

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0266

IN THE MATTERS OF

K.P. and K.P.,

Youths in Need of Care.

ANDERS BRIEF

On Appeal from the Montana First Judicial District Court, Lewis and Clark
County, the Honorable Michael McMahon, Presiding.

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STATEMENT OF THE ISSUE

Whether counsel for the Appellant should be permitted to withdraw from this cause in accordance with the criteria established in *Anders v. California*, 386 U.S. 738 (1967) and Montana Code Annotated § 46-8-103 (2021).

STATEMENT OF THE CASE AND FACTS

Appellant Mother, S.G., (Mother) appeals the First Judicial District Court's (District Court) order terminating her parental rights to her children K.P. and K.P. (D.C. Doc. 151.¹) The Child and Family Services Unit of the Department of Health and Human Services (Department) filed a *Petition for Emergency Protective Services, Adjudication as Youth in Need of Care (YINC) and Temporary Legal Custody (TLC)* on June 16, 2021. The *Petition* was based on parental inability to safely and appropriately parent the children resulting from ongoing domestic violence in the home and drug use. (D.C. Doc. 1, see *Affidavit*.) In the supporting *Affidavit*, Child Protection Specialist (CPS), Jordan Zoeckler, stated the children had been removed on June 9 due to reports that the children were being exposed to ongoing domestic violence and drug use. The Department had received a report about

¹ All district court documents are referenced to case number DN 21-62 unless otherwise noted.

the ongoing physical abuse in the home, including allegations of abuse of the children by the Mother when they would try to intervene in the parents' fights. When the report was received, the Department was already working to engage Mother in a Voluntary Services Agreement in which she had agreed to drug test. However, Mother had missed several random drug tests and was not responding to attempted contacts by the Department. (D.C. Doc. 1, see *Affidavit*.)

CPS Zoeckler also documented that the children had been removed from Mother's care three other times from May 23, 2013 to May 21, 2014; from August 27, 2014 to July 6, 2015 and from April 5, 2019 to May 7, 2019. Following this third reunification, Department remained involved on a voluntary basis until September 3, 2019. (D.C. Doc. 1, see *Affidavit*.)

The District Court set a Show Cause hearing for June 30, 2021. (D.C. 3.) After multiple continuances due to the appointment of new counsel for the parents, the Show Cause was finally held on September 15, 2021. Mother was present at the hearing and stipulated to the Department's requested relief while also noting for the record, that she disagreed with the allegations as laid out in the initial *Petition*. (9/15/21 Hearing Transcr. at 4:7-9.) Following this hearing, and based on the parties' stipulations, the

District Court adjudicated the children as YINCs and granted the Department TLC for a period of six months. (D.C. Doc. 19.)

A Treatment Plan Hearing was held on November 3, 2021. Mother was not present. (D.C. Doc. 21.) Mother's counsel reported that she had shared the proposed treatment plan with Mother but had not heard back on whether she objected to any of the provisions. (11/3/21 Hearing Transcr. at 4:5-7.) The District Court noted that Mother has been involved in DN cases previously and knows about the treatment plans and the need for compliance. Thus, the District Court approved and ordered the plan but stated Mother could bring up objections or issues at a later date, and it would set a hearing. (11/3/21 Hearing Transcr. at 5:3-14, D.C. Doc. 73.) Mother's treatment plan does not appear in the record as its own document but is referenced in future pleadings.

Mother entered Family Treatment Court (FTC) on January 25, 2022, and the DN cases were assumed by the FTC Judge. (D.C. Docs. 23, 24.) On March 1, 2022, the Department filed both a *Motion to Extend Custody* and a *Motion for Approval of Permanency Plan*. In its *Motion to Extend Custody*, the Department requested an additional six months of TLC for Mother to continue work on her treatment plan. (D.C. Doc. 30.) In her supporting affidavit, CPS Meyers updated on Mother's progress on her treatment plan

tasks. Mother had not completed a parenting class but regularly attended visits with her children and was attentive and appropriate during those visits. Mother had not yet engaged in family therapy. Mother had completed a chemical dependency evaluation and followed through with the recommendation to complete in-patient treatment at Rimrock. Mother was also still participating in FTF and was engaged in intensive outpatient therapy through Helena Valley Addiction Services. She was also compliant with drug testing. However, she still needed to complete and submit a relapse prevention and safety plan to the Department. (D.C. Doc. 30, see *Affidavit*.)

Regarding mental health, Mother had completed the requested mental health evaluation and was attending therapy. Mother had not completed changing patterns but was addressing being in abusive relationships with her counselor at Helena Valley Addictions Services. Mother had obtained housing through the Salvation Army and had maintained weekly contact with CPS Meyers. She had signed all necessary releases to allow communication with her providers. Given this progress, additional time was only necessary for Mother to complete the items that remained outstanding on her court-ordered treatment plan and graduate from FTC. (D.C. Doc. 30, see *Affidavit*.)

The Department outlined its permanency plan of reunification of the children with one or both birth parents in the *Motion for Approval of Permanency Plan*. (D.C. Doc. 29.) In her supporting affidavit, CPS Meyers noted this to be the desired outcome of the children. (D.C. Doc. 29, see *Affidavit*.) The Court held a hearing on both motions on March 9, 2022. Mother was not present. (D.C. Doc. 33.) CPS Meyers testified in support of the Department's request for an extension of TLC. She testified that Mother had still been engaging in FTC and had completed an in-patient treatment program at Rimrock. (3/9/22 Hearing Transcr. at 8:14-18.) However, there was some concern from the Department that Mother had relapsed and no longer had suitable housing. (3/9/22 Hearing Transcr. at 11:6-13.) Mother's counsel updated that Mother had received the motions, but she was unsure of Mother's position on them. (3/9/22 Hearing Transcr. at 5:11-15.) The District Court granted the extension of TLC for a period of six months. (D.C. Docs. 33, 72.)

A Status Hearing was held on May 18, 2022. (D.C. Doc. 48.) Mother was present, and her counsel updated that the children had been on a trial home visit with Mother since the end of April. (5/18/22 Hearing Transcr. at 4:5-8.) The District Court admonished Mother for her lack of attendance and participation in aspects of FTC. (5/18/22 Hearing Transcr. at 5-6.) The Court

also noted its concerns about Mother's protective capacity for children as regards the father and provided her information on the Cycle of Abuse to discuss further in FTC. (5/18/22 Hearing Transcr. at 6:25-7:9.) Additionally, the District Court was concerned because one of the children said he wanted to return to foster care and that was worrisome to the Court because of his age and because the family had only just been reunified. (5/18/22 Hearing Transcr. at 8:21-9:17.)

On August 16, 2022, the Department filed another *Motion to Extend Custody* and another *Motion for Approval of Permanency Plan*. (D.C. Docs. 63, 64.) In the affidavit supporting the request to extend custody, CPS Supervisor Westerhold argued that the Department needed an additional grant of TLC for a period of six months because Mother had not completed her treatment plan. Mother had the children on a trial home visit until just recently, but due to concerns with meeting their needs and keeping them safe, the children were again removed from her care. There were concerns that Mother was exposing the children to individuals who were under the influence of substances or who had concerns regarding drug use. Mother was engaged in family therapy but had not completed a parenting class. (D.C. Doc. 64, see *Affidavit*.)

Mother was still a participant in FTC and was still in intensive outpatient therapy through Helena Valley Addiction Services. However, Mother had relapsed and was out of compliance with her therapy but was working towards getting back in compliance. Mother still needed to complete and submit a relapse prevention and safety plan. Mother continued therapy at Helena Valley Addiction but had been referred to an additional therapist to further address her trauma. (D.C. Doc. 64, see *Affidavit*.)

Mother was in transitional housing through Family Promise and in the process of finding permanent and stable housing. Mother maintained weekly contact with the Department. She had signed all necessary releases to allow communication with her providers. (D.C. Doc. 64, see *Affidavit*.) The proposed permanency plan remained reunification. (D.C. Doc. 63, see *Affidavit*.)

Mother was present at the August 17, 2022, hearing on the motions. (8/17/22 Hearing Transcr. at 3:10-11.) She reported to the District Court that she had obtained housing. She also noted that she would stipulate the Department's request for an extension of TLC but wanted the children placed with her as soon as she had moved into her new housing and was settled. (8/17/22 Hearing Transcr. at 4:15-25.) The Court then informed Mother that the FTC team had recommended Mother be arrested due to her

“lack of honesty, ... lack of accountability, and ... lack of responsibility.” The Court requested a deputy take Mother into custody until August 20. (8/17/22 Hearing Transcr. at 7-8.)

The parties reconvened at the District Court on August 24, 2022 for further proceedings on the *Motion to Extend Custody* and *Motion for Approval of Permanency Plan*. (D.C. Doc. 70.) Mother was not present, and her attorney requested a continuance. Mother was suffering from withdrawals from her anti-depressants and was unable to be at Court. Mother also indicated her desire to leave FTC. (8/24/22 Hearing Transcr. at 3:21-4:8.) The District Court agreed to continue the hearing but informed the parties that it was only going to consider a three-month extension of TLC, and if the parent’s treatment plans were not "caught up" it would be expecting the Department to move for termination of parental rights. (8/24/22 Hearing Transcr. at 4:20-25.)

At the hearing on August 31, 2022, Mother again stipulated to the Department’s request for an extension of custody. (D.C. Doc. 74.) The District Court then ensured Mother was aware she was stipulating to an extension of TLC for only three months. The Court went over Mother’s right to a hearing on the issue. (8/31/22 Hearing Transcr. at 9-10.) Following this hearing, the District Court issued an *Order Extending TLC and*

Approving the Permanency Plan for a period of three months. (D.C. Doc. 75.)

On October 20, 2022, the Department filed a *Petition for Termination of Parental Rights and Permanent Legal Custody with Right to Consent to Adoption or Guardianship*. The Department's basis for requesting Mother's rights be terminated was her failure to successfully complete her treatment plan. (D.C. Doc. 76.) CPS Alicia Becker provided the affidavit in support of the *Petition*. CPS Becker recounted that Mother had the children on a trial home visit until recently, but due to concerns about meeting their needs and keeping them safe, the children were removed from her care again. There were concerns that Mother was exposing the children to individuals under the influence of substances or potentially using drugs. (D.C. Doc. 76, see *Affidavit*.)

Mother had completed a mental health evaluation and continued attending therapy through Helena Valley Addiction Services. She had also been referred to a separate trauma counselor. However, Mother was not able to link the skills she was taught in therapy to parenting her children as she was still turning to drug use when frustrated or upset. Mother had not completed a parenting class. (D.C. Doc. 76, see *Affidavit*.)

Mother completed a chemical dependency evaluation and followed the recommendation to complete in-patient treatment at Rimrock. However, Mother was not compliant with drug testing. Mother relapsed and was out of compliance with Helena Valley Addictions Services. She attended her individual weekly sessions but was missing her weekly group sessions. Mother had yet to complete and submit a relapse prevention and safety plan. Mother had housing lined up but did not sign the lease after being incarcerated. Mother was residing with a friend and looking for stable housing. (D.C. Doc. 76, see *Affidavit*.)

CPS Baney alleged Mother was unlikely to change in reasonable time because of her history of drug addiction and domestic violence which led to her inability to safely parent any of her children. Mother was also a participant in FTC, but when the Court sanctioned her with jail time, she decided she no longer wanted to be a participant. Mother was then released, immediately turned to drugs, and missed the opportunity to sign her lease for her housing. The children had been in the Department's custody for 15 months and this was their fourth removal from Mother's care. (D.C. Doc. 76, see *Affidavit*.)

The first day of the Termination Hearing was held on March 9, 2023. Mother was present. (D.C. Doc. 144.) At the start of the hearing, Mother's

counsel moved for the District Court Judge's recusal due to his presiding over FTC, as well, and potential bias. (3/9/22 Hearing Transcr. at 8:9-15.) The District Court denied Mother's motion and noting that the motion was not timely, nor did it follow correct procedure. The Court also stated it was able to hear the evidence and allegations set forth with the perspective of the children's best interests and could weigh that evidence without bias. (3/9/22 Hearing Transcr. at 12-13.)

CPS Supervisor Westerhold testified that her biggest concerns with Mother were her drug use and co-dependency issues that led her to get involved in bad relationships. (3/9/23 Hearing Transcr. at 21:14-22:25.) She noted that when Mother distanced herself from the father, the Department would see her improve, but when father returned, Mother's situation would deteriorate. (3/9/23 Hearing Transcr. at 23:25-24:5.)

In terms of the failed trial home visit, Westerhold testified the removal of the children was necessary because Mother was struggling to sustain the children in her home. The stress of having the children back in her care led Mother to relapse, which led to the loss of housing at Family Promise. The Department also believed that "[t]he children were being left unattended for long periods of time. And ultimately, their -- the children reported acts of violence between [Mother] and [the father] at that point in

time again.” (3/9/23 Hearing Transcr. at 26:16-24.) This was discouraging to the Department because “... in that short three-month period of time again, we were back to the same situation we had been back to for the last approximately nine years that the Department had been involved” with the family. (3/9/23 Hearing Transcr. at 26:25-27:3.)

CPS Becker testified as to the components of Mother’s treatment plan that were unsuccessful. In particular, Mother had not completed a parenting class, Mother did not engage in family therapy, Mother had completed a chemical dependency evaluation and had done treatment a number of times but had not maintained her sobriety throughout the case, Mother had not completed a relapse prevention plan and Mother did not have suitable housing. (3/9/23 Hearing Transcr. at 42:9-12, 45:10-12, 45:19-25, 46:20-23, 48:19-21.) Mother also did not complete the safety of the children portion of her treatment plan because she allowed contact between the father and the children without involvement of Department. (3/9/23 Hearing Transcr. at 44:22-24.)

However, Becker also testified that Mother had recently begun complying with drug testing, and the tests have been negative. (3/9/23 Hearing Transcr. at 46:1-16.) She also noted that Mother had always been very communicative with her, and she had completed her mental health

evaluation and was engaged in individual counseling (3/9/23 Hearing Transcr. at 50:8-9, 47:5-7.)

Mother testified on her own behalf. She told the Court she recognized the cycle of her addiction and that she repeated the cycle more times than she should have but realized she was not living the life she wanted to. (3/9/23 Hearing Transcr. at 198:20-199:1.) Mother admitted she had not completed her treatment plan and was not ready for the kids to be back in her care at the moment, but she wanted the opportunity to continue working toward reunification. (3/9/23 Hearing Transcr. at 203:4-6, 204:24-205:4.)

Mother continued her testimony when the hearing resumed on March 20, 2023. Since the last hearing, Mother had moved into the YWCA, had been consistent with her drug testing, and had met with both her licensed addictions counselor and mental counselor. (3/20/23 Hearing Transcr. at 20:16-21:17.) Kylie Erp, Child and Family Advocate for the YWCA, testified about the programming available to Mother now that she was residing at the YWCA. (3/20/23 Hearing Transcr. at 37:14-15.) Mother would have access to group therapies, one-on-one mental health therapy, one-on-one addictions counseling, and regular meetings with Erp and a peer specialist. (3/20/23 Hearing Transcr. at 39-40.)

Miri'ikai Walter, Mother's mental health counselor, testified about Mother's diagnosis of Mother has complex post-traumatic stress disorder and anxiety. (3/20/23 Hearing Transcr. at 91:14-15, 91:22-23, 92:15-18.) She noted that complex post-traumatic stress disorder can manifest in erratic behaviors and is often self-medicated with substance abuse. (3/20/23 Hearing Transcr. at 93:14-18.) She also believed that Mother had lots of trauma that resulted in her inability to cope and "to basically live a prosocial, healthy life until she -- until she got treatment for it." (3/20/23 Hearing Transcr. at 94:20-23.) Walter had been seeing Mother for about four months and testified to seeing improvement in Mother's mental health. Mother had been working towards resolving her past traumas and developing coping mechanisms to help her better deal with the anxiety and fear of those experiences. Walter said, "[s]he's a -- a good example of someone who is utilizing clinical tools and directions in a positive way to make positive changes in her life." (3/20/23 Hearing Transcr. at 96:1-2, 95:13-21.)

Following hearing testimony, the District Court ruled from the bench, stating the evidence showed, and Mother admitted, that she did not successfully complete her treatment plans. (3/20/23 Hearing Transcr. at 151:14-16.) In summary, the Court noted,

"it's all over the case law, that Mother's long inability to recognize the disastrous effects of her drug use is not uncommon, and it's very

attributable to substance use disorders. But the law does not require children to wait for permanency until a parent -- parent's wake-up call produces meaningful results....This evidence certainly shows that Mother has taken some very concrete steps towards successful inpatient treatment. She went through Rimrock, and then she went through Centers for Recovery...She is not able at this time to resume parenting of her children.”

(3/20/23 Hearing Transcr. at 152:25-153:14.)

On April 14, 2023, the District Court issued its *Findings of Facts, Conclusions of Law and Order Terminating Parental Rights with Consent to Adoption or Guardianship*. In this *Order*, the District Court reiterated its findings that Mother failed to successfully complete her treatment plan tasks and was unlikely to change in a reasonable time due to her long-standing addiction issues and relationship issues. (D.C. Doc. 151.)

Mother filed a timely *Notice of Appeal*.

ARGUMENT

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 v. California*, 386 U.S. 738, 744 (1967); *see also* Mont. Const. Art. II, § 17. When appellant’s counsel “finds [her] case to be wholly frivolous, after a conscientious examination of it, [s]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* in 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. Mont. Code Ann. § 46-8-103(2). 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 THE DISTRICT COURT ERRED WHEN IT TERMINATED HER PARENTAL RIGHTS.

A. Standard of Review

This Court reviews a district court’s order terminating an individual’s parental rights for abuse of discretion. *In re J.J.L.*, 2010 MT 4, ¶ 4, 355 Mont. 23, 223 P.3d 921. To do so, this Court first reviews the district court’s findings of fact to determine whether they are clearly erroneous and conclusions of law to determine whether they are correct. *In re D.B.*, 2007 MT 246, ¶ 18, 339 Mont. 240, 168 P.3d 691. Findings of fact are clearly erroneous if they are not supported by substantial evidence, the court misapprehends the effect of the evidence, or a review of the record convinces the Court that a mistake has been made. *In re M.J.W.*, 1998 MT 142, ¶ 7, 289 Mont. 232, 961 P.2d 105. The test for an abuse of discretion is

whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. *In re K.J.B.*, 2007 MT 216, ¶ 22, 339 Mont. 28, 168 P.3d 629.

B. Discussion

- i. Mother may assert the District Court erred when it terminated her parental rights because it failed to prove by clear and convincing evidence that the condition rendering her unfit or unable to care for the children was unlikely to change within a reasonable time**

Pursuant to Montana statute, the requirements for termination of parental rights are the child is adjudicated as a YINC and both the following exist: 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(f). (emphasis added). These findings must be supported by clear and convincing evidence. Mont. Code Ann. § 41-3-609(1). “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 R.J.F.*, 2019 MT 113, ¶ 20, 395 Mont. 454, 443 P.3d 387. Further, a District Court "must adequately address each applicable statutory requirement" before terminating an

individual's parental rights.” *In re A.T.*, 2003 MT 154, ¶ 10, 316 Mont. 255, 70 P.3d 1247.

Determining the likelihood of whether a parent is going to change within a reasonable time is akin to predicting the future, which is impossible. As a result, this determination is made largely based on the parent's past conduct as that information is available for analysis. Specifically, the parent's engagement and progress with their treatment plan is indicative of a parent's likelihood to change. The more progress and more engaged a parent is with their treatment plan, the more likely the parent will change within a reasonable time.

Mother may assert that the District Court erred in its determination that her condition, rendering her unfit to parent, was unlikely to change within a reasonable time. The standard for such a determination requires clear and convincing evidence, a threshold that Mother could argue was not met in this case.

One of the key factors supporting this assertion was Mother's engagement with her treatment plan. The record reveals that she did not complete *all* of her treatment plan tasks and she was making efforts toward compliance with those tasks before the termination hearing. (3/9/22 Hearing

Transcr. at 235; 3/20/23 Hearing Transcr. at 20:16-21:17, 95:13-21, 126:9-15.)

This engagement, although somewhat inconsistent, could be seen as a potential for future compliance and progress. Despite the need to still complete some aspects of the treatment plan, Mother's efforts towards may have shown she would be able to meaningful change in a reasonable time. Additionally, Mother testified about how she had begun internalizing the changes she needed to make to safely and appropriately parent. (3/9/23 Hearing Transcr. at 198:20-199:1.) She testified to knowing herself and her triggers better, as well as being able to handle stress better. (3/9/23 Hearing Transcr. at 204:15-23, 234:12-15.)

While past behavior can indicate future actions, it is not determinative. Mother's past struggles with compliance do not necessarily mean she would be unable to comply in the future. Mother's efforts and the nature of her circumstances may suggest that the District Court's decision to terminate her parental rights may have been premature.

CONCLUSION

A thorough examination of the record and research of the applicable law seems to compel a conclusion that Appellant Mother's appeal has no

merit. This Court should grant the undersigned's motion to withdraw as counsel on direct appeal.

Respectfully submitted this day of 20th 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

APPENDICES

Order on Termination of Mother's Parental Rights as to K.P.A

Order on Termination of Mother's Parental Rights as to K.P.B

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 09-20-2023:

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