
IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA 23-0303

IN THE MATTER OF:

V.R.F. AND M.M.-F,

Youths In Need Of Care.

ANDERS BRIEF

On Appeal from Montana's Eighth Judicial District Court,
Cascade County, The Honorable David Grubich Presiding

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Issue	1
Statement of the Case.....	1
Procedural History	1
Facts of the Case.....	2
Affidavit of CPS Brooklynn Wilson – December 12, 2022.	3
Affidavit of Nicole White – January 30, 2023.....	8
Affidavit of Megan Brunelle – February 3, 2023	9
Affidavit of Ellie Crabtree – February 3, 2023.....	10
Affidavit of Tia Kuntz – February 6, 2023	12
Disposition Hearing – February 8, 2023.....	12
Termination Hearing – April 14, 2023.	18
Findings of the District Court.	23
Standards of Review	31
Argument.....	32
1. Counsel for J.F. should be permitted to withdraw from this cause in accordance with <i>Anders v. California</i> and Mont. Code Ann. §46-8-103.	32
2. The record may arguably support J.F.’s assertion the district court erred when it terminated her parental rights.	34
Conclusion	36
Certificate of Compliance	37

TABLE OF AUTHORITIES

Montana State Constitution

Article II, Section 17	32
------------------------------	----

Montana Code Annotated

Mont. Code Ann. §41-3-423	8, 30, 35
Mont. Code Ann. §41-3-438	12
Mont. Code Ann. §41-3-609	8, 30, 34, 35
Mont. Code Ann. §45-2-101	31
Mont. Code Ann. §46-8-103	1, 32, 33

Montana Cases

<i>In re A.S.</i> , 2016 MT 156, 384 Mont. 41	31
<i>In re A.T. and J.T.</i> , 2003 MT 154, 316 Mont. 255	34
<i>In re B.J.J.</i> , 2019 MT 129, 396 Mont. 108	31
<i>In re D.B. and D.B.</i> , 2007 MT 246, 339 Mont. 240	34
<i>In re I.M.</i> , 2018 MT 61, 391 Mont. 42	32
<i>In re K.A.</i> , 2016 MT 27, 382 Mont. 165	31
<i>In re K.L.</i> , 2014 MT 28, 373 Mont. 421	31

United States Constitution

Fourteenth Amendment	32
----------------------------	----

Federal Cases

<i>Anders v. California</i> , 386 U.S. 738 (1967)	1, 32, 33, 34
<i>Person v. Ohio</i> , 488 U.S. 75 (1988)	33

Federal Statute

U.S.C. §1903	2, 23, 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

Mother and Appellant J.F. appeals the Order, entered May 4, 2023 by the Montana's Eighth Judicial District Court, Cascade County, terminating her parental rights to V.R.F. (2 years old) and M.M.-F. (11 months old).¹ (Appendix A) The rights of M.M.-F.'s birth father were also terminated.² (*Id.*)

Procedural History

The case originated December 12, 2022, when the Cascade County Attorney filed a Petition for Emergency Protective Services, Determination that Reasonable Efforts are not Required, Termination of Parental Rights and Permanent Legal Custody on behalf of the Department of Health and Human Services (the Department) for V.R.F. and M.M.-F. (DC001). The Department advised the district court diligent efforts were made to determine whether the children were Native American and there was no reason to know either child was an "Indian child" as

¹ This appeal encompasses two district court cases (DN-22-171, DN-22-172). The hearings and pleadings in the cases are concurrent and coincident as regards Mother and Appellant J.F. For simplicity, all references to the district court record are made to DN-22-171.

² V.R.F.'s birth father was determined to be a non-offending parent and was given a treatment plan. That case was still pending at the time of this appeal.

defined by ICWA.³ (*Id.*) December 13, 2022 the district court granted EPS and set a show cause hearing. (DC028)

January 18, 2023 the district court held the show cause and adjudication hearing. (DC068) J.F. stipulated to adjudication but contested termination of parental rights. (*Id.*) The court adjudicated both children as YINC and awarded the Department TLC. (*Id.*) January 25, 2023 the district court entered its adjudication order. (DC070)

February 8, 2023 the district court held disposition hearing. (DC094) The court determined no treatment plan would be offered to J.F. (*Id.*) The court entered its written order February 16, 2023. (DC096)

April 14, 2023 the district court held a hearing on the Department's Petition for a Determination that Preservation or Reunification Efforts Need Not Be Provided, Termination of Parental Rights and Permanent Legal Custody for V.R.F. (8 months old) and M.M.-F. (23 months old) (DC106) May 4, 2023 the court entered its order terminating J.F.'s parental rights to V.R.F. and M.M.-F. (DC109) Entry of Judgment was filed May 17, 2023 and J.F. filed her notice of Appeal June 2, 2023. (DC113, DC116)

Facts of the Case

³ The district court subsequently determined neither child was an "Indian child" and ICWA did not apply. (DC070)

Affidavit of CPS Brooklynn Wilson – December 12, 2022. CPS Wilson swore an affidavit in support of the Department’s Petition. (DC002, *Aff.* CPS Wilson) CPS Wilson alleges sexual abuse by V.R.F.’s stepfather and M.M.-F.’s birth father C.M. and severe neglect by J.F. for “for exposing or allowing the children to be exposed to unreasonable risk of physical or psychological harm. (*Id.*)

CPS Wilson states, C.M. “admitted to performing sexual acts on V.R.F., admitting to having sexual fantasies about V.R.F., stating he was addicted to porn, admitted to getting erections when VStepfathertting on his lap, and has masturbated towards V.R.F. Birth Mother admitted to knowing Birth Father/Stepfather watched child pornography, and that he became sexually aroused when holding V.R.F. and continued to allow Birth Father/Step Father unsupervised access to her daughter. Further, Birth Mother and Birth Father were not meeting M.M.-F.’s nutritional needs despite having in-home nursing and coaching. As a result, M.M.-F. has not gained weight and he is not meeting developmental milestones.” (DC002)

December 6, 2022 the Department received a report that M.M.-F. “is very underdeveloped for his age, it was reported that he could barely hold himself up in a sitting position and is reported to be ‘very floppy.’ M.M.-F. is said to be underweight, only weighing 13 pounds. M.M.-F. was possibly going to be

admitted for Failure to Thrive; however, the parents did not bring him to his scheduled follow-up medical appointment.” (DC002) The parents were reported to have been unwilling to take the baby for medical appointments or providing “proper nutrition.” (*Id.*) J.F. was reported to be breastfeeding M.M.-F., though she did not have adequate milk, and to be feeding the infant “pureed Top Ramen.” (*Id.*)

December 6, 2022 the Department received an additional report that M.M.-F. was observed and “looked very malnourished and could ‘visibly see his ribs.’” (DC002) M.M.-F. was reported to have weighed 14 lbs. 4 oz. on October 20, 2022 and 13 lbs. 12.5 oz. on December 1, 2022. (*Id.*) Despite being coached on supplementing breastfeeding with formula, J.F. was not giving the baby the formula provided to her. (*Id.*) The report expressed concerns M.M.-F was not able to hold his head up on his own or sit independently. M.M.-F’s muscle tone was typical for a 5–6-month-old child. “Birth Mother was instructed to get referred for physical therapy and complete an eye exam for M.M.-F, however she did not follow up on this.... M.M.-F [needs] to be admitted for Failure to Thrive. M.M.-F only gained 2 oz since his last weight check, and it is believed the parents are not following through with the appropriate medical care due to a lack of motivation.” M.M.-F “looks very malnourished” and “with the parents missing these important appointments for M.M.-F, they are also missing out on the education aspect.” (*Id.*)

CPS Wilson advises of a report that V.R.F. was also weighed and found to

be under weight for her age. (DC002) The reporter observed “a posterior fissure on V.R.F.’s rectum” and the toddler’s “rectum appeared to be dilated and does not appear to have a tone.... The reporter is concerned these injuries may be caused by sexual abuse.” (*Id.*)

December 7, 2022 CPS Wilson accompanied law enforcement to the Benefis Pediatrics Floor. (DC002) Pediatric nurse, Jordan A. Lejeune, told her V.R.F.’s rectum was ‘significantly dilated and is larger than any adult’s rectum that he has seen in his years at medical school.’ Dr. Lejeune stated, “something about this does not feel right and it had to be due to some kind of trauma.” (*Id.*) RN Joana Ginalias allegedly expressed concern that J.F. was giving “3 or 4 different stories on what happened.” (*Id.*) Both Dr. Lejeune and RN Ginalias were concerned V.R.F. had been sexually abused. (*Id.*)

CPS Wilson says she and law enforcement interviewed J.F., who said she “noticed how big it looked, but thought it was a diaper rash.” (DC002) When asked if she had any concerns about C.M., J.F. is reported to have said, “I do sometimes.” (*Id.*) Asked to elaborate, V.R.F. is reported to have said she had observed C.M. watching child pornography, “niece and uncle porn, mother and son, and son and dad porn.... It’s usually normal porn, but I have seen child porn.” (*Id.*) J.F. is alleged to have said she recently left V.R.F. alone with C.M. for five hours, and that C.M. would request she leave V.R.F. with him. (*Id.*) V.R.F. said, despite

seeing him watch child pornography, “she still felt it was appropriate to leave V.R.F. with him ‘because she had errands to run’ and said, ‘when its cold out, I don’t want to take them (the children) with me.’” (*Id.*)

CPS Wilson observed the examination of V.R.F. by RN Ginalias and certified Sexual Assault Nurse Examiner (SANE) Tina Kuntz. (DC002) CPS Wilson reports the child appeared to be in “severe discomfort,” and CPS Wilson “observed V.R.F.’s rectum to be completely torn open, a severe rash and lesions throughout her pubic area, as well as bilateral bruising on her groin area.” (*Id.*) SANE nurse Kuntz is reported have said, “the exam, ‘was the worst she has seen’ and [she] did not feel this incident only happened one time due to the extreme tearing and lesions throughout.” (*Id.*)

Law enforcement subsequently told CPS Wilson J.F. “expressed concerns that C.M. ‘was fucking her dog’ and watching animal porn. Birth Mother was asked what she thinks happened to V.R.F., and Birth Mother stated, ‘she believed C.M. stuck his penis in V.R.F. and that he has a big penis.’” (*Id.*)

The determination was made that “there was immediate danger identified due to the severity of V.R.F. ‘s injuries and Birth Mother’s admittance that she knew C.M. was a danger to her children due to her knowing that C.M. watches child pornography, that he was showing grooming behaviors towards V.R.F., that she had observed him ‘getting hard while holding V.R.F.’ and still she chose to

routinely leave the children home alone with him.” (*Id.*)

CPS Wilson spoke with City County Health employee Ellie Crabtree, who began working with the family in August 2022. (DC002) Ms. Crabtree visited to the family home six times and stated, “she has had concerns for the family since the first day she started working with them.” (*Id.*) Ms. Crabtree is reported to have said she had only recently seen M.M.-F. “in only a diaper and he ‘looked super thin.’” (*Id.*) Ms. Crabtree stated there were concerns of possible of Failure to Thrive, and the doctor’s office recommended the baby be brought in and enrolled in physical therapy “but the parents did not follow up.” (*Id.*) Ms. Crabtree and Parents as Teachers Educator Megan Brunell both expressed concerns that the home was “very dirty” and that J.F.’s brother M.F. – a registered sex offender – appeared to be living in the home.⁴ (*Id.*)

Law enforcement informed CFS that C.M. confessed to having “sexual fantasies about V.R.F., masturbating to the baby and “having sexual intercourse anally with V.R.F.” (DC002)

CPS Wilson concluded that no reasonable efforts at reunification should be required, due to the serious bodily injury V.R.F. suffered as a result of C.M.’s sexual assault and J.F.’s failure to protect the baby despite being aware C.M.

⁴ It was subsequently disclosed that J.F. had been sexually molested by her brother when she was a child. (*Id.*)

watched child pornography, “was always horny,” and became aroused when holding V.R.F. on his lap.” (DC002) CPS Wilson further alleges that V.R.F. further demonstrated a lack of protective custody by allowing her brother M.F. to live in the home and have access to the children “despite knowing M.F. to be a registered sex offender and having the past history of him sexually molesting Birth Mother when she was a child.” (*Id.*) With regard to M.M.-F., CPS Wilson stated the parents “are not adequately meeting the need of M.M.-F., resulting in M.M.-F. losing weight and not meeting developmental milestones.” (*Id.*)

CPS Wilson alleged termination of the parental rights of J.F. and C.M. was appropriate in that the parents since pursuant to Mont. Code Ann. §41-3-609(d) the parents had subjected V.R.F. and M.M.-F. to circumstances listed in Mont. Code Ann. §41-3-423, to wit:

- (i) subjected child to aggravated circumstances (abandonment, torture, chronic abuse, sexual abuse, chronic, severe neglect of a child)
 - (ii) the death or serious bodily injury of a child caused by abuse or neglect by the parent has occurred.
 - (iii) committed neglect of a child that resulted in serious bodily injury or death
- (DC002)

Affidavit of Nicole White – January 30, 2023. Pediatric Nurse Practitioner and RN White swore an affidavit regarding her examination and treatment of V.R.F. on two occasions following removal from parental care. (DC087) Ms.

White reported,

[T]he child has global developmental delays. She is speech delayed. She will require services to work on improving those skills; such as speech therapy, and possibly occupational and physical therapy. She failed her developmental screening through Benchmark.

It is my understanding that the child was poorly fed under her parents' care. This could cause life long cognitive and developmental delays due to the parents not meeting her nutritional needs. This would affect her brain development and contribute to her current developmental status.

V.R.F. sustained anal trauma due to sexual abuse that occurred under her parents' care.... The anal penetration not only caused damage to the anus or opening of the bottom, but there was injury to the muscle rings (there are two) that help you to control your stool. Therefore, damaging her ability to hold in her stool. She also had fissures, or tears, in the tissue of the anus and colon that would have bled and been painful. This injury could cause her lifelong incontinence (or stool leakage/inability to control her stool). She will potentially need to wear diapers for the rest of her life.... She has experienced significant trauma and neglect under her parents' care.

(DC087)

Affidavit of Megan Brunelle – February 3, 2023. RN and Public Health

Nurse Brunelle swore an affidavit detailing her examinations of M.M.-F. on

December 1, 2022 and December 6, 2022. (DC089) Ms. Brunelle states:

[on December 1, 2020 M.M.-F.] was hypotonic (low muscle tone) and unable to sit without support and could not hold his head up without support.... At 6 months of age an infant should be able to sit independently and hold their head up. He overall looked malnourished and dehydrated....

Dr. White... ‘is concerned for M.M.-F. because his weight at his last check-up on 10/20/22 was 14 pounds 4 oz. which is less than his weight today (13 pounds 12oz).... Dr. White stated that at her visit with M.M.-F. on 10/20/22 she referred him to PT and an eye doctor which he has not been to yet. [Another] Weight check done for M.M.-F. on 12/6/2022.... J.F. stated that she has not given M.M.-F. any formula. She did say that she is offering M.M.-F. solids 3 times a day and that he likes pureed Ramen noodles. Educated again on the importance of offering foods that are high in protein to support his weight gain.... M.M.-F. did gain 2oz. in 4 days. He is still unable to sit up unsupported. He appears to be less floppy but still overall low muscle tone and signs of malnourishment. His eyes appear to be sunken in which is indicative of dehydration. His weight was 13 pounds 14.5 oz.

(DC089)

RN Brunelle also attested that J.F. asked her to “check V.R.F.’s butt.”

Upon assessment of her rectum, I noticed that it appears to be wider than normal and there appears to be what looks like a fistula or fissure around her rectum. Generally, when relaxed a rectum is almost closed. V.R.F.’s rectum was dilated to the size of a nickel while relaxed. This is not-normal, as an adult’s rectum is not even close to this size when relaxed....

I made a DFS report that evening regarding M.M.-F. and his sister, V.R.F. This is due to the lack of care M.M.-F. has had during his life, along with low weight and lack of weight gain. He is not meeting developmental milestones which is also a cause for concern, and he appears malnourished. I also was concerned about V.R.F.’s bottom and included my assessment on her in the DFS report.

(DC089)

Affidavit of Ellie Crabtree – February 3, 2023. Ms. Crabtree swore an affidavit of her observations as a Parents as Teachers home visitor for the Health Department. (DC090) On August 31, 2022 Ms. Crabtree states she had her first

home visit (*Id.*) Ms. Crabtree observed the home to be messy with “food all over the floor. There was a marijuana smoking device on the shelf by the entryway. House also very dark with no natural light.” (*Id.*) Parents kept M.M.-F. swaddled. M.M.-F. struggled to hold his head up, and it rested to the side. Parents unswaddled M.M.F. briefly.... M.M.-F. was not able to lift his head, but he did lay there for a couple minutes on his tummy. M.M.-F.’s cry was the quietest cry I have ever heard. As soon as parents picked M.M.-F. up C.M. swaddled him up again.” (*Id.*)

On September 29, 2022 Ms. Crabtree reports, “House was still messy. J.F. has not gotten M.M.-F. into the doctor since they moved to Montana. He is now behind on his two- and four-month appointments.... M.M.-F. head does tilt a little to the side.” (DC090)

November 30, 2022 Ms. Crabtree reported, “This was the first time I have seen M.M.-F. without heavy clothing on. He appeared malnourished, very skinny with sunken eyes.... In conversation it sounds like Pediatrician (Nicole White) did refer M.M.-F. to PT and eye doctor. I brought up the PT referral with J.F. and she stated that they can do stuff with him at home and don’t want to deal with insurance.... Discussed trying some formula and J.F. stated they would rather just feed solids.... Shared my concerns regarding M.M.-F.’s nutrition with WIC. WIC showed me M.M.-F.’s growth chart and his drop in weight between appointments.

(DC090)

Affidavit of Tia Kuntz – February 6, 2023. Sexual Assault Nurse

Examiner Kuntz swore an affidavit regarding a sexual assault examination she performed on V.R.F. (DC093) “Upon inspection, there was lesions to the left labia and right labia. A severe rash was noted to the entire buttock and rectal area. Noted yellow bruising to the left groin and redness to vaginal canal. There was extensive rectal dilation to the extent that the internal bowel was exposed and would protrude outside the rectum There was no rectal tone noted. Patient... was inconsolable during the entirety of the physical exam.” (*Id.*)

Disposition Hearing – February 8, 2023. J.F was present for the hearing.

(DC094) Department counsel advised the district court that the Department had not prepared a treatment plan for either J.F. or C.M. and were pursuing an immediate termination of parental rights without a requirement of reasonable efforts.

(2/8/2023 Hrg. Tr. 7:6-13) J.F. objected to the affidavits submitted in support of the Department’s Petition, arguing they “contain hearsay within hearsay.” (*Id.* 9:15-25)

Department counsel responded that they were prepared to offer “extensive testimony” in support of the petition. (2/8/2023 Hrg. Tr. 12:1-2) Counsel further asserted that Mont. Code Ann. §41-3-438(2) provides that hearsay evidence is allowed at disposition, and that medical providers are allowed to rely upon reports

of other medical providers in making a diagnosis. (*Id.* 12:1-7)

Great Falls Police Special Victims Unit Detective Kaleb Larson testified regarding his involvement in the case. (2/8/2023 Hrg. Tr. 20:22, et seq.) On December 7, 2022, Detective Larson responded to a report of possible sexual abuse of a 22-month-old child and of a 7-month child “that was possibly in failure to thrive.” (*Id.* 21:13-21) Detective Larson met with pediatric hospitalist, Dr. Jordan Lejeune, who told him V.R.F. was observed to have “significant tearing to her rectum” for which medical staff were unable to find any medical explanation except trauma from non-accidental sexual abuse. (*Id.* 22:3-21) Detective Larson described V.R.F. as “very skinny for her age. She was still in diapers, which isn’t uncommon, but very skinny.” (*Id.* 23:21-25)

Detective Larson testified he was also able to observe M.M.-F.:

For 7 months old, he wasn’t able to support his head. He couldn’t lift his head up. He could not sit on his own.... He did not reach for anything. I would hold things in front of him, he wouldn’t reach for anything. He would just sit there with a blank stare and just look at me, occasionally I could get him to smirk, but he was not interacting with me at all.... He was very skinny as well. He had a lot of hair on his head, but there was a lot of thin spots, especially on the back of his head indicating that he would lay down a lot.
(2/8/2023 Hrg. Tr. 24:3-21)

Detective Larson testified at length regarding statements made to him by

CPS Brooklynn Wilson regarding her interaction with J.F.⁵ (2/8/2023 Hrg. Tr. 24:22, et seq.) Detective Larson testified regarding his observation of the sexual abuse examination of V.R.F. by SANE examiner Tia Kuntz. (*Id.* 26:24, et seq.) Detective Larson said V.R.F. “was fine” but, “The second that Tia went to lay V.R.F. down on her back, she instantly flipped out – screaming, crying, kicking, doing anything she could to get Tia away from her so she could sit up and not be on her back.” (*Id.* 27:17-22) Detective Larson stated that, when V.R.F.’s diaper was removed, he observed bruising on her inner thighs and that her vagina and anus were both “red and swollen.” (*Id.* 28:9-12) When V.R.F.’s legs were lifted up, Detective Larson said, “I could see into her anus. It appeared to look like you could see intestines.” (*Id.* 28:16-19) Detective Larson stated that, after the examination, Ms. Kuntz advised him her findings were that V.R.F.’s injuries were “consistent with sexual abuse.” (*Id.* 29:9-14)

Detective Larson testified he met with J.F. (Hr. Tr. 2/8/2023 29:25-30:5) Detective Larson said J.F. told him C.M. had raped J.F. (*Id.* 30:6-10) J.F. said she had noticed the change in V.R.F.’s anus “two or three days” earlier. (*Id.* 30:17-22) J.F. told Detective Larson she came to the hospital that day because J.F. had glass in her foot. (*Id.* 30:17-31:3) J.F. said she knew C.M. was watching “stepson and

⁵ The testimony was entirely consistent with CPS Wilson’s affidavit. For brevity, it is not repeated here.

stepdaughter type pornography,” and animal pornography. (*Id.* 31:7-32:25) J.F. said she thought C.M. was having sex with her dog and that, on one occasion she had “found C.M. and the dog together under the covers.”⁶ (*Id.* 33:22-34:22) J.F. told Detective Larson she observed C.M. having an erection while holding V.R.F. on his lap, that “he gave special treatment” to V.R.F., and that C.M. became upset when J.F. would not leave V.R.F. alone with him. (*Id.* 35:3-17) Detective Larson said, after being advised of his Miranda Rights, C.M. detailed his sexual proclivities and confessed to sexually assaulting V.R.F. when J.F. left him alone with the child.⁷ (*Id.* 35:18-43:10) Detective Larson testified that, in a second interview, J.F. said she left the children with C.M. for several hours at a time “when she had to go run errands... to the grocery store, and when she went to go purchase a vehicle.” (*Id.* 46:5-14) J.F. told him she thought someone who watches child pornography “might offend on a child.” (*Id.* 46:22-47:8) J.F. told Detective Larson she had seen C.M. have a “boner” while holding V.R.F. on his lap. (*Id.* 47:11-19) Detective Larson said J.F. told him she didn’t have any concerns about leaving the children with C.M., that she trusted C.M., and that she didn’t expect C.M. to do anything to the children. (*Id.* 47:22-48:12)

⁶ Counsel for J.F. objected to this questioning on the grounds of relevance. The Department responded the testimony went to the issue of whether J.F. had knowledge that she should not have left V.R.F. alone with C.M.

⁷ The extensive details of Detective Larson’s interview of C.M. are not set forth here.

Detective Larson testified J.F.'s brother, M.F. told him he loved V.R.F. and M.M.-F. but did not want to be left alone with them because, "it made him uncomfortable," and he was on probation for being a sexual offender. (*Id.* 56:3-57:1) M.F. testified that, on occasion, J.F. asked him to baby sit because she "needed to run errands, or there was some type of emergency...." (*Id.* 57:2-11) Detective Larson testified that V.R.F.'s grandfather P.F. told him he had observed V.R.F.'s injuries the day before the child went to the hospital. (*Id.* 61:5-62:6) P.F. is alleged to have said, "her butt was split wide open, and that he knew that she needed to go to the hospital right away." (*Id.*)

On cross-examination, Detective Larson conceded that the grandfather, P.F., discovered the injuries to V.R.F. and took the child to the hospital. (2/8/2023 Hrg. Tr. 16:1-23) Detective Larson stated that P.F. indicated it seemed to him that V.R.F. was unaware of the injuries. (*Id.* 68:7-25) Detective Larson acknowledged that, later in the day, J.F. told him that it was possible C.M. had an erection while holding the V.R.F. "because she was walking around the house half naked." (*Id.* 70:18-23)

CPS Brooklynn Lindland⁸ testified regarding her involvement in the case, in conformity with her affidavit in support of the Department's petition. (2/8/2023

⁸ Previously known by her maiden name, Brooklynn Wilson.

Hrg. Tr. 72:21, et seq, DC002) CPS Lindland testified that, based on the totality of the circumstances, the Department formulated concerns about J.F.’s “protective capacity and ability to meet the basic needs of the children.” (*Id.* 76:14-19) CPS Lindland said J.F., despite admitting she was aware of serious concerns about his sexual proclivities, proved unable or unwilling to protect V.R.F. from C.M. and left V.R.F. in his care, resulting in sexual assault on the child. (*Id.* 77:20-77:1) CPS Lindland said that J.F. placed the children in the care of her brother who she knew to be a registered sex offender. (*Id.* 77:1-4, 82:8-20, 83:7-22, 85:10-18, 85:22-86:3) CPS testified that C.M. admitted to her that he had sexually assaulted V.R.F. while J.F. was out of the home. (*Id.* 88:1-10)

CPS Lindland then testified in conformity with her affidavit regarding her observations and interactions with treating professionals on and around January 7, 2022.⁹ (2/8/2023 Hrg. Tr. 77:19-22, 86:10-17, 78:5, et seq.) CPS Lindland testified that her concerns were increased when she “reviewed the family’s history and found... similar things had happened in the past on Mother’s side....” (*Id.* 87:1-12)

On cross examination, CPS Lindland conceded her review of J.F.’s record indicated J.F. might have a cognitive disability, but that CPS Lindland “was able to have a whole conversation with her regarding... my reason for being there. She

⁹ Details are not provided here as they are repetitive and graphic. See DC002 and 2/8/2023 Hrg Tr. 78:5, et seq.

was able to tell me what her concerns were, and then.... Yeah. Nothing that I had observed directly.” (2/8/2023 Hrg. Tr. 89:1-21)

On recross CPS Lindland testified that, in her opinion, J.F.’s failure to provide appropriate care was a significant cause of M.M.-F.’s apparent failure to thrive. (2/8/2023 Hrg. Tr. 96:18-25) CPS Lindland testified that J.F.’s family history indicated substantial incest, family-wide transgressions of appropriate sexual boundaries, J.F.’s “crush” on one of her brothers, and that J.F. “actively pursued a sexual relationship.” (*Id.* 96:4-16)

Termination Hearing – April 14, 2023. Judge David Grubich presided over the Termination Hearing. (DC106) J.F. was present. (*Id.*)

Dr. Jordan Lejeune testified regarding his examination on December 7, 2023 during which he found V.R.F.’ rectum to be significantly dilated and unable to contract properly. (4/14/2023 Hrg. Tr. 10:13, et seq.) Dr. Lejeune concluded the injury arose from nonaccidental trauma and requested a sexual abuse examination. (*Id.*)

PA Jordan Hronek testified regarding her examination of V.R.F., her concern the child’s injuries were a result of sexual abuse and her decision the child needed to be admitted for observation. (4/14/2023 Hrg. Tr. 19:10, et seq.)

RN Sarah Beach testified regarding her care of V.R.F. when the child was

admitted to Benefis on December 7, 2022. (4/14/2023 Hrg. Tr. 28:16, et seq.) Ms. Beach testified to the injuries observed and that V.R.F. was generally agreeable but violently resisted any attempts to change her diapers, causing the child greater pain. (*Id.*)

RN JoAnna Ginalias testified regarding her care of V.R.F. on December 8 and 9, 2022. (4/14/2023 Hrg. Tr. 40:17, et seq.) Ms. Ginalais testified J.F. seemed withdrawn and more concerned with her needs than with the V.R.F.'s care. (*Id.*) Ms. Ginlais said V.R.F.'s anus remained dilated causing stool seepage and making it difficult to keep the baby's bottom clean. (*Id.*)

RN Samantha Chase testified regarding her care of V.R.F. on the evenings of December 8 and 9, 2022. (4/14/2023 Hrg. Tr. 54:8, et seq.) Ms. Chase described V.R.F. as "pretty traumatized with diaper changes. Everything else she was chill, calm, collected, and pretty comfortable with. But as soon as we would do a diaper change, or say that diaper, or go anywhere towards the area, she was become -- would become frantic and cry and be very uncomfortable." (*Id.*)

RN Toni Hackett testified regarding the care provided to V.F at Benefis. (4/14/2023 Hrg. Tr. 62:7, et seq.) Ms. Hackett testified that, at times it took three nurses to change V.R.F.'s diaper because the child became so upset. (*Id.*)

RN and SANE examiner Tia Kuntz, testified regarding the SANE exam she

performed December 8, 2022. (4/14/2023 Hrg. Tr. 76:3, et seq.) Ms. Kuntz described the exam as “pretty horrific,” saying V.R.F. was terrified and crying hysterically. (*Id.*) Ms. Kuntz said V.R.F.’s rectum was completely dilated “to the point of no rectal tone,” and the mucosal lining of V.R.F.’s bowels were protruding. (*Id.*) Ms. Kuntz also observed abrasions V.R.F.’s labia and bruising on the child’s inner thighs and perineum. (*Id.*) Ms. Kuntz stated the child’s injuries were unlikely to be the result of anything besides sexual assault. (*Id.*)

County Health Department Parent Educator Ellie Crabtree testified regarding her involvement as family coordinator beginning in August 14, 2022. (4/14/2023 Hrg. Tr. 89:5, et seq.) Ms. Crabtree observed numerous concerns with the home including cleanliness, lack of light and repeated disregard of advice and cancellation of appointments by the parents. (*Id.*) Ms. Crabtree testified that, the first time she saw M.M.-F. in just a diaper, she noticed, “He was very skinny, sunken eye, and just... he didn’t look good at all.” (*Id.*) Ms. Crabtree said she counseled the parents on nutrition and physical therapy for M.M.-F., but they did not follow her advice. (*Id.*) Ms. Crabtree testified that, despite the fact the baby was losing weight, J.F. refused to supplement his diet with formula, missed several appointments for the child. (*Id.*) CPS Crabtree stated that, as of December 1, 2022 she had ongoing concerns about M.M.-F.’s nutrition, development, weight, gross motor skills and the parent’s failure to provide necessary physical therapy. (*Id.*)

RN Megan Brunelle testified regarding her involvement with the family beginning December 1, 2022 when she was contacted by Ellie Crabtree.¹⁰ (4/14/2023 Hrg. Tr. 120:3, et seq.) Ms. Brunelle said her initial observations were that M.M.-F. appeared developmentally and physically behind, was “very hypotonic” and unable to hold his head up without support. (*Id.*) Ms. Brunelle testified to her unsuccessful efforts to get J.F. to supplement M.M.-F.’s diet with formula and J.F.’s failure to keep appointments. (*Id.*) Ms. Brunelle testified that On December 6, 2022 J.F. asked her to look at V.R.F. (*Id.*) Ms. Brunelle said she observed the child’s rectum to be dilated “to the size of a nickel” and relaxed. (*Id.*)

RN and pediatric nurse Nicole White testified regarding her examination of M.M.-F. on October 20, 2022 as well as her observation of both children since their removal. (4/14/2023 Hrg. Tr. 137:19, et seq.) Ms. White testified she had seen M.M.-F. when he was in his parents’ care and had seen both children since removal. (*Id.*) Ms. White testified that, in October 2022, M.M.-F. came in for a checkup, “had not great weight gain, concern about movement of one of his arms and some developmental delay.... In addition, he had a milky opacity in one of his eyes.” (*Id.*) Ms. White said the parents did not bring the baby in for scheduled follow-up appointments in November 2022 and December 2022. (*Id.*) Ms. White

¹⁰ CPS Brunelle’s testimony is consistent with her affidavit. (DC002)

said she followed up with M.M.-F.'s other medical providers after removal and was advised the cloudy area in his eye was probably due to an injury and the baby had not received any physical therapy. (*Id.*) Ms. White said, since removal, solid foods had been introduced to M.M.-F.'s diet, and the baby had "gained significant weight and increased his percentiles on the growth chart." (*Id.*) Ms. White said, while M.M.-F. is still delayed in gross motor skills, he had begun using his arm normally and "actually reached both of his arms toward the CPS worker when he was in her lap." (*Id.*) Ms. White said M.M.-F. had a "fairly significant flattening to his head" as a result of too much time on his back, so required helmet therapy to help correct that. (*Id.*) Ms. White testified that the nutritional deficits M.M.-F. had experienced in his infancy could have a long-term impact on the child's "learning or other executive functions of the brain." (*Id.*)

Police Officer Samantha Gondeiro, Detective Kevin Lake and Police Sergeant and special victims unit supervisor Katie Cunningham testified regarding their participation in the investigation in the case. (4/14/2023 Hrg. Tr. 187:22, et seq., 200:4, et seq., 205:2, et seq.) Detective Kaleb Larson testified in conformance with his earlier testimony in support of the Department's request that reunification services need not be provided. (4/14/2023 Hrg. Tr. 210:18)

CPS Brooklynn Lindland in conformance with her earlier testimony in support of the Department's request that reunification services need not be

provided. (4/14/2023 Hrg. Tr. 235:9)

PPS Christa McKay testified in conformance with her earlier testimony in support of the Department's request that reunification services need not be provided. (4/14/2023 Hrg. Tr. 257:2)

J.F.'s father, P.F. testified on behalf of J.F. (4/14/2023 Hrg. Tr. 274:12)

After hearing testimony, the district court heard argument and, at the request of J.F.'s attorney granted the parties two weeks to submit proposed findings of fact and conclusions of law. (4/14/2023 Hrg. Tr. 316:7-317:4)

Findings of the District Court. In the Order entered May 4, 2023 the district court recounted the relevant testimony of the witnesses,¹¹ explicitly incorporated the court's previous findings and made the following pertinent Findings of Fact in support of its decision to terminate V.R.F.'s parental rights:

1. V.R.F. was born January 7, 2021. M.M.-F. was born May 9, 2022.
2. Neither V.R.F. nor M.M.-F. is an Indian Child as defined by U.S.C. §1903, and ICWA does not apply to this case.
3. December 7, 2022 the children were placed in protective custody and are in foster care.
4. January 18, 2023 the children were adjudicated as YINC.
5. J.F. told law enforcement she left V.R.F. alone with C.M for several hours on December 5, 2022, after which she noticed the child's anus was dilated.

¹¹ As set forth in greater detail above. The Judgment is 22 pages long, details 20 witnesses, and is necessarily condensed here. (DC113, Appendix A)

6. December 6, 2022 City County Health Department RN Megan Brunelle did a home health visit regarding M.M.-F.'s weight loss and failure to thrive. At J.F.'s request, Ms. Brunelle looked at V.R.F.'s anus and saw that it was abnormally dilated. RN Brunell told J.F. to immediately seek urgent medical care for the child and reported her concerns of child abuse and neglect to the Department.
7. J.F. took V.R.F. to Benefis ER later on December 6, 2022. J.F. said her primary reason for going to the ER was for glass in her foot, but asked Benefis staff to examine V.R.F.'s bottom.
8. PA Jordan Hronek examined V.R.F. and discovered the child's rectum was abnormally dilated, with no tone and anal prolapse.
9. Concerned that the condition was caused by sexual abuse, P.A. Hronek contacted the Department, consulted Dr. Jordan Lejeune, and admitted V.R.F. overnight for observation.
10. December 7, 2022 Dr. Lejeune examined V.R.F. and found the child's rectum was "significantly dilated" to about the size of a quarter – which he described as "larger than any adult's" rectum he had seen – and would not contract properly. Dr. Lejeune also found 2 small lesions near V.R.F.'s anus. Dr. Lejeune could think of no possible medical explanation other than nonaccidental trauma and determined a sexual abuse exam was necessary.
11. December 7, 2022 Great Falls Police Detective Kaleb Larson responded to Benefis, after multiple reports, for concerns involving anal tearing and an unusually dilated rectum on a 22-month-old child, identified as V.R.F. V.R.F. was found to have an abnormally dilated anus and rectal prolapse.
12. After midnight on December 7, 2022 Benefis Pediatric RN Sarah Beach cared V.R.F. V.R.F. was generally congenial but actively resisted diaper changes. There was obvious trauma to V.R.F.'s anal area and there were two tears to her rectum. Crying while fighting the diaper changes exacerbated the anal prolapse, as this puts pressure on the rectum causing pain and discomfort. V.R.F. also had bruising on the inside of her thighs.
13. December 8 and 9, 2022 RN JoAnna Ginalias provided daytime care for V.R.F. The child cried, fussed, and fought diaper changes. Ms. Ginalias observed that J.F. seemed withdrawn or hesitant while at the hospital. J.F. seemed more concerned with her own personal needs than with the

baby. J.F. did not seem concerned about V.R.F. and appeared overwhelmed. V.R.F. did not do well at bath time. Keeping her bottom clean was difficult because the anal dilations caused her to continuously seep stool.

14. December 8 and 9, 2022 RN Samantha Chase provided nighttime care for V.R.F. V.R.F. was friendly, calm, and collected except during diaper changes, when she was frantic, cried, and become uncomfortable. Diaper changes for V.R.F. appeared very traumatic. She would try to kick, hit, and hide between the chair, crib, and curtain. V.R.F.'s bottom was red and irritated. Excoriation occurred due to fecal matter that was constantly oozing. Crying would put extra pressure on V.R.F.'s rectum. V.R.F.'s rectum remained dilated. Ms. Chase did frequent diaper changes, every 2 to 3 hours minimum overnight, which was unusual.
15. RN Toni Hackett advised that, at times, it took three nurses to help calm V.R.F. down for diaper changes so as to reduce V.R.F.'s trauma. Sometimes two nurses had to hold her still while a third performed the change, which was abnormal in Ms. Hackett's experience.
16. December 8, 2022 certified Sexual Assault Nurse Examiner RN Tia Kuntz examined V.R.F. The child was terrified, crying, and screaming throughout the exam. Ms. Kuntz described the exam scene as "horrific." Ms. Kuntz observed extreme anal dilation and the lining of bowels that were protruding. There were abrasions to the labia and bruising could be seen between the opening of the vagina and the opening of the anus (perineum). Ms. Kuntz also observed yellowish bruising on V.R.F.'s medial inner thigh. This was abnormal. Ms. Kuntz also observed mild scrapes, pustules, and abrasions on V.R.F.'s labia. Ms. Kuntz determined that the diminished rectal tone was concern for future, long-term complications. Ms. Kuntz determined it was very unlikely V.R.F.'s injuries could be explained by anything other than sexual assault. Ms. Kuntz noted these were all obvious injuries readily apparent to a caregiver or parent. J.F. disclosed to Ms. Kuntz that she lived with her boyfriend (C.M.) and that he might be the perpetrator, and that he watches child porn. J.F. also disclosed that similar injuries appeared on V.R.F. when she was six to seven months old which "looked the same." Ms. Kuntz concluded after the SANE exam that V.R.F.'s injuries were the result of sexual abuse and ruled out all else.
17. Det. Larson observed V.R.F.'s SANE exam and saw her intestines protruding through the dilated rectum and bruising near V.R.F.'s labia.

18. Det. Larson learned that C.M. used J.F.'s electronic devices to watch porn and was looking up porn regarding stepdaughter and stepson, Rule 34, and Rule 36 sites, and animal porn. The people involved were not adults. J.F. advised that when V.R.F. would be on his lap, he would have an erection. J.F. also told Det. Larson she believed she once walked in on C.M. having sex with her dog.
19. Det. Larson interviewed C.M. at the Great Falls Police Department. After being advised of his Miranda rights he admitted that he had fantasies about having sex with his aunts and his 3 sisters, fantasized about children ages twelve to sixteen, six to seven, and younger. C.M. told Det. Larson his penis would become erect while holding V.R.F. and M.M.-F., and he regularly had sexual thoughts about V.R.F. C.M. thought about he and V.R.F. pleasuring each other despite V.R.F. being two years old. C.M. admitted he would get an erect penis while sexually fantasizing about V.R.F., masturbated while he was changing her diaper, admitted that changing V.R.F.'s diaper turned him on, and admitted to having anal sex with V.R.F. by inserting his penis into V.R.F.'s anus. C.M. denied having vaginal sex with V.R.F.
20. Det. Larson determined that J.F. ignored multiple, obvious warning signs demonstrating C.M. was an unsafe, placed the children at risk of harm, that he was dangerous, and a completely inappropriate caregiver.
21. December 8, 2022 CPS Brooklynn Lindland went to the jail. M.C. admitted he penetrated V.R.F. in the back bedroom of his residence. When he was finished, V.R.F. was walking around, and she was crying, leaking, and bleeding. He had to clean her up some. C.M. said that the incident when he had sexual intercourse with V.R.F. occurred several days prior to the date of this conversation.
22. City County Health Department Parent Educator Ellie Crabtree worked with the family from August 2022. CCHD has been involved with the family since V.R.F.'s birth. Ms. Crabtree provided information on nutrition and family wellbeing. Ms. Crabtree was concerned about M.M.-F.'s feeding and failure to meet development milestones. August 21, 2022 Ms. Crabtree observed that the home was cluttered with debris on the floor. Marijuana paraphernalia was in plain view. She discussed the importance of keeping a safe environment for M.M.-F. She also observed the home was very dark and daylight was not being let in. She counselled J.F. and C.M. on increasing exposure to daylight to assist with M.M.-F.'s trouble regulating his days and nights.

23. September 29, 2022 the condition of the home had not improved. M.M.-F. was behind on 2-month-old and 4-month-old milestones. His gross motor development was far behind. J.F. said they were not working with a pediatrician and had cancelled some home visits. Ms. Crabtree provided sample sleep schedules.
24. October 19, 2022 Ms. Crabtree observed M.M.-F. would cry when Birth Father held him which is unusual for someone considered to be a primary caregiver. Maternal Uncle M.F. was present in the home and when he would hold M.M.-F., the infant would not cry.
25. M.F. is currently a registered sex offender.
26. November 16, 2022 Ms. Crabtree observed the home remained messy. November 22, 2022 the home was cleaner. This was the first visit which allowed Ms. Crabtree to see his physical condition. M.M.-F. was wearing only in a diaper. Ms. Crabtree observed M.M.-F. was very thin, had sunken eyes, and looked unwell. Ms. Crabtree was concerned about his development and gross motor skills. Ms. Crabtree counseled J.F. on nutrition and supplementing M.M.-F.'s diet with solid foods or formula. J.F. refused to consider formula. Ms. Crabtree counseled the parents to follow up with the recommended physical therapy for M.M.-F. and urged them to attend his pediatric appointments. J.F. said she did not want to bring M.M.-F. to physical therapy and could do it at home. J.F. also stated she did not want to deal with insurance and the cost of insurance, although Ms. Crabtree counseled mother on how to get Medicaid to cover these services.
27. Ms. Crabtree testified that she was aware J.F. received disability benefits. Ms. Crabtree was not aware of what J.F.'s disability was but did not notice anything on J.F.'s part that made her question J.F.'s ability to respond to her advice. Ms. Crabtree testified that J.F. said missed appointments were often due to their lack of a car for transportation. However, Ms. Crabtree testified that bus passes were offered. Ms. Crabtree testified that J.F. appeared willing to learn but did not raise concerns and rarely asked questions.
28. December 1, 2022, Ms. Crabtree discovered through WIC that M.M.-F. had lost weight between a weigh-in on September 13, 2022, and a weigh-in on November 14, 2022. She texted J.F. two or three times before J.F. responded. J.F. was not demonstrably concerned. Ms. Crabtree tried to get a public health home visit nurse to weigh M.M.-F. She again counseled J.F. on supplementing M.M.-F.'s diet with formula.

J.F. continued to refuse to use formula. Ms. Crabtree had continuing concerns about M.M.-F.'s nutrition, development, weight, gross motor skills, and lack of needed physical therapy.

29. Upon receiving notice of concerns about M.M.-F. from Ms. Crabtree, Megan Brunelle, RN, went to J.F. and C.M.'s home on December 1, 2022. She was greatly concerned about M.M.-F. losing weight, his being behind developmentally, and his problems with gross motor skills. M.M.-F. was "floppy" and could not support his head, which was abnormal for his age of six months. A child at M.M.-F.'s age should not lose weight if he is getting proper nutrition. She urged J.F. to take M.M.-F. to his scheduled and recommended medical appointments, including seeing an eye doctor. J.F. complained about not having a ride and insurance. Ms. Brunelle counselled her about Medicaid. She also provided J.F. with a can of formula to help supplement M.M.-F.'s diet. Ms. Brunelle observed that M.M.-F. appeared dehydrated, depleted, and thin.
30. December 6, 2022 Ms. Brunelle visited the home. At six months M.M.-F. should have doubled his birth weight and be gaining a one to two pounds per month. Ms. Brunelle counseled J.F. on supplementing M.M.-F.'s breastmilk diet with formula. J.F. said she had not given formula but did not say why, and said she fed him pureed ramen noodles instead. Ms. Brunelle observed that the formula she had provided for M.M.-F. a week earlier remained unopened. She observed that the home was very messy. Food, objects, and choking hazards were all over.
31. October 30, 2022 Nurse Practitioner Nicole White observed several concerns with M.M.-F. The child had dropped weight, had developmental delays and was not able to lift his arm properly. M.M.-F. had cloudiness in one of his eyes likely due to an injured cornea. Ms. White observed that M.M.-F. was floppy and fussy. Ms. White discussed M.M.-F.'s need to gain weight with the birth parents and what they needed to do to help M.M.-F. gain weight. She recommended that he receive physical therapy for his arm, and the parents appeared receptive at the time. She also recommended that M.M.-F. see the eye doctor for the injured cornea, which the parents could not explain. The parents discussed transportation travel problems, and Ms. White made a referral to a local eye doctor. Ms. White was concerned that M.M.-F. had lost weight. During infancy, nutrition is crucial for brain development. Ms. White testified that inadequate nutrition impacts brain and muscle development. M.M.-F. was not using his arm and the parents could not

think of any injuries. Lack of nutrition was a concern. Ms. White found the eye injury to be medically significant and determined that at the time of injury it would have caused M.M.-F. pain and stinging. Ms. White noted the parents' lack of follow through regarding the medical needs of the children. Ms. White was concerned with M.M.-F.'s failure to thrive and testified to its potential long-term effects, including death, if not corrected.

32. Ms. White has seen both children since removal. M.M.-F. has gained significant weight and solids were introduced. His diet was brought to an age-appropriate level, although he remains around the 7th to 10th percentile. Ms. White would like to see M.M.-F. reach the 30th percentile. No barriers have been identified that prevented his ability to gain weight normally with appropriate care and nutrition. M.M.-F. is now using both arms normally and reached up with both arms during his last checkup. He also had physical flattening on his head (positional plagiocephaly). Ms. White testified that there is ongoing concern as to the effect of M.M.-F.'s nutritional deficits on his long-term health as they can affect everything including cognitive abilities and brain development. The Court finds M.M.-F.'s medical and developmental issues were the result of J.F. and Birth Father C.M.'s physical neglect, including failure to provide his basic necessities, adequate nutrition, failure to follow repeated and clear instructions to supplement his nutrition and follow up with appropriate medical care which exposed M.M.-F. to unreasonable physical and cognitive risk.
33. Ms. White has also seen V.R.F. since removal. Ms. White has treated V.R.F. for the anal dilation and trauma. There is some improvement but problems with stool function remain. V.R.F.'s rectum injury continues to show significant dilation and only time will reveal the extent. Stool leakage continues. The anus and rectum do dilate but only stretch so far. Injuries to these muscles do not heal well, which results in perpetual problems retaining stool. Scar tissue makes the area less flexible and responsive as well. V.R.F. has injuries to both sets of muscles, and may have lifelong impairment and stool leakage, in addition to the emotional trauma. The injuries to V.R.F.'s labia have healed but would have been painful while healing.
34. J.F. knowingly left V.R.F. in the care of C.M. whom she suspected of having sex with a dog, sexual deviancy, whom she knew was "always horny," she knew C.M. became aroused when holding V.R.F., she knew C.M. watched child porn and incest porn, and she knew C.M. gave

V.R.F. special attention and that he wanted alone time with V.R.F., and with whom she admittedly, for these reasons, had concern about leaving V.R.F. alone. J.F. allowed her brother M.F., a registered sexual offender, to regularly visit her home and have close contact with her children. J.F. knowingly failed to provide medical and nutritional care for both children, which resulted in M.M.-F. failing to thrive placing his current and future development and health at great risk. J.F. failed to provide a physically safe and appropriate home environment despite receiving extensive support services in the past and parenting education services presently. Even with J.F.'s low functioning, the warning signs were apparent to her. J.F. admitted having concerns about leaving C.M. alone with V.R.F. J.F. was able to identify clear risks prior to leaving V.R.F. alone with C.M. for hours and allowing him the opportunity to sexually abuse V.R.F. J.F. subjected V.R.F. to sexual abuse, chronic abuse, chronic and severe neglect, and torture under the circumstances. The result will be likely be lifelong physical and mental damage that V.R.F. must now endure.

35. Clear and convincing evidence supports termination of the parent-child legal relationship between J.F. and V.R.F. pursuant to §41-3-609(1)(d) and §41-3-423(2)(a & d), because J.F. subjected V.R.F. to aggravated circumstance/s, including chronic physical abuse, sexual abuse, torture, chronic severe neglect, and physical harm, and committed neglect of V.R.F. that resulted in serious bodily injury.
36. As to M.M.-F., Clear and convincing evidence supports terminating parental rights of both parents – based on the facts set forth above because J.F. and Birth Father C.M., pursuant to Mont. Code Ann. §41-3-423(2)(a), subjected a child to aggravated circumstances (including but not limited to torture, chronic abuse, or chronic, severe neglect of a child; and §41-3-423(2)(d), neglect of a child that resulted in serious bodily injury.
37. Clear and convincing evidence supports this court's termination of the parent-child legal relationship between J.F. and Birth Father C.M. and the Youths pursuant to Mont. Code Ann. §41-3-609(4)(a), because after a hearing the Court finds that an appropriate treatment plan was not required for J.F. and Birth Father C.M. because they meet the criteria of subsection §41-3-609(1)(d). J.F. and Birth Father C.M.'s abuse, or neglect caused the serious bodily injury of a child, as defined in §45-2-101.

38. The conduct or condition rendering J.F. and Birth Father C.M. unfit is unlikely to change within a reasonable time, due to their inability to care for the ongoing physical, mental, and emotional needs of Youths within a reasonable time. The Court does not find any of the considerations required pursuant to 41-3-609(2)(a-d), MCA change this Court's finding relating to the parents' inability to care for the children within a reasonable time.

(App. A, DC113)

STANDARDS OF REVIEW

The Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re B.J.J.*, 2019 MT 129, ¶9, 396 Mont. 108, 443 P.3d 488; *In re A.S.*, 2016 MT 156, ¶11, 384 Mont. 41, 373 P.3d 848; *In re K.A.*, 2016 MT 27, ¶19, 382 Mont. 165, 365 P.3d 478. The Department has the burden of proving by clear and convincing evidence that the statutory criteria for termination have been met. *In re B.J.J.*, ¶9. In the context of parental rights cases, clear and convincing evidence is the requirement that a preponderance of the evidence be definite, clear, and convincing. *In re B.J.J.*, ¶9; *In re K.L.*, 2014 MT 28, ¶14, 373 Mont. 421, 318 P.3d 691. The Court reviews a district court's findings of fact for clear error and conclusions of law for correctness. *In re B.J.J.*, ¶9; *In re M.V.R.*, 2016 MT 309, ¶23, 385 Mont. 448, 384 P.3d 1058. 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 B.J.J.*, ¶9. To reverse a district court's evidentiary

ruling for an abuse of discretion, the Court must determine the district court either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *In re I.M.*, 2018 MT 61, ¶13, 391 Mont. 42, 414 P.3d 797.

ARGUMENT

1. Counsel for J.F. 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. The record may arguably support J.F.’s assertion the district court erred when it terminated her parental rights.

The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence that the child is an adjudicated youth in need of care, an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful, and the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time. Mont. Code Ann. §41-3-609(1)(f); *In re D.B. and D.B.*, 2007 MT 246, ¶20, 339 Mont. 240, 168 P.3d 691.

An order terminating an individual’s right to parent his children must be supported by clear and convincing evidence that the statutory criteria for termination have been met. *In re A.T. and J.T.*, 2003 MT 154, ¶10, 316 Mont. 255, 70 P.3d 1247. Once the criteria for termination of parental rights are met, the decision whether or not to terminate those rights is within the court’s discretion.

a. J.F. may assert there was insufficient evidence to support the district court’s decision that reasonable efforts were not required.

Mont. Code Ann. §41-3-423(1)(c) provides that, in determining preservation and reunification services to be provided, and in making reasonable efforts to

preserve the parent-child relationship, the child's health and safety are of paramount concern. Mont. Code Ann. §41-3-423(1) requires the Department to engage in reasonable efforts to prevent the necessity of removal of a child from the child's home and to reunify families that have been separated by the State. However, pursuant to Mont. Code Ann. §41-3-609(1)(d), the district court may terminate parental rights without providing reasonable efforts upon a finding that the parent has subjected a child to the circumstance listed in Mont. Code Ann. §41-3-423(2).

Mont. Code Ann. §41-3-423(2) states that, except where ICWA applies, the Department may, at any time, request a determination that preservation or reunification services need not be provided. The district court may make such a determination if the court determines, by clear and convincing evidence, that the parent has, among other criteria: a) subjected a child to aggravated circumstances including, but not limited to, abandonment, torture, chronic abuse, sexual abuse, or chronic, severe neglect; c) committed aggravated assault against a child; d) committed neglect of a child that resulted in serious bodily injury or death; or e) had parental rights to the child's sibling or other child of the parent involuntarily terminated where the circumstance of the termination are relevant to the parent's ability to care for the child at issue.


In this case, J.F. may arguably assert the Department did not establish sexual

abuse or chronic, severe neglect by clear and convincing evidence.

CONCLUSION

After thorough review of the entire record and researching applicable statutes, case law, and rules, counsel has determined that J.F.'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 September 15, 2023.

A handwritten signature in blue ink, appearing to read 'G. Birdsong', is positioned above a horizontal line.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



Gregory D. Birdsong

CERTIFICATE OF SERVICE

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 09-18-2023:

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