

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0414

IN THE MATTER OF

T.K.B,

A Youth in Need of Care

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Thirteenth Judicial District, Yellowstone County, the
Honorable Michael G. Moses, Presiding.

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STATEMENT OF THE ISSUE

- I. Whether the Department failed to provide reasonable efforts to reunify Father and the child when the Department failed to provide adequate communication or referrals for services.
- II. Whether the District Court erred when it concluded that Father's conduct was unlikely to change within a reasonable time when the Department filed its Termination Petition less than six months after approving Father's treatment plan.
- III. Whether Father received ineffective assistance of counsel when Father's original counsel failed to communicate with him.

STATEMENT OF THE CASE AND FACTS

H.E. (Father) appeals Yellowstone County District Court's (District Court) Order terminating his parental rights to his two-year-old child, T.K.B. (D.C. Doc. 74.) The Department of Child and Family Services (hereinafter "Department") filed its Petition for Adjudication as Youth in Need of Care (YINC), and Temporary Legal Custody (TLC) on May 24, 2021, due to concerns of physical neglect by M.B. (Mother.) (D.C. Doc 2.) The Department's Petition alleges that on May 17, 2021, the Department received a report that Mother was falling asleep with her newborn T.K.B. in her arms and not picking up on his cues. Child Protection Specialist (CPS) Breanna Riesen responded to the hospital to meet with

staff regarding the report, staff stated they worried Mother did not have the necessary coping skills to care for the baby once home. T.K.B. was born prematurely at 37 weeks gestation and needed an extra level of care, which included supervising his blood sugar before feeding. Staff stated they asked Mother multiple times to alert staff before feeding T.K.B., but she refused despite being educated on the importance of assessing T.K.B.'s blood sugar prior to being fed. (D.C. Doc 2.)

Staff also voiced concerns that Mother would be unable to attend the needed doctors' appointments that T.K.B. would require being born at 37 weeks. (D.C. Doc 2.) The Department also had concerns regarding Mother's extensive Department history and Mother's open criminal investigation into the death of her daughter R.E. who was smothered in the night when Mother co-slept. After consulting with Child Protective Specialist Supervisor (CPSS) Shelby Goodman, CPS Riesen notified Mother and filed a motion for TLC for T.K.B. (D.C. Doc 2.)

On May 24, 2021, the Department filed its Petition for Adjudication of Youth in Need of Care and a petition for Temporary Legal Custody. (D.C. Doc. 1.) A day later, the District Court ordered a Show Cause Hearing on the matter to be held on June 16, 2021, which was continued until August 11, 2021. (D.C. Docs. 5 and 8.)

On August 11, 2021, the Show Cause hearing was held. (D.C. Doc. 22.) Mother and Father were not present at the Hearing, but their respective counsel, Guardian Ad Litem Fred Snodgrass, and CPS Riesen were present. At the Hearing the Department motioned to amend its Petition from requesting TLC to requesting Temporary Investigative Authority (TIA.) All parties stipulated the continuance of Emergency Protective Services (EPS) and the Department's Petition for TIA. (D.C. Doc. 22.)

On August 28, 2021, the Department filed its Petition for Adjudication of YINC after the Department received a report that Mother allegedly engaged in a physical altercation when T.K.B. and his half-brother were present and witnessed the entire event. (D.C. Doc. 25.) The victim's daughter was knocked to the ground, hurting her elbow and hitting her head. CPS Riesen received a call from Deputy Shaffer from the Yellowstone County Sheriff's Department on August 18, 2021, stating that Mother had been arrested for assault on a minor and she would be going to jail on the assault charge. The Department was unable to locate T.K.B. for two days; once T.K.B. was located on August 20, 2021, he was placed in licensed foster care. Mother asked if Father could be a placement for T.K.B., and the Department advised her that since Father was not T.K.B.'s Birth Certificate, he would need to take a paternity test. The Department had no reason to believe

T.K.B. was an Indian Child as defined by the Indian Child Welfare Act (ICWA); therefore ICWA did not apply. (D.C. Doc. 25.)

On August 30, 2021, the District Court ordered an Adjudication/Disposition and Treatment Plan Hearing to be held on October 20, 2021, which was continued until December 1, 2021. (D.C. Docs. 26 and 31.) On October 4, 2021, CPSS Goodman called Father to let him know she received the results of his paternity test, which stated he was the biological father of T.K.B. (D.C. Docs. 33 and 40.) During the call, Father inquired when T.K.B could be placed with him. (D.C. Doc. 40.) CPSS Goodman advised Father that to be a placement for T.K.B., Father would need to make sure he had everything he needed for a baby, his home would need to be safe and appropriate, he needed to build a bond with T.K.B., and address the concerns of domestic violence between him and Mother. The call escalated when Father became frustrated that he could not be placement and handed the phone to his grandmother A.R. Unbeknownst to Father, A.R. and CPSS Goodman were familiar with each other from prior unrelated cases. (3/8/23 Hearing Tr. 93:13-25, 94:5-23.) A.R. became aggressive with CPSS Goodman, at which point CPSS Goodman ended the call. (D.C. Doc. 40.)

The Department filed proposed treatment plans for Mother and Father on October 6, 2021. (D.C. Docs 28 and 29.) At the Adjudication/Disposition hearing, all parties were present and stipulated to the Department's Petition. The court

adjudicated T.K.B. as a YINC and granted TLC to the Department for six months. (D.C. Doc. 32.)

On October 13, 2021, CPSS Goodman texted Father that he would receive a referral for visitation and that someone would reach out to him to schedule visits. (D.C. Doc 40.) CPSS Goodman also requested that he set up a time to meet with her at the Department. Father did not respond. On October 27, 2021, Father went to the Department to sign his necessary releases and voiced concern over the fact T.K.B. wasn't placed with him after he was told he would be once paternity was established. Father's began visitation with T.K.B. through RE Services in December of 2021. (D.C. Doc 40.)

Mother and Father's Treatment Plan Hearing was held on January 12, 2022; all parties aside from Father were present. Mother signed the treatment plan, and Father's counsel had no basis to object. Father's treatment plan was approved on January 12, 2022, and filed by the Department on March 24, 2022. (D.C. Docs 35 and 37.) Father's Treatment plan required Father to contact the CPS worker to determine his parenting intentions, enroll in an approved parenting class, attend visitation with T.K.B., complete SafeCare, complete an anger and domestic violence risk assessment, confirm paternity, meet with his assigned CPS worker to review his progress, alert CPS and counsel of any change in contact information,

and obtain and maintain appropriate safe housing and a legal source of income.

(D.C. Doc. 37.)

On February 10, 2022, Father's family advocate from RE Services reached out to the Department to help Father work on his treatment plan. RE Services explained that Father was short on cash and needed gas cards from the Department to make it to all his appointments. (12/5/22 Hearing Tr. 166:1-3.) The Department refused to provide any financial assistance and told Father that if he required help, he needed to contact the Department directly. (D.C. Doc. 37.)

On June 28, 2022, less than 6 months after Father's treatment plan had been approved, the Department filed its Petition for Termination. (D.C. Doc. 39) On June 29, 2022, the District Court ordered a Termination Hearing to be held on September 21, 2022. (D.C. Doc 41.) A few weeks later, on July 13, 2022, CPSS Goodman filed an Affidavit requesting a Permanency Hearing. (D.C. Doc. 43.) In CPSS Goodman's Affidavit she wrongfully asserted that "...[Father] has not engaged in his treatment plan and has made no attempts to engage with the Department throughout the life of the case." (D.C. Doc. 43 at 3:1-3.) This statement was a misrepresentation when CPSS Goodman acknowledged in her earlier Affidavit that on October 27, 2021, Father attempted to speak with someone at the Department regarding his case. (D.C. Doc. 40.) Additionally, CPSS Goodman's earlier Affidavit also supported that Father had engaged in his

treatment plan to the best of his ability given the lack of referrals and outreach.

(Id.) Father had complied with many tasks on his treatment plan but with regard to his housing, CPSS Goodman never followed up to do a home visit. (12/5/22 Hearing Tr. 165:12-25, 170:4-15, D.C. Doc 40.)

On July 14, 2022, the District Court ordered the Permanency Hearing to be held on August 10, 2022. (D.C. Doc 45.) At the Permanency Hearing, all parties were present, and the court approved the Department's permanency plan. (D.C. Doc. 47.) On September 6, 2022, Kingston Small was reassigned as counsel for Father. (D.C. Doc 49.) The Termination Hearing began on September 21, 2022, and all parties were present. Michael Sullivan was the only witness heard that day, he testified regarding his anger assessment of Mother. (D.C. Doc. 50.) Father's attorney asked Mr. Sullivan if he was familiar with Father or had received a referral to work with him; Mr. Sullivan stated he only knew of Father by name but had not received a referral, nor was he scheduled to work with him. (9/21/22 Hearing Tr. 42:18-23.)

Day two of the Termination Hearing, initially scheduled for November 4, 2022, was reset to December 5, 2022. (D.C. Doc 53.) On day two, five witness provided testimony: Payton Livengood, who was Father's first family advocate at RE Services; Debra Dalke, who worked with Mother during her supervised

visitation; Candance Dozhier, who worked with Mother coordinating visits at the Department; and finally, Mother and Father also took the stand. (D.C. Doc. 60.)

Ms. Livengood testified that she worked with Father from April to October 2022. (12/5/22 Hearing Tr. 8:8-12.) During the five months she worked with Father she stated that he would leave his visits 15 minutes early, which made coordinating transportation difficult, but "...[Father] got better towards the end of my time doing visitation with him." (12/5/22 Hearing Tr. 12:13-21.) Ms.

Livengood also stated that the concerns she worked with Father on revolved around having age-appropriate expectations of T.K.B. and speaking appropriately to him. (12/5/22 Hearing Tr. 13:20-25, 14:9-15, 15:6-11.) Ms. Livengood testified that she addressed these issues within the Nurturing Parenting class, and "...it did seem that [Father] worked on that after the -- after the visits that we did with that." (12/5/22 Hearing Tr. 15:14-16.) At the end of her testimony, Ms. Livengood indicated that despite her concerns, Father was very good with attendance, and when she addressed concerns with Father, she felt they would be fixed. (12/5/22 Hearing Tr. 23:22-25, 28:6-9.)

The testimony from Debra Dalke and Candance Dozhier focused on Mother's involvement in the case; both witnesses were not familiar with Father. (12/5/22 Hearing Tr. 33-106.) The court took a short recess, and then Father took the stand. (12/5/22 Hearing Tr. 108:2-10.) At the beginning of his testimony,

Father was questioned about his six other children and his relationship with them. (12/5/22 Hearing Tr. 109:1-4.) Father testified he was on good terms with his children, and this was the only instance where he needed to be involved with the courts. (12/5/22 Hearing Tr. 111:8-9.) Father was then questioned about his relationship with Mother; Father stated that aside from T.K.B., they had shared another child, R.E., who was smothered in the night when Mother co-slept. (D.C. Doc. 2, 12/5/22 Hearing Tr. 126:3-22.) Their relationship was off and on, but at the time of his testimony, they were "...just trying to work things out for [their] kids." (12/5/22 Hearing Tr. 126:21-22.)

When asked about conflict in his and Mother's relationship, Father stated that they did not argue; most of the conflict stemmed from issues between Mother and the mothers of his other children. (12/5/22 Hearing Tr. 127:14-24.) Father was arrested in 2020 for partner family member assault (PFMA) where Mother was the victim. (12/5/22 Hearing Tr. 128:11-20.) Father maintained throughout his testimony that while he pled guilty to the charge, the altercation between him and Mother was verbal. (12/5/22 Hearing Tr. 133:19-25.)

Father was then questioned about his treatment plan; he voiced concerns about no one responding to him the numerous times he reached out to the Department. (12/5/22 Hearing Tr. 149:17-23.) Father repeatedly testified that he never got referrals and was confused about what he needed to do: "I never got a

referral to safe care. That's what I'm saying or anger management...Only thing I have was visiting for almost six, seven months. Then I started getting parenting classes.” (12/5/22 Hearing Tr. 161:4-8.) Father also stated he relied on RE Services to help him with his treatment plan because he wasn’t getting responses or support from the Department. (12/5/22 Hearing Tr. 169:2-6.)

Father reached out to the Department in Helena and his original attorney, Cory Harman, multiple times to figure out what he needed to get done. (12/5/22 Hearing Tr. 186:13-25, 187:10-19.) Father stated Mr. Harman never explained his treatment plan to him and told Father he should have received the plan when he was in jail. (12/5/22 Hearing Tr. 187:20-25.) Father received approximately 1500 papers in jail from this case, his PFMA with Mother, and the investigation into the death of R.E. (12/5/22 Hearing Tr. 188:1-18.) At the time of this Hearing, Father had not received a referral for a domestic violence assessment or SafeCare. (12/5/22 Hearing Tr. 202:8-25.)

At the end of his testimony, Father stated that his preferred placement for T.K.B. was with his younger sister T.D.L.S. (12/5/22 Hearing Tr. 213:5-9.) After Father was finished, Mother took the stand and testified to her history with the Department and her other children. (12/5/22 Hearing Tr. 251:3-5.) Mother did not complete her testimony, and the Hearing was continued to January 4, 2023. (D.C. Doc. 64.)

At the original date set for day three of the Termination Hearing, all parties were present aside from Ms. Watson on behalf of the state, who had fallen ill. (1/4/23 Hearing Tr. 7:5-14.) The Department moved for a continuance. (Id.) There was no objection to a continuance, but Mr. Small, Father's attorney, did provide an update to the court. (1/4/23 Hearing Tr. 7:20-24.) After the last Hearing CPSS Goodman reached out to Mr. Small and established the steps necessary for Father to complete his treatment plan. (1/4/23 Hearing Tr. 8:2-4.) Father completed his anger evaluation, set up SafeCare, and CPSS Goodman completed a walkthrough of his home. (1/4/23 Hearing Tr. 8:5-8.) The court then reset day three of Termination Hearing for March 8, 2023, and set day four for March 9, 2023. (D.C. Doc. 64.)

On March 8, 2023, the third day of the Termination Hearing, Mother took the stand and continued her testimony from day two. (3/8/22 Hearing Tr. 10:10-13.) The first half of Mother's testimony focused on her relationship with her other child's father and her assault charge. (3/8/22 Hearing Tr. 10-34.) Mother testified that the Department treated Father differently due to his Family's involvement with the Department, specifically with CPSS Goodman. (3/8/22 Hearing Tr. 55:7-23.) Mother expressed concerns regarding the father of her other child but felt like those concerns were "pushed under the rug" whereas with Father reports were "...blown out into bigger things than what it was..." (3/8/22 Hearing Tr. 55:12-

21.) The Hearing concluded, and the court set day five of the Termination Hearing for April 19, 2023. (D.C. Doc. 68.)

On March 9, 2023, all parties were present on day four of the Termination Hearing. (D.C. Doc. 69.) Four witnesses took the stand: Shannon Johnston, who worked with Mother on SafeCare; Wendy Bulkley, who supervised visitation with Mother; Elizabeth Gregory, who was Father's family advocate at RE Services after Payton Livengood left; and Michael Sullivan, who completed Father's evaluations. (Id.)

Shannon Johnston and Wendy Bulkley were unfamiliar with Father and only worked with Mother. Ms. Gregory, Father's family advocate at RE Services, stated that Father was doing well in September 2022, but she saw a huge improvement in Father's parenting style starting in November 2022. (3/9/23 Hearing Tr. 118:12-23.) She stated that Father showed up to almost every visit well prepared and appeared more comfortable "[Father] plays on the floor. He sings song. He makes sound effects with the toys. He is very playful with [T.K.B.]" (3/9/23 Hearing Tr. 110:1-22.) She also testified that Father and T.K.B. appeared to be bonded. (3/9/23 Hearing Tr. 117:7-18.)

The last witness of the day, Mr. Sullivan, testified to Father's anger evaluation results. (3/9/23 Hearing Tr. 170:13-24.) Part of Mr. Sullivan's evaluation addressed Father's alleged criminal charge: "[Father] denied exchanging

marijuana for sex, denied sex with the alleged victim, but did report having given marijuana to the 15-year-old girl.” (3/9/23 Hearing Tr. 176:7-19.) Mr. Sullivan testified that based on the evaluation results, he concluded that Father had poor judgment, awareness, and an unhealthy level of denial. (3/9/23 Hearing Tr. 179:3-112.) Mr. Sullivan recommended individual therapy with someone skilled in working with individuals around interpersonal violence, a chemical dependency evaluation, and continued parenting classes. (3/9/23 Hearing Tr. 194:23-25, 195:1-6.)

On April 19, 2023, the final day of the Termination Hearing took place. (D.C. Doc. 71.) All parties were present, and five witnesses testified: CPSS Goodman from the Department; Kelly Ogger, who was Mother's therapist; Mother; T.D.L.S. Father's younger sister; and Father.

CPSS Goodman took the stand and recounted her involvement with the case. She testified that Father had started SafeCare and walked the court through her first phone call with Father. CPSS Goodman testified that during the call where she told Father DNA results came back proving he was the father; he became aggressive once he was told T.K.B. would not be placed with him immediately. (4/19/23 Hearing Tr. 56:21-24, 60:12-25.) Father then gave his grandmother the phone, and she began threatening CPSS Goodman. CPSS Goodman testified that she hung up the phone, then after staffing with her supervisor, “it was determined that given the

violence and the outburst and the anger that all communication would go through his attorney.” (4/19/23 Hearing Tr. 61:1-19.) She also testified that she did not think either parent had addressed the issues leading to removal. (4/19/23 Hearing Tr. 79:8-11.) Her main concerns with Father’s fitness were the issues raised in Mr. Sullivan’s evaluation and his pending criminal charges. (4/19/23 Hearing Tr. 79:13-25, 80:1-7.) CPSS Goodman testified that she believed it was in the best interests of T.K.B. to be adopted by his placement and parental rights to be terminated. (4/19/23 Hearing Tr. 82:6-23.)

Kelly Ogger and Mother took the stand and testified about Mother’s mental health and visitation. Father’s younger sister then briefly took the stand and testified that she was a licensed foster care provider and was willing to be a placement for T.K.B. (4/19/23 Hearing Tr. 212:9-11.)

Finally, Father took the stand and gave an update on where he was with his treatment plan. (4/19/23 Hearing Tr. 214:1-4.) Father testified that he was on part two of SafeCare, regularly attended visits, and had a better relationship with CPSS Goodman. (4/19/23 Hearing Tr. 214:5-8, 217:2-15, 218:9-11.) Father also engaged in individual therapy for a session before there was a conflict and he could no longer see the therapist; but had not received an additional referral for a new therapist. (4/19/23 Hearing Tr. 222:21-25, 223:1-4.)

Father also testified that he rarely spoke with his first attorney, Mr. Harman, and was unaware that communications with the Department went through him. (4/19/23 Hearing Tr. 223:13-25.) Father stated that for the first part of the case, he navigated the system by calling RE Services or going to addresses he was given in court because he was not receiving communications from the Department. (4/19/23 Hearing Tr. 224:16-25, 225:1-23.) Father expressed frustration with receiving his SafeCare, anger evaluation, and other referrals so late in the case. (4/19/23 Hearing Tr. 236:24-25, 237:1-4.)

On June 30, 2023, the District Court entered its Findings of Fact, Conclusions of Law and Order terminating Father's parental rights. (D.C. Doc. 74.) The District Court found that Father had failed to successfully complete his treatment plan, and the conduct or condition rendering him unfit to parent was unlikely to change in a reasonable time. The District Court also found that the termination of Father's parental rights was in the child's best interest. (Id.) Father filed a timely Notice of Appeal. (D.C. Doc. 78.)

SUMMARY OF THE ARGUMENTS

The District Court erred when it found the Department had provided Father with reasonable efforts to reunify with his child. The Department did not communicate with Father for much of the length of the case, nor did it provide Father with referrals for completing tasks after the District Court had ordered and

approved its proposed treatment plan. Furthermore, Father had only had a court ordered and approved treatment plan for six months before the Department filed for termination of his parental rights. Thus, not providing him a reasonable time with which to engage with and complete his treatment plan.

Furthermore, because Father was not given a reasonable amount of time to work on and complete his treatment plan, the Department did not provide the District Court with the requisite clear and convincing evidence that Father's conduct or condition was unlikely to change in a reasonable time.

Father received ineffective assistance of counsel from his first attorney. His attorney did not communicate with him what the Department's expectations were, nor did he provide Father with information regarding the status of the case. This left Father in a position to be behind in working on tasks for reunifying with his child as he did not have the necessary communications on how to address the Department's concerns.

STANDARD OF REVIEW

This Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re K.A.*, 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478. The Department has the burden of proving by clear and convincing evidence that the statutory criteria for termination have been satisfied. 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 K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691. This Court reviews a district court's findings of fact for clear error and its conclusions of law for correctness. *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 this Court a mistake was made. *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715. "To reverse a district court's evidentiary ruling for an abuse of discretion, this Court must determine the district court either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *In re I.M.*, 2018 MT 61, ¶ 13, 391 Mont. 42, 414 P.3d 797 (citing *In re O.A.W.*, 2007 MT 13, ¶ 32, 335 Mont. 304, 153 P.3d 6). ¶10.

ARGUMENTS

I. THE DEPARTMENT FAILED TO PROVIDE FATHER WITH THE REQUIRED REASONABLE EFFORTS TO REUNIFY HIS FAMILY.

The Department is obligated to provide a parent with reasonable efforts to reunify the parent with the child. Section 41-3-423, MCA; *In re R.J.F.*, ¶ 25. The Department must “make reasonable efforts to prevent the necessity of removal of a child from the child’s home and to reunify families that have been separated by the state.” Section 41-3-423(1), MCA. Although a determination of reasonable efforts

is not a separate requirement for termination, this Court has held it may be a predicate for determining whether a parent's conduct or condition is likely to change. *In re R.L.*, 2019 MT 267, ¶ 18, 397 Mont. 507, 452 P.3d 890. A district court's "conclusion that a parent is unlikely to change could be called into question if the Department failed to make reasonable efforts to assist the parent." *In re C.M.* 2019 MT 227, ¶ 22, 397 Mont. 275, 449 P.3d 806. Reasonable efforts will differ depending on the particular facts of each family. The child protection specialist assigned to the case must tailor their efforts to each family, with the ultimate goal of reuniting the child and parent. Montana law provides a non-exhaustive list of reasonable efforts including developing voluntary protective services agreements, individual written case plans, provision of services to accomplish a case plan, and periodic review of the plan to ensure timely progress toward reunification. Section 41-3-423(1), MCA.

This Court has held that reasonable efforts "requires the Department to diligently attempt to contact reluctant parents and engage them with services, . . . requires the development and implementation of voluntary services and/or a treatment plan reasonably designed to address the parent's treatment and other needs precluding the parent from safely parenting, [and] . . . requires more than merely suggesting services to a parent and waiting for the parent to then arrange those services for herself." *In re R.L.*, ¶ 22. When the Department provides a parent

with a treatment plan, “[it] must in good faith develop and implement treatment plans designed to preserve the parent-child relationship and the family unit.” *In re R.L.*, ¶ 19, (citing *In re R.J.F.*, ¶ 26.)

While the Department is not required to put forth “herculean efforts,” it does have a duty to assist parents in completing their treatment plan. *In re R.L.*, ¶ 20, (citing *In re R.J.F.*, ¶ 38.) Treatment plans are a partnering of the Department with the parent and require a “joint effort” between the Department and the parent. *In re R.L.*, ¶ 19; *In re R.J. F.*, ¶ 26; *Matter of J.S. & P.S.*, 269 Mont. at 178-79, 887 P.2d at 724. See also *In re A.T.*, 2003 MT 154, ¶ 21, 316 Mont. 255, 70 P.3d 1247. The Department must continue to monitor treatment plan tasks throughout a case and the good faith requirement “does not end once the court has approved a treatment plan.” *In re D.B.*, 2007 MT 246, ¶33, 339 Mont. 240, 168 P.3d 691. Finally, if the Department elects to provide an incarcerated parent with a treatment plan, the same burdens and good-faith requirements apply. *In re A.T.*, ¶¶ 23-25.

a. The Department Did Not Provide Father With Sufficient Time to Complete His Treatment Plan After It Was Ordered by the District Court.

The Department's decision to file a petition to terminate Father's parental rights less than six months after the District Court’s approval of his Treatment Plan contradicts the Department's Treatment Plan for Father and MCA § 41-3-604. According to MCA § 41-3-604, it is presumed to be in the best interests of the

child to terminate parental rights if the child has been out of home for 15 out of the most recent 22 months. This guideline provides a reasonable timeframe for parents to complete their Treatment Plans and work towards reunification.

Montana Code Annotated § 41-3-604(1) comes from the Adoption and Safe Families Act (ASFA), enacted in 1997. The congressional intent of ASFA came from concern regarding the well-being of children caught in the foster care system for extended periods without a clear pathway to permanency. The 15 out of 22 months provision was aimed to balance the rights and responsibilities of biological parents with the pressing needs and rights of children in foster care. *See* National Council For Adoption, *Understanding the Adoption and Safe Families Act (ASFA)*, issued October 5, 2023, <https://perma.cc/A9TN-4LMP>. By setting forth a clear timeline of 15 months, Congress aimed to mitigate the detrimental effects of prolonged foster care stays, incentivize timely parental efforts towards reunification, and expedite the transition to adoptive homes when necessary. Those 15 months are meant to be used by parents to fulfill the requirements of the Department—yet in this case, Father had less than six months to work on his Treatment Plan before the Department filed its Petition to Terminate Parental Rights. (D.C. Doc. 39.)

In those six months, Father faced challenges engaging with his Treatment plan because the Department did not provide Father with the necessary referrals.

Father did not receive referrals to SafeCare, cognitive behavioral therapy, anger evaluations, or a chemical dependency evaluation until after the Termination Hearings took place. (4/19/23 Hearing Tr. 126:1-23.) This lack of engagement on behalf of the Department hindered Father's ability to successfully complete his treatment plan.

Father was not afforded the opportunity to work meaningfully on completing his treatment plan before the Department filed its Petition to Terminate his parental rights. The Department based its Petition to Terminate on Father's failure to complete his treatment plan, yet he only had six months to comply before the time of filing. Considering the multifaceted nature of the treatment plan, the Department's petition filing timeline was significantly premature.

b. The Department Failed to Engage Meaningfully With Father.

From the onset of this case, the Department's engagement with Father was insufficient. The solitary call from CPSS Goodman confirming Father's paternity failed to provide an explanation or support for the necessary steps towards reunification. Father testified during day two of the termination hearing that he called the Department multiple times asking for a new CPS worker because he was not receiving support and had only spoken with CPSS Goodman "once or twice" before the Termination Hearings began. (12/5/22 Hearing Tr. 165:12-25.) Due to the Department's lack of support, Father relied on RE Services to help guide him

through his treatment plan—he asked them to assist with referrals for "everything, safe care, whatever they said I needed to take." (12/5/22 Hearing Tr. 165:2-5.) RE Services established Father with visitation and a nurturing parenting class but could not help with the other services because they did not provide them at their facility. (12/5/22 Hearing Tr. 165:8-11.)

Father also testified that he tried multiple times to reach out to the Department for help, even going down in person "several times" when attempting to set up visitation with T.K.B. (12/5/22 Hearing Tr. 167:14-25.) Father further expressed his frustration with only receiving referrals to complete one task at a time, where Mother was able to work on multiple tasks at the same time:

I wasn't doing anything else because nobody never call me [sic]. But I was asking RE Services for these other services. So when I got done with one thing, they said, well, you still need to complete this or complete that all one at time, which the mother is doing multiple at one time. So I was like, how come I am only doing visits and you are doing everything?

(12/5/22 Hearing Tr. 168:15-21.) The Department also failed to visit Father's home. Father stated he had received a text that CPSS Goodman would check the living conditions of his home but never went to see it. (12/5/22 Hearing Tr. 170:4-15.) RE Services corroborated this lack of effort by the Department. When asked if there was anything unique about the attitude of the Department towards Father, Elizabeth Gregory testified that even she had "...the least amount of

communication with the caseworker” in Father’s case compared to the other seven cases she was working on. (3/9/23 Hearing Tr. 121:11-17.)

CPSS Goodman and the Department maintained that the lack of communication was due to an argument during their first phone call regarding Father’s paternity test. Father repeatedly testified that he handed the phone to his grandmother because he had never dealt with the Department, and that was when a heated exchange occurred. (12/5/22 Hearing Tr. 171:4-23.) Father’s grandmother had a prior history with CPSS Goodman, and Mother testified that the Department treats Father poorly because of it. (3/8/23 Hearing Tr. 93:13-25, 94:5-23.)

Specifically, Mother testified that the Department treated Father worse than the father of her other child, who was also removed:

It was a meeting between me, [CPSS Goodman], and my previous lawyer. And I had brought up concerns of [other child’s father] and she just kept emphasizing more on [Father]. She made a statement in that meeting and said I know the history that she has with his family, and I know that she doesn’t like them. And with [other father’s] family, it just has always been basically brushed off like nothing...And it just seem like that because [other father’s mother] doesn’t give [CPSS Goodman] a hard time. She favors more his side of the family and is always constantly bashing and badgering me about [Father’s] family so it does seem like there is favoritism between the two.

(3/8/23 Hearing Tr. 92:16-25, 93:1-4.) When Father attempted to visit T.K.B. after Mother gave birth, the Department refused Father any contact because he was not on the birth certificate. (3/8/23 Hearing Tr. 93:5-17.) Yet, Mother testified the Department allowed the father of her other child to be a placement even though he

was not on the birth certificate and “...never had any relationship and had barely just met his son that year.” (3/8/23 Hearing Tr. 93:18-20.)

The Department's conduct did not meet the reasonable efforts standard mandated by this Court in *In re R.L.*, which requires proactive engagement and tailored treatment plans to support family preservation. The Department’s passive approach in Father's case reflects a clear departure from the reasonable efforts standard implemented to preserve the parent-child relationship.

II. THE DISTRICT COURT ERRED WHEN IT TERMINATED FATHER’S PARENTAL RIGHTS.

A “natural parent’s right to the care and custody of a child is a fundamental liberty interest which courts must protect with fundamentally fair procedures at all stages of the proceedings for the termination of parental rights.” *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282 (*citing In re B.N.Y.*, 2003 MT 241, ¶ 21, 317 Mont. 291, 77 P.3d 189). Because the procedures to terminate an individual’s right to parent her child implicate a fundamental liberty interest, the procedures are protected by the Due Process Clause of the United States and Montana Constitutions which guarantee that those procedures are fundamentally fair. *In re C.J.*, ¶ 26; *In re D.B.*, ¶ 17; U.S. Const. *amend. XIV*; Mont. Const. *art. II*, § 17.

If a child is in the Department’s custody for 15 of 22 months, then it is presumed to be in the child’s best interests to terminate parental rights. Mont. Code

Ann. § 41-3-604. A district court may order the termination of the parent-child legal relationship if there is clear and convincing evidence that the child was adjudicated a YINC, the parent failed to comply with an appropriate treatment plan, and the condition or conduct that rendered the parent unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), Mont. Code Ann. Further, in considering termination, a district court must give primary consideration the best interests of the child. Mont. Code Ann. § 41-3- 609(3).

The clear and convincing standard requires that a preponderance of the evidence is definite, clear, and convincing. *In re L.M.A.T.*, 2002 MT 163, ¶ 33, 310 Mont. 422, 51 P.3d 504. Clear and convincing evidence does not have to be conclusive and falls between the criminal law rule of beyond a reasonable doubt and the civil law standard of a mere preponderance. *In re L.M.A.T.*, ¶ 33. It is the Department's burden to prove by clear and convincing evidence that every requirement of the termination statute has been satisfied. *In re L.M.A.T.*, ¶ 33.

a. The District Court's Finding That the Conduct or Condition Rendering Father Unfit to Parent Was Unlikely to Change Within a Reasonable Time Was Not Supported by Clear and Convincing Evidence.

If a district court finds that a child has been adjudicated a YINC and the child's parent has failed to comply with or successfully complete a court-approved treatment plan (§ 41-3-609(1)(f)(i), MCA), the court may order the parent's rights terminated only if it also finds that the conduct or condition that rendered the

parent unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f)(ii), MCA (emphasis added). As such, the termination criteria under § 41-3-609(1)(f), MCA are conjunctive and require proof of both subsection (i) and (ii) by clear and convincing evidence. Further, in assessing termination, the District Court must consider the best interests of the child. Mont. Code Ann. § 41-3-609(3).

Here, the Department failed to establish by clear and convincing evidence that Father was unlikely to change within a reasonable time. The Department allotted Father less than six months to work on his treatment plan, which was insufficient given the tasks. (D.C. Doc. 37.) Additionally, even with the lack of time, referrals, and support by the Department, Father took active steps to work his treatment plan.

Any delay in completion of Father's tasks was due to a lack of referral or communication by the Department. Although Father did not receive the necessary referrals for most of his treatment plan until the Termination Hearings commenced, he promptly engaged in what he was able to absent those referrals. At the time of Termination, Father had engaged in a mental health and violence risk assessment, completed his Nurturing Parenting class and 2 of 3 modules for Project SafeCare, engaged in visitation, and demonstrated the principles taught in Nurturing Parenting during his supervised visitation. (D.C. Doc. 72 & 74.) Testimonial from Staff at RE Services suggest Father did well engaging and responded positively to the directives during his visitation time. When Elizabeth Gregory, Father's family

advocate, was asked how Father did with redirection and if he implemented her suggestions during visitation, she stated, "I would say, yes, within the visit."

(3/9/23 Hearing Tr. 112:7.)

Ms. Gregory also testified that she and Father had a goal in February to work with T.K.B. on educational development, and Father came "...prepared at the start of February with like a Leap Frog laptop that he had got for [T.K.B.] and then I also noticed a huge increase in him talking and letters and sounds and things of that aspect." (3/9/23 Hearing Tr. 113:9-13.) When asked about if there was a bond between Father and T.K.B. Ms. Gregory testified:

"Yes, [T.K.B.] usually smiles. If [Father] is already sitting in the visit room, [T.K.B.] will usually smile and go sit up next to him. And if he is -- if [T.K.B.] is already in the office and [Father] is entering through the front door, he usually runs up and smiles at him..."

(3/9/23 Hearing Tr. 117:7-18.) Father made significant progress in the little time he had to work on his plan.

The District Court's finding that Father was unlikely to change within a reasonable time was clearly erroneous. Father did not have enough time to complete his treatment plan. Despite the Department's inadequate time frame and support, Father demonstrated initiative in adhering to his treatment plan, making tangible progress, and fostering a positive relationship with his child. This proactive behavior, coupled with the Department's failure to prove the statutory criteria for Termination suggests the district court's determination was erroneous.

III. FATHER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

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., ¶ 20.) 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.

Father's understanding of the Treatment Plan significantly improved with the appointment of his new attorney, Mr. Small, on September 6, 2022. Before this, the Department's decision to channel all communications through Father's previous attorney hindered his comprehension of the case status and his progress toward reunification. CPSS Goodman herself testified that Father's communications have

“...gotten better since [Mr. Small] became his attorney...” (4/19/23 Hearing Tr. 125:8-11.)

At the outset of this case, the Department unilaterally decided that all communication with Father would go through Father’s original attorney. (D.C. Doc. 72.) Father was never informed of the decision by the original attorney and only became aware of the decision after Mr. Small was appointed on September 6, 2022. (*Id.*) The original attorney’s failure to relay that the Department sent communications to him or maintain an open line of communication left Father in an information vacuum, evidenced by the mere 13 text messages from the Department to Father throughout the case’s duration till the new attorney’s appointment. (*Id.*)

Father testified that after Mr. Small was appointed, his relationship with the Department drastically improved. (4/19/23 Hearing Tr. 218:9-22.) Father received more texts, phone calls, and even in-person visits with the Department and CPSS Goodman. (*Id.*) Father never received communication from his original attorney that the Department wanted to speak with him. (4/19/23 Hearing Tr. 224:2-10.) The only communication Father received regarding this case up until Mr. Small’s appointment was texts from RE Services about getting his visitation scheduled. (4/19/23 Hearing Tr. 224:20-24.) Until Mr. Small's appointment, Father was

essentially navigating the system independently, doing the best he could given the circumstances.

The substantial improvement in communication after Mr. Small's appointment on September 6, 2022, highlights the ineffective assistance provided by his first attorney. The original counsel's failure to communicate and advocate effectively left Father in an informational void, with a significant turnaround seen only after the change in representation. This stark contrast in legal support and Father's subsequent enhanced engagement with the Department is evidence of the prejudicial impact of initial counsel's ineffective assistance.

CONCLUSION

For these reasons, Father respectfully requests this Court reverse the Order of the District Court terminating his parental rights and remand for further proceedings.

Respectfully submitted this 13th day of November 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 Opening 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

APPENDIX

Findings of Fact, Conclusions of Law, and Order Terminating Parental Rights as to
T.K.B.A

CERTIFICATE OF SERVICE

I, Shannon Colleen Hathaway, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-13-2023:

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