

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0631

IN MATTER OF:

E.F.,

A Youth in Need of Care.

ANDERS BRIEF

On Appeal from the Montana Third Judicial District Court, Powell County,
the Honorable Ray Dayton, 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 FACTS AND CASE

Appellant D.F. (Father) appeals the Powell County District Court Order terminating his parental rights to one child, E.F. (a girl, now age 16). (D.C. Doc. 85, Attached as App. 1.)

In May 2019, the Department of Public Health and Human Services, Child and Family Division (the “Department”) became involved with E.F. (the Youth) and three siblings (who are not Father’s children nor the subject of this appeal) because S.L. (the Mother) had been using methamphetamine and heroine, exposing the children to the same and requiring the Youth to care for her younger siblings. (D.C. Doc. 1.) Father was on the Youth’s birth certificate but incarcerated in an Arizona prison.

The Department filed a *Petition for Emergency Protective Services (EPS)*, *Adjudication of Child as a Youth in Need of Care (YINC)*, and *Temporary Legal Custody (TLC)* on May 23, 2019. (D.C. Doc. 1.) At the Show Cause hearing on June 12, 2019 Father had not yet been served but the

Mother stipulated to Temporary Legal Custody, which was so ordered based on the Mother's behavior. (D.C. Doc. 15, 19.) Father was served on July 12.

In investigating the case, the Child Protection Specialist assigned, Amy Pearson (CPS Pearson) contacted the Hawaii Department of Child and Family Services to learn that Father had an open case there stemming from approximately 2008 due to charges of sexual assault of the Youth. Videos of Father assaulting the Youth had been found at a bus station. A child found these videos and turned them in to authorities, resulting in his arrest and fourteen charges relating to sexual assault, child abuse, and promotion of child abuse in various degrees pursuant to Hawaii law. (D.C. Doc. 21.)

On July 26, 2019, the Department filed a *Request for Determination that Preservation or Reunification Efforts Need Not be Provided to Birthfather [D.F.]*. (D.C. Doc. 21). The Department alleged that Father was convicted of three counts of sexual assault in the third degree, eight counts of sexual assault in the first degree, and three counts of promoting child abuse in the first degree, and the victim was the Youth who was the subject of this proceeding; therefore, no treatment would be required under Mont. Code Ann. § 41-3-423(2). Additionally, under § 41-3-609(f)(4)(c) Father was incarcerated for more than one year and reunification was not in the Youth's best interests. (D.C. Doc. 21.)

Father's counsel requested continuation of the hearing on the matter numerous times while she attempted to secure a teleconference with him. A contested hearing on reasonable efforts finally occurred on September 3, 2019. (D.C. Doc. 27.) Father was not present and the Court concluded there was no feasible method of contact with him while he was in the Arizona prison and elected to hold the hearing with him absent. After taking testimony from the Child Protection Specialist (CPS) and the Mother the Court ruled that no reunification services would be required. (D.C. Doc. 28.)

Counsel for Father argued that there was not a clear match between the Hawaii statutes Father was convicted of and the requirements of Mont. Code Ann. § 41-3-423(2). None of the statutes listed indicated that the sexual assault was of a child; but rather, that he was convicted of sexual assault and child abuse, separately. Father also had indicated in a letter that he pled guilty for reasons other than guilt; therefore, the conviction should not stand alone as evidence that Father committed the crimes listed in Mont. Code Ann. § 41-3-423(2). (Hearing Tr. 8:24-9:23, September 3, 2019.) However, Mother testified that she viewed the videos at the time of the criminal case in order to provide a positive identification of the Youth and Father. The Court ruled from the bench that the conviction combined with the independent knowledge from Mother provided clear and convincing

evidence that the Department had satisfied the requirements of Mont. Code Ann. § 41-3-423(2). (9/3/19 Tr. 22:6-25.)

TLC was extended four times while Mother and the other children's father were given additional time to complete treatment. (D.C. Docs. 33, 47, 53, 62.) On November 24, 2021, The Department requested that Father's rights be terminated on the basis that he had subjected the Youth to aggravated circumstances and would be incarcerated for more than one year. A contested hearing was rescheduled multiple times while Father's counsel was given opportunities to secure his presence at the hearing; however, Father ultimately reported he would waive his presence and the hearing took place without him on March 18, 2022. (D.C. Docs. 78, 80, 81.)

Father turned in a letter to the Court requesting that the proceedings wait until after his criminal case was appealed. Father reported that his trial counsel in his criminal matter failed to pursue the affirmative defense of not guilty by reason of insanity. Father also reported that he had been served only days before each hearing in this case, giving him too little notice to prepare when his only method of communication was by writing. Father had not heard from counsel since it was ruled that he was not entitled to reunification efforts which led him to believe that his case was being dismissed. (D.C. Doc. 79.) Father's counsel presented this evidence to the

Court as his defense and also questioned whether the Youth's unique circumstances showed that Father's rights should be terminated. After hearing testimony from CPS Pearson that the Youth had serious resulting trauma and no desire to know Father, Father's rights were terminated. (D.C. Doc. 85.) Mother consented to dismissal of the case to a guardianship and Father now appeals.

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 ASSERTION THAT THE DISTRICT COURT ABUSED ITS DISCRETION 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 it was within the Court's discretion to require the Department to make an effort to engage him and to wait until his criminal appeals were resolved.

The decision to terminate rights, even if all elements are met, is within the discretion of the trial court. "The court *may* terminate a parent's rights"

based upon a determination that the statutory criteria have been met. Mont. Code Ann. § 41-3-609 (emphasis added.). Thus, the District Court had the discretion to direct the Department to engage Father and to wait out the results of Father's criminal appeals.

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 March, 2023.

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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.

By: /s/Meri Althaus
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APPENDIX

Order Granting Request for Determination that Preservation or Reunification Efforts Need Not be Provided to Birthfather [D.F.].....App. A

Findings of Fact, Conclusions of Law, and Order Terminating Parental Rights of Biological Father App. B

CERTIFICATE OF SERVICE

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