

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0570

IN THE MATTERS OF

M.E.H.,

Youth in Need of Care.

ANDERS BRIEF

On Appeal from the Montana Sixteenth Judicial District Court, Custer
County, the Honorable Michael B. Hayworth, 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, R.H. (Mother), appeals the termination of her parental rights to her child, M.H., by the Custer County District Court (District Court). (D.C. Doc. 42.) The Child and Family Services Unit of the Department of Health and Human Services (the Department) became involved with Mother and M.H. shortly after M.H.'s birth due to concerns about Mother's capacity to care for her. Initially, the Department worked with Mother under a Voluntary Services Agreement (VSA) to ensure M.H.'s needs were being met. (11/8/21 Hearing Transcr. at 14-15.) When the VSA proved to be unsuccessful, the Department removed M.H. and initiated a legal case. (11/8/21 Hearing Transcr. at 14-15.)

An Emergency Protective Services (EPS) Hearing was held on November 8, 2021. (D.C. Doc. 3.) Mother contested M.H.'s removal from her care. Child Protection Specialist (CPS) Supervisor Jennifer Winkley testified the Department's reasons for involvement were concerns about

Mother's cognitive delays and ability to meet the child's needs. Additionally, Mother had two other children she does not currently parent. (11/8/21 Hearing Transcr. at 15:22-16:6.) Regarding M.H., during the pendency of the VSA with Mother, the Department received numerous calls to the child abuse hotline with concerns about neglect. (11/8/21 Hearing Transcr. at 14-15.)

CPS Supervisor Winkley that she was aware Mother had development disabilities but was not aware of any actual diagnoses. (11/8/21 Hearing Transcr. at 22:1-7.) Winkley did admit that Mother was evaluated by Dr. Hougardy in early July of 2021 and that evaluation confirmed some cognitive deficiencies, but Mother was able to answer appropriately some of the questions about safety protocol. This allowed the Department to feel it could move forward with the VSA. (11/8/21 Hearing Transcr. at 32:6-17.) However, Winkley continued that even with the assistance of two in-home providers, Mother's home continued to be of concern with choking hazards in reach, as well as rotting food. (11/8/21 Hearing Transcr. at 20:15-23.) M.H. had been placed in foster care and Mother was having supervised visits with her at the Department's office. (11/8/21 Hearing Transcr. at 17-18.)

Mother testified to the District Court that if M.H. was placed back in her care she would continue to work with in home providers and the

Department through her VSA. (11/8/21 Hearing Transcr. at 45:15-18.) Ellen Adock, friend of Mother, testified that she was ready and willing to support Mother and provide any help necessary in order to keep M.H. in Mother's care. (11/8/21 Hearing Transcr. at 51.) The District Court ultimately found basis for M.H.'s removal from Mother's care and for her continued out of home placement. (D.C. Doc. 3.)

On November 9, 2021 the Department filed its *Petition for EPS, Adjudication as Youth in Need of Care and Temporary Legal Custody* (TLC). (D.C. Doc. 4.) The Affidavit in support, authored by CPS Brooke Latham, reiterated the concerns testified to at the EPS hearing. The parenting assessment completed by Dr. Hougardy was attached and indicated that Dr. Hougardy did not have concerns about Mother's cognitive deficiencies hindering her ability to appropriately parent. (D.C. Doc. 4, Affidavit, Exhibit B.) The District Court set a Show Cause Hearing on the *Petition* for November 16, 2021. (D.C. Doc. 5.)

Mother was present at the Show Cause hearing and contested the Department's continued involvement. The Court heard testimony from both CPS Latham and Mother, as well as taking notice of the CPS' *Affidavit*. The District Court adjudicated the child as a Youth in Need of Care (YINC) and reflected on the amount of time CFS has already been working with Mother

and her apparent disregard for instructions from service providers. (D.C. Doc. 15; 11/16/21 Hearing Transcr. at 21:1-11.) The Court granted TLC to the Department for a period of six months and ordered that the Department develop a treatment plan for Mother. (D.C. Doc. 16.)

On December 20, 2021 the Department filed a *Motion for Approval of Service Treatment Plan*. (D.C. Doc. 17.) The attached plan outlined the tasks the Department requested Mother complete. These included the following “parenting tasks”: engage in parenting resources, exercise parenting time, participate in parent-child interaction therapy and follow recommendations, ensure for child safety and attend child appointments. “Mental health tasks” included engaging in individual counseling. The Department listed the following under “housing tasks”: obtain/maintain safe and appropriate housing and housemates, keep the Department informed of any change in address or contact information. “General tasks” included: maintain contact with the CPS and sign releases of information. Both Mother and her attorney signed the treatment plan on November 23, 2021. (D.C. Doc. 17, attachment.) The Court ordered this plan into effect on December 20, 2021. (D.C. Doc. 18.)

The Department filed a *Petition to Extend TLC* on May 10, 2022. The *Petition* alleged the extension of TLC was necessary because Mother needed

additional time to complete her treatment plan. (D.C. Doc. 19.) In the supporting *Affidavit*, CPS Latham updated on Mother's treatment plan progress. According to Latham, Mother attended supervised visits but still had trouble picking up on child's cues or managing her frustration when tasks are difficult with child (like putting on a coat or buckling a car seat). Mother was doing Safe Care but not grasping what constitutes a safety hazard for child. Mother's house continued to be cluttered with unwashed dishes and rotten food. Because of this, the Safe Care Provider believed Mother's critical thinking skills were lacking and she likely would need someone to live with her and do simple tasks to assist Mother in caring for child. Only two sessions of parent-child interaction therapy had been completed, and the Department needed more time to monitor that therapy. Mother was given the opportunity to attend M.H.'s appointments, but had chosen not to go or waited in waiting room. (D.C. Doc. 19, *Affidavit*.)

Mother attended counseling but struggled with answering questions about the child's needs. Mother also had housing, although there continued to be safety concerns for child as the home was cluttered and unsanitary. Mother did not report that anyone else lived in the home, however the Department believed she continued to associate with inappropriate individuals. (D.C. Doc. 19, *Affidavit*.)

Overall, the Department felt additional time was needed because Mother had been given many learning opportunities to better meet the child's needs but was unable to follow through or demonstrate an understanding of what she was being told. (D.C. Doc. 19, *Affidavit*.)

A hearing on the *Petition to Extend TLC* was held on June 14, 2022. At this hearing, Mother stipulated to the extension of TLC for a period of six months. (D.C. Doc. 26.) The Department updated the Court that Mother had made the decision to attend relinquishment counseling because she no longer wished to engage in her treatment plan. (6/14/22 Hearing Transcr. At 6:7-11.) The District Court stressed the importance of Mother completing the full three hours of relinquishment counseling due to her intellectual disabilities and the Department agreed. (6/14/22 Hearing Transcr. At 6:15-19.) Based on Mother's stipulation, the District Court extended TLC for another six months. (D.C. Doc. 25.)

The Department filed Its *Petition for Termination of Parental Rights and Permanent Legal Custody* (TPR) on July 15, 2022. The TPR noted that on June 17, 2022, Mother received Options Counseling and on June 20, 2022, she signed an *Affidavit of Mother Waiving All Parental Rights, Relinquishing Child, and Consenting to Child's Adoption*. (D.C. Doc. 27.) The *Affidavit* in support of the TPR by CPS Latham stated Mother had

received all three hours of options counseling and, after thinking about her decision over the weekend, had decided to relinquish her parental rights.

(D.C. Doc. 27, Affidavit.) The District Court issued an *Order Setting Hearing Date on Petition for Termination of Parental Rights* and scheduled it for September 13, 2022. (D.C. Doc. 29.)

On September 9, 2022, Mother filed a *Notice of Intent to Withdraw Relinquishment*. In the *Notice*, Mother's counsel argued that, because of the procedural stage of this matter, Mother could voluntarily withdraw her relinquishment pursuant to § 42-2-410, MCA, where a "parent who executed the relinquishment and consent to adopt and the department, agency, or prospective adoptive parent named or described in the relinquishment and consent to adopt may mutually agree to its revocation prior to the issuance of an order terminating parental rights." (D.C. Doc. 38.)

In its *Response to Birth Mother's Notice of Intent to Withdraw Relinquishment*, the State argued that "[c]ontrary to the birth mother's assertion, she cannot simply withdraw her consent to relinquish and adoption. The Department does not consent to her withdrawal," as is required under § 42-2-210, MCA. Instead, Mother could only withdraw her relinquishment if, as mandated by § 42-2-417(1)(a), MCA, she could show

by clear and convincing evidence that her consent was obtained by fraud or duress. (D.C. Doc. 39.)

On September 12, 2023, the District Court issued its *Order Denying Motion to Withdraw Parental Rights Relinquishment*. The Court agreed with the State that there was “not mutual agreement for withdrawal of the relinquishment and that § 42-2-210(1), MCA, does not authorize unilateral relinquishment withdrawal. Birth Mother has not alleged a statutory basis for the Court to allow Birth Mother to unilaterally withdraw her parental rights relinquishment. Absent a statutory basis authorizing withdrawal of relinquishment of parental rights, ‘after the document is signed or confirmed in substantial compliance with this section, it is final and, except under a circumstance stated in § 42-2-411, may not be revoked or set aside for any reason...’” § 42-2-212(3)(a), MCA. Because Mother’s *Notice of Intent to Withdraw Relinquishment* of parental rights did not provide the Court a basis to set aside the relinquishment, “withdrawal must be denied because except for the statutory circumstances of fraud or duress, the relinquishment ‘may not be revoked or set aside for any reason.’” (D.C. Doc. 40.)

The District Court held the hearing on the TPR on September 13, 2023. (D.C. Doc. 45.) Mother renewed her argument in favor of withdrawing her relinquishment. (9/13/22 Hearing Transcr. at 4-5.)

Specifically, Mother argued that a parent has a legal right to parent under Montana constitutional law, and the statute does not place the decision to withdraw a relinquishment of parental rights solely in the hands of the Department. (9/13/22 Hearing Transcr. at 5:18-22.)

The District Court then heard testimony regarding Mother's relinquishment from Options Counselor, Cindy Dufner, who provided Mother with counseling. (9/13/22 Hearing Transcr. at 11:18-21.) While Dufner testified that she was not aware of Mother's cognitive deficiencies, she would not have approached the counseling any differently had she known about Mother's cognitive level, as Mother had answered all the questions asked of her and did not appear to have any trouble understanding the counseling, the paperwork, or the ramifications. (9/13/22 Hearing Transcr. 13:17-24.)

CPS Jessica Latham testified that Mother waited the weekend after receiving Options Counseling to sign the relinquishment because she wanted to consider everything. Latham then met with Mother and her counsel to go over the relinquishment affidavit. (9/13/22 Transcr. at 27-26.) Latham noted that Mother's counsel went over the Affidavit point by point and explained it to Mother. She then asked if Mother had questions or if she wanted to

rethink this choice. Mother ended up signing the relinquishment. (9/13/22 Hearing Transcr. at 29:2-9.)

Given this testimony, the District Court found relinquishment to be appropriate in this matter and valid. Mother signed relinquishment after counseling and going over the affidavit with her attorney. (9/13/22 Hearing Transcr. at 31.)

On September 13, 2022, the District Court entered its *Findings of Fact/Conclusions of Law and Order Terminating Parental Rights*. (D.C. Doc. 42.) The Court made findings regarding the testimony surrounding Mother's relinquishment and found that Mother relinquished her parental rights voluntarily. The Court also found that termination of Mother's parental rights was in child's best interests due to months of Department intervention. (D.C. Doc. 42.)

Mother filed a timely *Notice of Appeal*. (D.C. Doc. 47, *Notice of Filing* referring to *Notice of Appeal*.)

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. *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* in Mont. Code Ann. § 46-8-103(2) (2021). 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 MOTHER'S ARGUMENT THAT THE RELINQUISHMENT OF HER PARENTAL RIGHTS WAS DONE UNDER DURESS AND SHOULD NOT HAVE BEEN ACCEPTED BY THE DISTRICT COURT.

A. Standard of Review

This Court reviews a district court's termination of an individual's fundamental constitutional right to parent his children for the abuse of discretion. *In re D.B. and D.B.*, 2007 MT 246, ¶ 16, 339 Mont. 240, 168 P.3d 691. A district court has abused its discretion if its findings of fact are clearly erroneous or its conclusions of law are incorrect. *Id.* ¶ 18. "Findings of fact are clearly erroneous if they are not supported by substantial evidence." *In re D.H., S.H., K.H., N.S., J.B., Jr.*, 2001 MT 200, ¶ 14, 306

Mont. 278, 33 P.3d 616. If a court's findings of fact are supported by substantial evidence but the court misapprehended the effect of the evidence, the findings of fact are clearly erroneous. *Id.* The findings of fact are also clearly erroneous if the facts were supported and the district court did not misapprehend the effect of the evidence, but this Court is still left with the "definite and firm conviction that a mistake has been committed. *Id.* Further, to determine whether a district court abused its discretion, this Court applies a test that considers "whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice." *In re D.B. and D.B.*, ¶ 16.

B. Discussion

To be effective, a relinquishment of parental rights must be made "voluntarily and unequivocally." Mont. Code Ann. § 42-2-412(2) (2021). Voluntariness can be made ineffective when a parent is coerced into relinquishing her rights or when the parent's actions are due to pressure from outside sources. Under Mont. Code Ann. § 42-2-417, the Court can set aside a parent's relinquishment of parental rights and consent to adopt if the parent can establish "by clear and convincing evidence, before a decree of adoption is issued, that the consent was obtained by fraud or duress." Mont. Code Ann. § 42-2-417(1)(a) (2021).

When considering an individual's ability to consent to contract, the Montana Legislature has codified the principle that apparent consent is not real or free when obtained through duress. Mont. Code Ann. § 28-2-401(1)(a) (2021). This Court has determined that the formation of a binding and legal contract requires “the free and mutual consent of the parties to contract.” *Keil v. Glacier Park*, 188 Mont. 455, 465, 614 P.2d 502, 507. In contracts law, duress consists of,

- (1) unlawful confinement of the person of the party, of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
- (2) unlawful detention of the property of any such person; or
- (3) confinement of such person, lawful in form but fraudulently obtained or fraudulently made unjustly harassing or oppressive.

Mont. Code Ann. § 28-2-402 (2021). If any of the situations above exist, an agreement between two parties is rendered unenforceable. This is because the effect of duress is to render free decision-making and voluntariness invalid.

Outside the contracts arena, duress has a colloquial definition. Black’s Law Dictionary defines duress broadly as “a threat of harm made to compel a person to do something against his or her will or judgment.” *Black’s Law Dictionary* 230 (Bryan A. Garner ed., 11th ed., West 2019). The essence of duress is that one feels as though they have no other choice than to act in a prescribed manner.

While there is an argument that a waiver of parental rights, relinquishment of child and consent to adoption is a contract between a biological parent and the Department, the nature of dependency and neglect proceedings do not fit within the traditional definition of duress in the realm of contracts law. However, when one looks at the broader definition of duress, it has clear applicability to the case at hand. The result is the same as in a contracts case: a parent's ability to voluntarily consent to relinquishment is compromised.

Here, at the Extension of TLC Hearing on June 14, 2022, the Department informed the District Court that Mother had made the decision to attend relinquishment counseling because she no longer wished to engage in her treatment plan. (6/14/22 Hearing Transcr. at 6:7-11.) The District Court emphasized the importance of Mother completing the full three hours of relinquishment counseling due to her intellectual disabilities and the Department agreed. (6/14/22 Hearing Transcr. at 6:15-19.) On June 17, 2022, Mother received Options Counseling and three days later she signed an *Affidavit of Mother Waiving All Parental Rights, Relinquishing Child, and Consenting to Child's Adoption*. (D.C. Doc. 27.) The *Affidavit* in support of the Department's *Termination Petition* by CPS Latham stated Mother received all three hours of Options Counseling, and took the

weekend to think about her decision to relinquish her parental rights. (D.C. Doc. 27, Affidavit.)

However, despite the Options Counseling and subsequent weekend to think about the decision, the record may support a finding that Mother's relinquishment was not voluntary. Her ultimate decision to relinquish may have been made under duress because she felt she had no other choice. As Mother's counsel stated at the hearing on the TPR,

I do disagree with the statute. I think that under Montana Constitutional law a parent has the legal right to parent. And I disagree that the statute puts this decision in the hands of the Department and others to withdraw any sort of relinquishment of their parental rights. Specifically, for the result we have seen here, Your Honor, in a situation where Ms. Hassan really saw no other out for herself at the time that she signed the relinquishment document. At that time, she did not have familial support. The services the Department were providing were not at the level Ms. Hassan needed. (9/13/22 Hearing Transcr. at 5-6.)

Thus, the record may support a finding that Mother's signature on the relinquishment paperwork was due to duress because she saw no other way forward, and arguably, the Department's subsequent refusal to accept her withdrawal under MCA § 42-2-410 was a violation of her constitutionally protected right to parent.

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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 30th day of January 2023.

By: /s/ Shannon Hathaway

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.

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APPENDIX

Order on Termination of Mother's Parental Rights as to M.E.H.....A

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 01-30-2023:

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