department. (*Id.* at 10.)

The treatment plan identified three concerns with Mother's conduct/condition that resulted in the need for intervention. (Doc. 73, Att. at 2.) Mother's medical neglect of her children was her primary "parenting issue." (*Id.*) The second concern listed was CD, where it was noted "Mother's untreated drug

and alcohol abuse makes it hard for her to parent her child/ren safely and meet the physical and emotional needs of her child/ren." (*Id.*) The treatment plan further noted Mother's "erratic behavior" and that her failure to meet her children's needs could be caused by her drug or alcohol abuse. (*Id.*) Finally, the treatment plan sought to address Mother's ongoing MH issues. (*Id.*)

Under the "Parenting Tasks" section, the treatment plan required Mother to follow recommendations from her "treatment providers." (Doc. 73, Att. at 2.) The fourth "task" contemplated Mother providing a safe home for the children, to include not exposing them to "drugs or drug paraphernalia." (*Id.*) The treatment plan required her to provide "appropriate supervision of her children and not allow any person, including herself, to be around the children . . . who is under the influence of alcohol or drugs. . . ." (*Id.* (emphasis added).) Under the "Housing Tasks" section, the treatment plan again required Mother to "not expose her children to any individual, including herself, using alcohol or drugs . . ." (*Id.* at 3.) Under the "Mental Health Tasks" section of the treatment plan, Mother was to complete a MH evaluation and "follow recommendations made by the professional, including any recommendations that may lead to a higher level of care. . . ." (*Id.*)

At a November 6, 2020 status hearing, Mother updated the court that she had not made much progress on her treatment plan. (11/06/20 Tr. at 6.) Mother

reported attending one appointment for her MH, but stated she was struggling because she did not have a driver's license. (*Id.*)

At a November 20, 2020 follow-up status hearing, CPS Claudia Bergman (Bergman) reported Mother struggled to consistently attend visitations. (11/20/20 Tr. at 6.) Mother also missed her MH appointment after being arrested on a justice court warrant. (*Id.* at 10.) Mother agreed, but reported she had been to Gateway Community Services (Gateway) for outpatient treatment and counseling and had also gone to Sunburst Mental Health (Sunburst) for treatment. (*Id.*)

Bergman clarified Mother had only attended one intake appointment at Gateway on October 28, 2020. (*Id.* at 11.) Bergman reported she was still concerned about Mother's drug use and noted Gateway provided drug testing and she was waiting to see the results. (*Id.* at 12.)

At the next hearing, CPS Tamara Eads (Eads) described Mother's progress on her treatment plan. (12/18/20 Tr. at 10.) Eads reported Mother had completed an evaluation at Gateway that recommended intensive outpatient drug treatment. (*Id.*) It was later discovered Mother had tested positive for methamphetamine on the day of the evaluation, but Mother denied use. (04/07/22 Hr'g, Ex. 5.)

Mother declined Gateway's recommendation for outpatient treatment, but told Eads she would reengage with their services. (12/18/20 Tr. at 10-11.) However, when Eads later contacted Gateway staff, Eads learned Mother had not

been to Gateway since her intake appointment. (*Id.* at 12.) Mother also told Eads she was going to Sunburst, but when Eads contacted staff at Sunburst, they reported Mother was not a client. (*Id.*)

Mother failed to appear at the next status hearing on January 22, 2021. (01/22/21 Tr. at 4.) Eads reported having difficulty staying in contact with Mother because Mother had disappeared from her residence for a couple of weeks and she had changed her phone number. (*Id.* at 5.) When Eads was able to contact Mother, Mother reported she had not gone back to Gateway. (*Id.* at 6.) Mother told Eads she went to another provider, the Oxytocin Clinic (Oxytocin). (*Id.*) Eads contacted staff at Oxytocin to see if she was a client there or if she had been referred elsewhere. (*Id.*) Staff at Oxytocin reported Mother had not been there. (*Id.*) The district court noted it had signed search warrants the prior week that indicated Mother "has allegedly been involved in some recent drug activity. . . ." (*Id.* at 8.)

At the February 2021 status hearing, Eads reported Mother had recently made some progress by moving into Peggy's House. (02/26/21 Tr. at 5.) Eads reported Mother would be doing random drug testing there. (*Id.*) Mother still had not engaged in MH or CD treatment but confirmed she would engage with Oxytocin. (*Id.* at 5-6.) Eads confirmed Oxytocin would address mother's MH therapy and CD needs. (*Id.*)

On February 28, 2021, the Department petitioned the court to extend TLC. (Doc. 95.) Eads noted Mother had not engaged in the MH therapy required by her treatment plan. (*Id.*, Eads Aff. at 2.) Eads also noted Mother had completed the evaluation at Gateway but she was refusing to follow their recommendations. (*Id.*)

Prior to the hearing on the Department's petition, Mother was accepted into the Flathead Family Treatment Court (Treatment Court). (Doc. 100.) In order to enter the Treatment Court, Mother was required to have a CD evaluation that showed she had a substance use disorder. (Doc. 142, Aff. at 6.) Mother met the qualification as a result of her evaluation from Gateway, which diagnosed her with methamphetamine use disorder—severe, and opioid use disorder—severe, in sustained remission. (*Id.* at 10; 04/07/22 Hr'g, Ex. 5.)

On March 24, 2020, Mother was inducted into Treatment Court. (03/24/20 Tr. at 6.) The court questioned Mother about drug testing. (*Id.* at 8.) Mother confirmed she was testing at Peggy's House and through Oxytocin. (*Id.*) Mother informed the court she had started MH counseling that day at Sunburst. (*Id.* at 14.)

Mother missed her April 21, 2021 Treatment Court hearing and tested positive for methamphetamine that day and again on April 28, 2021, at Oxytocin. (05/05/21 Tr. at 19-20.) Mother was discharged from Oxytocin on April 30, 2021, for not engaging in their program. (Doc. 142, Aff. at 10.) Mother abruptly moved

out of Peggy's House on April 30, 2021. (05/05/21 Tr. at 17.) Around that time, Mother was also missing her parenting time with her children. (*Id.* at 21.)

At the next Treatment Court hearing, the court informed Mother she needed to continue drug testing. (05/05/21 Tr. at 23-24.) Mother stated she understood the requirement for continued testing. (*Id.* at 24.) At the end of the hearing, with no objection from Mother, the court extended TLC for an additional six months. (*Id.* at 25; Doc. 107.) As part of its order extending TLC, the court noted Mother needed additional time to complete substance use disorder tasks. (Doc. 107 at 2.)

Mother missed her next two Treatment Court hearings on May 19, 2021, and June 2, 2021, but appeared on June 16, 2021. (Docs. 108-110.) Mother reported her housing situation continued to be unstable and she had again changed employment. (06/16/21 Tr. at 5.) Mother indicated she was not doing treatment, but she wanted to reengage. (*Id.*) The court confronted Mother about her drug use, but Mother continued to deny use despite the positive tests. (*Id.* at 6.) The court indicated it did not believe Mother and encouraged her to reengage in treatment. (*Id.* at 6, 8.)

Mother next appeared for Treatment Court on July 7, 2021. (Doc. 114.) The court told Mother the Treatment Court team was at a loss on what to do for her because she was not engaged in treatment or drug testing and only "kind of showing up for parenting." (07/07/21 Tr. at 8.) The court reiterated that Mother needed to drug test in order to stay in Treatment Court. (*Id.*) The court told Mother

she needed to start drug testing at CMS due to her lack of testing. (*Id.* at 11.) Mother stated "[t]hat's absolutely fine." (*Id.*)

Mother missed her next Treatment Court hearing on July 21, 2021, but appeared on August 4, 2021. (Docs. 115, 117.) Mother admitted she had not engaged in treatment. (08/04/21 Tr. at 5.) Mother indicated her reason for not testing was because she was concerned about false-positive results. (*Id.* at 6.) Mother claimed she did not have a substance use disorder. (*Id.* at 8-9.) Mother stated the only reason she previously admitted to having a substance use disorder was to get into the Treatment Court because she thought it would facilitate the return of her children. (*Id.* at 10.) Mother was terminated from the Treatment Court program and the case was returned to the original district court. (*Id.* at 11-12; Doc. 118.)

The district court set a status hearing for August 20, 2021, but Mother failed to appear. (Doc. 121.) Eads reported Mother continued to refuse CD treatment. (08/20/21 Tr. at 5.) Eads provided additional information on Mother leaving Peggy's House, stating she left in the middle of the night after having a MH breakdown where she was punching herself. (*Id.* at 6.) The district court noted it had been "years without any substantial movement from the Mother." (*Id.* at 8-9.) Prior to the hearing, Mother had been missing about half of her visitations with the children. (*Id.* at 10.) Mother's monitored visitation through a visitation center,

Bear Logic, was temporarily suspended on August 31, 2021, due to Mother missing the appointments. (Doc. 124.)

On September 1, 2021, the Department filed its second petition to extend TLC. (Doc. 122.) CPS Jodi Black-Fucci (Black-Fucci) noted Mother's place of residence was unknown at the time and she was not actively working on her treatment plan. (Doc. 122, Aff. at 2.) At the September 17, 2021 hearing on the petition, Mother stipulated to the extension. (Doc. 131; 09/17/21 Tr. at 5.) Based on the facts in Black-Fucci's affidavit and Mother's stipulation, the court extended TLC to February 28, 2022. (Doc. 136 at 3.) In extending TLC, the court noted Mother was not participating in CD treatment, drug testing, or MH counseling. (*Id.* at 2.) The court also observed Mother was not participating in consistent visitation time with her children. (*Id.*)

At the December 20, 2021 status hearing, Black-Fucci reported she was trying to get Mother engaged in MH treatment at Sunburst because Mother's MH remained a primary concern. (12/20/21 Tr. at 5.) Black-Fucci explained that following cancelation of a visit at Bear Logic because Mother was 30 minutes late, Mother stormed out and repeatedly punched herself. (*Id.*) Bear Logic surveillance video captured Mother's self-harming behaviors. (*Id.*; Hr'g, Ex. 20.)

On March 8, 2022, the Department filed a TPR petition. (Doc. 142.) Just prior to the Department filing the petition, Mother moved to Havre. (Doc. 142, Aff.

at 11; Doc. 152 at 5.) Black-Fucci reported Mother had not been successful with her treatment plan because "severe mental health concerns have not been addressed, [Mother] continued to use methamphetamines, and she has been inconsistent in parenting time." (*Id.* at 11.) Black-Fucci opined Mother's condition was unlikely to change and noted the children had been out of Mother's care for 20 of the previous 22 months. (*Id.* at 12.)

The district court held a TPR hearing on April 7, 2022. Nicole Hutcherson (Hutcherson), the clinical director at Sunburst, testified she met with Mother on April 7, 2021, and diagnosed her with generalized anxiety disorder, but she could not rule out borderline personality disorder. (Hr'g at 10, 13.) Hutcherson considered Mother "highly impaired" as a result of her anxiety and noted it caused her to self-harm on several occasions, including on one occasion after beginning treatment at Sunburst. (*Id.* at 12, 17.) Hutcherson testified she recommended Mother engage in outpatient treatment on a bi-weekly basis for her MH-specific needs. (*Id.* at 14.) Hutcherson stated she would have recommended weekly therapy, but Mother reported being engaged in intensive outpatient drug treatment at Oxytocin, so she believed reduced MH therapy was sufficient. (*Id.*) Hutcherson reported Mother attended sessions through April 2021, but was then discharged on June 4, 2021, after she was a no-call, no-show for her appointments over the course of 30 days. (*Id.* at 20-21.) Hutcherson reported Mother set up several appointments

after discharge, but she never showed up and never reengaged in services. (*Id*. at 21-22.)

Gateway licensed addiction counselor Sonya VanBemmel (VanBemmel) testified she met with mother on October 28, 2020. (Hr'g at 25-26.) VanBemmel conducted a "Bio-Psycho-Social" evaluation of Mother and diagnosed her with methamphetamine use disorder—severe, and opiate use disorder—severe, in sustained remission. (*Id.* at 27.) VanBemmel testified Mother did not believe she needed to make any changes regarding her substance use and believed Mother was at an immediate danger of continued narcotics use. (*Id.* at 29.) VanBemmel recommended Mother engage in intensive outpatient treatment, which is nine hours of therapy per week. (*Id.* at 30.) VanBemmel testified Mother never engaged with Gateway in any services after her initial intake on October 28, 2020. (*Id.* at 30-31.)

Derek Dalton (Dalton) testified he was a licensed addiction therapist at Oxytocin. (Hr'g at 32-33.) Dalton began seeing Mother in March 2021. (*Id.*) Dalton reported he received Mother's evaluation from Gateway and then started her in intensive outpatient treatment. (*Id.* at 34.) Dalton reported Mother initially attended her treatment and appeared to be making progress. (*Id.* at 35-36.) Dalton testified Mother began having MH issues around the beginning of April 2021. (*Id.* at 36-38.) The drug test results showed Mother tested positive for methamphetamine in late April 2021. (Hr'g, Ex. 7-11.) The positive results were confirmed by a third-party

lab. (Hr'g at 82-86.) Dalton testified Mother dropped out of services and was discharged from Oxytocin on April 30, 2021. (Hr'g at 38-39.) Mother never reengaged in services through Oxytocin. (*Id.* at 40.)

Black-Fucci, Marinella Steccone, a Department social service technician, and Berni McDonald with Bear Logic, all testified Mother was inconsistent in visiting the children over the course of the treatment plan. (*Id.* at 51, 89-121.) Black-Fucci further testified Mother's MH and propensity for self-harm remained a concern as Mother had gone almost one year without engaging in MH services. (*Id.* at 52-53.) Black-Fucci opined Mother had not made progress on the MH component of her treatment plan. (*Id.* at 54.)

Black-Fucci testified she had ongoing concerns about Mother's untreated substance abuse history. (Hr'g at 54.) Mother had not engaged in any CD treatment other than what she received through Oxytocin and her minimal participation in Treatment Court. (*Id.* at 55.) Black-Fucci testified she did not believe Mother's conduct would change. (*Id.* at 57.) During cross-examination, Mother's counsel did not challenge the Department's expectation that Mother would engage in CD treatment. (*See Id.* at 62-66.)

Mother testified on her own behalf. (Hr'g at 128-52.) Mother agreed she had anxiety disorder and explained she stopped getting treatment at Sunburst because she moved further out of town. (*Id.* at 132.) Mother stated she disagreed with her

CD evaluation results and claimed she did not have a substance abuse problem. (*Id.* at 147.) Mother admitted she had not engaged in CD treatment since she stopped attending Oxytocin. (*Id.* at 149.) Mother further admitted she did not engage in MH services between May 4, 2021, until about one month before the hearing, when she started seeing a counselor in Havre. (*Id.* at 150-51.)

During her closing argument, Mother's counsel requested an additional six months of TLC to allow Mother to engage in services in Havre. (Hr'g at 157-58.) Mother's counsel argued Mother was willing to engage in MH treatment and she was "willing to drug test." (*Id.* at 157.) Mother's counsel did not argue the treatment plan lacked authority to require CD treatment. (*See id.* at 156-57.)

On April 28, 2022, the district court issued a written order terminating Mother's parental rights. (Doc. 181.) The court referenced Mother's "inability to remain sober, remain mentally stable, consistently visit her children, and obtain and maintain safe and stable housing" as primary reasons for terminating her parental rights. (*Id.* at 7-8.) The court noted Mother had not made any progress on any component of her treatment plan over the prior two years. (*Id.* at 8.) The court concluded termination of Mother's parental rights was in the best interests of the children and "additional services would have likely been unproductive." (*Id.* at 8, 10.)

STANDARD OF REVIEW

"Whether a parent has been denied his or her right to due process is a question of constitutional law over which this Court's review is plenary." *In re D.A.D.*, 2021 MT 2, ¶ 13, 402 Mont. 399, 478 P.3d 809.

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.

An appellant bears the burden of establishing error by the district court; therefore, it is the appellant's burden on appeal to establish the district court's factual findings are clearly erroneous. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825. This Court reviews "the evidence in the light most favorable to the prevailing party when determining whether substantial credible evidence

supports the district court's findings." *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715.

SUMMARY OF THE ARGUMENT

Mother cannot establish that the unavailability of the transcript for the second day of the adjudication hearing constitutes a violation of her due process rights. Due process requires fundamentally fair procedures. Here, M. R. App. P. 8(7) (Rule 8(7)) provides a fundamentally fair procedure to recreate a missing record. However, Mother did not avail herself of the statutory process to reconstruct the hearing. Therefore, Mother has not established she was denied fundamentally fair procedures.

Furthermore, the record is sufficient for appellate review. The district court made detailed findings of fact after the hearing that summarized the witness statements. Mother has not claimed any of the facts relied on by the district court were erroneous, nor has she provided the Court with a tenable theory on what a transcript of the hearing might show that would put the district court in error. Mother has not established how she was prejudiced by the absence of the hearing transcript.

Finally, the appropriate remedy for a due process violation would not be reversing the TPR order. Rather, the remedy would be to remand pursuant to Rule 8(7) for reconstruction of the record.

Mother's contention that she was not given an appropriate treatment plan is also without merit. First, Mother never objected to the provisions in her treatment plan related to CD and she never objected to how the treatment plan was being implemented. Due to her lack of objection and acquiescence in the plan, she waived appellate review of this issue.

Even if Mother did not waive the objection, the treatment plan appropriately required CD treatment and drug testing. There were numerous references to CD in the treatment plan and addressing her substance abuse was a main goal of the plan. Mother was also specifically required to obtain a MH evaluation and follow recommendations. A recommendation of her MH evaluation was to engage in CD treatment. Therefore, CD treatment was part of Mother's appropriately ordered treatment plan and the plan did not require modification.

However, even if the district court improperly relied on the requirements for CD treatment and drug testing in terminating Mother's parental rights, such reliance was harmless error. Mother failed to make progress on the remaining treatment components, including completing MH objectives, obtaining stable housing, and consistently visiting her children. Even without reference to CD treatment, Mother

failed to complete her treatment plan and was unlikely to make progress in the foreseeable future. Therefore, any reliance on the CD requirements was harmless error.

ARGUMENT

I. Mother's due process rights were not violated because: (1) process was available to her to reconstruct the record, but she did not avail herself of that process; and (2) there is an adequate record for this Court to determine adjudication was appropriate.

Mother's argument that her due process rights were violated as a consequence of the missing record is not compelling. First, Mother cannot claim she was denied fundamentally fair procedures when she did not avail herself of Rule 8(7) to reconstruct the record. Second, the record that is available is sufficient for appellate review, so Mother has not suffered any prejudice.

A. Mother's right to due process was not violated because she failed to avail herself of Rule 8(7).

The United States and Montana Constitutions provide that "[n]o person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17; *accord* U.S. Const. amend. V. Parents have a fundamental liberty interest in the care and custody of their children. *In re K.B.*, 2019 MT 73, ¶ 11, 395 Mont. 213, 437 P.3d 1042. A parent's due process rights to the custody of their

children require "fundamentally fair procedures at all stages of termination proceedings." *Id.*

"The key components comprising fundamentally fair proceedings are notice and an opportunity to be heard." *In re C.B.*, 2019 MT 294, ¶ 18, 398 Mont. 176, 454 P.3d 1195. Due process requires that a "parent not be placed at an unfair disadvantage" during the proceedings. *In re C.B.*, ¶ 18. The Court will not find a due process violation where the statutory scheme provides for a "fundamentally fair process . . . ." *In re T.S.B.*, 2008 MT 23, ¶ 36, 341 Mont. 204, 177 P.3d 429.

Generally, for an appellant to "state a claim for failure to provide due process, [the appellant] must have taken advantage of the processes that are available to him or her . . . ." *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000). The State does not violate a person's due process rights "when it has made procedural protection available and the plaintiff has simply refused to avail himself of them." *Id.* (quoting *Dusanek v. Hannon*, 677 F.2d 538, 543 (7th Cir. 1982)); *see also Santana v. City of Tulsa*, 359 F.3d 1241, 1244 (10th Cir. 2004) (stating: "A party cannot create a due process claim by ignoring established procedures.").

On appeal, an appellant has the "duty to present the supreme court with a record sufficient to enable it to rule upon the issues raised. M. R. App. P. 8(2). If the appellant fails to present the Supreme Court with a sufficient record on appeal, the failure "may result in dismissal of the appeal or affirmance of the district court

on the basis the appellant has presented an insufficient record." (*Id.*); *see also Giambra v. Kelsey*, 2007 MT 158, ¶ 36, 338 Mont. 19, 162 P.3d 134 (refusing to address the merits of appellant's appeal because he failed to provide "a record sufficient to enable this Court to rule upon the issues raised").

Rule 8(7) sets forth a process to reconstruct a record where a record of a proceeding is unavailable. First, the parties may prepare and file a "joint written statement and stipulation of the unavailable evidence . . . ." M. R. App. P. 8(7)(b). Alternatively, one party may file a motion with the district court including a statement of the unavailable evidence and allow the other party to respond. M. R. App. 8(7)(c).

Pursuant to either option, the district court shall examine the statements and may hold a hearing on the matter. M. R. App. 8(7)(d). The district court shall then issue "an order adopting or rejecting, in whole or in part, the statement of unavailable evidence such that any statement adopted by the district court most accurately reflects the unavailable evidence." M. R. App. P. 8(7)(d). The district court's order "shall then constitute the record on appeal as to the unavailable evidence." M. R. App. P. 8(7)(e).

Mother claims her rights to due process were violated because the record from the second day of the adjudication hearing is missing. (Br. at 30.) Here, Mother had the duty to present the Supreme Court with the record on appeal. When

Mother learned a part of the record was missing, she could have availed herself of the process set forth in Rule 8(7) to reconstruct the record for appeal, but she did not do so. Undoubtedly, Rule 8(7) sets forth a "fundamentally fair process" to follow when parts of the record are missing.

Mother cannot claim that the process has been fundamentally unfair when she has not tried to avail herself of the process. Here, the statutory scheme contemplates situations exactly like this and provides a remedy. Mother's rights to due process were not violated simply because Mother chose not to follow the rule to recreate the record.

Furthermore, had Mother followed Rule 8(7), she still would have preserved her objections if she believed the reconstructed record was inadequate. *See* M. R. App. P. 8(7)(e). Due to Mother's failure to follow the rule, this Court should reject Mother's due process argument.

B. Mother's due process rights were not violated because the court made detailed findings summarizing what occurred at the hearing.

This Court has not directly addressed the application of Rule 8(7) in the context of a dependent neglect case.[3] However, the Court has addressed the issue

[3] In *Off. of the State Pub. Def. v. Fourth Jud. Dist.*, 2009 Mont. Lexis 732, OP 09-0378, ¶ 6 (June 30, 2009), this Court denied a request to order compliance with Rule 8(7) in a dependent neglect case, finding that remanding the case to the district court to comply with Rule 8(7) would unnecessarily delay the appeal to the detriment of the children.

in the context of criminal cases. *See, e.g., State v. Deschon*, 2002 MT 16, 308 Mont. 175, 40 P.3d 391 (*Deschon I*). This Court should assess Mother's arguments under the due process analysis applicable to dependent neglect cases in general. However, even if the Court applies the *Deschon I* analysis, Mother cannot show a due process violation.

1. Mother cannot demonstrate a due process violation because the outcome would not have been different.

"For a parent to 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." *In re C.B.*, ¶ 18; *see also In re B.J.J.*, 2019 MT 129, ¶ 13, 396 Mont. 108, 443 P.3d 488 (holding father's due process rights were not violated when he was not personally served with the petition seeking adjudication because father could not show how the outcome would have been different had he been properly served).

To adjudicate a child as a YINC, a court "must determine the nature of the abuse and neglect and establish facts that resulted in state intervention . . . ." Mont. Code Ann. § 41-3-437(2). A child is a YINC if the child has been "neglected." Mont. Code Ann. § 41-3-102(35). Neglect includes failing to provide "adequate health care" to a child. Mont. Code Ann. § 41-3-102(22)(a)(iv).

Here, the district court found that A.B.W. and D.L.W. should be adjudicated as YINC because of Mother's "medical and physical neglect." (Doc. 75 at 5.)

Therefore, for Mother to show a due process violation based off the missing record, she must show how the outcome might have been different if the recording were available. Mother argues that because the evidence was "nuanced and voluminous," the evidence must be "gleaned" over for possible errors. (Br. at 31-32.) However, Mother does not identify possible errors and only assumes they must exist in the "voluminous" missing record. Such conclusory statements are insufficient to show Mother's due process rights were violated.

On the contrary, sufficient evidence exists from Roth's testimony alone, which was preserved on the record, to adjudicate A.B.W. and D.L.W. as YINC. Roth testified about D.L.W.'s medical condition, how Mother delayed his medical care to avoid Department intervention, and that she sought to discharge D.L.W. against medical advice. Mother also recounted to Roth how A.B.W. had an incident where she was "choking" and "couldn't breathe." (08/28/20 Tr. at 17.) When Roth asked Mother if she took A.B.W. to the hospital, Mother would not tell Roth where A.B.W. was located. Based off Roth's testimony alone, which Mother does not contest now, there was sufficient evidence to show Mother medically neglected A.B.W. and D.L.W., and adjudication, therefore, was proper.

Furthermore, the district court issued findings of fact detailing the witnesses' testimony. (Doc. 75 at 1-2.) Importantly, the court summarized Dr. Dooley's testimony about Mother delaying D.L.W.'s medical care, which could have

resulted in "severe complications." (*Id.* at 2.) Dr. Dooley opined directly that Mother medically neglected D.L.W. (*Id.*)

The court's findings of fact also detailed how Gamma witnessed the event where A.B.W. was apparently unconscious in Mother's care. (Doc. 75 at 2.) Mother left "in a rush" to take A.B.W. to the hospital, but never arrived and, instead, hid A.B.W. from the Department. (*Id.*)

In sum, Roth's testimony together with the district court's detailed findings are sufficient for this Court to review and determine, by a preponderance of the evidence, that A.B.W. and D.L.W. were properly adjudicated as YINC. Mother does not allege the district court erred in assessing Roth's, Dr. Dooley's, or Gamma's testimony. Mother does not explain how a recording would show that Dr. Dooley or Gamma were mistaken in their testimony.

Mother argues the district court's findings are "devoid of reference to [her] objections or testimony in opposition to the decision." (Br. at 32.) Mother's argument that she made objections is pure speculation. If Mother did make objections, she has not offered how the objections might have affected the outcome. On appeal, Mother does not argue that any of the evidence summarized in the court's findings was inadmissible or mistaken. Moreover, even if Mother's version of events differed from the other witnesses, the district court, as the trier of fact, determined whether Mother's testimony was accurate. Therefore, this Court

could 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 due process argument fails because she has not identified how the outcome might be different with the missing recording.

2. Mother did not suffer a due process violation even if this Court applies the analysis from *Deschon I*.

In the context of a criminal case, the Montana Supreme Court has held it will analyze two criteria to determine if a defendant's due process rights were violated because of a failure to record a portion of a trial. *Deschon I*, ¶ 26. The two relevant criteria are: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *Deschon I*, ¶ 26 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

Under the first prong of the test, the "defendant must identify a 'tenable theory as to what the [recording] error might have involved.'" *State v. Caswell*, 2013 MT 39, ¶ 19, 369 Mont. 70, 295 P.3d 1063 (quoting *Deschon I*, ¶ 28). The defendant must show there is a "substantial and significant omission from the record which cannot be adequately reconstructed." *State v. Deschon*, 2004 MT 32, ¶ 14, 320 Mont. 1, 85 P.3d 756 (*Deschon II*).

Under the second prong, "[a]lternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the

events at trial from which the appellant's contentions arise." *Caswell*, ¶ 21 (quoting *Draper v. Washington*, 372 U.S. 487, 495 (1963)). The "alternative methods" could include a "narrative statement based . . . on the trial judge's minutes taken during trial . . ." (*Id.*). The lack of a "verbatim transcript is not a constitutional defect when a suitable alternative is provided." *Deschon II*, ¶ 13. Whether the record is "of sufficient completeness to accord effective appellate review is a question which may be determined by this Court." *Id.*, ¶ 16.

Although *Deschon I* should not control or be adopted here, it may inform this Court's determination of whether Mother met her burden on appeal to establish how the alleged due process violation would have affected the outcome.[4] However, even if the *Deschon I* test is applied, Mother has not shown a due process violation.

Under the first prong of *Deschon I*, Mother would need to show a "tenable theory" on what the missing record might show. Mother has only speculated that it would show error because there were numerous witnesses and nuanced testimony. Mother has not advanced a concrete theory showing how the recording could be

[4] The *Deschon I* test arguably provides a lower standard to show a due process violation because Mother would only need to show the "value" of the missing record as opposed to affirmatively showing the record would make a difference in the outcome.

grounds to reverse the district court's findings. Therefore, Mother has not shown the "value" of the record under the first prong of *Deschon I.*

Second, Mother must show there are no "alternative devices" that could fill the same function as the transcript. The *Caswell* Court approved using a judge's notes taken during trial to reconstruct the record. *Caswell*, ¶ 21. Here, the district court issued detailed findings soon after the hearing. In summarizing the witness statements, the court reconstructed the record. Mother has not claimed that any of the findings were in error, nor has she shown how a transcript could refute a finding made by the court. Therefore, the summarization of the witnesses' testimony is sufficient to allow this Court to review the district court's TPR order.

C. Even if the Court finds a due process violation, the appropriate remedy would be to remand to reconstruct the record.

Mother argues that, as a remedy, her parental rights should be restored and the case remanded for further efforts toward reunification. (Br. at 32.) It is unclear if Mother is requesting a new adjudication hearing. Either way, Mother does not cite any authority for her proposed remedy.

If this Court does find a constitutional error, the remedy would be to follow Rule 8(7). Doing so would allow the district court to hold a hearing and make further attempts to reconstruct the record. *See Deschon I*, ¶ 30. However, the Court should not take this approach as doing so will cause unnecessary delay to the children's permanency.

II. The district court did not err in terminating Mother's parental rights for failing to follow her treatment plan.

A parent has a fundamental liberty interest in the care and custody of their child. *In re D.H.*, 2022 MT 37, ¶ 16, 407 Mont. 424, 504 P.3d 1099. However, those rights are constrained by the child's constitutional right to be free from abuse and neglect. *See* Mont. Const. art. II, §§ 3, 15. The balance is struck in the laws governing termination of parental rights, which include clear statutory mandates that primary consideration must be given to the needs of the child. Mont. Code Ann. §§ 41-3-604, -609(3).

A court may terminate parental rights if clear and convincing evidence establishes the child was adjudicated a youth in need of care and both of the following exist: (1) an appropriate court-approved treatment plan has not been complied with by the parent or has not been successful; and (2) the conduct or condition of the parent rendering them unfit is unlikely to change within a reasonable time. *In re J.B.*, 2016 MT 68, ¶ 12, 383 Mont. 48, 368 P.3d 715 (citing Mont. Code Ann. § 41-3-609(1)(f)). If a child has been in foster care for 15 of the most recent 22 months, then "the best interests of the child must be presumed to be served by termination of parental rights." Mont. Code Ann. § 41-3-604(1); *In re K.L.*, 2014 MT 28, ¶ 27, 373 Mont. 421, 318 P.3d 691.

Mother argues her court-approved treatment plan was not appropriate and that it was modified without notice.[5] Mother's argument fails for three reasons. First, Mother never objected to the requirements of her treatment plan or how the treatment plan was implemented. Therefore, she has waived appellate review of the issue. Second, Mother's treatment plan appropriately required her to engage in CD treatment and drug testing. Finally, even if the Department mistakenly required Mother to complete CD tasks, the error was harmless because the district court also relied on Mother's failure to complete the other tasks on her plan.

A. Mother waived her objections to the treatment plan.

A parent who "fails to object to a treatment plan in a timely manner . . . waives any argument regarding the propriety of the treatment plan." *J.B.*, ¶ 16; *In re T.S.*, 2013 MT 274, ¶ 25, 372 Mont. 79, 310 P.3d 538. Therefore, a parent "who does not object to a treatment plan's goals or tasks waives the right to argue on appeal that the plan was not appropriate." *T.S.*, ¶ 25. If the parent has concerns regarding the plan or implementation of the plan, then the parent must raise the concern when the plan is before the district court. *J.B.*, ¶ 17.

[5] Since Mother has not challenged the district court's determination that the conduct or condition rendering her unfit to parent is unlikely to change, she has waived appellate review of that conclusion of law. *See* M. R. App. P. 12(3).

It is black-letter law that "acquiescence in error takes away the right of objecting to it." *In re. A.A.*, 2005 MT 119, ¶ 26, 327 Mont. 127, 112 P.3d 993 (quoting Mont. Code Ann. § 1-3-207). The district court cannot be held in error "for an action to which the appealing party acquiesced or actively participated." *A.A.*, ¶ 26.

Here, Mother never objected to the implementation of CD treatment or drug testing. At the treatment plan hearing, Mother stated she wanted to live at Peggy's House specifically because she knew the Department would want to monitor her for drug and alcohol use. Rather than object to testing, it was Mother who offered to change residences so that she could test at Peggy's House.

Soon after the treatment plan hearing, Mother went to Gateway and completed an evaluation. VanBemmel, the evaluator at Gateway, noted Mother had tested positive for methamphetamine on her intake UA and diagnosed her as having substance use disorder. Mother did not object to drug monitoring being a part of the treatment plan. On the contrary, Mother indicated she was "continuing outpatient treatment" with Gateway. (11/20/20 Tr. at 10.) Although that was not true, it confirms Mother understood her treatment plan required CD components and her intention to follow those requirements.

During the approximately 18 months Mother had to work on her treatment plan, she continuously made abortive efforts to obtain CD treatment. In April 2021,

Mother went to Oxytocin to address her CD but stopped going shortly after testing positive for methamphetamine. Mother voluntarily entered the Treatment Court, which is a program dedicated to parents with CD. Throughout those 18 months, although Mother occasionally claimed she was not chemically dependent, she never made an argument to the court that her treatment plan did not require CD treatment. On the contrary, the CD expectations were consistent throughout, starting the day the treatment plan was ordered and continuing through to the termination hearing.

In fact, at the termination hearing, Mother's counsel argued for an additional six months of TLC because, in part, Mother was "willing to drug test." (Hr'g at 157.) Mother not only failed to object, she argued throughout the proceedings that she would be able to comply with CD tasks.

B. Mother's treatment plan appropriately required her to engage in CD treatment and drug testing.

A treatment plan "must identify the problems or conditions that resulted in the abuse or neglect of the child and treatment goals and objectives that will address those conditions." *In re T.N.-S.*, 2015 MT 117, ¶ 21, 379 Mont. 60, 347 P.3d 1263 (citing Mont. Code Ann. § 41-3-443(2)). The particular problems facing the parent should be considered in determining the appropriateness of the plan. *T.N.-S.*, ¶ 21.

Given the unique circumstances present in each case and the difficulty in establishing a "bright line definition," this Court has consistently "declined to

specifically define what constitutes an appropriate treatment plan." *In re A.C.*, 2001 MT 126, ¶ 26, 305 Mont. 404, 27 P.3d 960. When the Court evaluates a treatment plan for appropriateness, it generally considers the following factors: "1) whether the parent was represented by counsel, 2) whether the parent stipulated to the treatment plan, and 3) whether or not the treatment plan takes into consideration the particular problems facing both the parent and child or children." *In re C.J.M.*, 2012 MT 137, ¶ 15, 365 Mont. 298, 280 P.3d 899.

In *T.N.-S.*, the court approved treatment plan required mother to address her CD and remain "chemically free." *T.N.-S.*, ¶ 7. The plan did not require mother to complete a CD evaluation, but did require her to get a psychological evaluation. *Id.* Mother obtained a MH evaluation where the primary recommendation was that she engage in substance abuse treatment. *Id.*, ¶ 9. The Department provided mother with resources to obtain a CD evaluation for treatment, but never sought modification of the treatment plan to require a CD evaluation or treatment. *Id.*, ¶¶ 10, 22.

On appeal, mother argued the lack of CD evaluation and treatment requirements made the treatment plan ineffective and, consequently, left her "ill equipped" to complete the requirement that she remain substance free. *T.N.-S.*, ¶ 22. The Court recognized the treatment plan did not include a specific provision requiring treatment even though mother needed it; however, the Court likewise

held the omission did not "render it inappropriate." *Id.*, ¶ 22. The Court found the treatment plan appropriately required mother to stay "drug free" but left it to the Department and Mother "to work out how to accomplish that objective." *Id.*, ¶ 25. Under those circumstances, the Court found the treatment plan was appropriate. *Id.*, ¶ 25. The same is true here.

Here, Mother appeared with counsel at the treatment plan hearing and did not object to the treatment plan. (*See* 09/18/20 Tr. at 4-10.) The plan appropriately identified the particular problems facing Mother. The plan recognized "Mother's untreated drug and alcohol abuse makes it hard for her to parent her child/ren safely" and her "erratic behavior" could be caused by her "drug or alcohol abuse." (Doc. 73 at 2.) The treatment plan required Mother to not allow anyone who was using drugs, including herself, to be around the children. While the treatment plan did not specify CD treatment or drug testing as a requirement, it did require Mother to live a drug free life in order to be around her children.

Furthermore, the treatment plan was clear Mother needed to complete a MH evaluation and "follow recommendations made by the professional. . . ." (Doc. 73 at 3.) Mother's first "Bio-Psycho-Social" evaluation at Gateway found she was chemically dependent and recommended intensive outpatient drug treatment. (Hr'g, Ex. 5.) Mother obtained a second MH-specific evaluation from Sunburst in

April 2021. (Hr'g, Ex. 1.) At the time Mother went to Sunburst, she reported she was engaged in intensive outpatient drug treatment at Oxytocin.

The Sunburst provider, Hutcherson, determined Mother should attend MH therapy every-other week, but only because she was also reportedly engaged in intensive outpatient drug treatment. After Mother stopped attending appointments at Sunburst, Hutcherson noted Mother's likelihood for relapse was high and she needed continued MH services and CD services. (Hr'g, Ex. 4.) Mother engaged in some intensive outpatient drug treatment at Oxytocin, but dropped out soon after testing positive for methamphetamine.

The treatment plan appropriately identified that Mother had CD needs. The plan required Mother to be substance free to be around her children. The only way to ensure Mother was substance free would be to test her for the use of substances. Although the treatment plan could have been more explicit in requiring a CD evaluation and drug testing, there was no doubt in anyone's mind that it was required. Furthermore, the treatment plan was explicit that Mother needed to obtain a MH evaluation and to follow the provider's recommendations. Mother obtained two evaluations and both providers recommended drug treatment. As the plan was explicit that Mother needed to follow the provider's recommendations, no modification of the plan was necessary.

Similar to *T.N.-S.*, Mother's treatment plan here correctly identified her CD struggles and that they were preventing her from adequately parenting her children. Furthermore, like in *T.N.-S.*, Mother obtained a MH evaluation that required her to engage in CD services. This Court should come to the same conclusion as it did in *T.N.-S.*, that any omission of a more specific requirement in the treatment plan did not "render it inappropriate." Accordingly, the district court did not err in using Mother's failure to engage in treatment and testing as a partial basis for termination.

C. Harmless error

It is well established that "no civil case shall be reversed by reason of error which would have no significant impact upon the result; if there is no showing of substantial injustice, the error is harmless." *In re L.M.A.T.*, 2002 MT 163, ¶ 21, 310 Mont. 422, 51 P.3d 504. In the context of harmless error, the Court must interpret the "abuse and neglect statutes to protect the best interest of the children." *In re J.C.*, 2008 MT 127, ¶ 43, 343 Mont. 30, 183 P.3d 22. The "district court may protect the children's best interest despite procedural error." *J.C.*, ¶ 43.

Where a requirement is erroneously included in a treatment plan, this Court has analyzed the termination of parental rights for harmless error by evaluating compliance with the remaining goals from the treatment plan. *See In re A.N.*, 2000 MT 35, ¶ 41, 298 Mont. 237, 995 P.2d 427 (finding harmless error where an

inappropriate provision in the treatment plan "impacted only one goal of the five goals").

In terminating Mother's parental rights, in addition to her CD concerns, the district court relied heavily on Mother's "inability to . . . remain mentally stable, consistently visit her children, and obtain and maintain safe and stable housing . . . ." (Doc. 181 at 7-8.) The district court noted Mother had not made any progress in "nearly two years of intensive services being provided." (*Id.* at 8.)

The district court noted Mother had been diagnosed with generalized anxiety disorder and she needed further evaluation to rule out a borderline personality disorder. (Doc. 181 at 9.) Despite these concerns, Mother failed to follow up on MH treatment from June 2021 until just prior to the TPR hearing. At the time of termination, Mother's MH was still a primary concern, especially her propensity toward self-harm. (*Id.* at 52.)

The district court also relied on the testimony that Mother struggled with consistently visiting her children and she was often late or entirely missed visits. (Doc. 181 at 5.) The workers monitoring the visits observed the missed visits impacted the children, as they would become anxious and upset when Mother did not attend. (*Id.*) Mother also struggled to find consistent housing and, by the time of the termination hearing, had moved to Havre. (*Id.* at 6-7.)

The district court also noted Mother's lack of insight. (Doc. 181 at 7.) The district court referenced Mother's belief that she was stable and handling her anxiety so well that she did not need any further treatment. (*Id.*) The district court found Mother was unlikely to reverse course and start to make progress. (*Id.* at 8.) The court further relied on the fact that the children had been in foster care for 20 of the previous 22 months and the court could not "hold the children hostage while waiting for the good behavior" of Mother. (*Id.* at 10.)

Here, even without any reference to Mother's CD issues, there was abundant evidence in the record showing Mother failed to complete the other tasks in her treatment plan. Mother had failed to obtain MH services, consistently visit her children, or provide for a safe and stable residence during the 20 months the children were out of her care. Mother's lack of insight demonstrated it was very unlikely her behavior would change in the foreseeable future. Moreover, Mother had moved to Havre without notification to the Department, making intervention even more difficult. Due to the time that had passed without progress, termination was presumed to be in the best interest of the children. For these reasons, references to CD testing and drug treatment did not have a significant impact on the result and, therefore, any error committed was harmless.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order terminating Mother's parental rights.

Respectfully submitted this 1st day of November, 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 10,000 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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