IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0414

IN THE MATTER OF N.Z.B. and T.K.B.,
Youths in Need of Care.

OPENING BRIEF OF APPELLANT

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

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STATEMENT OF THE ISSUES

1. Whether the Department of Public Health and Human Services, Child and Family Services Division (Department) failed to comply with the statutory requirements of Sections 504 and 1557 of the Rehabilitation Act, and 29 U.S.C. § 794, when the Department and its service providers denied Mother's requests for reasonable accommodations during her pregnancy.
2. Whether Mother received ineffective assistance of counsel when her attorney did not obtain an alternative psychological evaluation and did not consult with another expert psychologist regarding the deficiencies in Michael Sullivan's evaluation.
3. Whether the district court abused its discretion when it determined that the condition or conduct rendering Mother unfit to parent was unlikely to change in a reasonable time.

STATEMENT OF THE CASE AND FACTS

M.B. (Mother) appeals an Order from the Thirteenth Judicial District Court (District Court) terminating her parental rights to N.Z.B., a five-year-old boy, and T.K.B., a two-year-old boy.

The father of N.Z.B.—J.F-B.—relinquished his parental rights. The father of T.K.B.—H.E.—did not relinquish his rights, which were terminated by the district court in the same order as Mother's. 6/30/23 Order Terminating Parental Rights, attached as App. A. N.Z.B.'s and T.K.B.'s cases were consolidated under T.K.B.'s case number, DA 23-0414.

Mother was pregnant during most of these proceedings. T.K.B. was born in May, 2021. Mother also gave birth to a girl, L.E., in May 2022.

The Department filed a petition for emergency services for N.Z.B. on August 24, 2020. D.C. Doc. 1.[1]

The Department had received periodic complaints about Mother from 2018 to 2020, all of which were anonymous allegations of drug use that had been proven to be false. D.C. Doc. 2 at 4-5. CPSS Goodman later confirmed Mother had never had a substance abuse problem. 4/19/23 Tr. at 85.

[1] All references to D.C. Docs will be to court documents in the record provided for DA 23-0413 (for N.Z.B.), unless otherwise noted, in which case they are from the record in DA 23-0414 (for T.K.B.). The termination order is identical for both cases.

In August, 2020, however, Mother's infant daughter, R.E., died of sudden infant death syndrome. D.C. Doc. 2. A criminal investigation later concluded that Mother was not at fault and no charges were filed.

At the time of R.E.'s death, Mother asked two-year-old N.Z.B.'s paternal grandmother, K.F., to care for him temporarily while she was dealing with her grief. After a few days, however, Mother reported to CPS that she had seen a video of N.Z.B. being driven in a car with no car seat by his father, J.F-B, while Father was intoxicated. D.C. Doc. 2 at 3; 3/8/23 Tr. at 133. Because of this allegation and R.E.'s death, CPS decided to petition for emergency protective services for N.Z.B. on August 19, 2020.

September 2020 to January 2021: Limited Visitation & Covid Pandemic

On November 4, 2020, all parties stipulated to Show Cause, Adjudication and Disposition. D.C. Doc. 13. N.Z.B. was adjudicated a youth in need of care on this date. Temporary Legal Custody was granted to the Department for up to six months.

No visitation with N.Z.B. was set up for Mother until three months after the petition for emergency services had been filed. The

district court urged the Department to set up visitation at a November hearing. 11/4/20 Tr. at 8.

During the fall of 2020, the case moved at a slow pace because of the covid pandemic. Both Mother and the paternal grandmother separately and repeatedly cancelled visitation appointments because of fears about covid or actual illness.

Treatment plans were approved for Mother and N.K.B.'s father on December 21, 2020. D.C. Doc. 18. Mother was required to perform the following tasks: 1) assess mental health concerns and attend individual counseling; 2) attend parenting classes and visitation; 3) maintain communication with CPS; 4) obtain housing; 5) maintain employment. D.C. Doc. 16.

May, 2021: Birth of T.K.B. and In-Home Safety Plan

The Department filed a petition to extend temporary legal custody on May 25, 2021. D.C. Doc. 22. At the hearing on the petition on June 16, 2021, all parties stipulated to the extension. D.C. Doc. 29.

The May 25, 2021 affidavit stated that Mother was for the most part in compliance with her Phase I treatment plan. D.C. Doc. 23. She had completed a mental health evaluation, was attending counseling,

had completed her required parenting classes. She was in compliance with the CPS communication requirement. She was struggling with being consistent about visitation. D.C. Doc. 23 at 5, 10.

On May 16, 2021, T.K.B. was born. CPSS Riesen went to the hospital and confronted Mother, stating that hospital nurses were concerned about her ability to care for him. D.C. Doc. 2 at 3 (DA 23-0414). The nurses had alleged that Mother had not attended prenatal appointments, and was not responding to the infant's cues because she was sleepy. Mother explained that she had in fact attended her prenatal appointments, but they had been at another hospital. Mother's response was correct, and the allegation about missing prenatal appointments was false. Mother also explained that she was sleepy because of medication given to her. The hospital nurses also criticized Mother for feeding her baby without having his blood sugars checked before each feeding.

CPSS Riesen told Mother she would either have to sign a protective plan, or have her newborn baby seized and placed in foster care. Mother chose to sign the protective plan, which required her to

live with T.K.B. in the home of her friend, 70-year-old Patty Zimmerman. 3/8/23 Tr. at 26.

From May 2021 to mid-August 2021, Mother seemed to fare well, caring for her newborn son, T.K.B., in the home of her friend Patty, and progressing to unsupervised visits with N.Z.B. Patty's home was cleared by CPS as appropriate and safe.

At an August 11, 2021 hearing, CPSS Riesen told the court that Mother was doing well. 8/11/21 Tr. at 6. A new treatment plan was filed on August 6, adding SafeCare, but not requiring that Mother obtain her own housing separate from her friend Patty. D.C. Doc. 19 (DA 23-0414). The Department modified its petition to one for temporary investigative authority and the Court ordered continued protective services. D.C. Doc. 23. (DA 23-0414).

August 16, 2021: Mother's Misdemeanor Assault at Fair; Department Removes T.K.B.

On August 16, 2021, Mother's case took a 180-degree turn for the worse. Mother was attending the fair with N.Z.B., T.K.B. and her non-custodial older daughter, when she encountered a woman who was the mother of another child of H.E. (T.K.B.'s father). A mutual physical fight ensued, and Mother was charged with misdemeanor assault. A few

days later, she was arrested and put in jail for a day. Before going to jail, she gave T.K.B. to her friend Angel to babysit. CPS then could not locate T.K.B. for twenty-four hours, while Mother was in jail. CPS blamed Mother for hiding T.K.B., but could not prove that she was responsible. Mother denied any involvement. Mother's housemate, Patty Zimmerman, was never alleged to have played a role in hiding T.K.B. D.C. Doc. 25. (DA 23-0414).

On August 24, 2021, the Department filed a petition for adjudication of T.K.B. as a youth in need of care and temporary legal custody. D.C Doc. 24 (DA 23-0414).

T.K.B. was removed on August 20 and placed in foster care. Visitation did not begin until mid-September, about a month after removal of her three-month-old infant. 12/5/22 Tr. at 37. Mother was provided with a single supervised two-hour visitation session per week.

Shortly after T.K.B.'s removal, Mother filed complaints with the Department ombudsman about CPSS Riesen and CPSS Goodman. 9/22/21 Tr. at 8. She asked to have different workers assigned to her case.

The Department's team of supervisors informed Mother that Goodman would now be handling her case. On September 22, 2021, a permanency hearing was held. The district court approved a permanency plan of reunification. D.C. Doc. 38 (DA 23-0414).

CPSS Goodman made it clear at the permanency hearing, however, that the agency now viewed Mother in an extremely unfavorable light. 9/22/21 Tr. at 8-9. She stated that Mother was pregnant again and that this was cause for concern. 9/22/21 Tr. at 7.

Under Goodman's direction, new treatment plan requirements were imposed on Mother in September, 2021 that were much more onerous than those proposed on August 6, 2021. *Compare* D.C. Doc. 28 (DA 23-0414) and D.C. Doc. 19 (DA 23-0413). The new requirements included an anger assessment with Michael Sullivan, who later provided a negative evaluation that became the centerpiece for the Department's case for termination. 9/22/21 Tr. at 5.

Goodman also decided that Patty's home would no longer meet Mother's housing requirement under the treatment plan and that she now needed to obtain "her own residence" in order to ever progress to unsupervised visits or to having her children returned to her. State's

Ex. I at 1; 10/14/21 Out of Home Safety Plan at 2; D.C. Doc. 40 at 5 (DA 23-0414).

Fall of 2021 to January 2022: Mother Misses Work and Visits Because of Pregnancy Appointments and Illness

During the fall of 2021, Mother attended weekly two-hour supervised visits combining SafeCare and parental visitation. Because she was pregnant, she was no longer working. She missed several SafeCare appointments because of doctor's appointments and sickness.

T.K.B. was adjudicated a youth in need of care on December 1, 2021 and the Department was granted temporary legal custody for up to six months. D.C. Doc. 34 (DA 23-0414).

January 12, 2022 to May, 2022: Phase II Treatment Plan & Conflict over Reasonable Accommodation Requests

On January 12, 2022, Mother signed her Phase II treatment plan that was also approved by the district court. D.C. Doc. 35 (DA 23-0414). The new treatment plan ordered Mother to obtain an anger assessment and follow all recommendations from it. It also required her to obtain "her own residence" without any other adults living in the unit. *Id*.

Mother testified at the January 12 hearing that she had been looking for housing, but that it was difficult for her to find something she could afford. 1/12/22 Tr. at 4-5.

A second Petition for Extension of Temporary Legal Custody, supported by an affidavit, was filed on January 18, 2022. After a continuance, on June 1, 2022, all parties stipulated to the extension. App. A at 3.

In February, 2022, Mother complied with the anger assessment requirement. This evaluation was used to support the Department's petition for termination. Sullivan Anger Assessment, State's Ex. A, attached as App. B.

On March 23, 2022, a hearing was held on the Department's request to extend TLC. CPSS Goodman complained that Mother was missing visitation because of her prenatal appointments. She stated that Mother had been warned that her new baby would be removed if she did not obtain "her own residence." 3/23/22 Tr. at 6.

Mother was placed on bed rest in February, 2022 and requested accommodation in the form of in-home visits and SafeCare training in her current residence. D.C. Doc. 40 at 8. The Growing Together

supervisor refused this request, as did the Department. Mother did not participate in visitation or SafeCare during the month of April. *Id*. at 10.

On May 5, 2022, Mother informed CPSS Goodman that she had obtained Section 8 housing and would move in shortly. D.C. Doc. 40 at 13. On May 10, 2022, CPSS Goodman drafted her affidavit in support of a petition for termination of legal rights. D.C. Doc. 40 (DA 23-0414).

Mother gave birth to L.E. on May 17, 2022, who was immediately removed from her care. Mother filed additional complaints about CPSS Goodman to the Department ombudsman. D.C. Doc. 40 at 13. Deb Cole, Department supervisor for CPSS Goodman, refused to arrange any more meetings and told Mother she could not have a new worker. *Id*.

Goodman inspected Mother's Section 8 apartment on June 30, 2022 and noted that it lacked furniture for the children. 4/19/23 Tr. at 110. Mother testified that she fainted while trying to move a couch into the home herself during the two weeks after L.E.'s delivery. 3/8/23 Tr. at 23. The Department did not offer her any assistance. Goodman never inspected the home again. *Id*. at 112.

On June 28, 2022, the Department filed their Petition for Permanent Legal Custody, supported by CPSS Goodman's affidavit of May 10, 2022. D.C. Doc. 39 (DA 23-0414).

Mother continued to attend Growing Together SafeCare modules sporadically throughout the summer of 2022, but was "exited from the program," in part because of visits she had missed while pregnant during the spring and those she had missed while attending required anger management classes. 3/9/23 Tr. at 28.

September 2022 through April 2023: Termination Hearings

Day one of the termination hearing was September 21, 2022. Michael Sullivan, the social worker who had completed Mother's anger assessment, testified regarding his negative conclusions about Mother's personality, stating that she was "not equipped to have children primarily in her care at this time." 9/23/22 at 31. He had never observed her parenting. *Id*. at 39. On Day 2, December 5, 2022, visitation workers testified regarding Mother's tendency to pay more attention to the younger children than to N.Z.B. Mother had missed many visitation appointments while pregnant. 12/5/22 Tr. at 40, 46.

Day 3 was March 8, 2023. Mother testified, explaining her difficulties during pregnancy and the Department's refusal to accommodate them and to communicate reliably with her. Day 4 was March 9, 2023. Shannon Johnston, supervisor at Growing Together, and Department visitation worker Wendy Bulkley testified. Day 5 was April 19, 2023. CPSS Goodman testified, as did Mother's more recent therapist, Kelly Ogger.

The district court terminated Mother's parental rights on June 30, 2023. The court also terminated the parental rights of H.E., the father of T.K.B. *See* App. A.

SUMMARY OF THE ARGUMENT

The Department failed to provide Mother with reasonable efforts to reunify her with her children because it discriminated against her for being pregnant. The Department violated pregnancy discrimination laws when it refused to accommodate Mother's request for in-home visitation and SafeCare training after she presented a note from her doctor putting her on bed rest. The Department then retaliated against Mother when she complained about this denial, filing for termination immediately after her complaint. CPSS Goodman made discriminatory

statements in court about Mother's pregnancy throughout the case. The treatment plan did not appropriately allow for Mother's pregnancy-related disabilities.

Mother received ineffective assistance of counsel when her attorney failed to obtain an alternative psychological evaluation for her and failed to consult another expert psychologist. Mother was prejudiced by Michael Sullivan's negative evaluation, which the district court heavily relied upon in its termination order.

The district court erred in determining that Mother's condition was unlikely to change in a reasonable period of time.

STANDARD OF REVIEW

This Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *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 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 27, ¶ 14, 373 Mont. 421, 318 P.3d 691.

ARGUMENT

I. PARENTS HAVE A CONSTITUTIONAL RIGHT TO DUE PROCESS IN CHILD WELFARE PROCEEDINGS.

A "natural parent's right to 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 Fourteenth Amendment of the United States Constitution which guarantees that those procedures are fundamentally fair. *In re C.J.*, ¶ 26; *In re D.B.*, ¶ 17; U.S. Const. amend. XIV.

In a dependency-neglect proceeding, the Department must engage in reasonable efforts to reunify the family. Mont. Code Ann. § 41-3-423 (1), (7). Reasonable efforts require that the Department, "in good faith,"

assist a parent in completing his or her voluntary services and treatment plan." *In re R.J.F.*, ¶28 (citing *In re D.B.*, ¶33; *In re T.D.H.*, ¶42, Child and Family Services Policy Manual, § 401-1. Treatment plans between parents and the Department are "intended to be a good-faith, joint effort" between the Department and the parent. *In re J.S. & P.S.*, 269 Mont. 170, 178-79, 887 P.2d 719, 724 (1994). *See also In re A.T.*, 2003 MT 154, ¶21, 316 Mont. 255, 70 P.3d 1247. Thus, the Department has a duty to act in good faith regarding the treatment plan because the overarching goal of reunification stems from a fundamental liberty interest.

II. THE DEPARTMENT AND ITS PROVIDERS VIOLATED PREGNANCY DISCRIMINATION LAWS WHEN THEY DENIED MOTHER'S REQUESTS FOR REASONABLE ACCOMMODATION DURING PREGNANCY.

A. The Department is required to make reasonable efforts to reunify families and this includes complying with pregnancy discrimination laws.

Under both Section 1557 and Section 504 of the Rehabilitation Act of 1973 and 29 U.S.C. § 794, recipients of federal financial assistance are prohibited from discriminating in their health programs and

activities, and all programs and activities, on the basis of disability, respectively.[2]

Discrimination against pregnant people on the basis of their pregnancy or related conditions is a form of sex discrimination, which can have significant health consequences. Under federal civil rights law, pregnancy discrimination includes discrimination based on current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth. Additionally, while pregnancy itself is not a disability, medical issues resulting from pregnancy can qualify as a disability under Section 504.

This Court has held that the ADA and Rehabilitation Act, Section 504, require the Department to make reasonable accommodations for those individuals with disabilities in the reunification services and programs it provides. *In re K.L.N.*, 2021 MT 56, ¶¶20-21, 403 Mont. 342, 482 P.3d 650.

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[2] *See* https://www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/index.html

This Court has explained that these requirements are consistent with—and generally subsumed within—the requirements of Title 41, chapter 3, MCA, to provide reasonable efforts and to develop an appropriate treatment plan. *In re K.L.N.*, ¶ 25, citing, among other cases, *In re D.B.*, ¶ 34 ("[T]reatment plans must be customized to meet the needs of disabled parents.") In other words, if the Department fails to take into account a parent's limitations or disabilities and make reasonable accommodations, then it did not develop an appropriate treatment plan or make reasonable efforts to reunite the family. *In re K.L.N.*, ¶ 25.

Mother was pregnant during most of the case. N.Z.B.'s removal began in August, 2020, and T.K.B. was born in May, 2021. L.E. was born in May, 2022. Mother was pregnant with L.E. during the most crucial time frame of the proceeding—from August 2021, when T.K.B. was removed, to May, 2022, when L.E. was born. Mother was also pregnant during the final months during which the termination hearings were conducted, from September 2022 to April 2023. L.E. and the fourth child were removed from Mother's care immediately after she gave birth. Mother had a history of high-risk pregnancies requiring bed

rest. 12/5/22 Tr. at 259. N.Z.B. had been born premature at 27 weeks; T.K.B. was also born premature at 37 weeks. 3/8/23 Tr. at 23.

B. The Department and its visitation provider denied Mother's request for reasonable accommodation in the form of in-home visitation and SafeCare training while she was on bed rest.

In March, 2022, while Mother was attempting to complete her SafeCare modules, she was placed on bedrest by her physician. 3/9/23 Tr. at 12-15, 17. Mother asked the Growing Together supervisor, Shannon Johnston, and CPSS Goodman if her visitation and SafeCare modules could be completed at her home because she was on bed rest. She offered a note from her physician stating that she should be excused from work because of pregnancy. 3/9/23 Tr. at 12. Mother had previously been provided with in-home visits when she had been pregnant in the spring of 2021. D.C. Doc. 40 at 10.

Instead of accommodating this request, Ms. Johnston rejected the doctor's note that Mother had provided. She questioned what exactly mother's bed rest restrictions were. 3/9/23 Tr. at 13. She refused to conduct visitation and SafeCare in Mother's home, citing concerns that Mother might not be able to lift her children. She also questioned whether Mother needed bed rest at all, citing a Mayo Clinic definition of

bed rest she had looked up on the Internet and her own experience of bed rest restrictions. 3/9/23 Tr. at 22-25; D.C. Doc. 40 at 9.

Ms. Johnston counted against Mother her four pregnancy-related missed visits which occurred prior to her bed rest note which was provided on April 11. 3/9/23 Tr. at 20-21. She alleged 11 missed appointments, but Mother only had seven missed appointments after delivery. *Id*. In Ms. Johnston's calculation, the bed rest note of mid-April did not justify medical appointments or cancellations that occurred prior to the note being provided. *Id*. Several of the missed appointments after delivery occurred during required anger management classes. 3/9/23 Tr. at 30-31.

Mother's missed visits during pregnancy were counted towards the total visits that led to Ms. Johnston's decision to terminate Mother from the Growing Together program later that summer. *Id*. at 11, 21. Ms. Johnston also criticized Mother for "triangulating" between her and the Department during the dispute regarding in-home visits during the bed rest period. 3/9/23 Tr. at 26-28. This "triangulation" was offered at the termination hearing as evidence of Mother's personality disorder. *Id*.

Like the Growing Together supervisor, the Department did not provide a reasonable accommodation in response to Mother's bed rest request. Instead, CPSS Goodman and her supervisor, Deb Cole, instructed Mother that she needed to obtain a more detailed letter from her doctor regarding her limitations on bed rest; the simple note stating she should not work was not enough. D.C. Doc. 40 at 11.

During this period, the Department could have at a minimum arranged visitation in Mother's home (without the involvement of Growing Together). Mother asked for in-home visitation and SafeCare modules because she had been allowed to have that opportunity when she had been pregnant before. D.C. Doc. 40 at 10. The Department unreasonably refused to hold visits in Patty's home, despite the fact that Mother had been permitted to live there with T.K.B. in the summer of 2021. D.C. Doc. 40 at 11.

Instead of accommodating Mother's reasonable request, Goodman arranged a single Zoom visit in the month of April, 2022. Goodman ignored Mother's objections that a three-year-old and an 11-month-old were incapable of participating in a Zoom call for more than ten minutes. D.C. Doc. 40 at 10. Mother did not have any visits with her

children for the entire month of April, 2022. The Department also did not arrange in-home visits after Mother obtained her own residence in mid-May, 2022.

Soon after her request for reasonable accommodation was denied, Mother filed a complaint with the Department ombudsman and supervisors on May 18, 2022. D.C. Doc. 40 at 13. The supervisors told her she could not change workers and that they would not have any more meetings with her. *Id.* CPSS Goodman told Mother she would not return Mother's children to her home, even though the out-of-home safety plan had stated that they would be returned if Mother obtained housing. Instead, the Department filed for termination for Mother's rights on June 30, 2022.

These actions by the Department—immediately following Mother's request for accommodation and her complaints about it being denied—constituted illegal retaliation. Retaliation after complaints is prohibited under pregnancy discrimination laws.

C. The Department repeatedly made direct statements demonstrating intentional discrimination against Mother because she was pregnant.

CPSS Goodman made several statements on the record revealing that she disapproved of Mother being pregnant and viewed Mother's pregnancy as something that made her unable to care for her other children. She viewed Mother's pregnancy as an act of defiance toward the Department. Goodman also indicated to the court that the Department did not tolerate medical reasons based on pregnancy as an excuse for missing visitation appointments.

In March, 2022, CPSS Goodman told the court:

> With mom, there are a lot of issues with regards to visitation. She is pregnant right now. And for some reason always seems to have her prenatals during visits so she is cancelling her visits regularly. We have to move her safe care over to Growing Together because she didn't like the lady who was doing it. She threw a fit at FSN enough to where they had to change her worker. Now we are having to move her visits to another agency. She just started safe care at Growing Together and has already had an unexcused, said she was at doctor's appointment. We made it very clear you need to start bringing doctor's note because this is a continuous theme with Mikaela.
> She did this when she was pregnant with [T.K.B.] as well where she would just miss everything. So if she misses two more, she is terminated from that program again.
>
> …
> There is some concern that with her being pregnant that she is planning to possibly leave the state. Because I have made it very clear if she does not have a place of her own and a

> safe place to take this baby, the department is going to intervene on this baby as well.

3/23/22 Tr. at 5-6.

Earlier in the case, in September 2021, CPSS Goodman made a long speech to the court about Mother's failings, including the fact that her pregnancy was one of the Department's "concerns"

> There is also ***concerns*** -- and I have to talk to her, it sounds like she is pregnant already again. So now we may have a third child coming in the mix.

9/22/21 Tr. at 7.

The Department's evaluator, Michael Sullivan, also made offensive and discriminatory statements about Mother's pregnancy to her. Mother testified that evaluator Sullivan told her that "Shelby wanted to know why or do I ever try to keep my legs closed." She stated that he made her uncomfortable with these kinds of comments. 3/8/23 Tr. at 197.

Mother testified that she felt like she was being badgered with questions from Shelby about whether or not she was pregnant. 3/8/23 Tr. at 45, 76.

Another visitation provider indicated to Mother that sickness related to pregnancy was an unacceptable excuse for missing visitation

appointments. When Mother offered a doctor's note to a Family Support Network supervisor to explain a missed visit, the supervisor interrogated her about whether she was pregnant and made it clear that was not an acceptable excuse. At the December, 2021 hearing, Mother told the court: "When I sent -- I showed Judy doctor's note, me being sick, she told me that they wanted to know or somebody wanted to know if I was pregnant because there was a suspicion of me being pregnant." 12/1/21 Tr. at 10.

This pregnancy discrimination was illegal under federal law. There is no exception under law permitting government agencies to discriminate against mothers in DN cases who continue to get pregnant, however much the agency may disapprove of a mother's pregnancy.

CPSS Goodman also refused to accommodate Mother's request for gas cards that she could use to obtain rides to visits. 3/8/23 Tr. at 40, 188-89. Instead, the Department provided bus passes that Mother could not use because she could not walk 20 minutes to the bus stop while pregnant. *Id*. at 190-91.

The Department's refusal to accommodate Mother's medical appointments and bed rest request heavily prejudiced Mother in the termination proceedings. Mother's failure to be consistent about visitation and SafeCare was cited frequently by witnesses at the termination hearings. The court cited this testimony in its termination order. App. A at 21, 23. The district court also sided with the Department in blaming Mother for not using the bus passes. App. A at 22.

At a minimum, the Department and the district court should have permitted Mother additional time to complete the three remaining SafeCare modules rather than terminating her parental rights. Mother's pregnancy was a reasonable justification for her inconsistency in visitation and in completing the last three SafeCare modules (she completed 18 of 21). Both the Department and the court were required under law to accommodate her disabilities (including doctor's appointments and pregnancy related illness) created by her pregnancies. Extending the time for Mother to complete the remaining 3 out of 21 modules was a reasonable accommodation that should have been made. Such an accommodation would not have posed an undue

hardship on the Department. It was also unclear why Mother was not approved for in-home visits or progress during the summer of 2022 after she had obtained her own housing in May, 2022 and only had three SafeCare modules remaining.

D. The Department violated its duty of "good faith" when it required Mother to obtain "her own residence" and refused to accept her residence with 70-year-old Patty Zimmerman.

The Department retaliated against Mother in September, 2021, for complaining to the ombudsman and for getting pregnant again. It violated its duty of good faith when it imposed an unreasonable requirement that Mother obtain "her own residence" in order to make any progress toward reunification. This requirement was a pretext justifying continued refusal to return the children to Mother. There was no justification for the Department not to accept Patty Zimmerman's home as an appropriate place to live. It had been acceptable before Mother's misdemeanor assault at the fair. The pretextual nature of this requirement was demonstrated when Mother finally did manage to obtain Section 8 housing. Instead of returning the children to Mother's home, Goodman immediately decided to terminate Mother's parental rights.

Similarly, the Department's requirement of Sullivan's anger assessment was not made in "good faith." Sullivan's evaluation was "hit job" designed to build the case for termination. Neither Sullivan nor CPSS Goodman followed up to see whether Mother was receiving treatment along the lines he recommended. 9/21/22 Tr. at 37-38.

III. MOTHER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY FAILED TO OBTAIN AN ALTERNATIVE PSYCHOLOGICAL EVALUATION AND DID NOT CONSULT AN EXPERT REGARDING DEFICIENCIES IN MICHAEL SULLIVAN'S EVALUATION.

"[P]arents have a due process right to effective assistance of counsel in termination proceedings." *In re A.S.*, 2004 MT 62, ¶ 20, 320 Mont. 268, 87 P.3d 408. Whether assistance was effective requires review of counsel's training, experience, and advocacy. IAC requires reversal only if the parent suffered prejudice. *In re B.M.*, 2010 MT 114, ¶ 22, 356 Mont. 327, 233 P.3d 338. Effectiveness is evaluated by the non-exclusive factors of training and experience and advocacy. *In re A.S.*, ¶ 26. Effective advocacy requires investigating the case, researching and understanding the law, meeting with the client, and assiduously advocating for the client. *In re A.S.*, ¶ 28.

Mother received ineffective assistance of counsel when her attorney failed to obtain an alternative psychological evaluation, did not

consult psychologists for possible limitations of Sullivan's evaluation, and failed to point out to the court weaknesses in Sullivan's evaluation.

After the anger assessment was conducted, Mother begged CPSS Goodman for the opportunity to have an evaluation conducted by another expert. 3/8/23 Tr. at 196. CPSS Goodman rejected this request, stating that Mother could not engage in "doctor shopping." Goodman made this statement at a meeting with Mother's attorney. D.C. Doc. 40 at 8.

Mother's attorney could have obtained funding for an expert from the Office of the State Public Defender. Such an evaluation could have countered the highly negative picture of Mother that Sullivan presented. The expert also could have pointed numerous flaws in Sullivan's methodology, reasoning, and conclusions. Mother's attorney did not investigate this avenue for addressing one of the worst pieces of evidence the State offered.

Had Mother's attorney consulted with a forensic expert experienced in conducting evaluations for DN cases, he could have pointed out to the court the following flaws in Sullivan's evaluation:

1. Sullivan failed to conduct cognitive and reading tests. His report states that Mother's education was entirely in a homeschool setting, in a Jehovah's Witness family where she reported being sexual abused and isolated throughout childhood. Mother had not obtained her G.E.D. App. B. at 4, 7. Sullivan accepted at face value Mother's statement that she "reads OK." App. B. at 4. Mother's inability to read or comprehend the testing materials would affect the validity of the tests that he administered.[3]
2. Sullivan used a Millon personality test. This tool is no longer used by many forensic evaluators because of a high rate of false positive results for personality disorders. Numerous studies have shown that it over-pathologizes its subjects and generates invalid results.[4]

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[3] Instead of diagnosing this crucial issue, the Department and its witnesses repeatedly criticized Mother for failing to read to her children during visitation appointments. 3/9/23 Tr. at 75, 78.

[4] *See* Steven Erickson et al., "Psychological Testing and Child Custody Evaluations in Family Court," 45 *Fam. Ct. Rev.* 157, 162-63 (2007); S.D. Daubert & A.E. Metzler, "The detection of fake-bad and fake-good responding on the Millon Clinical Multiaxial Inventory III," *Psychological Assessment* 12(4): 418-24 (2000); H. Wakefield & R. Underwager, "Misuse of psychological tests in forensic settings: Some horrible examples," *American Journal of Forensic Psychology, 11*(1), 55–

3. Sullivan does not have Ph.D. He primarily conducts sex offender evaluations. 9/21/22 Tr. at 8. (His report included irrelevant and inappropriate questions on sexual aberrations.) Sullivan copied and pasted "cookie cutter" language from the Millon handbook rather than writing his own analysis.
4. Sullivan used the HCR-20 to assess risk of violence. This test has also been widely criticized as generating false positives.[5]
5. Sullivan criticized Mother for trying to present herself in an overly positive light, but this is a problem for all DN evaluations. It could actually suggest that his overall test results are invalid. If he had done an MMPI test instead, he could have compared her results with those of other parents in DN cases to assess validity.
6. Sullivan failed to recognize Mother's strengths—specifically, her lack of substance abuse, which is rare in the DN population. He

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75 (1993); R. Rogers et al., "Validation of the Millon Clinical Multiaxial Inventory for Axis II disorders: Does it meet the *Daubert* standard?"*Law and Human Behavior, 23*(4), 425–443 (1999).

[5] *See, e.g.,* Edward Silva, "The HCR-20 and violence risk assessment: will a peak of inflated expectations turn to a trough of disillusionment," *B J Psych Bull*, 2020 Dec. 44(6): 269–271.

failed to consider the impact of her pregnant state on her moods and anger.

Mother was prejudiced by her attorney's failure to obtain another expert evaluation and consult another expert. The district court heavily relied on Sullivan's evaluation in its termination order. App. A at 16-17, 19-20. An alternative evaluation might have uncovered cognitive and reading disabilities that would permit Mother more time to perform her treatment plan tasks. It might have pointed out that Sullivan's testing was invalid, and/or refuted Sullivan's over-pathologizing of Mother. The district court used Sullivan's "histrionic/turbulent" diagnosis as a basis for determining Mother had an emotional illness that met the statutory criteria for termination under Mont. Code §41-3-609 (2)(a). App. A at 15-16; App. B. at 8, 10.

Failure to obtain or consult an expert has been held to constitute ineffective assistance of counsel. There was no justifiable strategic reason neither to obtain an unwritten alternative evaluation of Mother, nor to even consult another psychologist regarding Sullivan's report.

The Ninth Circuit has observed that "[c]ounsel cannot justify a failure to investigate simply by invoking strategy... Under *Strickland*,

counsel's investigation must determine strategy, not the other way around." *Weeden v. Johnson*, 854 F. 3d 1063, 1070 (9th Cir. 2017) (failure to obtain alternative psychological evaluation for trial was IAC). While attorneys are afforded considerable discretion to make strategic decisions about what to investigate, this discretion is afforded only after the lawyer has "gathered sufficient evidence upon which to base their tactical choices." *Duncan v. Ornoski*, 528 F. 3d 1222, 1235 (9th Cir. 2008) (*citing Jennings v. Woodford*, 290 F. 3d 1006, 1014 (9th Cir. 2002).

IV. THE DISTRICT COURT ERRED IN FINDING THAT MOTHER'S CONDUCT OR CONDITION WAS UNLIKELY TO CHANGE WITHIN A REASONABLE PERIOD OF TIME.

A. The district court must determine whether the parent's conduct or condition is unlikely to change within a reasonable period of time.

If a district court has found, based on clear and convincing evidence, that a child has been adjudicated a YINC and the child's parent has failed to successfully complete an appropriate treatment plan, the court can only order the parent's rights terminated if it also makes a finding that the conduct or condition that rendered the parent

unfit is unlikely to change within a reasonable time. Mont. Code Ann. § 41-3-609(1)(f)(ii).

To make that determination, the court must enter a finding that continuation of the parent child relationship will likely result in the child's continued abuse or neglect or that the conduct or the condition that renders the parent "unfit, unable, or unwilling to give the child adequate parental care" is unlikely to change in a reasonable time. Mont. Code Ann. § 41-3-609(2).

In determining whether a parent's condition or conduct is likely to change in a reasonable amount of time, the district court must, to some extent, rely on the parent's past behavior as a predictor of future behavior. *In re D.A.*, 2008 MT 47, ¶ 23, 344 Mont. 513, 189 P.3d 631. An important measure of whether a parent's condition or conduct that made him unfit to parent is unlikely to change in a reasonable amount of time involves a review of the parent's progress in regard to the treatment plan designed to resolve the condition or conduct. *In re C.J.M. and A.J.M.*, 2012 MT 137, ¶ 19, 365 Mont. 298, 280 P.3d 899.

The district court should also consider whether reasonable efforts provided by the Department have been unable to rehabilitate the

parent when determining the likelihood that a parent's conduct or condition will change in a reasonable time. *See In re R.J.F.*, 2019 MT 113, ¶ 26, 395 Mont. 454, 443 P.3d 387. 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.

B. The district court erred in terminating Mother's rights because it should have determined that the Department did not make reasonable, "good faith" efforts in this case.

The court should have recognized that the Department did not provide "good faith" reasonable efforts to reunify Mother with her children. The court was presented with a great deal of evidence that the Department had illegally discriminated against Mother for being pregnant. The court should have recognized that Mother needed more time to complete her treatment plan, given her pregnancy.

This Court has explained that Section 41-3-609(1)(f)(i), MCA, directs the court to consider whether "an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful." Thus, the first determination the court must make is whether there is an "appropriate" treatment plan in

place. *In re D.B.*, ¶ 31. Even if the parent is represented by counsel and stipulates to the plan, these two factors alone do not establish that the plan was appropriate. *In re D.B.*, ¶ 32.

The law places the burden on the State—not the parent—to prove that the treatment plan is appropriate by clear and convincing evidence. *In re A.N.*, 2000 MT 35, ¶ 24, 298 Mont. 237, 995 P.2d 427. Mother's treatment plan should have allowed her more time to complete SafeCare after her pregnancy was over and to demonstrate consistency with visitation or success in her new home.

The court also should have recognized that the Department did not act in good faith when it retaliated against Mother with the unreasonable demand that she find "her own residence," rather than staying in the home it had previously approved. The court should have determined that Sullivan's "anger assessment" was required purely as a "hit job," rather than as a "good faith" intervention designed to improve Mother's parenting skills. Neither Sullivan nor CPSS Goodman followed up with Mother to determine whether his recommendations were being implemented.

The State has a duty to act in good faith in developing and executing a treatment plan to preserve the parent-child relationship and the family unit. *In re A.A.*, 2005 MT 119, P 20, 327 Mont. 127, 112 P.3d 993; *In re A.T.*, ¶¶21, 24. The State's burden to ensure appropriateness and duty to act in good faith does not end once the court has approved a treatment plan. The State did not meet its burden here.

C. The district court abused its discretion in determining that Mother's conduct or condition was unlikely to change in a reasonable period of time.

The district court's termination order identified the conduct or condition that made Mother unfit as follows: "emotional illness, mental illness, mental deficiency of the duration or nature as to render her unlikely to care for the ongoing physical, mental, or emotional needs of these children within a reasonable time. Natural mother's history of violent behavior and continued involvement with violent individuals and other unsafe persons pose a safety risk to these children." App. A. at 15.

The district court erred in concluding that Mother's "history of violent behavior" posed a safety risk to her children. Mother was

involved in two isolated misdemeanor fights, a year apart. Mother did not engage in any assaultive or violent behavior for the remaining 18 months of the case. This history did not justify termination of her parental rights. Many parents who have been convicted of felonies do not have their parental rights terminated.

The court's reference to "continued involvement with violent individuals and other unsafe persons" may have been a reference to Mother's ongoing coparenting relationship with H.E. and occasional interactions with him. Notably, no part of the treatment plan prohibited Mother from interacting with H.E. No part of the treatment plan required Mother to attend domestic violence training. The Department presented no proof of any domestic violence incidents occurring after the summer of 2020.

The district court erred in relying on Mr. Sullivan's conclusions regarding Mother's parenting abilities, particularly the opinion on an ultimate legal issue: "she does not appear equipped to have children primarily in her care." Mr. Sullivan's conclusion was unsupported by evidence or testing. He never personally observed Mother with her

children, and did not conduct any objective testing of her parenting abilities. 9/21/22 Tr. at 39-40.

The court also erred in relying on Mr. Sullivan's conclusions because the expert's methodologies and conclusions were inadequate for the reasons outlined above in Section III.

The court found that Kelly Ogger's testimony was consistent with Michael Sullivan's. App. A. at 17. The record does not support this finding. Ms. Ogger presented mostly positive testimony about Mother's cooperation with therapy, including cognitive behavioral therapy. 4/19/23 Tr. at 176-199. Unlike Mr. Sullivan, Ms. Ogger did not attempt to opine on Mother's parenting abilities, since she had not seen Mother parent.

The district court's assessment of Mother's compliance with her treatment plan was unfairly slanted against Mother. The court should have taken into account Mother's temporary disability in pregnancy as a reason for missed visitation appointments.

The court's finding that Mother was not going to change in a reasonable period of time overlooked the fact that Mother had completed 18 of 21 SafeCare modules, and that the remaining modules

would take only 6 weeks to complete. Mother also should have been given credit for completing all of her parenting plan classes during her Phase I treatment plan. D.C. Doc. 24. (DA 23-0413). The court overlooked the fact that Mother was required to go to anger management classes in the summer of 2022, when Growing Together terminated her for missing appointments. 3/29/23 Tr. at 28.

The Court failed to give Mother credit for obtaining housing, an extremely difficult task given the lack of affordable housing nationwide for low-income families. App. A at 18. The Court also failed to give Mother credit for being employed, criticizing her for her failure to report her employer's name to the Department, even though the CPSS Goodman acknowledged that she had no reason to doubt that Mother was employed. *Id*.

The district court also erred in finding that continuation of the parent-child relationship would result in the children's abuse and neglect. App. A at 20. The court relied on the testimony of various workers at the supervised visitation centers or the Department for this conclusion. App. A at 20-21. Deb Dalton, Candace Dozhier, Shannon Johnston all testified that Mother struggled to interact with two or

three children simultaneously. This kind of parental failing—paying more attention to an infant than to toddlers playing with toys—does not amount to abuse and neglect. These witnesses agreed, however, that they observed nothing that would suggest Mother was an unsafe parent. *See, e.g.,* 12/5/22 Tr. at 76. Their main objection was Mother missing appointments while pregnant.

None of this evidence of Mother's shortcomings justified the drastic remedy of terminating her parental rights. Mother's anger in response to her infant being removed and her anger about the Department's pregnancy discrimination made it unpleasant for the Department to deal with her. It did not prove that she could not safely parent her children.

CONCLUSION

For these reasons, Mother respectfully requests this Court reverse the order of the district court terminating her parental rights and remand for further proceedings.

Respectfully submitted this 14th day of November, 2023.

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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 Century Schoolbook 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 less than 10,000, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Laura Reed

Laura Reed

APPENDIX

June 30, 2023 Order Terminating Parental Rights .....App. A

Sullivan Anger Assessment, State's Ex. A .....App. B

CERTIFICATE OF SERVICE

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