

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0263

IN THE MATTERS OF

A.M. and R.M.,

Youths in Need of Care.

ANDERS BRIEF

On Appeal from the Montana First Judicial District Court, Lewis and Clark
County, Honorable Kathy Seeley presiding.

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STATEMENT OF THE ISSUE

Whether counsel for the Appellant should be permitted to withdraw from this cause in accordance with the criteria established in *Anders v. California*, 386 U.S. 738 (1967) and Montana Code Annotated § 46-8-103 (2017).

STATEMENT OF THE CASE AND FACTS

Appellant Mother, M.M. (Mother), appeals the Decree of Guardianship issued by the Lewis and Clark District Court (District Court) on April 10, 2023. The Decree granted B.R. and T.R. (Guardians) guardianship over Mother's two children. The District Court found that the Department of Health and Human Services, Child and Family Services Division (Department) made reasonable efforts to reunify the family. However, those efforts were found to be unsuccessful, and the Court found that further efforts to reunify would likely be unproductive and contrary to the children's best interests. Additionally, the Court found that termination of parental rights was not in the children's best interests. (D.C. Doc. 18.)¹

The Department became involved in this case on May 9, 2020, when law enforcement received a report that Mother and Father were both using drugs in a small hotel room with children present. When police arrived at the hotel room, they found large quantities of methamphetamine and heroin, as well as acid, exposed

¹ All references are to District Court Record DA-23-0121 unless otherwise noted.

syringes, and other drug paraphernalia. Mother and Father were arrested for dangerous drugs, including distribution and criminal child endangerment. (5/14/20 *Petition for EPS, Adjudication of Child as YINC, and TLC.*)² The two children, A.M and R.M., were removed, and on May 14, 2020, the Department filed a *Petition for Emergency Protective Services (EPS), Adjudication of Child as Youth in Need of Care (YINC), and Temporary Legal Custody (TLC).* (*Id.*) The accompanying affidavit by Child Protection Specialist (CPS) Randall Pebbles revealed that the family has a "significant history" with CPS; this was R.M.'s third removal. (*Id.*)

After their removal, the children were placed with Guardians. On May 15, 2020, the Silverbow County District Court approved the Department's *Petition*, issuing an *Order to Show Cause, an Order Granting Emergency Protective Services, and a Notice to Show Cause Hearing.* (5/15/20 *Order to Show Cause, Order Granting EPS, and Notice of Show Cause Hearing.*) On May 28, 2020, Guardians had a hair follicle test done on R.M., which returned positive for methamphetamine. (5/28/20 *Positive Hair Follicle Test.*) On May 28, 2020, the Guardians also filed a Motion to Intervene, which the court granted on May 29, 2020. (5/28/20 *Motion to Intervene*; 5/29/20 *Order Granting Intervention.*)

² All documents filed before the Change of Venue on June 16, 2021, were not included in the Register of Actions and are therefore referred to by their filing date and title.

On June 17, 2020, the Silverbow County District Court held a hearing on the Department's *Petition*. (6/17/20 Minute Entry.) At the hearing, the parents stipulated to the *Petition*, and the court adjudicated the child as a YINC and granted the Department TLC for six months. (*Id.*) On June 23, 2020, another motion to intervene was filed by Maternal Grandmother S.G., which was granted on July 22, 2020. (6/23/20 *Motion to Intervene-Maternal Grandmother*; 7/22/20 *Order Granting Motion to Intervene*). On June 29, 2020, the Court issued an *Order* continuing the EPS, adjudicating the children as YINC, and granting the Department TLC.

The Department filed a *Motion for the Court to Approve and Order Treatment Plan for Mother* on October 14, 2020, and to set a Treatment Plan hearing for November 4, 2020. (10/14/20 *Motion to Approve Treatment Plan, Re: Birth Mother*; 10/14/20 *Notice of Treatment Plan Hearing, Re: Birth Mother*.) The treatment plan included two separate plans, one for Mother if she was incarcerated and one for if she was released. (12/10/20 *Mother's Treatment Plan*.) Mother's plan included parenting tasks, substance use tasks, mental health tasks, housing and legal income source tasks, tasks regarding her involvement in criminal cases/probation, and general tasks to maintain stability. (*Id.*) The Silverbow County District Court signed and ordered the Mother's treatment plan on December 9, 2020.

The delay in getting Mother's Treatment Plan signed and ordered by the court was partially attributed to her legal actions. On November 18, 2020, she filed a *Motion and Brief to Transfer Venue*, and subsequently, on November 24, 2020, she filed a *Motion to Continue* her Treatment Plan Hearing. (11/18/20 *Motion and Brief to Transfer Venue*, 11/24/20 *Motion to Continue Treatment Plan Hearing*.) The basis for her request to continue the Treatment Plan hearing was her assertion that the outcome of her Treatment Plan hinged on the court's decision regarding her *Motion to Transfer Venue*. (*Id.*) The court granted the *Motion to Continue* the Treatment Plan hearing, and it was moved to December 9, 2020. (11/15/20 *Order Continuing Treatment Plan*.) Mother requested this matter be transferred to Lewis and Clark County because she accepted a plea agreement in her criminal cases that called for a five (5) year concurrent suspended sentence on the condition that she enter the Family Treatment Court in Lewis and Clark County. (11/18/20 *Motion and Brief to Transfer Venue*.) Mother argued that although venue was proper in Silver Bow County, but that participation in Treatment Court would offer her more services than would be available through the proposed treatment plan and would effectuate the goal of reunification more quickly. (*Id.*)

The Department objected to Mother's *Motion* to change venue and stated: "The Department believes that in light of the Department's long-standing relationship with the Birth Parents in the handling of this case it is in the best

interests of the child to have this case remain in Silverbow County." (12/9/20
Objection to Motion for Change of Venue.)

On February 11, 2021, the Department filed a *Notice of Hearing* and stated it would bring its petition to extend TLC before the court at the February 24, 2021, hearing. (2/11/21 *Notice of Hearing.*) Mother's newly appointed counsel moved to continue the hearing due to her unavailability. (2/12/21 *Motion to Continue Hearing.*) The court reset the hearing for March 31, 2021. (03/08/21 *Order Continuing Hearing.*) On March 31, 2021, the court heard the Department's *Petition to Extend TLC*. (3/31/21 Minute Entry.) Both parents stipulated the extension of TLC for a period of six months. (*Id.*)

On May 26, 2021, the Department filed a *Motion to Withdraw Objection to Birth Mother's Motion for Change of Venue and Joinder*. (5/26/21 *Motion to Withdraw Objection*) The Department filed this *Motion* because Mother was sentenced to extended supervision by Lewis and Clark County Probation and Parole. (*Id.*) That same day the Silverbow County District Court ordered that venue and jurisdiction be transferred to Lewis and Clark County. All parties received new counsel.

Following the change of venue, the Department requested the District Court set a permanency plan hearing following the change of venue, noting that setting

this hearing was necessary to continuing the dependency case. (D.C. Doc. 2.) The District Court set the permanency hearing for August 4, 2021. (D.C. Doc. 5.)

On July 20, 2021, the Department filed a *Motion for Approval of Permanency Plan*. (D.C. Doc. 9.) The Department asserted that their proposed permanency plan was reunification with Mother. (*Id.*) At the August 4, 2021 hearing the Guardians noted their concerns with the proposed plan of reunification. They stated that due to the previous removals and the trauma the children experienced they did not belief reunification was in the children's best interests and if they were to be reunified with Mother it would cause the children harm. (8/4/21 Hearing Transcr. at 8:12-16.)

Mother's counsel argued that reunification was appropriate especially considering her progress: "...[Mother] has completed the tasks and treatment plan. She has continued to work with the Department. She's completing a YWCA aftercare program. The Department is looking at starting a trial home visit." (8/4/21 Hearing Transcr. at 9:8-12) The District Court approved the permanency plan of reunification and stated that due to the prior removals a concurrent plan of either adoption or guardianship would be in the children's best interest. (8/4/21 Hearing Transcr. at 12:8-10) The court set a review hearing for September 29, 2021. (D.C. Doc 18)

On August 24, 2021, Guardians filed an *Emergency Ex Parte Motion for a Contested Placement Hearing* on the following grounds:

“The Department yesterday [August 19, 2021] revealed an abrupt plan to initiate a transition of the children to a trial home visit with Mother in the next week despite concerns raised by numerous professionals, as well as the children's own behaviors which indicate that the children are unable to tolerate even the current level of contact with Mother. In recent weeks the children's behaviors have continued to deteriorate substantially following contact with Mother. [Guardians] are concerned that a move towards a trial home visit at this time, and in the manner proposed by the Department would result in significant trauma to the children.”

(D.C. Doc. 15.) The Guardians also moved the Court to take judicial notice of seven other proceedings. (D.C. Doc. 16) These proceedings included Mother and Father’s prior criminal cases, the prior dependency case, and the Grandparent Visitation matter between Guardians, Mother, Father, and the children. (*Id.*) The District Court set a placement hearing for September 29, 2021. (D.C. Doc. 17)

On September 22, 2021, the Department moved the court to Extend TLC for an additional six months. (D.C. Doc 32.) In the accompanying affidavit, CPS Annie Meyers stated Mother needed additional time to demonstrate long term sobriety while parenting and to complete a parenting class. (*Id.*)

At the subsequent hearing, Mother stipulated to an extension of TLC but sought to adjust visitation. (9/29/21 Hearing Transcr. at 10:1-2) Mother requested a change to visitation as she was traveling to Kalispell once a week for supervised visits and she believed that visitation should be unsupervised. The District Court

stated it was not prepared to address visitation and placement issues without a formal request in writing. (9/29/21 Transcr. at 11:17-22)

The placement hearing was held on November 23, 2021. Guardians' counsel called Gina Rasmussen, a manager at Community Solutions, who testified about Mother's drug test results from March 2021 to the date of the hearing. Ms. Rasmussen testified that Mother had eight violations or noncompliance for failure to provide a sample or no-shows, two violations for abnormal or diluted samples, and five positive tests for substances including Buprenorphine (Suboxone) and opiates. She also testified that she was not given any prescription or notification from [Mother] that would explain the positive results. (11/23/21 Trans. 264:24-25, 265:1-13)

The next witness, Angela Harris, a licensed social worker, testified about her evaluation of the youth, R.M. She conducted a Neuro-Sequential Model of Therapeutic Assessment to assesses how trauma impacts brain development on R.M. Ms. Harris found that R.M. would benefit from occupational therapy and sensory activities to help regulate his stress responses. She emphasized the importance of caregiver education and consistency for R.M., stating that the child's frequent transitions and instability were detrimental to his development. (11/23/21 Hearing Transcr. at 42:8-13.)

Emily Gonsalves, the owner, director, and teacher at Create Hands Child Care testified. Both children had attended her daycare since June 2020. Ms. Gonsalves stated that the children's behavior worsened after visits with Mother, with more meltdowns and difficulties adjusting to the childcare routine. When asked by Mother if the children were visibly upset after having to leave Mother after visits Ms. Gonsalves responded by stating: "They cry for Nonna and for Poppy. They cry for consistency. They cry for stability. They do not cry for Mom." (11/23/21 Hearing Transcr. at 109:14-16.)

Berni McDonald, the director of Bear Logic Family Center, testified regarding the visits between children and Mother and about her formal recommendation to the Department for Mother to be drug tested after traveling for visits. When asked why she made that recommendation, she responded "Because-- for twofold. One it would show the people involved in her case that she's able to maintain her sobriety when traveling, and then also to be able to support her if she's struggling, for relapse prevention or anything she might need during that time." (11/23/21 Hearing Transcr. at 126:12-18.)

When asked about the children's behavior after the visits, Ms. McDonald suggested that the children's difficult behaviors result from grief and that they should be supported during this time. She also testified that if the visitation did not increase as she recommended, it could hinder the parent-child relationship and

cause additional stress and trauma to the children and Mother. (11/23/21 Hearing Transcr. at 140:2-17, 141:2-12.)

The Department's witness, Ellen Vandekop, a child and family therapist at the YWCA, described how Mother could be reunified with her children while living at the YWCA. When asked if she has any concerns regarding Mother's ability to parent when the children visit, Ms. Vandekop stated she had no concerns.

"... [Mother] just showed so much attunement with her children...the biggest piece for me was seeing the proximity where the children were with her. They felt safe with [Mother]. They wanted to be around her. They were climbing on the couch and just sitting next to her. And, like, she gets up to get a tissue and the kids would follow."

(11/23/21 Hearing Transcr. at 221:2-18.)

CPS Myers, caseworker since June of 2021 explained the Department's procedures and Mother's progress with her Treatment Plan. Other than the Department needing to actively monitor Mother's progress while parenting and completing a parenting class, Ms. Meyers testified that Mother was on track to successfully complete her Treatment Plan. Following witness testimony, the District Court states that while it would usually rule from the bench, it needs to be more time to rule on the Guardians' requests. (11/23/21 Hearing Transcr. at 275:11-1.)

On November 24, 2021, Mother was assigned new counsel. (DC Doc 58.)

On January 10, 2022, the District Court issued its *Findings of Fact, Conclusions of*

Law and Order on Placement Motion. (D.C. Doc. 73) The court Ordered: the children shall remain with Guardians for the time being, that a trial home visit shall not begin unless Mother is in full compliance with her drug testing for a period of ninety days from the filing of this Order, (3) the Department shall resume testing for Buprenorphine (Suboxone) unless Mother supplies a prescription. (*Id.*) Additionally, if beginning one week after the date of the Order, and if ongoing testing indicates Mother has maintained sobriety, the Department may proceed with a gradual transition plan. (*Id.*) The court ordered a gradual transition plan of at least four weeks of monitored supervision in Kalispell with Mother taking the children off site with safety checks. (*Id.*) If Mother's monitored supervision is successful, overnight visits in Kalispell may begin. (*Id.*) The Department should continue to monitor the safety of R.M. and A.M. and implement service for their trauma and behavioral difficulty as needed, and no trial home visit should begin if Mother is using drugs. If a trial home visit is implemented, Mother shall remain at the YWCA, comply with her treatment plan, and UA at least twice weekly. (*Id.*)

On March 24, 2022, the Department filed a Motion to Extend TLC and Approve a Permanency Plan. (D.C. Doc. 74.) The next day on March 25, 2022, Guardians filed a Notice of Concern with the court, which included various complaints. (D.C. Doc. 81.) Guardians' first complaint was with Department's plan to proceed with a trial home visit beginning April 10, 2022. (*Id.*) Guardians

asserted that Mother has not complied with drug testing as was instructed in the January 10 Order, as she has missed a UA tests. (*Id.*) Guardians also asserted that during visits Mother was not adhering to basic water safety with the children, Mother allowed children to have unauthorized contact with Father, Mother made concerning statements to the children, and the children have shown signs of distress after visits with her. (*Id.*)

On March 30, 2022, the Department filed a *Notice to the Court* recognizing that Mother did not properly comply with the court Order and did miss multiple UAs. However, the Department still felt Mother was a safe placement for the children. (D.C. Doc. 86.) The Department asked that the court make a recommendation or Order regarding the permanency of the children. (*Id.*) Additionally, the Department objected to prolonging the start of a transition to trial home visits with Mother as recommended by Guardians, claiming it is not in the children's best interests. (*Id.*)

A Review and Permanency Plan hearing was held on March 30, 2022, where Mother stipulated to a six-month extension of TLC, and Guardians asserted that adoption or guardianship should be pursued due to Mother's noncompliance with the January 10 *Order*. (3/30/22 Trans. 7:8-11.) Both the Department and Mother disagreed with Guardians; "The department has told me on numerous occasions that they feel that -- they have asked [Mother] to do more than several other

parents in her position and they feel reunification is in her best interest and the youths' best interest." (3/30/22 Hearing Transcr. at 6:19-23.) The Court extended TLC with a permanency plan of reunification but stated "that if this [Permanency Plan] falls apart, [Guardians] are a wonderful option for these kids." (3/30/22 Trans. 13:12-19) A Status hearing was set for June 29, 2022, and a Review and Permanency Plan hearing is set for September 28, 2022. (*Id.*)

At the June 29, 2022, Status hearing the Department testified that the children went home with Mother on May 1, 2022, and remained on a trial home visit with her at the YWCA. Mother was still completing UA drug tests, and the Department requested that it be allowed to scale back their check-ins with Mother. When asked about any concerns by providers regarding Mother, CPSS Westerhold stated: "...I don't get any poor reports, I don't get any concerns from the Y, nothing. No concerns that I've received from [Guardians]... everything seems to be going as well as it could in this situation" (6/29/22 Hearing Transcr. at 6:24-25,7:1-3.) The Department stated that its goal was "...to have [Mother] transition into housing and be able to monitor her and the kids in their own housing away from the YWCA for a period of time before we dismiss the case." (6/29/22 Hearing Transcr. at 11:15-22.)

Guardians voiced concerns regarding an alcohol positive UA and some additional missed and diluted tests.

“...in the six weeks the children have been in the trial home visit appears that the frequency of UA testing has already reduced, and the mother had a missed UA on May 19th and a missed sample just two days ago on June 27th. Both missed test and dilute samples are violations of this Court's drug testing included in the January 10th *Order*.”

(6/29/22 Hearing Transcr. at 13:15-22.) Mother argued that the positive alcohol test was a false positive. (6/29/22 Hearing Transcr. at 15:16-22.)

On July 12, 2022, Mother was assigned yet another new attorney, Ms. Rosseman. (D.C. Doc. 91.) On August 3, 2022, the Department filed its *Notice of Filing a Status Report*. The report stated that the Department,

“...would like to continue to monitor the Children as they continue on the trial home visit with [Mother] and work towards a healthy and successful transition out of the Department's care and custody. In order to do this, the Department would like to see [Mother] begin to transition out of her residence at the YWCA and would like this court's permission to reduce her UAs through Community solutions to a lesser amount per month, as recommended by her LAC, but still continue to randomly UA [Mother]. Her UAs through the YWCA would continue per their internal policy.”

(D.C. Doc. 92.)

On September 26, 2022, the Department filed a *Motion to Extend TLC and Approve a Permanency Plan*. (D.C. Doc. 97.) At the September 28, 2022 hearing, the Department, requested a three-month extension of TLC to continue monitoring Mother, to which there was no objection. Mother provided an update that she was working on securing housing in Helena and was at the top of a few waitlists. Based on the stipulation of the parties, the District Court granted a three-month extension of TLC. (9/28/22 Hearing Transcr. at 16:7-12.) Before the end of the hearing the

Department requested it be allowed to “...pull back on the number of UAs that [Mother] is doing and those things we normally do at this point...” (9/28/22 Hearing Transcr. at 17:1-4.) The Department wanted to see Mother parent with less supervision but did not want to violate the Court’s January 10, 2022 Order. The Court responded that the Department could “...back off some for sure and see how she does.” (9/28/22 Hearing Transcr. at 7-9.)

On November 22, 2022, the Department filed a Motion to Dismiss, asserting that the children were no longer YINC. (D.C. Doc 101.) On November 28, 2022, Guardians filed an objection to the dismissal, arguing that significant reasons existed for further Department intervention and monitoring, and the Department's Motion inaccurately represented the facts of the case. (D.C. Doc 102.) Specifically, they argued that the Motion misrepresented Mother’s housing situation when it stated, “Mother moved into her own housing in October.” (D.C. Doc. 101.) Guardians claimed Mother was kicked out of the YWCA for breaking the rules and resided in a hotel with the children for a few weeks. (D.C. Doc. 102.) Mother did ultimately secure housing but had resided in her apartment for less than 30 days at the time of the Department’s Motion to Dismiss. (*Id.*) Guardians also raised issue with the Department’s lack of clarity regarding whether it had conducted any home visits in Mother’s new apartment. (*Id.*) Guardians alleged they voiced concerns to the Department regarding Mother associating with a convicted felon with an active

warrant but were not satisfied with the Department's investigation of the matter.

(*Id.*) Guardians maintained that this individual presented a risk to the children, dismissal was premature, and an additional monitoring period was required. (*Id.*)

The Department filed a response to the Guardians' objected and addressed the concerns about Mother's housing situation:

"...the Department does not dispute the fact that the mother was asked to leave the YWCA for not following the rules. However, mother was not kicked out of the YWCA. She had completed the WINGs program there in addition to her treatment plan, and she had met Conditions of Return. She was already in the process of moving out at that time as she was at the top of the housing list. Most importantly, a trial home visit had already begun at this time, and there were no reports of any safety concerns for the children from any service providers or community members even when leaving the YWCA and residing in a hotel for some weeks."

(*Id.*) The Department stated it had done home visits at Mother's new apartment and had no indication that anyone other than Mother and children was living in the

space. (*Id.*) Concerning N.P., the Department asserts that Mother had

"...demonstrated her ability to keep her children safe, and this extends to

[Mother's] prerogative to keep her children protected from unsafe individuals."

(*Id.*)

At the January 4, 2023 Review Hearing the Court was informed that the children had been removed from Mother's care after she relapsed over the weekend. (1/4/23 Hearing Transcr. at 19:2-7.) The Department stated it planned to move forward with a guardianship given the history of the case, the time the

children had spent out of the home during the prior and current dependency proceedings. (*Id.*) The Department stated that statutorily it did not believe they had enough to terminate parental Mother's parental rights, nor did it believe that termination of her parental rights was in the children's best interest. (1/4/23 Hearing Transcr. at 28:5-10.) The Court ordered that until further Order the status quo will continue. (1/4/23 Hearing Transcr. at 24:22-23.)

On January 11, 2023, the Department filed a Motion to Extend TLC and for Approval of Permanency Plan. (D.C. Doc 110.) On January 13, 2023, the District Court ordered an extension of TLC until the permanency hearing set for February 1, 2023. (D.C. Doc. 111.) On January 30, 2023, the Department filed a Petition for Appointment of Guardians and a Request for Hearing. (D.C. Doc. 114.) It also filed a Motion to Set a Guardianship Hearing that same day. (D.C. Doc. 115.) The District Court ordered a hearing be held on February 1, 2023. (D.C. Doc. 116.)

At the February 1, 2023, hearing Mother stipulated to TLC for three months but objected to the guardianship. (D.C. Doc. 121.) CPSS Westerhold testified that the children have been out of the home for well over the 15-month requirement, and therefore, guardianship is in the children's best interest. (2/1/23 Hearing Transcr. at 41:14-16.) CPSS Westerhold continued to state that while Mother must "...work on her sobriety again, get herself to a place where she can safely parent, restabilize in the community, and get back to where she was doing well..."

terminating parental rights was not in the children's best interests given their connection with Mother. (2/1/23 Hearing Transcr. at 42:1-5.) On cross-examination, CPSS Westerhold addressed Mother request to have Maternal Grandmother serve as guardian for the children "...because the children have been placed with [Guardians] through the entirety of both cases, moving them again is not going to be in their best interests." (2/1/23 Hearing Transcr. at 17-21.)

Mother argued that it is in the best interests of the children to remain with her despite her relapse, and the Department had plenty of tools available to "...bring a parent who has relapsed back onto the straight and narrow and get them refocused..." (2/1/23 Hearing Transcr. at 51:21-24.) CPSS Westerhold acknowledged that Mother has put in the work in the past but due to the children's age and their inability to protect themselves, the risk of harm was too high to place them back with Mother. The Court approved the Department's proposed permanency plan of reunification with a concurrent plan of guardianship and set a contested hearing on the guardianship for March 16, 2023. (D.C. Doc 121.)

At the hearing, CPSS Westerhold testified that while Mother did complete her treatment plan tasks, the Department could not call them completed successfully—specifically her sobriety task. While Mother had worked on her sobriety, "[Mother] still struggles with maintaining that sobriety over an extended period of time, particularly when there's nobody involved, for example in this case.

When the Department was just about to not be involved, that was when [Mother's] slip-up occurred." (3/16/23 Hearing Transcr. at 76:4-23.)

CPSS Westerhold continued, stating due to the multiple removals and amount of time the children had been out of the home, the Department believed that Mother was unlikely to change within a reasonable time. CPSS Westerhold was then asked about the efforts by the Department to reunify the children with Mother. Westerhold noted that when Mother was living at the YWCA she received wrap-around services through them, once her case was transferred to Helena a caseworker worked with Mother closely and attended multiple family engagement meetings with her, the Department provided gas and hotel vouchers, and it coordinated UA testing in Kalispell and Helena. Additionally, when Mother was kicked out from the YWCA, the Department provided funding so she could live in a motel for a few weeks, it provided a hotel when the trial home visit started, it connected her with therapists, provided transportation, and facilitated Zoom and phone calls with extended family members. CPSS Westerhold stated, "I don't know what else could be done on our end. I think at this point it's something that the parents have to do...there has to be extended sobriety for a longer period of time then these children can be out of the home." (3/16/23 Hearing Transcr. at 81:23-25, 82:1-3) While the Department has concerns with parents, CPSS Westerhold emphasizes Mother and Father should remain in the children's lives: "I strongly

believe mom and dad need to remain a vital part of these children's lives, a consistent and strong part of these children's lives. But I think they need to be clean, sober, safe, and stable before they can come back." (3/16/23 Hearing Transcr. at 90:14-22.)

On cross-examination by Guardians, CPSS Westerhold stated that when she first learned of Mother's relapse, she was concerned that Mother did not reach out to any of her supports but rather her probation officer. It was not until the Department reached out to Mother that she came in to speak with CPSS Westerhold about her relapse. According to the report, Mother traveled to Bozeman over New Year's Eve weekend with the convicted felon the Guardians had worried about before back in October of 2022. Mother allegedly then overdosed on fentanyl. Law enforcement was called to the scene and Mother had to be administered at least three doses of Narcan. CPSS Westerhold testified that another worrying factor, aside from Mother relapsing and not reaching out to any of her supports, was that she drove the kids with methamphetamine, amphetamine, cocaine, fentanyl, and alcohol in her system. "[Mother] did a UA for her probation officer, which still came up positive for all of the substances, which means unless the children got home in some other way, which they did not because I know [Mother] picked the children up, she did transport them home with numerous drugs in her system." (3/16/23 Hearing Transcr. at 100:8-14.)

Mother called Elizabeth Carlson-Thompson, a family advocate at Head Start, to testify on her behalf. After explaining her position and establishing that she began interacting with Mother and the children in August 2022, she testified that Mother always dropped the children off and picked them up at appropriate times, and the children appeared well taken care of. She described Mother as "...very patient, she is very gentle. She always had a quiet tone of voice, a very nurturing approach." (3/16/23 Hearing Transcr. at 196:22-24.)

Guardians call Berni McDonald on their behalf. Ms. McDonald testified previously in late 2021 when she worked at Bear Logic but was now employed at the Yellowstone Boys and Girls Ranch in Kalispell. Ms. McDonald facilitated supervised visitation with Mother in 2023 and spoke with Mother shortly after her relapse. On cross-examination, Ms. McDonald stated she had seen a regression in the children's behavior after their removal in January. (3/16/23 Hearing Transcr. at 220-221.)

Guardians maintained that they had no intention of cutting the children off from Mother but did refuse to provide a timeline for visitation. They stated the issues of visitation was contingent on various factors, including Mother's sobriety but they were willing to facilitate this contact if it was in the children's best interests. (3/16/23 Hearing Transcr. at 268-270.) Following this, the District Court stated it needed to take the matter under advisement and asked the parties to submit

Findings by March 30, 2023. All parties filed their findings on time aside from Mother's counsel, who filed a petition for leave to file untimely findings with Mother's proposed findings on April 3, 2023. (D.C. Docs. 129, 130.)

On April 10, 2023, the court filed a Decree of Guardianship and Order of Dismissal (D.C. Doc. 131.) Throughout the duration of the case the Department referred Mother to treatment and therapy, conducted Family Engagement Meetings, met with Mother and her treatment providers, provided gas vouchers and motels for Mother's visits with the children in the Kalispell area, provided supervised visits in Kalispell, helped Mother find and fund a motel to live in when she was asked to leave the YWCA, and made reasonable efforts to reunite the children with Mother and Father. (*Id.*) The court determined that, despite the Department's efforts, Mother was unable to successfully complete her treatment plan and was unable to safely parent R.M. and A.M. (*Id.*) As a result, it was deemed that guardianship would be in the children's best interest. Guardian's B.R. and T.R. have provided a safe, secure, and stable home for the children for more than half of their lives. Given this, along with their demonstrated commitment to maintaining the children's contact with their mother, the court concluded that remaining in the Guardians' care was also in the children's best interest. A notice of appeal was duly filed on May 10, 2023. (D.C. Doc 136.)

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ARGUMENTS

I. COUNSEL FOR MOTHER SHOULD BE PERMITTED TO WITHDRAW FROM THIS CAUSE IN ACCORDANCE WITH *ANDERS V. CALIFORNIA* AND MONTANA CODE ANNOTATED § 46–8–103.

An appellant is guaranteed the right to fair representation by the Sixth Amendment of the United States Constitution. *Anders*, 386 U.S. 738, 744 (1967). This right was recently extended to indigent parents at risk of losing parental rights in a private termination proceeding. *In the Matter of the Adoption of A.W.S.*, 2014 MT 322, ¶26, 377 Mont. 234, 228 P.3d 414. When appellant’s counsel “finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.” *Anders*, 386 U.S. at 744. To ensure protection of this right, counsel seeking to withdraw must accompany her Motion to withdraw with a brief that references anything in the record that might arguably support an appeal. *Id.* A copy of the brief should be provided to the appellant and the appellant must be afforded the time to respond to counsel's Motion and brief. *Id.*

The State of Montana has codified the requirements of *Anders*. Mont. Code Ann. § 46–8–103(2) (2021). If counsel concludes that an appeal would be frivolous or wholly without merit after reviewing the entire record and researching the applicable law, counsel must file a motion with the Montana Supreme Court requesting permission to withdraw. *Id.* A memorandum discussing any issues that

arguably support an appeal must accompany counsel's Motion. *Id.* The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, along with appropriate citations to the record and the law bearing on each issue. *Id.* An *Anders* brief is intended to assist the appellate court in determining that counsel has conducted the required detailed review of the case and that the appeal is so frivolous that counsel's Motion to withdraw should be granted. *Penson v. Ohio*, 488 U.S. 75, 81–82 (1988). The requirements of an *Anders* brief are not meant to force counsel to argue against her client. *Anders*, 386 U.S. at 745.

After conducting diligent research of the record and applicable law in this matter, counsel has not found any non-frivolous issues appropriate for appeal. Without arguing against her client, counsel for the Appellant is compelled by her ethical duty of candor before this Court to provide the Court with this brief in accordance with the requirements of *Anders*.

II. THE RECORD MAY ARGUABLY SUPPORT MOTHER'S ASSERTION THAT SHE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY COUNSEL'S FAILURE TO ADVOCATE EFFECTIVELY.

A parent's right to due process is violated when they do not receive effective assistance of counsel in termination proceedings. In re E.Y.R., 2019 MT 189, ¶ 22, 396 Mont. 515, 446 P.3d 1117 (citing In re A.S., 2004 MT 62, ¶ 20, 320 Mont. 268, 87 P.3 408.) When determining whether a parent received ineffective

assistance, this Court reviews the attorney's training experience and advocacy. In re E.Y.R., ¶ 22. Further, counsel's failings must have prejudiced the parent. In re E.Y.R., ¶ 22 (citing In re B.M., 2010 MT 114, ¶ 22, 356 Mont. 327, 233 P.3d 338.) To evaluate effectiveness, this Court assesses the "non-exclusive factors of training and experience and advocacy." In re E.Y.R., ¶ 22 (citing In re A.S., ¶ 26.) For counsel to effectively advocate for their client, they must "investigate the case, research and understand the law, meet with their client, and assiduously advocate for their client." In re E.Y.R., ¶ 22 (citing In re A.S., ¶ 28.) Counsel must "understand [the law] and assiduously advocate" for their client. In re E.Y.R., ¶ 35.

Mother may argue that her constitutional right to due process was violated as she did not receive effective assistance of counsel, resulting in prejudice that contributed to the termination of her parental rights. Throughout the duration of this case, Mother was represented by four different attorneys, which raises concerns about the consistency and quality of legal representation she received. Mother's last attorney, openly admitted on the record that she was a late addition to the case and had spent the last few months merely "coasting" under the assumption that the case was moving towards dismissal. This statement, made during the termination hearing, suggests a lack of thorough preparation and dedication to the case on the part of the attorney. (2/1/23 Hearing Transcr. at 65:17-24.) Mother may argue that her attorney did not adequately investigate the case, research and

understand the law, or meet with her to discuss the case, all of which are essential duties of an attorney to effectively advocate for their client as per In re E.Y.R., ¶ 22.

Furthermore, the attorney's apparent lack of understanding of the case's trajectory and her casual approach towards it can be seen as a failure to "assiduously advocate" for the mother, another requirement for effective counsel as stated in In re E.Y.R., ¶ 35. Mother may argue her attorney did not provide competent assistance of counsel, which may have significantly prejudiced Mother's case, leading to the termination of her parental rights.

CONCLUSION

A thorough examination of the record and research of the applicable law seems to compel a conclusion that Appellant's appeal has no merit. This Court should grant the undersigned's motion to withdraw as counsel on direct appeal.

Respectfully submitted this 8th day of September 2023

By: /s/ Shannon Hathaway

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Anders Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

/s/ Shannon Hathaway

SHANNON HATHAWAY

APPENDIX

Decree of Guardianship	A
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CERTIFICATE OF SERVICE

I, Shannon Colleen Hathaway, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 09-08-2023:

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