

---

**IN THE SUPREME COURT FOR THE STATE OF MONTANA**

**No. DA 23-0087**

---

IN THE MATTER OF:

U.A.C.,

A Youth In Need Of Care.

---

**ANDERS BRIEF**

---

On Appeal from Montana's Thirteenth Judicial District Court,  
Yellowstone County, The Honorable Rod Souza Presiding

---

APPEARANCES:

ATTORNEYS FOR FATHER AND  
APPELLANT:

GREGORY D. BIRDSONG  
Birdsong Law Office  
P.O. Box 4051  
Santa Fe, NM 87502

ATTORNEYS FOR PLAINTIFF AND  
APPELLEE:

Austin Miles Knudsen  
Kathryn Fey Schulz  
Montana Attorney General's Office  
P.O. Box 201401  
Helena, MT 59620-1401

Scott D. Twito  
Brett D. Linnneweber  
Yellowstone County Attorney's Office  
P.O. Box 35025  
Billings, MT 59107

## **TABLE OF CONTENTS**

Table of Authorities .....	iii
Statement of the Issue .....	1
Statement of the Case.....	1
Procedural History .....	1
Facts of the Case.....	3
Affidavit of CPS Steussie – October 30, 2018. ....	3
Show Cause Hearing – March 12, 2019. ....	4
Treatment Plan – March 14, 2019.....	5
Status Hearing – June 18, 2019.....	5
Status Hearing – August 17, 2019. ....	6
Affidavit of CPS Bushard – September 30, 2019 .....	6
Show Cause Hearing – October 1, 2019.....	7
TLC Hearing – October 29, 2019. ....	7
TLC Hearing – November 26, 2019. ....	9
Affidavit of CPS Bushard – November 13, 2019 .....	11
TLC and Permanency Hearing – March 31, 2020. ....	11
Status Hearing – August 18, 2020. ....	14
Affidavit of CPS Bushard – September 3, 2020.....	14
Termination Hearing – October 13, 2020.....	16
Mediator’s Report – December 18, 2020.....	16
Termination Hearing – January 6, 2021. ....	17
CASA Report – February 17, 2021.....	18

Status Hearing – March 2, 2021.....	18
Status Hearing – April 27, 2021.....	19
Affidavit of CPS Usenova – May 10, 2021.....	19
Permanency Plan Hearing – June 8, 2021. ....	20
Affidavit of CPS Usenova – May 5, 2022.....	21
Termination Hearing – August 25, 2022. ....	22
Findings of the District Court. ....	29
Standards of Review .....	32
Argument.....	34
1. Counsel for J.G. should be permitted to withdraw from this cause in accordance with <i>Anders v. California</i> and Mont. Code Ann. §46-8-103. ....	34
2. D.J.C. may argue that termination of his parental rights was plain error and the Court should exercise plain error review.....	36
Conclusion .....	37
Certificate of Compliance .....	39

## **TABLE OF AUTHORITIES**

### **Montana State Constitution**

Article II, Section 17 .....	34
------------------------------	----

### **Montana Code Annotated**

Mont. Code Ann. §41-3-422 .....	33
---------------------------------	----

Mont. Code Ann. §46-8-103 .....	1, 34, 35
---------------------------------	-----------

### **Montana Cases**

<i>In re A.N.W.</i> , 2006 MT 42, 331 Mont. 208.....	33
--	----

<i>In re A.S.</i> , 2004 MT 62, 320 Mont. 268.....	32
--	----

<i>In re B.J.J.</i> , 2019 MT 129, 396 Mont. 108 .....	33
--	----

<i>In re B.J.J.</i> , 2019 MT 129, 396 Mont. 108 .....	32
--	----

<i>In re C.J.</i> , 2010 MT 179, 357 Mont. 219.....	32
---	----

<i>In re J.B.</i> , 2016 MT 68, 383 Mont. 48.....	34
---	----

<i>In re J.S.W.</i> , 2013 MT 34, 369 Mont. 12 .....	36
--	----

<i>In re K.A.</i> , 2016 MT 27, 382 Mont. 165 .....	32
---	----

<i>In re K.L.</i> , 2014 MT 28, 373 Mont. 421 .....	33
---	----

<i>In re M.K.S.</i> , 2015 MT 146, 379 Mont. 293 .....	36
--	----

<i>In re M.V.R.</i> , 2016 MT 309, 385 Mont. 448.....	32
---	----

<i>State v. Daniels</i> , 2003 MT 247, 317 Mont. 331.....	36
---	----

### **United States Constitution**

Due Process Clause.....	32
-------------------------	----

Fourteenth Amendment .....	34
----------------------------	----

### **Federal Cases**

<i>Anders v. California</i> 386 U.S. 738 (1967).....	1, 34, 35
<i>Penson v. Ohio</i> , 488 U.S. 75 (1988) .....	35

## **STATEMENT OF THE ISSUE**

Whether, pursuant to the criteria set forth in *Anders v. California*, 386 U.S. 738 (1967) and Mont. Code Ann. §46-8-103, counsel for Appellant should be permitted to withdraw from this cause of action.

## **STATEMENT OF THE CASE**

Father and Appellant D.J.C. , appeals the Order, entered December 20, 2022 by the Montana's Thirteenth Judicial District Court, Yellowstone County, terminating his parental rights to U.A.C. (5 years old). (Appendix A, DC001) The rights of the child's birth mother were also terminated.

### **Procedural History**

The case originated October 20, 2018, when the Yellowstone County Attorney filed a Petition 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 U.A.C. (DC002). and supported by the Affidavit of CPS Mike Steussie. (DC002) The Department advised the district court the child was believed to be Native American and ICWA might apply and, ultimately, it was determined U.A.C. was eligible for membership in the Chippewa-Cree Tribe and that ICWA did apply.<sup>1</sup> (*Id.*) The

---

<sup>1</sup> March 8, 2019 the Department filed a determination letter from the Chippewa-Cree Tribe concluding U.A.C. was not eligible for membership. (DC022) February 12, 2020 the Department filed a second determination letter from

district court granted EPS and set a show cause hearing. (DC005)

March 12, 2019, after several continuances to accomplish service on D.J.C. – who was, at that time, identified as the putative father – the district court held the show cause hearing. (DC023) Both parents stipulated to adjudication. (*Id.*) The district court adjudicated U.A.C. as YINC and awarded the Department TLC. (*Id.*) The district court entered its written adjudication order the same day. (DC026)

March 14, 2019 the Department filed a court-approved treatment plan for D.J.C. (DC027) April 20, 2020 the Department filed a Phase II treatment plan for D.J.C. (DC064)

September 3, 2020 the Department filed a petition to terminate parental rights of both parents. (DC070) October 13, 2020 the district court conducted a hearing on the petition, after which it ordered the Department to enter into mediation with D.J.C. regarding treatment requirements. (DC080, 084) The mediation was held on December 4, 2020 and, on December 18, 2020, the mediator reported the parties had reached agreement on specific goals D.J.C. had to meet to enable reunification. (DC087) January 6, 2021 the district court vacated the petition to terminate parental rights and extended TLC. (DC088, DC089)

---

the tribe concluding U.A.C. was eligible for tribal membership and that ICWA requirements attached to the case. (DC060)

May 9, 2022 the Department again petitioned for termination of parental rights and permanent legal custody. (DC139)<sup>2</sup> August 16, 2022 the Birth Mother advised the district court she did not want U.A.C. to be placed with D.J.C., and she would relinquish her parental rights if the parental rights of D.J.C. were also terminated. (DC159) Birth Mother's conditional relinquishment of parental rights was filed August 18, 2022. (DC160)

August 25, 2022 the district court held a hearing on the Department's petition to terminate D.J.C.'s parental rights. (DC163) After hearing testimony and argument, the district court ordered the parties to submit proposed findings and orders. (DC163) December 20, 2022 the district court entered its written order terminating D.J.C.'s parental rights to U.A.C. (DC171, Appendix A) January 9, 2022, the Yellowstone County Attorney filed notice of entry of judgment. (DC176) February 3, 2022 the Clerk of the Montana Supreme Court transmitted D.J.C.'s notice of appeal. (DC180)

## **Facts of the Case**

**Affidavit of CPS Steussie – October 30, 2018.** CPS Mike Steussie swore an affidavit in support of the Department's Petition for Emergency Protective

---

<sup>2</sup> The hearing on this petition was delayed due to appeals by the foster parents of the district court's denial of their motion to intervene and subsequent placement order. (DC095, DC111, DC114, DC119, DC123, DC130, DC134, DC137, DC166)



Services, Adjudication as Youth in Need of Care and Temporary Legal Custody for U.A.C. (DC001) CPS Steussie stated U.A.C. was removed from the care of her birth mother and stepfather because of because of substantiated reports of domestic violence between the parents and substance abuse by the birth mother (C.L.R.) (*Id.*) D.J.C. is identified as U.A.C.'s putative father with an address in Roanoke, Virginia. (*Id.*) C.L.R. is reported to have told CPS Steussie D.J.C. was not on U.A.C.'s birth certificate, "but they are still legally married, and his parental rights are intact. C.L.R. stated, 'He is a violent offender and in West Virginia somewhere.'" (*Id.*) CPS Steussie stated he was unable to make contact with D.J.C. but found information on an interstate compact with the State of Virginia, "Where D.J.C. is on probation and registered." (*Id.*)

**Show Cause Hearing – March 12, 2019.** February 27, 2019 the Department filed an Affidavit of Service from the Roanoke, Virginia City Sheriff's office stating D.J.C. had been served with notice of the dependent neglect proceeding. (DC021) D.J.C. was not present for the hearing but was represented by counsel. (DC023) Counsel reported DNA testing had established D.J.C. as U.A.C.'s birth father, and that D.J.C. was on probation for "an aggravated violent crime." (3/12/2019 Hrg. R. 7:12) Through counsel, expressed his wish to parent U.J.C. (*Id.* 9:22-25) (*Id.*)

**Treatment Plan – March 14, 2019.** The Department filed Notice – served upon D.J.C. via counsel – that the district court had approved a form treatment plan for D.J.C., along with a copy of the treatment plan. The treatment plan from specifies six areas of treatment:

1. Chemical Dependency: D.J.C. is to complete a CD evaluation, follow all recommendations, and participate in random drug and alcohol testing.
2. Mental Health: D.J.C. is to complete a psychological evaluation and follow all recommendations. D.J.C. is to schedule and attend individual counseling.
3. Parenting: D.J.C. is to spend parenting time with U.A.C.
4. Risk of Violence: D.J.C. is to complete an anger management assessment and follow all recommendations.
5. Paternity: D.J.C. is to cooperate with paternity testing.
6. Communication/Cooperation with the Department: D.J.C. is to meet with his assigned CPS worker as requested “to review progress.”

(DC027)

**Status Hearing – June 18, 2019.** D.J.C. attended the hearing by telephone. (DC029) Counsel requested the district court expedite the home study, advising D.J.C. “has a good job, a place to live, adequate housing...” (6/18/2019 Hrg. Tr. 7:12-15) The Department told the court there were concerns with D.J.C., stating he had “some history with his other children... PFMA, violence, things like that. And there’s been some reports of alcohol drinking.” (*Id.* 10:22-25) D.J.C. denied any history of alcoholism or mental illness, but conceded, “I do have a violent history, but so does she.” (*Id.* 11:4-6) D.J.C. said he had a relationship with U.J.C. but didn’t take U.J.C. with him when he went to Virginia because, “she was supposed

to be on the way....” under her parents’ IPC through probation and parole, but the birth mother, “messed up, and then she couldn’t make interstate compact.... So, I had no contact with my daughter... because nobody could get in touch with [birth mother].” (*Id.* 11:10-12:10)

**Status Hearing – August 17, 2019.** D.J.C. flew out from Virginia for the hearing (DC033, 8/27/2019 Hrg. Tr. 5:15-6:1) Upon inquiry by the district court, D.J.C. said that, though he had been promised parenting time with U.A.C. “But I haven’t had none of that happen since I’ve been envisioned (sic?). No house visits, no FaceTime, the foster care people, none of that.” (*Id.* 6:1-19) Birth mother advised the court, “I really feel that D.J.C. will take very good care of her. You know, he has his mother there for support.” (*Id.* 15:3-4) The court said he would have the Department arrange a supervised visit while D.J.C. was in town but gave no instructions for accommodating regular parenting opportunities. (*Id.* 16:2-17:5) September 5, 2019 the case was transferred to a judge versed in ICWA cases. (DC035)

**Affidavit of CPS Bushard – September 30, 2019.** CPS Dawn Bushard swore an affidavit in support of the Department’s petition to extend TLC. (DC040, DC039) CPS Bushard reported that, on August 27, 2019 she supervised a visitation with birth mother, D.J.C. and U.A.C. (DC40, p8) CPS Bushard said U.A.C. did not appear to know D.J.C., did not interact with him and refused to give him a hug or

kiss goodbye. (*Id.*) CPS Bushard stated she was not sure D.J.C. had received a copy of his treatment plan, so he was considered in compliance. (*Id.* p10)

**Show Cause Hearing – October 1, 2019.** The case did not come before the district court for a show cause hearing until October 1, 2019 – eleven months after the petition for EPS was filed. (DC044, DC001) D.J.C. appeared by telephone (DC044) Counsel advised the court D.J.C. was about to be released from probation in Virginia, had maintained stable employment as a restaurant kitchen manager, and lived in a “five-bedroom house” with his 21-year-old son. (10/1/2019 Hrg. Tr. 8:1-7) D.J.C. was also reported to have completed a parenting class, a life skills class and an anger management class. (*Id.* 8:8-11) The GAL advised the court the parents had agreed to D.J.C. having parental rights under a dissolution proceeding parenting plan but said “I have some pretty significant concerns about him.” (*Id.* 9:12-15) The birth mother advised the court the plan called for D.J.C. to “establish a relationship with U.A.C.” and, eventually have unsupervised parenting time. (*Id.* 10:18-23) . , February (*Id.*) CPS Bushard told the court she had “dropped the ball” the previous Spring and had failed to give D.J.C. a treatment plan. (*Id.* 11:7-10)

**TLC Hearing – October 29, 2019.** D.J.C. appeared by telephone. (DC046) Counsel lodged a complaint with the district court, saying D.J.C. felt “ostracized and left out of this case.” (10/29/2019 Hrg. Tr. 11:22)

This case has been going on for a year. And I know at the FEM

and at the last hearing the Department had also made representations that it didn't even know that there was a treatment plan and didn't even talk with D.J.C. that there was a treatment plan. So for the past year, he hasn't been working on tasks. The only task that he was directed to do, was paternity testing and he immediately did it.... The Department removed his daughter and it waited ten months to start the ICPC process. And we all know ICPC process takes months to get through. So he would not even be given a chance to get his daughter into his care until probably a year into the case.... I found in this case, when I took it over, there was no established visitation time... scheduled in this case.

(10/29/2019 Hrg. Tr. 3:3-12)

Birth Mother's counsel responded D.J.C.'s treatment plan tasks, "are based on his violent nature, a lot of the violence was against the mom in this case.... So, while I understand that he's frustrated that things aren't moving forward, he moved out of the state, he perpetrated a ton of violence against the birth mother, he did so while she was pregnant." (10/29/2019 Hrg. Tr. 18:6-8, 14-17) D.J.C.'s attorney asked for an updated treatment plan, and the Department agreed to immediately work on getting a Phase 2 treatment plan in place. (*Id.* 19:4-11) The GAL expressed his concern about D.J.C.'s criminal history, "He was convicted in July of 2015 of aggravated assault and aggravated burglary.... So, my concern is that we shouldn't just rush to change things because there's a DN case where mom has some substance abuse concerns." (*Id.* 19:20-25)

D.J.C. addressed the district court:

[T]oday I had a house visit, five, six hours ago, I am approved, my house, my mother's house is approved. The... CPS worker over here

is Megan Keefe (phonetic), she says I'm approved, she has no concerns, no doubt to contact her with any concerns. The only concern she has is why it took so long. She says there's no need for the case to go any longer, it could be transferred, she has accepted it. She has seen U.A.C.'s bedroom set up at both houses. She says that room is ready to go. I sent Dawn Bushard, the caseworker over there, with the documents, one from my PO saying I have no tasks to complete, I've never had dirty UAs for five years.... I have no treatment, they have no reason, no concerns, that's from the PO. Also from the CPS worker, no concern, I am clear, cleared of conduct for everything that they're saying.... I'm just saying like, it's been a long process, it's been 12 months, sir.  
(10/29/2019 Hrg. Tr. 22:1-17, 25:20-21)

**TLC Hearing – November 26, 2019.** D.J.C. did not attend the hearing. His attorney did repeat an ongoing complaint about Department inaction:

[A]bout a month has past since the last hearing, it looked like we were still trying to figure out what treatment plan tasks the Department wants D.J.C. to do. I talked to the Department, they said that they will within the next week or so get me a list based upon what information that D.J.C. has already provided to the Department of things that he has done. The Department has said that within the next week or two, hopefully they will get me a condensed list of the things that actually they want him to be working on, because I would hate to find this in a situation where the ICPC comes back that he's approved and the Department still refuses to transfer the child out to him because he hasn't completed any tasks that he has not known that he needed to accomplished.  
(11/26/2019 Hrg. Tr. 13:10-24)

In response to the district court's inquiry into why he left Montana, D.J.C. responded at great length. (11/26/2019 Hrg. Tr. 21:12, et seq.)

[W]hen I went to prerelease, I had already applied for interstate compact immediately. When I went to jail, I never went to prison. And when I adjourned the prerelease stay that I had, I visited my daughter everyday.... [W]e both had a same PO, Jeff Snell. She was

also doing interstate compact to come to Virginia with me. I left first, so that's the only reason I left U.A.C. I came back, when I got off the plane, I was employed immediately before I even seen the PO, I had a two bedroom apartment for me, her, U.A.C., P.S. and A.S<sup>3</sup>. We were married.

I made phone visitation everyday. We kept in contact. But then she gets back with W.S., she blocked me on Facebook. I don't know anybody out there. Over three months during the summer, I didn't have any contact with my daughter, nobody knew where she was at. [Later] I did Facetime with her, like she was going through some things, she sent me pictures of her with having a black eye... I sent clothes out to Montana, \$300 worth of clothes....

It got returned a month later, they said they found needles in the basement, she abandoned, nobody knew where she was at again. Then I received a call from the PO and that was Mike Steussie saying that my daughter was placed in foster care. We were still married, so I asked him, with my mom, could I come and get her because I was the father,... but then he told me... I wasn't on the birth certificate, so I need to take a blood test. I took that blood test like... 20 days later, on December 3rd, I believe... the result came back positive. And after that, that is why I got switch to do Mike Steussie to Dawn Bushard.

When I got with Dawn Bushard, she said something happened with the current foster family where they couldn't have her no more. So I asked again could I come and get her, she said she was going to file the paperwork then, this is like February or January. So, I waited then, I told her my situation, I sent her the house, the certificates, the whole nine yards. I was told multiple times by Dawn Bushard that she was going to do the paperwork. I went through all that. And then after that, like she just stopped contacting me. I contacted her every week for updates and so on and so on, then the rest, I pretty much just got court date....

At the time I was in Montana, but I knew the cost of living here, I could get a house and she was onboard, everything was

---

<sup>3</sup> Birth mother's children from a previous relationship with W.S.

fine. And I just love my time to be closer to my family and she had family members in this state, ...and I just want everything better, that's why I moved back.

(11/26/2019 Hrg. Tr. 21:12, et seq.)

**Affidavit of CPS Bushard – November 13, 2019.** CPS Dawn Bushard swore an affidavit in support of the Department's motion to set a permanency hearing. (DC048, DC047) CPS Bushard states the permanency options are reunification with the birth mother and "an ICPC mailed to the State of Virginia for D.J.C." According to CPS Bushard, U.A.C. "has a very good bond with the mother.... She does not know her father, and he has not taken the opportunity to contact her on a regular basis, even though numbers were exchanged with the foster family in August 2019."<sup>4</sup> (DC048)

**TLC and Permanency Hearing – March 31, 2020.** D.J.C. appeared by telephone. (DC055) CPS Sather advised the district court D.J.C.'s ICPS had been approved by the State of Virginia but, "At this point in time, the Department does not intend to be moving this child to her father even with that approved ICPC. The criminal history, our concerns regarding chemical dependency, the collateral information that... I don't believe was provided to... the individual who did a chemical dependency and mental health evaluation of D.J.C. My understanding is that all of that evaluation was based on self report. D.J.C., as recently as 2018, had

---

<sup>4</sup> The affidavit was dated October 21, 2019.



an arrest for driving under the influence.... The Department in Montana does not believe he is safe, and that the child does not have a significant relationship with him at this time.” (3/11/2020 Hrg. Tr. 5:16-25, 6:20-22)

D.J.C.’s counsel responded, “[H]e’s working with the DFS workers out there, he’s got two jobs, he’s had stable housing for a year. The home study has been done and his housing is approved. It was indicated to be very clean and appropriate. He’s doing testing, he’s engaged with services, and still he’s had no contact with U.A.C. since January. His calls ended in January. We reached out to Dawn Bushard and have had no response from her trying to alleviate that problem. And we just cannot get the Montana Department to move off of zero on this.” (3/11/2020 Hrg. Tr. 8:14-24)

Megan Keith, D.J.C.’s CPS worker in Virginia told the district court,

D.J.C. and I have been working together since October of 2019. He has always been very responsive to me. Anytime I call him, he answers, calls back. He’s proactively setting up meetings with me and wants me to be kept in the loop of things. Most recently I received a treatment plan of things that the Department was asking him to do. And then we sat down and started to work on some of those items. D.J.C. has participated in substance screenings, as well as any mental health and substance use, meeting with our community services board here in Virginia.

He also is willing to do a domestic violence assessment, if that’s required. At this time, we had an update from the service provider who handles those assessments, and they’re only doing telecommunication and are not able to see people via in person. But as far as I know D.J.C. is... fine with that if that needs to happen too.... [I]f they would like... we can make the referral. It is an authorized

domestic violence program headed up by Dr. Fender in Roanoke. So as soon as we could get approval to do that, then we could move to that.

(3/11/2020 Hrg. Tr. 9:6-23, 10:1-8)

CPS Sather said telephone contact was ended because “The foster parents were being bullied by D.J.C. (3/11/2020 Hrg. Tr. 12:2-4) Counsel denied the allegation, stating, there were other people present to establish that, “He simply asked the foster parents to stop allowing U.A.C. to call them mom and dad and redirect her that... he was her dad, who her mom was. And, with that, they got upset and told him they were ending the calls.” (*Id.* 12:10-13) The foster parent told the court that D.J.C. was bullying, aggressive and called while intoxicated, to which counsel responded that D.J.C. was, “a black person from the city. They talk different out there than we do. He does have somewhat of an aggressive demeanor I guess -- I wouldn’t say aggressive, just more assertive than I think we’re used to out here. But I think there’s adequate people in place that can be present during those phone calls to make sure there are no issues.” (*Id.* 13:1-14:20) The GAL stated, “I oppose U.A.C. being moved to Virginia. I think there’s a difference between being assertive and being a violent offender. And I have real concerns about the latest positive alcohol tests. I have real concerns about the lack of collateral on the CD eval. And those are just some of the concerns I have.” (*Id.* 16:3-8) Finally, D.J.C. responded to allegations he called intoxicated, “I can’t be intoxicated on the phone, because all the visitation I took, I was at work. Seven

o'clock I'm at work.... I work six days a week." (*Id.* 18:14-18)

**Status Hearing – August 18, 2020.** Due to Covid-19 restrictions, all parties appeared by telephone or video. (DC068) D.J.C. attended by telephone. (*Id.*) CPS Sather advised the district court the birth mother was in custody and had been charged with deliberate homicide. (8/18/2020 Hrg. Tr. 5:0-12) CPS Sather said D.J.C. had continued visitation via Zoom, but “those visitations were very detrimental to U.A.C. They did not go well. My understanding is that Family Support Network decided that those visitations were no longer in the child’s best interests, they were not productive, did not go well, and my understanding is that those visitations have stopped. I also understand that the individual counselor for U.A.C. is currently recommending that there not be contact between U.A.C. and D.J.C. because it is detrimental to the child.” (*Id.* 5:16-25) CPS Sather told the court the Department would be filing a petition for termination of parental rights. (*Id.* 6:13-17) The GAL expressed “serious concerns” about sending U.A.C. to Virginia and said she did not think it would be in the child’s best interests. (*Id.* 11:12-18)

**Affidavit of CPS Bushard – September 3, 2020.** CPS Dawn Bushard swore an affidavit in support of the Department’s first Petition for Termination of Parental Rights and Permanent Legal Custody of Indian Child. (DC070, DC069) CPS alleges D.J.C. failed to complete the treatment plan approved by the district

court on March 13, 2019 because “he did not do the recommendations of his parenting... assessment<sup>5</sup> as follows:”

1. D.J.C. *should* “consult a psychiatrist for a psychotropic medication management evaluation as needed.” He should also consult a mental health counselor for further evaluation and treatment as recommended.
2. D.J.C. *should* abstain from illegal drug use and prescription drug abuse. He should not consume alcohol in the presence of children or to the point of intoxication. He should submit to drug and alcohol testing.
3. D.J.C. “may benefit from a parenting coach to strengthen his parenting skills.”
4. “The current evaluation<sup>6</sup> only addresses concerns based on the client evaluated in the context of all information provided.” The evaluator has not had any contact with U.A.C. The child’s evaluator or therapist should “provide opinions about the impact of placement changes on the child.”

(DC070)

CPS Bushard states that “as of 8/12/2020 the Department has not had confirmation any of these recommendations have been fulfilled except parent coaching... The few alcohol tests D.J.C. had in the Spring of 2020 were positive for alcohol.” (DC070) CPS alleges D.J.C. “has extensive criminal history involving violence. He was arrested for an alcohol-related offense in early 2018 in Florida.... There have been reports called into the child abuse hotline on D.J.C. about violence and abuse towards (sic) U.A.C.’s siblings. U.A.C.’s therapist, Julie Clark, does not support reunifying her with her parent *at this time.*” (*Id.* emphasis

---

<sup>5</sup> Counsel finds no “parenting assessment” in the record from below. CPS Bushard fails to reference the Phase II Treatment plan approved by the district court April 20, 2020. (DC064)

<sup>6</sup> Presumably by the CFS evaluator in Virginia.

added)

CPS Bashard attests the conduct rendering D.J.C. “unfit, unable, or unwilling” to parent U.A.C. include: “concerns of substance abuse risks, domestic violence risks, and mental health stability as noted by the facilitator of his parenting assessment.” (DC070) CPS Bashard says U.A.C. is “in constant fear and anxiety during zoom visits.... She has gone back to depending on her pacifier, carrying her blanket everywhere, back to not sleeping through the night, and has to hold foster mother’s hand everywhere.” (*Id.*)

**Termination Hearing – October 13, 2020.** D.J.C. was present for the hearing. (DC082) His attorney was not. (*Id.*) Given the chance to address the district court, D.J.C. made compelling statements regarding multiple changes of attorney, poor attorney communication, multiple changes of Child Protection Specialists, changes of courts, ongoing delays, poor communication, insufficient parenting opportunities, broken promises of reunification, lack of responsiveness by his attorney and the Department, and his efforts to remain patient and respectful. (10/13/2020 Hrg. Tr. 4:14-24, 6:11-9:25, 15:10-16:10, DC082) After hearing D.J.C.’s concerns, the district court, without objection from any party, expressed its intention to send the matter to mediation. (*Id.* 11:3, et seq., DC082)

**Mediator’s Report – December 18, 2020.** Mediation was held December 4, 2020 and, on December 18, 2020 the mediator filed a statement detailing the

parties' agreement as follows (in part):

The Department will coordinate with D.J.C. for one visit to Montana for parenting visits per month and pay for airfare and lodging.

The Department will coordinate weekly video parenting time supervised by the Department or a supervising agency.

The Department will resubmit ICPCs for D.J.C. and his mother.

D.J.C. will "make sure he is comfortable" with parenting arrangements in advance.

D.J.C. will follow rules and requests by the Department or supervising agency during his parenting time.

D.J.C. will comply with alcohol testing twice a week to ensure his use of alcohol is appropriate and not a barrier to reunification. D.J.C. may use alcohol socially.

D.J.C. will comply with requests for "Parent Child Interaction Assessments and related therapeutic recommendations to improve is interactions and bonding with his daughter."

(DC087)

**Termination Hearing – January 6, 2021.** D.J.C. was not present for the hearing. (DC088) Counsel reported to details of the mediation agreement to the district court and stated, "The Department would like to be working with D.J.C. for another six months to continue to establish his relationship with his daughter and work further active efforts on this case to reunify this family." (20210106 Hrg. Tr. 3:11, et seq.) Noting that, while the "foster mom" had voice concerns about U.A.C.'s behavior, CPS Usenova had "observed that the visits have gone very well," counsel advised the court, "...we wanted a neutral third party for sure." (*Id.* 4:9-16) Counsel expressed the opinion that U.A.C. "would be at risk of serious emotional or physical harm if placed back in parents' care due to birth mother's

incarceration and the need for ongoing... bonding between D.J.C. and his child....” (*Id.* 5;17-20) Without objection, the district court ordered an extension of TLC. (*Id.* 8:7-12) Despite a clear statement by the Department that reunification was being actively sought, the CASA reported the foster parents, “ have expressed a strong interest in being a permanent placement consideration,” and said, “at this time, this CASA endorses this interest, as it would best serve U.A.C.’s best interests.” (*Id.*)

**CASA Report – February 17, 2021.** The CASA reported that she observed U.A.C. during a Zoom visit with D.J.C., and that, “U.A.C. appeared to be anxious throughout the session,” though D.J.C. “was engaged and appropriate....” (DC090)

**Status Hearing – March 2, 2021.** D.J.C. was present. (DC091) Counsel reported that D.J.C.’s parenting time was proceeding as agreed and that “the reports we have gotten are that that went well.” (3/2/2021 Hrg. Tr. 13-15) Counsel also told the district court “...from the Department’s perspective, D.J.C. has followed through on all of the items and tasks that [CPS Aliia [Usenova] has been asking him to do.” (*Id.* 4:19-21) The GAL told the court the foster parents reported, “some struggles that U.A.C. has had after her visits with her dad.... I also noticed... there have been one to two positive alcohol tests by D.J.C.” (*Id.* 5:19-6:7) The CASA volunteer told the court, “When U.A.C. is finished with her visits with her... with D.J.C., she’s starting to display some behaviors that are troubling.” (*Id.* 6:22-24) D.J.C. responded that, “all my visits went good.... They said she was

doing really well, she responded really well, she calls me Dad. So, I don't know what these concerns or anything they speak of, like she doesn't look like anything of that nature when I leave – when I leave her or anything like that.” (*Id.* 8:5-10) CPS Usenova told the court, “ I do receive formal feedback about D.J.C.’s visits with U.A.C., and all of them are positive. I haven’t read or had any signs... to be cautious. D.J.C. does real well during that one hour of Zoom meetings and he does really well during one-on-one with U.A.C. here in Billings.” (*Id.* 10:21-11:1)

**Status Hearing – April 27, 2021.** D.J.C. was present. (DC100) The Department advised D.J.C. had tested positive for alcohol , even though it had been agreed he could “drink socially.” (4/27/2021 Hrg. Tr. 4:5-7, 7:10-12) Counsel advised D.J.C. would be abstaining “to allay any fears that alcohol may be an issue for him.” (*Id.* 7:20-22) D.J.C. disclosed a DUI in August 2018 which he said was completely resolved. (*Id.* 12:24-13:3)

**Affidavit of CPS Usenova – May 10, 2021.** CPS Usenova swore an affidavit in support of the Department’s proposed permanency plan. DC103, DC104) CPS Usenova said U.A.C. was doing well in her placement, and she was visiting D.J.C. in person once a month and by Zoom weekly. (DC104) D.J.C. and U.A.C. are reported to have begun family therapy sessions and the Department recommended reunification if D.J.C. “is able to successfully complete his treatment plan and achieve conditions for return.” (*Id.*) CPS Usenova stated that,



between January 2021 and April 2021, D.J.C. tested negative for alcohol on 11 occasions and positive for alcohol on 13 occasions but had not tested positive for any other substances. (*Id.*) CPS Usenova advised the Department had requested D.J.C. maintain complete sobriety “at this time....” (*Id.*)

**Permanency Plan Hearing – June 8, 2021.** D.J.C. was present. (DC109) Counsel advised the district court of the Department’s view that reunification with D.J.C. would place U.A.C. at risk of “serious emotional or physical harm” due to the “need for the ongoing building of relationship with her father.” (6/8/2021 Hrg. Tr. 4:20-24) Counsel advised that birth mother wished for U.A.C. to remain with her foster parents so she could be with her half-sibling and that, “it would be an extreme detriment to both of them should wone of them leave.” (*Id.* 7:10-15, 8:10-14) The CASA volunteer agreed with the Department, stating that to remover her from the “support of the family that she knows now would be... a disaster for her.” (*Id.* 8:24-9:1) Counsel for the foster parents told the court they were “interested in keeping these two children together with them in a forever family.” (*Id.* 9:19-21)

D.J.C. took issue with characterizations made by the CASA and foster parents’ counsel. “[A]ll of my visitations have been outstanding.... All the reports I got [ say]... that I’m doing an excellent job....I don’t appreciate the [foster parents] telling them I’m a high-risk violent offender.... I’m low risk.” 6/8/2021 Hrg. Tr. 14:16-15:6

**Affidavit of CPS Usenova – May 5, 2022.** CPS Aliia Usenova swore an affidavit in support of the Department’s Petition for Termination of Parental rights and Permanent Legal Custody of Indian Child (DC139, DC140) CPS Usenova alleged D.J.C. failed to complete an appropriate treatment plan approved by the district court March 13, 2019 or a Phase II treatment plan approved April 9, 2020. (DC140) CPS Usenova stated D.J.C. failed to follow the recommendations of a 3-day parenting assessment, to wit:

D.J.C. did not seek therapy to address “paranoia, emotional regulation and behavioral patterns around authority figures and confrontation.”

D.J.C. did not provide clean UA’s.

D.J.C. did not follow recommendations from family therapists or U.A.C.’s therapist.

D.J.C. did not learn did not learn about the Little Shell Tribe, or “demonstrate a willingness to support her tribal identity.”

(DC140)

CPS Usenova alleged the conduct rendering C.J.C. unfit, unable, or unwilling to give U.A.C. adequate parental care includes “concerns about substance abuse, domestic violence risks, and mental health stability as noted by the facilitator of his parenting assessment.” (DC140) CPS Usenova reported U.A.C. struggles with visitation, “is still regressing after each visit and her therapist... reports that U.A.C. continues to express fear of her father.” (*Id.*) According to CPS Usenova, U.A.C.’s therapist reported that, “despite the fact that

U.A.C. has been seeing her father regularly via zoom meetings and monthly in-person visits, U.A.C. has not developed a bond with her birth father....” (*Id.*)

**Termination Hearing – August 25, 2022.** Judge Rod Souza presided over the Termination Hearing. (DC163) D.J.C. was present. (*Id.*) CPS Aliia Usenova testified in conformance with her affidavit, which was deemed read into the record. (8/25/2022 Hrg. Tr. 5:20, et seq.) CPS Usenova testified that, since the previous hearing in July 2022 D.J.C. had participated in monthly visitation with U.A.C., but not engaged in alcohol or drug monitoring. (*Id.* 7:13-19) CPS Usenova testified that D.J.C. had not followed recommendations made by a parenting evaluator to engage in individual therapy, continue joint therapy with U.A.C., improve his knowledge of U.A.C.’s tribal connections or work on “his long-term sobriety.” (*Id.* 8:3-17) CPS Usenova testified that, after the July hearing, D.J.C. “basically told me, ‘I’ done. I did all that I have to do and, if you want to talk to me, talk to my attorney. I will not talk to you any more.’” (*Id.* 8:24-9:1) CPS Usenova said she had no information regarding D.J.C.’s life since that time. (*Id.* 9:2-5) CPS Usenova testified D.J.C. had continued visitation with U.A.C. with monthly in-person visits – paid for by the Department – and weekly Zoom calls. (*Id.* 9:6-21) CPS Usenova summarized:

D.J.C. ... unsuccessfully followed through with all of the tasks on his treatment plan. First and foremost, maintain sobriety. For the past year the Department has been unable to maintain his sobriety because I

have not received any UAs or random UAs or anything from D.J.C. When I attempt to reengage him with the Department, he basically told me that he's done. And that's what his answer was. So, I was unable to get through. And the reasons why we continue in-person visits in hopes that he will reengage with me, he knows my phone number, he knows my office location, he comes here monthly. (8/25/2022 Hrg. Tr. 10:3-13)

CPS Usenova testified that, based on U.A.C.'s behavior, she believed the visitation was detrimental to the child. "[S]he would continue to say that she doesn't want to go to those meetings -- visits. She would hold onto foster mom leg, hide when Arisa (phonetic) would come to pick her up from her house. She would fall back on using pacifier, hold onto her blanket.... [T]hat was a sign of her regression." (8/25/2022 Hrg. Tr. 11:21-12:1) CPS Usenova testified that U.A.C.'s relationship with her sibling – for whom parental rights had previously been terminated and who was being adopted by the foster parents – was “incredibly important to U.A.C.” (*Id.* 12:5-7)

D.J.C. testified that, while he didn't dispute his statement that “he was done,” he only meant for that specific hearing” (8/25/2022 Hrg. Tr. 30:8-15) D.J.C. said he hadn't seen a court-ordered treatment plan. (*Id.* 30:7-19) D.J.C. conceded he had not participated in UAs, but argued “there was no treatment plan or anything of sobriety. I agreed to do sobriety.” (*Id.* 30:20-23) D.J.C. denied that he had failed to participate in joint counseling session, “Because I didn't hear anything after that placement hearing, period. I got contacted in September or

October by Sam Larson, and she said a decision hasn't been made.... So I met with her on a visitation.... but then she was taking a paternity leave. After that, nothing. I have never heard from anybody or anything or any Tribe, anything of these that they're talking about, I haven't been in contact with any of these people, nobody has ever talked to me, period." (*Id.* 31:9-22) D.J.C. said if joint counseling sessions with U.A.C. had been offered, "I would have done it absolutely." (*Id.* 31:23-32:1)

D.J.C. testified U.A.C. is happy in their visits and knows her brother and her sister – D.J.C.'s other children – and her grandmother. (8/25/2022 Hrg. Tr. 32:14, et seq.) D.J.C. said U.A.C. became confused and upset because the foster parents told her she was being adopted, and "I've seen her show up to visits where Brittainy has said that they were having a girls day and because she had to go to a visit, they would have to leave her behind. So, I've seen that." (*Id.* 33:24-34:9) D.J.C. testified that was engaged and connected during visits and Zoom calls and, usually, the child didn't want the call or visit to end. (35:10, et seq.)

D.J.C. spoke about the frustrations and costs he incurred due to schedule changes by the foster parents and maintaining a connection with U.A.C. "I accommodate them, I adjust them. But, personally, like between visitations and coming out here, I've taken over... for 18 months I've been doing this. So, I take financial losses. I've taken job losses. Just on U.A.C., period. Of flying and visitations, all of that. I'll just say that. Yeah, I've taken losses. But I make them

happen.” (8/25/2022 Hrg. Tr. 37:11-16)

D.J.C. testified he had a chemical dependency evaluation and mental health evaluation in 2019, “before Aliia.” (8/25/2022 Hrg. Tr. 39:23-25) D.J.C. testified his home had been approved, and an ICPC was approved “a year or two ago.” (*Id.* 40:6-14) D.J.C. said he had completed a “7-month course” in parenting and two classes for domestic violence. (*Id.* 41:1-10) D.J.C. testified he had completed a psychiatric evaluation, and it had been provided to the Department. (*Id.* 41:11-16) According to D.J.C. the evaluation, “was like a test. It would just say like I could use parenting, or coaching, or of that nature....” (*Id.* 41:17-21)

D.J.C. expressed his frustration:

...[W]hen I have a heart to heart, I have to talk about me.... [T]hey tell me I can't tell her I'm taking her home... that's making a broken promise. But I'm the nonoffending parent, so how am I going to make a broken promise?... I have to hide that in, and I have to be a man about that, but nobody know how that really feels.... I'm supposed to say to my daughter... I mean I had to teach her her name. K. She thinks that's her name. And now I told her... why she is U. But you renamed my daughter.... It's wrong. Period.... So, things of heart to heart, that's what I have to skip over.... [W]hen did I get to see you like in person, she will say like, can I take a vacation with you, things like [that] sometimes. But I can't answer those questions.  
(8/25/2022 Hrg. Tr. 48:20-49:12, 50:2-5)

D.J.C. addressed the district court directly:

Mr. Souza, I've done everything. I've tried to work with people, I did your mediation. And then this thing with alcohol test.... I gave a whole month of, but I don't have any problems, sir. I'm on clear conduct in Virginia. Point blank, period. It's been like that for years,

same address, same two jobs, everything's the same. I don't know what else to do. The parenting is parenting. I'm literally a block and a half away from school. Daycare where she's out of, that's all in the neighborhood. I'm only ten minutes from a hospital. I have -- my son is in the house, my mom is two doors over, which have been on this case, I've been on this case longer than anybody in this room. I've been on this case since day one.

(8/25/2022 Hrg. Tr. 50:15-25)

D.J.C. concluded:

I've never abandoned any of my kids. I will never do anything to harm my kids or put them in any danger, period. I've never had put any child in danger, period. So, people that bring up concerns, opinions, I get it. But really, really... I've never did nothing to destroy kids. I'm actually stable. I don't have any drug, mental problems, alcohol problems either.... I don't feel that I should to be terminated, period.... I haven't done anything at all like to [violate] any parental rights, or put my child in danger....

(8/25/2022 Hrg. Tr. 52:12-19, 53:3-6)

Visitation Supervisor LaQuita Cantu testified regarding her observations of D.J.C. and U.A.C. (8/25/2022 Hrg. Tr. 104:1, et seq.) Ms. Cantu had been the family advocate, observing both in person and zoom visits, since August 2021. (*Id.*) Ms. Cantu said D.J.C. was always appropriate, interacted well with U.A.C., and required very little coaching. (*Id.*) Ms. Cantu confirmed D.J.C.'s testimony that the in-person visits involved excursions to Chuck E. Cheese, the Zoo and the Museum. (*Id.*) Ms. Cantu testified she had never seen D.J.C. act inappropriately in person or by Zoom, and she had never seen him under apparent influence of drugs or alcohol. (*Id.*) Contrary to reports by the foster parents, Ms. Cantu said U.A.C.'s

potty habits were typical of a child her age and she had never seen the child with soiled clothing. (*Id.*)

Ms. Cantu testified U.A.C. occasionally came in “a little sad, and those days she normally will tell me, “Oh, well, my sister’s going here to do this, and I wanted to go.” So, she’s kind of a little upset that she’s not able to go do certain things that her other sisters are able to go do. But as soon as she starts playing with dad, she doesn’t say anything else about it.... She normally comes in very bubbly.”

(8/25/2022 Hrg. Tr. 109:7-21) Ms. Cantu testified U.A.C. knew her father, her grandmother and her brother, knew they were her family, and proactively interacted with them. (*Id.* 110:22, et seq.) “Yesterday she even asked, “can we call Grandma?” and “Can I talk to my brother? But there’s plenty of times that she’ll ask, when we’re on the Zoom calls, if D.J.C. will walk to grandma’s because she wants to talk to grandma and she wants to see grandma’s dogs.”<sup>7</sup> (*Id.*)

Ms. Cantu testified that, in her opinion, there was a bond between U.A.C. and her father. (8/25/2022 Hrg. Tr. 11:24, et seq.) She knows that he’s her dad, she gives him big hugs. They have a tradition at the end of their visits, he asks for, you know, who loves you the most, and she’ll play with him and then point at him. She gives him a big hug, but it’s not your traditional hug because, of course, it’s on

---

<sup>7</sup> D.J.C. lives three houses away from his mother.



Zoom, so she hugs her head. And so that's her head hug. She's kind of sad at the end of the day on the in-person visits. Yesterday she was like, "No, I still want to go with you.".... I do believe that there is a bond there. (*Id.* 112:2-16)

On cross-examination, Ms. Cantu testified D.J.C. always acted appropriately and, on one occasion, appropriately dealt with U.A.C. when the five-year-old was cranky and tired. "D.J.C. just got down on her level and explained to her what was going on. And he let her sit there for a few minutes and then she was perfectly fine and ready to continue playing." (8/25/2022 Hrg. Tr. 115:1-8)

B.D., U.A.C.'s foster mother testified in support of the Department's petition. (8/25/2022 118:5, et seq.) B.D. testified U.A.C. had been in her care since February 2019, and U.A.C.'s half-sibling had been in her care since May 2019. (*Id.*) B.D. testified the siblings "are very close. There is quite a difference between them, but they love [each] other....I don't know what they would do without each other." (*Id.*) B.D. testified she had received calls from U.A.C.'s preschool that U.A.C. had soiled or urinated in her pants "in the last to five months." (*Id.*) B.D. said U.A.C. had "some night terrors." (*Id.*) B.D. testified they had asked about her visits, but U.A.C. didn't want to talk about them. (*Id.*) B.D. denied ever telling the child she was missing a special girls outing because she had to visit Dad. (*Id.*) B.D. testified she was open and willing to respect U.A.C.'s tribal customs. (*Id.*) "[S]he did a Native American class at school last year, two days a week after school. I try

to provide dream catchers for both of the girls, I try to provide Native American artwork in my house for the girls.” (*Id.* 123:23-124:2) B.D. testified she was open to continuing contact with “any of” U.A.C.’s family “as long as they are appropriate and safe.” (*Id.*)

ICWA expert Edie Adams testified that, in her opinion, placing U.A.C. in her father’s care would place the child at risk of emotional or physical harm, “Because she would be taken away from everything that she knows.... She is with her sister, who is the most important person in her life that has been the stable person, she’s in the foster home and has been in that foster home with her sister for a number of years.... I know the foster mother will take her and her sister and participate in Native American activities.... I think that if she were to be placed with her father way out there, that we would all lose track of her, and she would lose her identity with her Tribe.”

After hearing testimony, the district court, heard testimony from U.A.C.’s maternal grandmother before taking the matter under advisement. (8/25/2022 Hrg. Tr. 141:23, et seq.)

**Findings of the District Court.** In the Order entered December 20, 2022 the district court took notice of the relevant testimony of the witnesses, and incorporated the findings of fact from a placement hearing held November 9,

2021<sup>8</sup>:

1. D.J.C.’s “excessive use of intoxicating liquor... affects [his] ability to care for and provide for” U.A.C.
2. D.J.C.’s “lack of attention to his history of domestic violence and his mental health needs “render [him] unlikely to care for the ongoing physical, mental and emotional needs of U.A.C. within a reasonable time.”
3. D.J.C. failed to complete the Phase II treatment plan<sup>9</sup> approved by the district court April 9, 2020:
  - a. CD Evaluation: “A thorough and well-written parenting assessment of D.J.C.” shows CPS Usenova provided the assessor with “a Psychological Assessment, Substance Abuse Assessment, Domestic Violence Risk Assessment and Parental Capacity Assessment completed by Keith E. Fender, Ph.D., LCSW, CSOTP, of Blue Ridge Counseling, LLC in Radford, Virginia.” D.J.C. complied with this requirement.
  - b. Alcohol Testing: D.J.C. acknowledges he has not engaged in drug or alcohol monitoring since July 2021. D.J.C. is not compliant with this requirement.
  - c. Parenting: D.J.C. completed parenting classes in 2017. This does not satisfy the requirement he “enroll in the next available class.” D.J.C. is not compliant with this requirement. D.J.C. is compliant with the visitation requirement.
  - d. Risk of Violence: D.J.C. completed risk assessment and is compliant with this requirement.
  - e. Contact with CPS: D.J.C. cut off communication with CPS Usenova and testified he had no reason to contact CPS Usenova except to arrange visits.
4. D.J.C.’s testimony shows, after the July 2021 placement hearing, his only participation in his treatment plan was to participate in weekly Zoom and monthly in-person visitation with U.A.C.
5. D.J.C. agreed in mediation to participate in alcohol testing. His failure to

---

<sup>8</sup> DC134

<sup>9</sup> DC057

do so is a violation of that agreement.

6. D.J.C.'s opinion that 'he does not feel U.A.C. is a member of the Little Shell Tribe' is a violation of the mediation agreement provision that he learn about the tribe and support U.A.C.'s connection to her tribal heritage.
7. D.J.C. did not provide evidence how the Tribe would maintain connection with U.A.C. in Virginia.
8. U.A.C. has a very strong bond with her half-sister, which is her longest family connection.
9. The Tribe supports placing U.A.C. with her foster parents and her sibling as the best way to maintain her connection with the Tribe.
10. D.J.C. denies having seen the Phase II treatment plan.
11. D.J.C. is bonded with U.A.C. This does not vitiate concerns with D.J.C.'s parenting.
12. D.J.C. testified he continues to drink, but denies alcohol played any role in previous crimes. Findings of fact 26-36 in the placement order belie this assertion, including the finding that "multiple witnesses and parental fitness assessments demonstrate D.J.C.'s problem of drinking too much negatively affects his ability to parent."<sup>10</sup>
13. D.J.C. testified he had no need for individual counseling but after an evaluation between March 31, 2021 and July 12, 2021 the Interaction Assessment required individual therapy for D.J.C. to "specifically work on his paranoia, emotional regulation and behavioral patterns around authority figures and confrontation."<sup>11</sup> Dr. Fender's May 2020 assessment recommended D.J.C. "consult with a psychiatrist for medication management and begin mental health counseling. That has not happened."
14. D.J.C.'s parenting time with two other children who live in Billings was "strictly limited, in part, due to his violence against [the birth mother]"<sup>12</sup>
15. Parenting supervisor LaQuita Cantu testified D.J.C.'s visits with U.A.C. went well, U.A.C. is bonded to D.J.C., and Ms. Cantu has never seen D.J.C. be inappropriate with U.A.C.

---

<sup>10</sup> DC134

<sup>11</sup> DC Exhibit 1

<sup>12</sup> DC019

16. ICWA expert Edie Adams testified, in her opinion, U.A.C. would be at serious risk of emotional or physical harm if placed with D.J.C. and removed from her sister due to the sibling bond, “red flags” in D.J.C.’s lifestyle and his failure to fully engage with the Department and work his treatment plan.
17. Both the GAL and the CASA support termination of D.J.C.’s parental rights as being in the best interests of the child.
18. Evidence beyond a reasonable doubt establishes that U.A.C.’s best interests would be served by terminating D.J.C.’s parental rights.

(App. A)

### **STANDARDS OF REVIEW**

“As a natural parent’s right to care and custody of a child is a fundamental liberty interest which must be protected by fundamentally fair procedures, termination procedures must satisfy the Due Process Clause of the Fourteenth Amendment.” *In re B.J.J.*, 2019 MT 129, ¶13, 396 Mont. 108, 443 P.3d 488 (citing *In re C.J.*, 2010 MT 179, ¶26, 357 Mont. 219, 237 P.3d 1282). Whether a parent has been denied his or her right to due process is a question of constitutional law, for which the Court’s review is plenary. *In re M.V.R.*, 2016 MT 309, ¶24, 385 Mont. 448, 384 P.3d 1058 (citing *In re A.S.*, 2004 MT 62, ¶9, 320 Mont. 268, 87 P.3d 408).

Beyond due process concerns, 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 to

prove by clear and convincing evidence all required elements for termination of a parent's rights. Mont. Code Ann. §41-3-422(5)(a), *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 findings of fact to determine if they are clearly erroneous, conclusions of law for correctness, and the evidence found by the district court to determine whether, on the whole, 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.

## **ARGUMENT**

**1. Counsel for J.G. should be permitted to withdraw from this cause in accordance with *Anders v. California* and Mont. Code Ann. §46-8-103.**

The Fourteenth Amendment of the United States Constitution and Article II, Section 17 of the Montana Constitution guarantee every defendant the right to a fair trial and due process of law, including fair representation. 386 U.S. 738, 742 (1967). When appellant's counsel "finds his case to be wholly frivolous" he should, after conscientious examination of the case, advise the court and request permission to withdraw. *Id.* at 744

To ensure protection of appellant's rights, counsel's request to withdraw must be accompanied by a brief that references anything in the record that might arguably support an appeal (an *Anders* brief). *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 v. California* in Mont. Code Ann. §46-8-103(2). If, after reviewing the entire record and researching the applicable law, counsel concludes that an appeal would be frivolous or wholly without merit, 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 the motion to withdraw. *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 meets the requirements of both *Anders v. California* and Mont. Code Ann. §46-8-103(2). The 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 appellant. *Anders*, 386 U.S. at 745.

Pursuant to Mont. Code Ann. §46-8-103(2), counsel for Appellant reluctantly advises the Court that, after conducting diligent review of the record and the relevant law, counsel has not found any non-frivolous issues appropriate for appeal in this matter. While counsel has great sympathy for the Appellant, he can find no meritorious grounds for appeal. In accordance with the requirements of *Anders* and Mont. Code Ann. §46-8-103(2), counsel provides this memorandum (Anders Brief) discussing any issues that arguably support an appeal, a summary of the procedural history of the case and any jurisdictional problems with the appeal, and appropriate citations to the record and the law bearing on each issue. *Id.*



**2. D.J.C. may argue that termination of his parental rights was plain error, and the Court should exercise plain error review.**

The Court may, at its discretion review an issue not raised before the district court for plain error if the issue implicates a fundamental right and not reviewing the asserted error may result in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *State v. Daniels*, 2003 MT 247, ¶20, 317 Mont. 331, 77 P.3d 224, *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.

While the record shows no clear egregious errors in the findings of fact or application of law by the district court, a reading of the record leaves one with the inescapable impression that many agencies and advocates were never on board with reunification of U.A.C. with her natural father. The foster parents' motives are suspect as they made it clear they wanted to adopt U.A.C. – going so far as to appeal the district court's denial of their motion to intercede to Montana Supreme Court twice. Both the GAL and the CASA were early and consistent advocates of termination of D.J.C.'s parental rights before the district court. As D.J.C. pointed out, during the pendency of the case he dealt with three CPS workers, four attorneys and two judges. These revolving doors, it could be argued, prevented the Department, the district court and his legal counsel from treating with him fairly

and consistently.

D.J.C.'s criminal history was often exaggerated or misstated to the district court. D.J.C.'s "drinking problems," were vaguely identified, and were never shown to have occurred in the presence of children. While D.J.C. eventually stopped participating in his treatment plan, he stated he did so out of frustration and indicated his belief that the cards were stacked against him from the start.

Given these facts, D.J.C. may argue that – upon an objective reading of the record from below – the Court may be left with the firm impression that termination of D.J.C.'s parental rights raised questions of the fundamental fairness of the proceedings. D.J.C. may argue plain error review is appropriate and the termination of his parental rights was plain error.

### **CONCLUSION**

After thorough review of the entire record and researching applicable statutes, case law, and rules, counsel has determined that D.J.C.'s appeal presents no non-frivolous issues and is, therefore, wholly without merit. Counsel respectfully requests the court grant the motion to withdraw on direct appeal.

Respectfully submitted this August 18, 2023.



---

Gregory D. Birdsong  
Birdsong Law Office

P.O. Box 4051  
Santa Fe, NM 87502  
406-529-6988  
[birdsonglaw@gmail.com](mailto:birdsonglaw@gmail.com)

### **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**

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 08-18-2023:

Chad M. Wright (Attorney)  
P.O. Box 200147  
Helena MT 59620-0147  
Representing: D. J. C.  
Service Method: eService

Kathryn Fey Schulz (Govt Attorney)  
215 North Sanders  
P.O. Box 201401  
Helena MT 59620-1401  
Representing: State of Montana  
Service Method: eService

Austin Miles Knudsen (Govt Attorney)  
215 N. Sanders  
Helena MT 59620  
Representing: State of Montana  
Service Method: eService

Scott D. Twito (Govt Attorney)  
PO Box 35025  
Billings MT 59107  
Representing: State of Montana  
Service Method: eService

D. J. C.  
1906 Westview Avenue SW  
Roanoke VA 24016  
Service Method: Conventional  
E-mail Address: deverycroson2@gmail.com

Electronically Signed By: Gregory Dee Birdsong  
Dated: 08-18-2023