
IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA 22-0696

IN THE MATTER OF:

D.A., L.A. and F.A.,

Youths In Need Of Care.

PLAINTIFF'S OPENING BRIEF

On Appeal from Montana's Second Judicial District Court,
Silver Bow County, The Honorable Robert Joseph Whelan Presiding

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STATEMENT OF THE ISSUES

1. Whether, the Department improperly withheld reunification services in violation of Mont. Code Ann. §41-3-423.
2. Whether the district court improperly admitted child hearsay evidence at the termination hearing, denying T.S. of her constitutional right to due process and fundamentally fair procedures.
3. Whether the findings of fact entered by the district court were established by clear and convincing evidence as required by Mont. Code Ann. §41-3-609(1)(f).

STATEMENT OF THE CASE

Mother and Appellant T.S. appeals the Orders, entered November 14, 2022 by the Montana's Second Judicial District Court, Silver Bow County, terminating her parental rights to D.A. (8 years old), L.A. (6 years old) and F.A. (3 years old) (collectively, "the children"). (Appendix A) The rights of the child's birth father (A.A.) were also terminated.

Procedural History

The case originated September 4, 2019, when the Silver Bow County Attorney filed Petitions for Emergency Protective Services (EPS), Adjudication as Youth in Need of Care (YINC), and Temporary Legal Custody (TLC) on behalf of the Department of Health and Human Services (the Department) for D.A., L.A.

and F.A. (DC001)¹. The district court granted EPS and set a show cause hearing. (DC003)

October 17, 2019 the district court held the show cause hearing at which both parents stipulated to adjudication. (DC008) The district court adjudicated children as YINC and awarded the Department TLC. (*Id.*) October 23, 2019 the district court entered its adjudication order. (DC009)

The district court set a disposition hearing for November 27, 2019. (DC009) No hearing was held but, on December 5, 2019, the Department filed a treatment plan signed by the mother and approved by the court. (DC011) The district court entered orders extending TLC on May 4, 2020, December 23, 2020, July 12, 2021 and again on April 25, 2022. (DC022, DC041, DC050, DC090)

July 1, 2021 Mother and Appellant T.S. filed Notice of Compliance with Treatment Plan (DC049) March 2, 2022 the GAL filed a Motion to Suspend Visitation and Contact with Parents. (DC073) March 14, 2022 T.S. filed objections to the GAL's motion, and filed a Motion for Finding of Lack of Reasonable Efforts and an Order for Immediate Placement with Mother. (DC075, DC074)

March 31, 2022 the Department filed petitions for termination of parental

¹ This appeal arises from three cases (DN-19-72, DN-19-73 and DN-19-74) that were procedurally coincident and have nearly identical pleadings. Citations to the record from below refer to DN-19-72 unless otherwise noted.

rights of T.S. and birth father (A.A.). (DC079, DC080) August 30, 2022 the district court entered a finding that ICWA did not apply to the children. (DC109)

The district court heard argument and testimony on August 29, 2022 and September 16, 2022, after which the court took the matter under advisement. (DC108, DC119)² November 14, 2022 the district court entered its written orders terminating the rights of both parents to the children. (Appendix A) December 6, 2022 T.S. filed a notice of appeal. (DC125)

Facts of the Case

Affidavit of CPS Ciana Dale – September 4, 2019. CPS Ciana Dale swore an affidavit in support of the Department’s Petitions for Emergency Protective Services, Adjudication as Youth in Need of Care and Temporary Legal Custody for all three children (DC002)

According to CPS Dale, the petitions arose after the Department received a report on August 17, 2019 that D.A. and L.A. were seen walking around 2nd Street in Butte, Montana without adult supervision. (*Id.*) CPS Dale stated law enforcement entered the home after officers “pounded on the door” without response. (*Id.*) Birth Father A.A. was found asleep in the bed with 2-month-old

² The district court minute entry and filing date for both hearings is August 29, 2022. (DC108, DC11) The hearing transcripts reflect the correct dates for the hearings. (8/29/2022 Hrg. Tr., 9/16/2022 Hrg. Tr)

F.A. (*Id.*)

CPS Dale stated that the Department received another report of the children “roaming the streets” on August 24, 2019. Law enforcement is reported to have responded to the home about 40 minutes later after T.S. contacted dispatch. (*Id.*) T.S. stated she was sleeping on the downstairs floor and did not know the children had “snuck out.” (*Id.*) T.S. is alleged to have told the CPS that she had been up several times with the new baby, and she had fallen asleep before the children left the home. (*Id.*)

Treatment Plan – December 5, 2019. The district court set a disposition hearing, but the record does not reflect that one was held. The Department filed a treatment plan signed by T.S. on November 21, 2019 and approved by the district court on December 4, 2019. (DC011) The treatment plan sets for several specific tasks for T.S.:

1. Medicaid: Obtain Medicaid or “explore other insurance and show proof of acceptance or denial....”
1. Housing: Obtain and maintain safe, stable, drug and alcohol-free housing, follow recommendation of CPS regarding the safety of the home.
2. Communication/Cooperation/Releases: Meet with CPS every other week with any changes in schedule to be “mutually agreed upon,” call CPS if she needs to discuss case.
3. Parenting and Visitation: Complete parenting course and provide documentation, demonstrate what she has learned during visitations, demonstrate ability to nurture and safely parent her children – physically and mentally – on an ongoing basis, participate in weekly supervised visitation, follow recommendation of the visitation facilitator, participate

- in referred parenting services and, if a trial home visit is initiated, allow providers and staff into the home to provide guidance and coaching.
4. Mental Health: Complete a mental health evaluation, sign releases, inform provider assessment is to be sent to the Department, follow recommendation, be direct with the provider, accept responsibility for her actions resulting in Department involvement and neglect of her children, address the history of arguing and fighting in the home, learn how this affects the children, participate in couples counseling or family counseling of recommended by the provider.
 5. Chemical Dependency: Participate in random UA testing at the Department's request and participate in CD evaluation if she tests positive for "illicit substances, prescription medication, alcohol, or any substance that could lead to impairment and impact her ability to parent.

(DC011)

The treatment plan provides that, "Following completion of this treatment plan, if completion of the plan did not lead to a resolution of safety concerns, or following a significant change in the family circumstances, the Department may propose a Phase II treatment plan.... Completion of the treatment plan without a change in the behavior that caused the removal of the child may result in termination of parental rights." (DC011)

Affidavit of CPS Ryan Sas – April 1, 2020. CPS Ryan Sas swore an affidavit in support of the Department's first petition to extend TLC (DC017, DC018) CPS Sas reported that the birth parents had obtained housing, that T.S. complied with the communication requirements of her treatment plan, that T.S. had completed two parenting classes and had "begun to implement the skills taught in the classes in visit," that T.S. had completed a mental health evaluation but had not

yet begun recommended therapy, and was in compliance with the CD requirements of the treatment plan. (DC018) CPS Sas summarized that, “T.S. has made respectable progress on her treatment plan.” (*Id.*)

Affidavits of CPS Anne Grover – October 8, 2020, October 20, 2020.

CPS Anne Grove swore affidavits in support of the Department’s second petition for extension of TLC and in support of the Department’s proposed permanency plan. (DC024, DC025, DC031) CPS Grover states that, “T.S. has completed the majority of tasks but is not able to articulate or admit to the reasons for Department involvement and demonstrate needed change.” (DC025) In her October 20, 2020 affidavit, CPS Grovers states that when six-year-old D.A. was asked about her wishes, “the child stated she wants to live with mom and dad again.” (DC031)

Affidavit of CPS Anne Grover – June 10, 2021. CPS Anne Grover swore an affidavit in support of the Department’s third petition for extension of TLC. (DC045, DC046) CPS Grover states, “T.S. has completed the tasks of her treatment plan except the counseling component but is not able to articulate or admit to the reasons for Department involvement and demonstrate needed change.” (DC046)

T.S. Notice of Compliance – July 2, 2021. T.S. filed a Notice of Compliance with Court-Ordered Treatment Plan after receiving a compliance letter from CPS Anne Grover, dated April 15, 2021, (DC049, Appendix G) According to

CPS Grover, T.S. was in compliance with every treatment plan requirement except the mental health requirement to which CPS Grover stated T.S. was “in partial compliance.” (Appendix G) In the Notice of Compliance, T.S. advised the district court she had addressed CPS Grover’s mental health concerns and attached a letter from LCPC Jeffrey Watson in which he detailed his treatment of T.S., requested further documentation from the Department, expressed the opinion that T.S. did not need further individual therapy and advised that reunification therapy for the children and the parents was recommended “soon.” (*Id.*) The district court took no action on the filing.

Affidavit of CPS Melinda Newman – January 25, 2022. CPS Melinda Newman swore an affidavit in support of the Department’s petition for appointment of a guardian. (DC059, DC060) CPS Newman stated that, though termination of parental rights was not in the best interest of the children, further efforts to reunite the parent and children “would likely be unproductive because neither parent is able to recognize or understand the reasons for Department involvement despite completing tasks on their treatment plan.” (DC060)

Guardian ad Litem’s Motion – March 2, 2022. March 2, 2022 the Guardian ad Litem filed a motion to suspend visitation and contact with the parents. (DC073) The GAL said she, “does not believe it is in the children’s best interest to have to go through emotional turmoil every week following a visit. It’s

not fair to them and each child has made it very clear they do not want to attend visits.”

March 14, 2022 T.S. filed a response to the GAL’s motion describing numerous procedural and legal defects in the motion including asserting that the GAL’s motion exceeded the authority of her position, the motion violated fundamental constitutional rights of the children, and that denying T.S. contact with the children makes it impossible for her to complete the treatment plan.

(DC075) T.S. argues,

...the GAL uses the children’s vocalizations that they don’t want to go to visits as reason to cease visits, instead of trying to get to the root of reasons why the child might be saying this.... A child’s statement to foster placement... should not be used to deny future visits or contact between the child and the parent.

(DC075)

T.S.’s Motion for Finding of Lack of Reasonable Efforts – March 11, 2022. T.S. requested the district court find that the Department had failed in its duty to make reasonable efforts toward reunification and requested the court order the Department immediately place the children in her care with an in-home safety plan. (DC074) Specifically, T.S. reported,

The Department has not only failed to increase visitation per the Treatment Plan, they have failed to provide any visitation or contact for D.A. and the Mother. The Department has failed

to follow through on scheduling weekly meetings for T.S. The Department has failed to monitor T.S.'s extensive progress, or to communicate with (therapist) Jeffrey Watson.

(DC074)

The Department filed no response to T.S.'s motion and the district court took no action on it.

Affidavit for Termination of Parental Rights – March 31, 2022. CPS

Kara Richardson swore an affidavit in support of the Department's Petitions for Permanent Legal Custody and Termination of Parental Rights for both parents.

(DC079, DC080, DC081) In support of the recommendation to terminate parental rights, CPS Richardson addressed each of the tasks set forth in T.S.'s treatment plan as follows:

1. Medicaid: "Mother was compliant with this portion of the plan."
2. Housing: "[T]he persons the children disclosed as touching their 'pee pee' continues to reside in the home. T.S. was also to understand how allowing someone who is impaired into her home affects the safety of the home. Mother has failed this portion of the plan."
3. Communication/Cooperation/Releases: CPS Richardson did not deny T.S.'s compliance with the requirement, but denied the Department failed to uphold its end of this treatment requirement.
4. Parenting and Visitation: T.S. completed all required parenting classes and attended supervised visitations. After a tedious recitation of visitation notes commencing in 2019 – and none of which impugned T.S.'s ability to parent the children appropriately – CPS Richardson concluded that, "L.A. and D.A. have expressed a desire not to see their parents, [and] continue to make disclosures about the [sic] one or both parents touching their 'pee pee.'" CPS Richardson made no conclusion about T.S.'s compliance with the parenting and visitation requirement.
5. Mental Health: CPS Richardson made no conclusion regarding T.S.'s

compliance with the mental health requirement.

6. Chemical Dependency: CPS Richardson reported T.S.'s had never had a positive drug test, implicitly concluding she was in compliance with this CD requirement.

(DC081)

CPS Richardson alleged T.S.'s treatment plan was unsuccessful, "because she continues to not understand the children's needs. Her response is to defend A.A. when the children disclosed that he has touched their 'pee pee.'" (DC081)

Termination Hearing – August 29, 2022 and September 16, 2022.

Judge Robert J. Whelan presided over the Termination Hearing over the course of two days. Both parents were present. (8/29/2022 Hrg. Tr. 5:14-19, 9/15/2022 Hrg. Tr. 5:17-19)

Social Worker Allison Brown described herself as a "mental health counselor," and testified regarding her work with D.A. and L.A. from March 17, 2020 through June 4, 2020. (8/29/2022 Hrg. Tr. 6:16, et seq., 8:3, 9:16-19)

According to Ms. Brown, D.A. "disclosed that her father touched her pee-pee and her bum, and her father touched his own pee-pee.... (*Id.* 10:6-15) Ms. Brown testified D.A. said her dad had struck her on the backside and locked her in a room. D.A. had described being "put in a round pink bag," and said she took a pillow and fell asleep in the bag. (*Id.* 10:23-11:4) None of these allegations were substantiated by the Department.

Counsel for A.A. lodged an objection on the basis of hearsay and the best evidence rule, which the district court overruled. (8/29/2022 Hrg. Tr. 11:17-12:4) Ms. Brown testified that L.A. “disclosed that... D.A. was put in the bag and that they left D.A. at home while they took L.A. to the store.” (*Id.* 12:11-14) Ms. Brown expressed the “medical opinion” that the children were traumatized, “based on the behaviors they were showing, the things that they were disclosing....” (*Id.* 12:20-13:8)³ Ms. Brown concluded that, despite “knowing full well that you have not seen the children in two years,” she did not believe it would be in the best interests of the children to be placed with their parents.” (*Id.* 14:16-21)

Mental health hospital teacher Jolynn Browning testified regarding her experience with D.A. and L.A. beginning in April 2020. (8/29/2022 Hrg. Tr. 31:1, et seq.) Ms. Browning testified to disturbing behavior when she first met with D.A. and that there was considerable improvement in the child’s behavior since. (*Id.*) According to Ms. Browning, D.A. said she was afraid of her father and had said he “touched my no-no box.” (*Id.* 36:16-18) Counsel for birth father A.A. objected on the basis of hearsay and best evidence rule. (*Id.* 36:19-25) The objection was overruled. (*Id.* 37:1-3) Ms. Browning testified that, when visitation with the parents was approaching, D.A. “would have meltdowns,” and that the child’s

³ Nothing in the record indicates Ms. Brown was qualified to offer a medical opinion.

behavior improved dramatically when visitations ceased. (*Id.* 37:21-38:7)

Ms. Browning testified that L.A. “was touching other children in daycare. She would touch herself at daycare or in front of people in the home. She would straddle people when she sat on their laps and would... rub on them....”

(8/29/2022 Hrg. Tr. 44:16-23) According to Ms. Browning, L.A. said that “her mom and dad had touched her no-no box....” (*Id.* 45:1-4) Ms. Browning testified L.A. also expressed fear of her parents. (*Id.* 46:1-3)

On cross-examination, Ms. Browning conceded to asking the children leading questions about improper touching, but said she was not concerned about it, “Because I was clarifying what she had already said.” (8/29/2020 Hrg. Tr. 49:22-50:11) Ms. Browning also conceded that, between removal of the children in August 2019 her meetings with the child in April 2020, L.A. had made no disclosures of possible abuse. (*Id.* 50:16-25) Ms. Browning also agreed with counsel’s observation that the problematic behavior exhibited by the children was first observed after they were removed from their first foster placement, and the improvements were observed after several months in a new foster placement. (*Id.* 52:4-16) Ms. Browning acknowledged the birth parents had expressed concerns regarding possible abuse by the prior foster parents....” (*Id.* 55:13-23)

CPS Kara Richardson testified regarding her involvement in the case. (8/29/2022 58:13, et seq.) CPS Richardson had been on the case for approximately

six months, though she testified she had “just about” reviewed the entire case.” (*Id.* 58:22-59:16) CPS Richardson was willing to “acknowledge mother has done items on the [treatment] plan, but, ultimately, it has failed, and now we’re not able to put the children back.” (*Id.* 60:11-13)

According to CPS Richardson, there were a total of 24 different reports of disclosures by the children of abuse or neglect, not including her conversations with the children. (8/29/2022 Hrg. Tr. 61:8-12) CPS Richardson stated she was “absolutely” trained to judge the reliability of the children, and that she found the children’s statements to be credible. (*Id.* 61:24-62:8)

No evidence was introduced to establish CPS Richardson’s qualifications to determine the credibility of the children. The Department did not provide documentation to support CPS Richardson’s allegation, did not specify the dates, times or parties to whom the disclosures were made, did not produce recordings or written reports describing the contexts in which the disclosures were made, and did not provide any specifics about the alleged disclosures.

CPS Richardson briefly testified in conformance with her affidavit regarding T.S.’s compliance with her treatment plan. (8/29/2022 Hrg. Tr. 62:14, et seq.) As before, CPS Richardson reported no failures by T.S. except that, “while mother maintained housing, I could not say that it would be safe or stable as the children disclosed sexual abuse, and that’s not safe.” (*Id.* 63:2-5) CPS Richardson testified

the children had anxiety about parental visitations and that, “Once the visitation was stopped, I have seen a decrease in both kids....” (*Id.*63:13-20) CPS Richardson said that, after discussions with the GAL, children’s counsel and the regional administrator, the Department ceased parental visitation. (*Id.* 64:22-65:5)

CPS Richardson testified that T.S. completed several parenting classes and engaged in all recommended counseling to improve her parenting skills and understand the emotional needs of the children. (8/29/2022 Hrg. Tr. 66:20-67:3) After describing a single incident – in October 2019 – in which the parents were alleged to have “escalated to the point of calling names, CPS Richards testified that “there were other times” the parents acted appropriately during supervised parenting. (*Id.* 67:4-25)

CPS Richardson confirmed Department counsel’s summary that “the issue on this parenting is the fear the children have for the birth parents,” “consistent allegations of inappropriate touching,” and “corporal punishment” that “kind of permeates this entire case.” (8/29/2022 Hrg. Tr. 68:3-19) CPS Richardson testified the children were afraid of the parents and did not want to go home. (*Id.* 68:23-69:1)

When asked if any concerns were raised by T.S.’s mental health or CD evaluations, CPS Richardson answered, “Yes.” (8/29/2022 Hrg. Tr. 69:2-8) Asked to specify those concerns, CPS Richardson said that, during an evaluation

conducted in January 2020, T.S. failed to express concerns about sexual abuse disclosures allegedly made in October 2019. (*Id.* 69:8-16) Additionally, CPS Richardson detailed that, in 2020, T.S. had been dismissed from her first mental health provider for three no-show/no-call appointments, before beginning therapy with a different provider. (*Id.* 69:18-70:1) Subsequent testimony showed that the no-show/no-call appointments occurred during the height of the Covid-19 pandemic.

On cross-examination, CPS Richardson conceded that, in forensic interviews conducted in October 2019, neither D.A. nor L.A. disclosed any abuse or neglect by their parents. (8/29/2022 Hrg. Tr. 86:6) CPS Richardson temporized that, L.A. “was pretty little” and “the room was very distracting for D.A.” (*Id.* 86:7-10) CPS Richardson testified that, however, there were several disclosures to other people outside the interview setting, though she did not provide names, dates, context or details of the alleged disclosures. (*Id.* 86:10-15)

CPS Richardson stated a second forensic interview was conducted regarding the bruised backside, but neither CPS Richardson’s testimony nor the record provided information regarding the interview, or whether the report was substantiated against either parent. (8/29/2022 86:15-17) On cross-examination, CPS Richardson testified that the Department subsequently removed the children

from the foster parents who reported the bruising on D.A.'s buttock. (*Id.* 101:11, et seq.)

On further cross-examination, CPS Richardson clarified that allegations of 25 instances of abuse or neglect, but simply 25 reported statements over the course of two years. Nowhere in the record is there any evidence of how many – if any – specific instances of inappropriate touching were alleged. CPS Richardson agreed that there were no allegations of inappropriate touching by T.S. prior to the termination hearing. (*Id.* 95:10-96:4) CPS Richardson conceded that inappropriate sexual contact by the birth father, A.A., was investigated in October 2019 and was unsubstantiated when neither D.A. nor T.A. made a disclosure of inappropriate contact in forensic interviews. (*Id.* 97:8-19) CPS Richardson acknowledged an unsubstantiation letter sent to A.A. in December 2019 and identified the letter for entry into evidence. (*Id.* 97:20-98:9, App. F) After significant hedging and evasion, CPS Richardson eventually conceded that the alleged deterioration in D.A.'s condition that ultimately led to removal from her previous foster home occurred several months after the Department cut off all parental contact. (*Id.* 103:14-105:2)

Jeffrey Watson testified regarding his counseling of both birth parents, his experience with the Department and his opinions regarding reunification. (9/16/2022 Hrg. Tr. 8:3, et seq.) Mr. Watson said he counseled T.S. and birth father A.A. from December 2020 until November 2021. (*Id.* 9:2-15) Mr. Watson

testified that in April 2021 he sent a letter to the Department recommending family counseling directed toward reunification. (*Id.* 9:16-22, Appendix B)⁴ Mr. Watson said he did not recommend T.S. continue individual counseling because, “She did not need it.” (*Id.* 9:23-10:3)

According to Mr. Watson, reunification therapy was recommended because, “when a child or children have been suddenly removed from their primary caregivers, the parental unit, there is usually some trauma associated with that. That comes from a variety of angles. And there is work that needs to be done in reconnecting the children and reestablishing their attachment relationship.” (9/16/2022 Hrg. Tr. 10:9-14) Mr. Watson testified he received, “no response either by telephone or in letter,” from the Department and that, “It’s been my experience over twenty-some years that the Department has not readily provided their information to me as a therapist.” (*Id.* 12:5-8, 16:18-21)

Mr. Watson testified that – in the absence of any records or clinical information from the Department – he relied upon the parents and contact with social workers regarding the Department’s allegations, the parents’ treatment plans and services provided. (9/16/2022 13:3, et seq.) Mr. Watson testified that, according to the parents, when D.A.’s foster placement was unable to meet her

⁴ Mr. Watson sent a total of four letters to the Department regarding T.S. and A.A. They were entered as exhibits in district court, and are attached as Appendix B to this brief.

needs, they were not considered a viable placement option.” (*Id.* 17:15-19:8) Mr. Watson disagreed with this conclusion, because, “It was my belief that family reunification included the parents having the children back in their possession at some point in time.” (*Id.* 19:9-16) When asked if the allegations of sexual abuse against A.A. would have changed his opinion, Mr. Watson demurred, stating that, in his understanding there was no evidence of sexual abuse and neither parent had been contacted by any authority with charges of sexual abuse. (*Id.* 19:22-20:6)

Mr. Watson testified regarding a forensic mental health evaluation performed by Michael Sullivan. (9/16/2022 Hrg. Tr. 21:6, et seq.) Mr. Watson stated that the Department did not advise him of the evaluation, Mr. Sullivan did not contact him as a collateral treatment source, and the parents provided him with a copy of the evaluation. (*Id.* 21:13-22:12) Mr. Watson testified on December 3, 2021 he sent a letter to the Department critical of Mr. Sullivan’s evaluation. (*Id.* 22:17-23:18, Appendix B) Mr. Watson testified he drafted a second letter filed as an Exhibit in T.S.’s objection to the GAL’s motion to suspend parental visitation. (*Id.* 23:19-25, 24:16-20, Appendix B) When questioned about his opinion regarding T.S.’s fitness to parent her children, Mr. Watson said, “Based on the statements of fact made to me by the parents and their commitment to work on any identified issues that were brought up, it was my professional opinion that T.S. was, in fact, a fit mother, and the involvement of the Department at the outset

really did not include T.S. as being in any way putting the children at risk.” (*Id.* 27:9-15) Mr. Watson testified that he discharged T.S. from therapy in November 2021 because he determined they would need to enter individual therapy as recommended by Mr. Sullivan in order to facilitate reunification with the children. (*Id.* 28:10-25)

Mr. Watson recommended the Department facilitate reunification by providing “therapy sessions where the parents and children were brought together and any identified issues were discussed and resolved so the parents could again work on reattachment to their children.” (9/16/2022 Hrg. Tr. 20:23-30:7) Mr. Watson criticized the Department for failing to provide an opportunity for the parents to “meet therapeutically with their children other than visitation.” (*Id.* 30:8-16) Mr. Watson explained that,

When there is a fractured attachment, no matter what the avenue of the fracture was, there needs to be work done with the children and the parents on healing the fracture. In this case, the fracture was the removal of the children. And that garners a sense of distrust by children, believing that their parents must have done something bad to cause the children to be taken away from them. That has to be dealt with therapeutically and resolved.
(9/16/2022 Hrg. Tr. 31:4-12)

Mr. Watson testified that cutting off all contact between the children and their parents as recommended by the GAL and implemented by the Department was “absolutely the opposite direction of helping the family to reunify,” and

would only deepen the children’s belief that the parents had done something terrible so that they were unable to see their parents.” (9/16/2022 Hrg. Tr. 33:17-34:3)

On cross-examination, the Department challenged Mr. Watson’s testimony that the Department had not responded to his letters by producing two e-mails purported to have been sent in response. (9/16/2022 Hrg. Tr. 44:9, et seq.) Review of the e-mails disclosed that, in fact, no response had been delivered to Mr. Watson because the Department had miss-spelled Mr. Watson’s e-mail address, had not sent any correspondence by regular mail and had not followed through on the e-mail correspondence has promised. (*Id.* 46:1-47:19, 52:21-53:23)

Social worker and parenting coach Wanda Jensen testified regarding a visitation between the parents and children she observed on June 10, 2021. (9/16/2022 Hrg. Tr. 73:1, et seq.) Ms. Jensen said CPS Melinda Newman asked her to supervise the visit “to see if they were implementing some of the skills, and also to kind of judge their connection with the children and.... The initiative that they were taking in order to engage with the children and strengthen their relationship with them.” (*Id.* 75:15-24) Ms. Jensen stated she produced written notes on the visitation which she provided to CPS Newman. (*Id.* 75:23-76:5)⁵

⁵ Ms. Jensen’s notes were entered into evidence as Mother’s Exhibit C (

Ms. Jensen concluded:

I thought it was a positive experience myself. The parents seemed to respond to the support that was offered to them. They did take some of the suggestions and acted on them. And I think that the visit overall was a positive experience for the children....
(9/16/2023 Hrg. Tr. 81:11-15)

T.S. testified in opposition to termination of her parental rights. (9/16/2022 Hrg. Tr. 84:17, et seq.) T.S. said it had been over a year since she had contact with D.A., and she had last had contact with L.A. and F.A. about five months earlier. (*Id.* 85:21-24) T.S. testified that, after ending couples counseling with Jeffrey Watson, she entered individual counseling with Wanda Jensen. (*Id.* 88:11-24) T.S. testified that, contrary to the allegations of CPS Richardson, she understood D.A.'s special needs, and T.S. detailed steps she had taken to address them before Department involvement with the family. (*Id.* 89:23, et seq., *Id.* 98:20-100:5) T.S. testified she had provided treatment for D.A.'s vision problems commencing in 2017, and provided supporting documentation. (*Id.* 89:23-91:21, Appendix D) T.S. testified that, in 2017, she had enrolled D.A. in Head Start at age three. (*Id.* 93:3-15) T.S. said, in May 2019, she had worked with D.A.'s school to develop and implement an IEP for D.A., and produced documentation to support her testimony. (*Id.* 93:18-95:4, Appendix D) T.S. gave testimony to establish that, contrary to the allegations by CPS Newman, both parents knew and understood D.A.'s special needs, took necessary steps to evaluate those needs and to give the child the

support she needed. (*Id.* 95:6-96:12) T.S. further testified that she continued to attend D.A.'s IEP consultation during the duration of the child's removal from parental custody, "Because... I want to help her in every way I can. And I want to know what's going on with my daughter and how she's progressing." (*Id.* 96:18-97:21)

After hearing testimony, the district court, took the matter under advisement (9/16/2022 Hrg. Tr. 105:6)

Findings of the District Court. In the Order entered November 14, 2022 the district court recounted the select testimony of the witnesses and made the following pertinent Findings of Fact in support of its decision to terminate T.S.'s parental rights:

1. The Department was initially concerned about the lack of supervision and trauma suffered by the children under the parents' care. The trauma became apparent after the Department had custody.
2. An appropriate treatment plan, approved by the court, has not been complied with by the Mother, or has not been successful, and the conduct or condition rendering her unfit, unable, or unwilling to give the children adequate parental care is unlikely to change within a reasonable time.
3. Mother completed multiple parenting classes but did not complete visitation and in-home services because, based upon the recommendations of professionals treating the child and the Guardian ad Litem, visits were suspended because of the emotional turmoil the children suffered after visits with the mother.
4. Throughout the length of the Department's involvement, the children have disclosed inappropriate sexual touching by the birth father.
5. D.A. informed Jolyn Browning that she was frightened of the birth father

- and reported inappropriate sexual contact.
6. Mother was aware of these disclosures and took no action to protect the child.
 7. In December 2020, D.A. returned from an overnight visit with a bruise on her eye and bruises on her buttocks. This occurred while the child was under the care of the birth parents.
 8. D.A. expressed fear of being safe in the care of her parents.
 9. D.A. suffered an emotional breakdown because of thoughts of visits with the birth mother and birth father and was placed in Shodair's acute unit because of safety concerns.
 10. The birth mother was inconsistent with her outpatient therapy and had a sporadic history of mental health treatment.
 11. Jeffery Watson, who advocated for the mother, never observed the birth mother with the children, and never sought collateral information from the Department or other treating professionals.
 12. Testimony "overwhelmingly supports" the Department's position that the children cannot be returned to the home.
 13. "The Court finds that the treatment plan has been failed. There has (sic) been extensive disclosures by the child and her siblings of inappropriate sexual contact. The child and her siblings suffered severe emotional trauma after visits with birth parents. It is apparent to the Court that the child was not protected nor provided a safe and stable home. The child is in need of permanency. The birth mother's treatment plan has been failed."
 14. "Mother's conduct and/or condition/s rendering her unfit, unable, or unwilling to give the child adequate parental care as described above is unlikely to change within a reasonable time. The birth mother has taken no steps to change or address the safety concerns and needs of her children during the pendency of this case which has been ongoing for over thirty-four (34) months."

(Appendix A)

STANDARDS OF REVIEW

The Montana Supreme Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re K.A.*, 2016 MT 27, ¶19, 382 Mont. 165, 365 P.3d 478.

In abuse and neglect cases, the burden of proof lies with the Department. Mont. Code Ann. §41-3-422(5)(a). The Department must prove by clear and convincing evidence all required elements for termination of a parent's rights. *In re K.L.*, 2014 MT 28, ¶14, 373 Mont. 421, 318 P.3d 691. "The district court, as the fact finder, evaluates if the Department has met its burden of presenting clear and convincing evidence regarding all required elements for termination of a parent's rights. The district court's findings of fact and conclusions of law summarize the court's evaluation as to whether the Department has met its burden of proof that a preponderance of the evidence is definite, clear, and convincing." *In re B.J.J.*, 2019 MT 129, ¶10, 396 Mont. 108, 443 P.3d 488.

Upon appeal of a district court's findings of fact, conclusions of law, and order terminating a parent's parental rights, the Montana Supreme Court does not substitute its judgment as to the strength of the evidence for that of the district court. *In re A.N.W.*, 2006 MT 42, ¶29, 331 Mont. 208, 130 P.3d 619. "Rather, the Court reviews factual findings to determine if they are clearly erroneous, conclusions of law for correctness, and that the evidence found by the district court

on a whole satisfies that a preponderance of the evidence is definite, clear, and convincing.” *In re B.J.J.*, ¶10.

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 J.B.*, 2016 MT 68, ¶10, 383 Mont. 48, 368 P.3d 715. To reverse a district court’s evidentiary ruling for an abuse of discretion, the Court “must determine the district court either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice.” *In re I.M.*, 2018 MT 61, ¶13, 391 Mont. 42, 414 P.3d 797 (citing *In re O.A.W.*, 2007 MT 13, ¶32, 335 Mont. 304, 153 P.3d 6).

Plain error review is discretionary and may be granted where an appellant shows: (1) the asserted error implicates a fundamental right, and (2) not reviewing the asserted error may result in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the proceedings, or may compromise the integrity of the judicial process. *In re M.K.S.*, 2015 MT 146, ¶¶13-14, 379 Mont. 293, 350 P.3d 27. The Court employs plain error review sparingly, on a case-by-case basis. *In re J.S.W.*, 2013 MT 34, ¶16, 369 Mont. 12, 303 P.3d 741.

SUMMARY OF THE ARGUMENT

T.S.'s parental rights were not terminated because she had neglected or abused her children. T.S.'s parental rights were terminated because, as CPS Richardson testified at the termination hearing, T.S. had successfully completed her parenting plan except that, "while mother maintained housing, I could not say that it would be safe or stable as the children disclosed sexual abuse, and that's not safe." The record from below is comprised of largely unattributed allegations based on ambiguous child hearsay disclosures from which the GAL, the final CPS and the district court concluded the father had inappropriate sexual contact with one or more of his children. These conclusions were reached despite substantial evidence to the contrary. The record shows that no such disclosures were made in either of two forensic interviews, that the Department's investigation into the disclosures determined they were unsubstantiated, that no referral to law enforcement occurred, no investigation was undertaken, and no charges were brought.

The Department violated Montana law when it ceased all contact between the parents and the children without seeking an order from the district court, supported by clear and convincing evidence, that reunification services need not be provided. The district court abused its discretion when it ignored T.S.'s objection to the GAL's motion to end contact with the parents and failed to hold a hearing on

that contested motion or on T.S.'s motion to for a finding of lack of reasonable efforts at reunification based.

The district court abused its discretion when it entered findings of fact based on the Department's tenuous allegations in the face of clear and convincing evidence to the contrary. The district court abused its discretion when it terminated T.S.'s parental rights on the basis of those findings of fact.

ARGUMENT

1. The Department improperly withheld reunification services in violation of Mont. Code Ann. §41-3-423.

Mont. Code Ann. §41-3-243(1)(a) requires the Department to “make reasonable efforts to prevent the necessity of removal of a child from the child’s home and to reunify families that have been separated by the state.” “Reasonable efforts” require the Department to act in good faith to develop and implement voluntary services agreements and treatment plans designed to preserve the parent-child relationship and the family unit, to assist parents in completing voluntary services agreements and treatment plans.” Mont. Code Ann. §41-3-423(1)(b) “In determining preservation or reunification services to be provided and in making

reasonable efforts at providing preservation or reunification services, the child’s health and safety are of paramount concern.” *Id.*

Mont. Code Ann. §41-4-423(4) provides that – except for a putative father – the Department may be relieved of the requirement to provide preservation or reunification services only upon a judicial finding, supported by clear and convincing evidence, that such services are not necessary.

In *In re J.O.*, the Court held that the Department was not required to provide phone contact between a mother with a long history of drug use, incarceration and parental neglect while the mother was incarcerated. 2015 MT 229, ¶27, 380 Mont. 263, 354 P.3d 1242.

This case is notably different. The Department stopped reunification services and suspended all contact between the parents and the children without an order from the district court. For reasons known only to the two parties, the GAL – not the Department – filed a motion for termination of parental contact. (DC074) In her brief in opposition to this motion, counsel for T.S., noted that:

In the Matter of A.J.C., 2018 MT 234, ¶38. The Montana Supreme Court... held that the Department violated his right to parent by failing to provide reasonable efforts to reunify him with his son, as required by §41-3-423, MCA. *Id.*, at ¶39. The Montana Supreme Court noted, “The Department has a duty to act in good faith which does not end with the development and approval of a treatment plan. *Id.*, citing *In re D.B.*, 2007 MT 246, ¶33.

This is factually similar to the mother's situation, as the Department has failed to provide reasonable efforts and reunification services by preventing the child from having any contact with the Mother. The Department's justification seemingly has been the child's wish not to go to visits and that the visits are not in the Department's subjective definition of the child's best interest.... "It is not the function of the State to choose better or different parents for children whose natural parents pose no safety risk, even where, in the State's subjective view, more desirable options may be available.... *Id.*, at ¶41....

Further, the Guardian Ad Litem cites no reason for suspending the children's contact with the parents that would amount to clear and convincing evidence on any of factors contained in MCA §41-3-423(2) The Guardian Ad Litem cites no opinion from any treatment professional, and instead asks for "a thorough therapeutic recommendation on the issue". No therapeutic recommendation exists to support the Guardian Ad Litem's motion."

(DC075)⁶

At the termination hearing, the Department argued its unsanctioned actions were justified because the children became anxious and acted out before and after parental visits and did not want to see their parents. There was, however, clear and convincing evidence to the contrary. The multitude of parenting visit reports provided in support of the Department's petition to terminate parental rights were

⁶ This is but an excerpt from the substantive brief submitted by counsel. The district court took no action on the GAL's motion, and the deficiencies noted by counsel were not subsequently addressed by the Department.

uniformly positive, with only one incident of parental disagreement early in the process.

Significantly absent from the documentation provided by the Department were the notes from the parents' June 10, 2021 parenting visit. Social Worker and parenting coach Wanda Jensen performed six pre-visitation sessions at the parents' home, observed visitation at the CPS office in Butte and conducted a post-visit session at the parents' home. (9/16/2022 Hrg. Tr. 77:2-11) Ms. Jensen testified that, on her visits, "...the house was orderly. It was clean. There... were... things in the home, like craft projects, visible and some art things that the children had done that looked like they were hung on the wall, etc. So, the house looked... it reflected their life and their children. But it was clean and orderly. There were no concerns about the shape of the house."

Ms. Jensen described the June 10th parenting visit in some detail. (77:21:et seq.) Ms. Jensen said the children were, "very enthusiastic to see mom and dad." Ms. Jensen described the interactions between the parents and children in positive terms, saying, "the children were very snugly with the parents." (*Id.*) The visit lasted about an our and 40 minutes and, according to Ms. Jensen, "there was very much a connection between the parents and the children...." (*Id.* 80:11-15)

The Department, in direct contravention of its duty to provide reunification services, discouraged this positive interaction between the children and the parents.

Ms. Jensen testified that coaching such as she provided is “...not intended to be just a one-time visit. It’s intended to be as needed.... After the visit, I asked Melinda Newman if she wanted me to continue with visit coaching for the family, and she...sort of left it up to me, but she indicated that she didn’t think it would do any good. So, I didn’t meet with them again.” (*Id.* 80:23-81:6)

When Ms. Jensen was disclosed as a rebuttal witness, both the Department and the GAL objected to allowing her to testify. Ms. Jensen’s testimony was credible, persuasive, and in direct contradiction to the arguments put forth by the Department. It was completely ignored by the district court.

In its findings of fact, the district court also stated that, “D.A. suffered an emotional breakdown because of thoughts of visits with the birth mother and birth father and was placed in Shodair’s acute unit because of safety concerns.” This finding is directly contradicted by the testimony of CPS Newman, who conceded that the deterioration in D.A.’s condition that ultimately led to removal from her previous foster home occurred several months after the Department cut off all parental contact. (*Id.* 103:14-105:2)

Therapist Jeffrey Watson testified that the sudden and complete cessation of all contact with their parents was detrimental to the children’s well-being, and that reunification therapy would have been the proper course of action. According to Mr. Watson, reunification therapy was recommended because, “when a child or

children have been suddenly removed from their primary caregivers, the parental unit, there is usually some trauma associated with that... And there is work that needs to be done in reconnecting the children and reestablishing their attachment relationship.” (9/16/2022 Hrg. Tr. 10:9-14) The district court did not take note of this testimony except to say that Mr. Watson had not observed the parents and children together.

In her October 20, 2020 affidavit, CPS Grover attests when six-year-old D.A. was asked about her wishes, “the child stated she wants to live with mom and dad again.” (DC031) This supports Mr. Watson’s hypothesis that the eventual trauma and emotional distress suffered by the children before and after parenting visits was more likely than not caused by events subsequent to removal such loss of the parent-child relationship and the influence of interviewers, foster parents and other individuals many of whom were never identified by the Department. The record shows that, at the time of removal, the children were closely bonded to their parents. When the Department improperly stopped reunification efforts without an order from the district court, the children were subjected to additional emotional

trauma which ultimately led to a breakdown by D.A. causing her to be sent to Shodair.

2. The district court improperly admitted child hearsay evidence at the termination hearing, denying T.S. of her constitutional right to due process and fundamentally fair procedures.

A birth parent's care and custody of a child "is a fundamental liberty interest protected by fundamentally fair procedures.... *In re C.S.*, 2020 MT 127, ¶12, 400 Mont. 115, 464 P.3d 66 (citing *In re C.J.*, 2010 MT 179, ¶26, 357 Mont. 219, 237 P.3d 1282) Termination procedures must satisfy the Due Process Clause of the Fourteenth Amendment and the Due Process Clause of the Montana Constitution set forth in Article II, Section 17. *Id.* To prove a violation of due process, a parent must show how the outcome would have been different had the alleged due process violation not occurred. *Id.* at ¶13 (citing *In re A.N.W.*, 2006 MT 42, ¶¶38, 47, 331 Mont. 208, 130 P.3d 619). Montana has held a fair proceeding requires "notice and an opportunity to be heard." *Id.* (citing *In re C.J.*, ¶27).

In this case, the district court violated T.S.'s fundamental right to due process by improperly allowing admission of child hearsay evidence over objection of counsel, improperly allowing witnesses to repeatedly vouch for the credibility of the child hearsay evidence, and by failing to require the Department to provide prior notice of the introduction of child hearsay evidence at the termination hearings. In support of this argument, Mother and Appellant T.S.

adopts, and incorporates by reference herein, the well-reasoned argument of Father and Appellant A.A. in its entirety. (Opening Brief of Father and Appellant A.A., p27, et seq., March 31, 2020)

3. The findings of fact entered by the district court were not established by clear and convincing evidence as required by Mont. Code Ann. §41-3-609 (1)(f).

Mont. Code Ann. §41-3-609(1)(f), provides that a district court may terminate parental rights to a non-Indian child if it finds, by clear and convincing evidence, that the child is an adjudicated youth in need of care, that “an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful,” and that the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

Clear and convincing evidence means that a preponderance of the evidence must be definite or that a particular issue must be established by a clear preponderance of proof. *In re T.D.H.*, 2015 MT 244, ¶28, 380 Mont. 40, 356 P.3d 457 (citation omitted). This standard does not call for unanswerable or conclusive evidence. *In re J.M.W.E.H.*, 1998 MT 18, ¶33, 287 Mont. 239, 954 P.2d 26 (quoting *In re J.L.*, 277 Mont. 284, 289, 922 P.2d 459, 462 (1996)), *In re A.K.*, 2015 MT 116 ¶22, 379 Mont. 41, 347 P.3d 711 (citations omitted). The Court will not “disturb a district court’s decision on appeal unless there is a mistake of law or

a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion” *In re H.T.*, 2015 MT 41, ¶10, 378 Mont. 206, 343 P.3d 159.

- a. **The district court erred in its finding that, “D.A. suffered an emotional breakdown because of thoughts of visits with her birth mother and birth father and was placed in Shodair’s acute unit because of safety concerns.”**

As fully detailed above, this finding was directly contradicted by the testimony of CPS Newman, Wanda Jenkins and Jeffrey Watson. Evidence presented by the Department consisted of unsubstantiated child hearsay and opinions based on that hearsay. This finding was not supported by clear and convincing evidence.

- b. **The district court erred when it determined the treatment plan was not complied with or successfully completed by T.S.**

April 1, 2020 CPS Sas swore that, “T.S. has made respectable progress on her treatment plan.” (DC018) October 8, 2020 CPS Grover attested that T.S. has completed the majority of tasks but is not able to articulate or admit to the reasons for Department involvement and demonstrate needed change.” (DC025) April 15, 2021 CPS Grover sent a letter of compliance to T.S. detailing as follows:

- A) Mental Health - You have completed a mental health evaluation and have recently engaged in individual counseling. You are in partial compliance with this portion of the treatment plan.
- B) Communication with the Department - You are in compliance with this portion of the treatment plan.
- C) Parenting/Visitation - You are in compliance with this portion of the treatment plan.

D) Housing Tasks - You are in compliance with this portion of the treatment plan.
(Appendix G, Exhibit A)

July 1, 2021 T.S. filed a notice of compliance with the district court in which she detailed her history of mental health treatment and therapy. (Exhibit G) The notice included, as Exhibit A, CPS Grover's compliance letter and, as Exhibit B, a letter dated April 27, 2021 from therapist Jeffrey Watson detailing his treatment and concluding T.S. individual counseling had been successfully completed, that T.S. and A.A. were continuing couples therapy, and that, " Reunification therapy is recommended for T.S., A.A. and their children soon, which this therapist is willing and qualified to provide."

January 25, 2022, CPS Newman expressed the sworn opinion that further efforts to reunite the parent and children "would likely be unproductive because neither parent is able to recognize or understand the reasons for Department involvement despite completing tasks on their treatment plan. Mother and Father have been unable to demonstrate their ability to parent safely, therefore reunification of the parent and child would be contrary to the best interests of the child." (DC060)

March 2, 2022, in her affidavit in support of the Department's petition to terminate parental rights, CPS Richardson alleged T.S.'s treatment plan was unsuccessful, "because she continues to not understand the children's needs. Her

response is to defend A.A. when the children disclosed that he has touched their ‘pee pee’.... Mothers denial of Fathers lack of cooperation, mothers denial that her children have been sexually touched by father and unwilling to protect them as she has stated that they could not have sexually abused their children... render Mother unlikely to care for the ongoing physical, mental, and emotional needs of [the children] within a reasonable time....” (DC081) In her testimony at the termination hearing, CPS Richardson confirmed counsel’s summary that “the issue on this parenting is the fear the children have for the birth parents,” “consistent allegations of inappropriate touching,” and “corporal punishment” that “kind of permeates this entire case.” (8/29/2022 Hrg. Tr. 68:3-19)

T.S. successfully completed every requirement of her treatment plan. The Department terminated her parental rights because the Department did not prove to her satisfaction that the children’s father – who had parental rights equal to her own – had sexually abused D.A. or L.A. If the Department presented her with the same vague, imprecise hearsay allegations it provided to the district court at the termination hearing – without context, documentation, substantiated reports or legal investigations – she was justified in demanding further proof. It was error for

the district court to determine T.S.'s skepticism was a failure to complete her parenting plan.

c. The district court erred when it determined the condition or conduct rendering T.S. unfit, unable or unwilling to provide adequate parental care was unlikely to change within a reasonable time.

The district court found there was clear and convincing evidence that, “the conduct or condition rendering her unfit, unable, or unwilling to give the children adequate parental care is unlikely to change within a reasonable time.” (Appendix A)

Mont. Code Ann. §41-3-609 (2) provides:

In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time, the court shall enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care.

CPS Richardson asserted the conduct or condition that rendered T.S. unfit, unable or unwilling to provide adequate parental care was unlikely to change in a reasonable time because, “sexual abuse disclosures have been made aware to both parents in October of 2019 and mother’s stance has not changed in over 2 years.” (*Id.*) CPS Richardson cited, as a reasonable effort by the Department, “October 26, 2019 Department received an (unattributed) informational report that L.A. stated, “monsters touch my pee pee.” (*Id.*) CPS Richardson conceded upon cross-examination that, in forensic interviews conducted in October 2019, neither D.A.

nor L.A. disclosed any abuse or neglect by their parents. (8/29/2022 Hrg. Tr. 86:6) CPS Richardson also testified that the October report was unsubstantiated when neither D.A. nor T.A. made a disclosure of inappropriate contact in forensic interviews. (*Id.* 97:8-19) CPS Richardson acknowledged and identified an unsubstantiation letter sent to A.A. in December 2019. (*Id.* 97:20-98:9, App. F)

CPS Richardson testified that, in the ensuing two years, about once a month a child would repeat a disclosure that one parent or the other touched her “pee-pee” or “no-no box” and T.S. refused to accept this as proof that A.A. improperly touched his children. No such disclosures were made in either of two separate forensic interviews. With no context, sources, or details regarding the alleged disclosures it is entirely reasonable for the mother to conclude that the father had not improperly touched his children.⁷

The Department alleged that the behavior rendering T.S. unfit to parent was her refusal to believe an allegation unsupported by the evidence provided to her. It is error in such a case to say the behavior cannot change. If the Department were to

⁷ Allison Brown, who worked with D.A. and L.A. from March 17, 2020 through June 4, 2020, testified that both children disclosed being touched on their “pee-pee.” Jolynn Browning, who worked with D.A. and L.A. beginning in April 2020 testified that both children disclosed being touched on their “no-no box.” No explanation was offered as to why the two children initially chose the exact same words to describe the alleged touching, or why they simultaneously changed their description in the exact same way to a different interviewer. In the absence of a forensic disclosure, this simultaneity strongly suggests the children were coached, or improperly interviewed.

provide actual evidence of the allegations, it is more likely than not she would believe it. That did not happen here.

d. The district court erred when it implicitly determined the children had made allegations of inappropriate sexual contact by the birth father.

The district court found there was clear and convincing evidence that, “Throughout the length of the Department’s involvement, the children have disclosed inappropriate sexual touching by the birth father,” “There has [sic] been extensive disclosures by the child and her siblings of inappropriate sexual contact.” (Appendix A)

As detailed repeatedly above, this allegation was not supported by clear and convincing evidence, and there was substantial credible evidence to the contrary. Unattributed child hearsay without context, improper vouching of hearsay credibility and herculean conclusion-jumping do not establish that a small child’s

statements that a parent touched his or her “pee-pee” or “no-no box” is inappropriate, or in any way sexual.

While it is possible that the children were inappropriately touched, it is equally possible – and presumptively more likely – that the parents properly touched the children’s genitalia when changing their diapers or bathing them.⁸

The presumption of appropriate touching is strengthened by the fact the disclosures were not repeated in two forensic interviews. Moreover, the Department investigated the disclosures in October 2019, found the disclosures unsubstantiated and issued an unsubstantiation letter in December 2019. Nothing in the record indicates any further investigation by the Department or law enforcement. The vague, non-specific allegations of the sort put forth by the Department do not provide clear and convincing evidence of inappropriate sexual contact. For the district court to reach this conclusion on the proof offered is contrary to the evidence and is an abuse of discretion.


CONCLUSION

CPS Richardson testified that, “[N]either parent is able to recognize or understand the reasons for Department involvement despite completing tasks on

⁸ The Court is asked to consider that – as practical matter – a parent changing a child’s diaper or tending to a child’s personal hygiene routinely and properly touches the child’s genitalia and that, absent context or further detail, a child can truthfully say that Mommy or Daddy “touched my pee-pee” without describing sexual abuse.

their treatment plan.” After thorough review of the record, it is clear that the parents’ reasoning on this issue was sound. Mother and Appellant T.S. respectfully requests the Court vacate the judgment and return this matter to the district court for further proceedings as the Court deems appropriate.

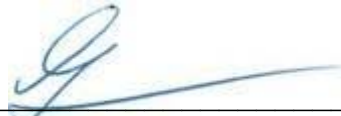
Respectfully submitted this April 23, 2023.



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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 not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



Gregory D. Birdsong

CERTIFICATE OF SERVICE

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