In the Supreme Court for the State of Montana
Supreme Court No. DA 23-0415

IN THE MATTER OF:

P.P.,

A YOUTH IN NEED OF CARE.

Appellant's Opening Brief

On Appeal from the Montana First Judicial District Court
Lewis & Clark County, Hon. Kathy Seeley, Presiding.

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Statement of the Case

T.P., biological father of P.P., appeals from an order terminating his parental rights. The Order from the First Judicial District Court, Lewis & Clark County, was issued July 7, 2023. (Appendix A).

Statement of the Issues

The District Court violated T.P.'s due process right by taking judicial notice of K.P.'s criminal proceeding at which T.P. had no ability to challenge the State's Evidence.

The District Court abused its discretion by terminating T.P.'s parental rights and finding the Department need not seek reunification with his daughter.

Statement of the Facts

I. Introduction

T.P. – a supervisor in the Montana Highway Patrol with over seventeen years of service – was never charged, let alone convicted of a crime. Despite this, his parental rights were terminated without the Department ever making the slightest effort toward reunification with his daughter, P.P.

In the findings of fact and conclusions of law supporting the decision to terminate T.P.'s parental rights, the district court noted T.P. "has not been charged with a crime for the injuries suffered by" P.P. (Appendix A at 3). The court noted the "Department has suspicion regarding [T.P.'s] involvement in abuse, but no evidence was presented to support that." (Appendix A at 13-14). The court also found "[t]here is not clear and convincing evidence that [T.P.] was directly involved in the physical abuse of [P.P]." (Appendix A at 14).

The Department ignored any reunification efforts, but the district court found that "[o]n his own, [T.P.] has completed thirty-eight hours of parenting classes. He is also enrolled in counseling/therapy and has attended regularly for eighteen months." (Appendix A at 16).

P.P.'s Guardian Ad Litem (GAL), who "has significant experience in child abuse and neglect" "opined that the parent/child bond with [T.P.] has been allowed to grow over time" during the pendency of the criminal and DN proceedings. (Appendix A at 17). The GAL believed that terminating T.P.'s parental rights were not in the best interest of P.P. (Appendix A at 17).

The court still terminated T.P.'s parental rights.

II. The Case of P.P.

P.P. was born on May 28, 2021, to T.P. and K.P. (Appendix A at 2). When P.P. was born, T.P. and K.P. were married and living in T.P.'s house on Bootlegger Drive in Helena. (Appendix A at 3). T.P. was a field supervisor in the Montana Highway Patrol. He still holds this position today. K.P. was working as an attorney for the Montana Department of Justice. (Appendix A at 2-3).

At the time the couple "started having discussions about having kids," both T.P. and K.P. were older-than-average, and were concerned about "risk factors given both" of their ages. T.P. also had "fairly significant" health problems. (Tr. at 305). In an effort to start planning, the couple made an appointment with an OB/GYN. The doctor's planning began by telling them they were already pregnant. (Tr. at 307). T.P. was "a little bit nervous" but "was excited." (Id.)

T.P. and K.P. are both rural people at heart and were looking for a ranching property. (Tr. 303). They finally found one they were able to buy together just north of Choteau. (Tr. at 302). Although the

couple completed a buy/sell on the property, it was not "really ready for a full time family of three." (Tr. 302-303). T.P. left his position training canines for the MHP and laterally transferred to Great Falls to supervise a detachment of troopers. (Tr. 304). T.P. did this, in part, to help with the family's eventual move to Choteau. (Id.) Both the purchase of the property and T.P.'s transfer occurred shortly after P.P. was born. (Tr. 304-305).

The plan was that T.P. and K.P. would sell the Bootlegger home and use the proceeds to purchase the property in Choteau. However, partly because K.P. was "still working through whether or not she was going to be allowed to work remotely," the plan was for K.P. and P.P. to move into an apartment. (Tr. 302). T.P. would reside in Choteau while he was working in Great Falls and would then commute to Helena to be with K.P. and P.P. (Tr. at 313).

When P.P. was born, T.P. took parental leave for six weeks and "alternated duties with [K.P.] and just was a dad, just checked out from work and was just a father during that time." (Tr. at 319). While T.P. was in Choteau, he would get updates on how P.P. was doing. These

updates came in the form of photos, videos, and some video calls from K.P. (Tr. 317). Back in Helena, K.P. was with P.P. and working in a hybrid fashion, "some work from home and some work in the office." (Tr. 316). T.P. did make time to attend all of P.P.'s wellness checks with her pediatrician. (Tr. at 319).

During one of the well-child checks, T.P. recalled having a question about "some blood that had collected in one of [P.P.'s] eyes." The doctor answered T.P.'s question leaving T.P. with the impression that the blood "potentially related back" to P.P.'s birth. (Tr. at 320). Nothing about the doctor's answer gave T.P. pause or concern. (Id.)

P.P. would have other hospital visits. T.P. suffers from polyneuropathy and thus his "feet don't always do what they're supposed to do." On July 3, 2021, T.P. was carrying P.P. in her car seat down a small set of stairs, and he ended up tripping and losing his grip on the car seat. (Tr. at 321). As P.P. was falling, T.P. grabbed the seat. In doing so, however, he also trapped "her leg against that soft foam cover piece." (Id.) Although T.P. was able to arrest some of the fall, he was not able to stop it altogether. (Id.)

P.P. started to cry and T.P. felt "pretty crappy." (Tr. at 322). T.P. checked P.P. out for more serious injuries. P.P. did not scream when he touched her and her crying did not intensify when he picked her up. "After a couple of minutes [P.P.] was fine." (Tr. at 322). Over the next several hours, T.P. monitored P.P. and perceived "she wasn't moving quite as much." Out of an abundance of caution, T.P. and K.P. took P.P. to the emergency room the next day on July 4, 2021, (Id.)

At the emergency room, a doctor did "a head to toe" examination of P.P. and tested her range of motion. According to T.P., the doctor did not see anything that concerned him but ordered X-rays anyway. (Tr. at 323-324). Both of P.P.'s legs were X-rayed and the doctor expressed no concern about what he saw. (Tr. at 324).

In September 2021, P.P. began attending day care. (Tr. at 326). T.P. and K.P. had reviewed three different facilities before finally settling on 3 R's. The couple liked 3 R's because "it felt like a childcare facility," and "didn't feel like an institution." (Id.)

Because of his work schedule, T.P. ultimately had very little interaction with the 3 R's employees. (Tr. at 327). T.P. believes he

dropped P.P. off at the facility on one occasion and picked her up twice. For the majority of the time P.P. was at 3 R's, it was K.P. who dropped P.P. off in the morning and picked her up in the evening.

During the contested hearing in this matter, T.P. testified about Father's Ex. D which is a calendar T.P. constructed using "different sources of information" including his "activity logs at work, timesheet stuff, travel, expense vouchers, tax receipts, to get as close as [he] reasonably could to a solid idea of where" he was for the month of September, 2021. (Tr. at 335) (Attached here as Appendix B). T.P.'s calendar reflects how much traveling[1] he did in September, and it explains why he had so little contact with employees at 3 R's.

Susan Anderson, the owner of 3 R's, testified at the combined hearing on the "Petition for Adjudication of Child as a Youth In Need of Care, Determination that Preservation/Reunification Services Need Not Be Provided, Permanent Legal Custody, and for Termination of Parental Rights of K.P. and T.P. With Regarding to Consent to

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[1]Regarding the court's finding of fact 17, his security work was through his employment at an MHP canine unit or his executive protection detail, "[p]roviding security at sporting events" including detection of explosive devices and guarding Governor Bullock.

Adoption or Guardianship."[2] Ms. Anderson testified about overall operation of her daycare as well as day-to-day activities pertaining to the care of each individual child. (Tr. 210-221). Part of the day-to-day procedure included health checks of the children throughout the day. (Tr. at 220). These health checks consisted of logs completed by staff members for individual children.

For 3 R's, the purpose of the logs are to share something about the child "with mom or dad at the end of the day," the employees "would note that in the book." (Tr. at 227). "If a child . . . bumps her or his tibia on a timber outside," the employees will document that. "If a child comes in with . . . a scratch on the left knee," the employees "document that." (Id.) Anything remarkable makes it into the records. Ms. Anderson had no knowledge that anyone from 3 R's ever showed T.P. a copy of the records regarding P.P. (Tr. at 264).

The earliest record from 3 R's relating to possible abuse is dated September, Tuesday, the 7th. According to the records and Ms.

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[2]For the sake of both the readers and the writer, this multi-pronged petition filed by the Department will hereafter be referred to as the "Combined Petition."

Anderson's testimony, P.P. appeared with what appeared to be a bruise on her cheek. The bruise itself was not significant enough for 3 R's to file a report with CPS. (Tr. at 265). Ms. Anderson testified that information regarding the bruise would have been conveyed to the parent who picked P.P. up that afternoon. There was no suggestion at the hearing that T.P. was that parent or even knew of the log entry.

The next log entry occurred on September 9, 2021. It was Ms. Anderson's belief it was "probably the same one recovering from the Tuesday notation." (Tr. at 265). Unless T.P. picked up P.P., he would not have known of the notation in the log. (Tr. at 266).

On September 13, 2021, the log for 3 R's indicates that P.P. "appeared with a rugburn." Although 3 R's records do not reflect who dropped P.P. off or who picked her up, Appendix B indicates T.P. was in Choteau that day. For her part, Ms. Anderson did not know whether T.P. learned about the rugburn or not. (Tr. at 266).

While Ms. Anderson was certain that "[s]taff did talk to [K.P.] about the marks on [P.P.], and that is documented," (Tr. at 273), Ms. Anderson could only recall seeing T.P. in her facility "one time." (Tr.

267). Ms. Anderson put great stock in her facilities documentation. As to whether or not any of her staff spoke to K.P. about P.P.'s marks, Ms. Anderson testified that "[i]f it was documented, I would know [K.P.] was spoken to." (Tr. at 273). The documentation, however, was less than complete. For example, Ms. Anderson the owner could not "confirm or deny if [P.P.] was at" the 3 R's facility on September 28, 2019, because it was "not noted on the health check." (Tr. at 274). In earlier testimony, Ms. Anderson did testify that P.P. was at her facility. (Tr. at 235).

Ms. Anderson was certain that P.P. was at 3 R's the day prior on September 27, 2021. That day, P.P. was dropped off with a black eye. (Tr. at 284). it was decided among the staff at 3 R's that someone would ask K.P. about the source of the black eye. (Id). According to K.P., P.P. had hit herself in the eye with a toy. (Tr. at 232).

T.P. did notice markings on P.P. during September and typically would have a conversation with K.P. "as far as like 'what happened?'"[3] T.P. testified that K.P.'s answers "varied based on circumstances.

[3]Internal quotations have been added based on context and for the clarity of the reader.

There was one instance where I think [K.P.] said that [P.P.] came home with . . . from daycare with bruises or a bruise." (Tr. at 424). T.P. also recalled another discussion with K.P. which "centered around, like, 'is she – you know, is it when she's picking her head up and she's dropping it down on the floor or onto a toy.'" (Id.)

In the days leading up to September 27th and 28th, T.P. was alone caring for P.P. while K.P. was working out of town. Specifically, T.P. was with P.P. from September 18 through the 23. September 23d, however, was "the last of five days" T.P. spent in Helena. (Tr. at 426). When he departed for Choteau, "there were not bruises on [P.P.]." (Tr. 427). In fact, between "September 19th all the way to the 22d," T.P. was home with P.P. At the hearing on the Combined Petition, T.P. affirmed that "nowhere in those six days . . did [he] ever see [P.P.] get an injury despite all the time [he] left her on the floor" while he was packing. (Tr. at 437).

When he saw P.P. again on September 25, P.P. had one bruise on her eye and one on her forehead. (Tr. at 429). It was K.P. that brought this to his attention. (Tr. at 432). To the best of T.P.'s recollection,

K.P. again told him that the bruise was "the same as the bruises involving the toy." (Tr. at 433).

Returning to the evening of September 28, 2021, T.P. came to Helena, stopped by the Bootlegger house – which was in the process of being packed up – and then picked up P.P. from 3 R's around 4 or 4:30, p.m. (Tr. at 353 & 436). This was the second time T.P. had ever picked P.P. up from daycare. (Tr. at 354). T.P. recalls P.P. being a bit less fussy than normal when he buckled her into the car seat, but "other than that she seemed fine." (Tr. at 353). T.P. does not recall anyone asking him about P.P.'s blackeye on the evening of the 28th. Another employee, Melissa Boice, did not recall having any conversations with T.P. and also did not witness anyone from 3 R's having a conversation with T.P. (Tr. at 702).

After picking up P.P. from daycare, T.P. and his daughter returned to the Bootlegger house so T.P. could continue packing. P.P. was "fine" on the drive back to the house. (Tr. at 356). When father and daughter returned to the house, T.P. brought P.P. inside, "unbuckled her but left her in the car seat." P.P. "kind of hung out

there, and [he] packed." (Id.) K.P. was also there packing. T.P. believe he spent most of his time packing items in his "detached shop" while K.P. and P.P. remained in the house. (Id.)

Sometime between 6 and 6:30, T.P. fed P.P. her bottle. (Tr. at 358-359). The two sat in the living room and P.P. "cradled in [T.P.'s] arm" while he held the bottle. (Tr. at 359). P.P. had a normal feeding which, for her, was between 100 and 125 milliliters. (Tr. at 360). After the feeding, P.P. "was a little bit fussy." (Id.) T.P. believes he put P.P. in the living room and briefly went back to packing. (Tr. at 361).

Shortly after that, T.P.'s boss, Major Dustin LeRette, arrived. Major LeRette was T.P.'s boss when T.P. was working Executive Protection for Governor Bullock and his family. (Tr. at 406). The two had prearranged for LeRette to come to the Bootlegger house because T.P. had brought some paperwork from Great Falls to deliver to LeRette. T.P. recalls Major LeRette staying for somewhere between 15 to 25 minutes. (Tr. at 362-363). Although T.P. does not recall P.P. crying during that time, Mr. LeRette did "believ[e] that she was crying." (Tr. at 363). After Mr. LeRette left, T.P. returned to packing.

T.P. and K.P. continued to pack for roughly another hour and half. At one point during that time, P.P. became fussy and T.P. carried "her around outside because it was something that was calming her down." (Tr. at 365). At approximately 9:00 p.m., T.P. took P.P. to the apartment while K.P. continued packing the Bootlegger house. (Tr. at 365).

Back at the apartment, T.P. was getting P.P. "ready for bed." (Tr. at 366). He changed her clothes, put on her pajamas, and changed her diaper. He also tried to feed her. "She didn't take very much." T.P. estimates she drank "somewhere around 25 mils." (Tr. at 366-367). While T.P. wanted P.P. "to go to sleep with a full belly," it did not concern him as P.P. had refused a bottle in the past. He assumed P.P. was still suffering the ill-effects from a virus or cold she had been had earlier in the week. (Tr. at 367).

Around this time, K.P. arrived at the apartment. T.P. asked her where P.P.'s "Owlet sock" was because he could not find it. (Tr. at 367). An Owlet instrument is a type of infant monitor that T.P.'s sister and cousins had used in the past and "spoke pretty highly of it." (Tr. at

309). T.P. bought one even before P.P. was born. K.P. located the Owlet sock "fairly quickly," (Tr. at 367-368), and put the sock on P.P. and T.P. and K.P. went to bed "shortly after 11." (Tr. at 371).

The Owlet has a small boot consisting of "kind of a wrap" that "fits on the bottom" but doesn't cover the infant's "entire foot." (Tr. at 368). It has a Bluetooth or wireless connection to a "base station" that "will send information to any phones that it's tethered with." (Tr. at 369). The base station itself does not light up and displays no information. (Tr. at 370). Rather, all information is sent to an individual's phone. (Id.) Because the base station does not display information, the only way for an Owlet user to see what the device is monitoring or the device's readings is to open the Owlet app on the user's phone. (Tr. at 370).

At some point that night, perhaps "a little after 1 a.m.," T.P. heard P.P. cry. (TR at 371). T.P. went in to check on P.P. and "she was fine." (Tr. at 372). T.P. "scooped her up gently," and held her for "a minute or two," but she had fallen back asleep," so T.P. went back to bed. (Tr. at 372-373.)

The Department presented no evidence at the contested hearing that T.P. took his phone with him into P.P.'s room that night or that he checked the Owlet app on his phone to register P.P.'s vital signs when she cried. The Owlet app did not make any alerts on the night of September 28 or the morning of the 29th. T.P. could not adjust the Owlet app to change when the device sends alerts. (Tr. at 456).

On the morning of September 29, 2021, T.P. awoke to give P.P. her regular 6:00 a.m. feeding. When T.P. went into her room, P.P. would not wake up. He picked her up and rubbed her back while she rested on his shoulder. (Tr. at 374). After P.P. didn't rouse, T.P. talked with K.P. The couple decided to call Partners in Pediatrics, which was where P.P.'s pediatrician worked. K.P. spoke with an on-call physician "[a] little after six." (Tr. at 376).

K.P. told T.P. that the on-call physician informed her that if P.P. had a fever, "it's probably nothing to worry about. Just bring her in." (Tr. 376). P.P. was scheduled for a well-child check that very day. (Id.) If P.P. did not have a fever, the couple was instructed to "bring her in" for her appointment later that day. (Id.)

Neither parent could find the thermometer because it had been packed away so T.P. felt P.P.'s forehead. T.P. did not believe P.P. had a fever but told K.P., "I think we need to take her in." (Tr. at 377).

As T.P. started to strap his daughter into the car seat for the trip to the Emergency Room, he noticed "there was a kind of rhythmical jerking of one of her arm – or one of her hands." (Tr. at 377). T.P. knew this was not good. (Id.)

At the ER, P.P. was tested and eventually Dr. Coil came in and "said 'it's bad.'" (Tr. at 378). At that point things became a "little bit blurred" for T.P. as he wondered "what's happening to my child, not knowing what 'it's bad' means." (Tr. at 379-380).

Staff at St. Peter's Hospital subjected P.P. to more tests and "then the decision was made to fly her to Kalispell" to Logan Health Center. (Tr. at 380). T.P. left the hospital and returned home to pack a bag for P.P. and K.P, who were flying to Kalispell from St. Peter's.

T.P. then drove to Kalispell. During the trip, K.P. gave him updates. When he arrived at Logan Health, T.P. saw "his daughter hooked to a lot of machines – in a hospital bed." (Tr. at 382).

Doctors "repeatedly" informed T.P. that P.P.'s injuries were "survivable." (Tr. at 383). From that point, T.P. described "whirlwinds and piecemealed information of non-accidental trauma." (Tr. at 383). At one point, when a doctor again told T.P. that his daughter had been subjected to non-accidental trauma, T.P. threw up. (Tr. at 384). Dr. Stidham, who testified at the termination hearing recounted his conversation with T.P. and conclusion that P.P. had been subjected to non-accidental trauma and the extent of the trauma "was quite significant." "[T.P.] was kind of tearful but I believe he went to the bathroom actually and threw up." (Tr. at 822).

During P.P.'s lengthy time in the hospital, T.P. and K.P. lived in an RV in the parking lot at Logan Health. (Tr. 385-386). One or both of them were with P.P. in her hospital room as much as time, energy, and hospital regulations would allow.

Based on the nature of P.P.'s trauma, CPS became involved and visited T.P. and K.P. at the hospital. (Tr. at 385). Jennifer Blodgett, a regional administrator for Child and Family Services in Flathead County, arrived at Logan on September 29th to conduct "a courtesy

interview." (Tr. at 48). Ms. Blodgett estimates she arrived at Logan at 8:00 p.m. on the 29th. By that time, P.P. was "more stabilized". (Tr. at 50).

Ms. Blodgett first interviewed T.P. Ms. Blodgett described T.P. as "kind of confused as to what was going on and presented as pretty tearful. He was pretty – you know, seemed shocked by what was happening. . ." (Tr. at 57). By contrast, Ms. Blodgett described K.P. as "pretty closed off," "there was no crying. [K.P.] was questioning more about the process, and why I was there, and those types of things, just in comparison was very flat." (Tr. at 59).

Ms. Blodgett returned for a second interview on October 1, 2021, and asked each parent to recount the month of September. (Tr. 60-70). At one point, T.P. told Ms. Blodgett, "he felt guilty for how much [K.P.] had to do as far as the – all the moving and caretaking of their baby while he was in Choteau." (Tr. at 70).

During this second interview, Ms. Blodgett inquired about the bruising previously seen on P.P. Each parent relayed that P.P. had struck herself on the head with a toy or fallen on a toy while doing

"tummy time." Ms. Blodgett found this odd. (Tr. at 72). Both parents did affirm to Ms. Blodgett that P.P.'s pediatrician was aware of the bruising. (Id.) Eventually, during this second interview, K.P. left the interview and refused to return. (Tr. at 72-73). T.P. agreed to continue talking with Ms. Blodgett. (Tr. at 73).

Although the Department did not want to "jump to conclusions" and neither T.P. nor K.P. had prior history with the Department, based on P.P.'s injuries, the Department notified the parents of its intention to proceed with formal action. (Tr. at 139). Based on "the hospital data" the Department was getting, conversations were being had within the Department "partially moving towards no reunification." (Tr. at 141).

Cat King, an intake specialist at Child Family Services Division worked with both T.P. and K.P. in the early stages of the Department's involvement. Ms. King affirmed that T.P. was "cooperative working with [her.]" (Tr. at 142). He was "always able and willing to answer questions about the possibility of [P.P.] being an ICWA child" and was "very forthcoming with the information [she] needed." (Tr. at 143).

Early in his work with Ms. King, T.P. had questions about "a parenting plan and reunification. T.P. recalled that, "the way" Ms. King "presented it was if we were to do a treatment plan these were likely the things [the Department] would be looking for." (Tr. at 394). In response, and despite the fact that the Department hadn't – and never would – offer T.P. a treatment plan or reunification services, T.P. enrolled in counseling in November of 2021. (Tr. at 395). This was before P.P. was even discharged from Logan Health.

T.P. also took the initiative and enrolled in three parenting classes. Certificates of completion were introduced as exhibits at the hearing on the Combined Petition. T.P. made a concerted effort to attend parenting courses that were accepted by Lewis & Clark County as a certified CPS class. (Tr. at 398). Despite a hope that he would be offered a treatment plan to "get his daughter back," (Tr. at 399), and the self-initiated counseling and treatment, the Department was unmoved from its original course of not attempting reunification and proceeding straight to termination.

At the termination hearing, Krista Westerhold, a child protection

specialist supervisor, testified that the decision not to seek reunification for either K.P. or T.P. was made early in the process based on "the direction the department was going to go with [P.P.'s permanency." (Tr. at 491-492). Although Ms. Westerhold acknowledged the Department's main priority is family reunification and usually offers parents a treatment plan, Ms. Westerhold also acknowledged that neither were offered to T.P. In fact, the Guardian *ad litem* found a notation in the Department's files as early as November 2, 2021, characterizing P.P.'s case as "a no reunification case." (Tr. at 986). Therefore, contrary to the Department's primary policy, "within 30 days of [P.P] being placed into care, emergency care, the state wanted to terminate." (Id.)

When asked by counsel for the Department, Ms. Westerhold explained that treatment plans were available even in instances of physical abuse. "If it's physical abuse, [the goals of a treatment plan] would be directly correlated to the physical abuse that led to child's removal." (Tr. at 494-495).

Ms. Westerhold had clear concern for P.P. in the case of K.P. Her

concerns with T.P., however, were "a little bit more complex." (Tr. at 500).

> We know without a doubt, however, that dad did see injuries without a doubt. He saw injuries and did not do anything. We know without a doubt that he was not protective. We know that not being there isn't an excuse. We know – we can't take that as an excuse for an infant who cannot protect themselves, so we have to take all of those things into consideration.

(Id.)

Ms. Westerhold testified about the extensive training she and other members of her staff undergo to identify "immediate red flag[s]," like bruising on a child who is not mobile. "[I]f they don't cruise, they shouldn't bruise." (Tr. at 502). Despite suggesting that law enforcement also attends such courses, (Tr. at 503), neither Ms. Westerhold nor anyone from the Department presented evidence that, despite his law enforcement background, T.P. had undergone training similar to that referenced by Ms. Westerhold. In fact, the State stipulated that T.P. never had any training or attended any courses on "kid cases or child abuse." (Tr. at 673).

Ms. Westerhold also expressed concern that T.P. took P.P. "to the

emergency room on one occasion, but when her oxygen was at 70 he called an on-call doctor but didn't rush her to the emergency room." (Tr. at 511). Essentially, Ms. Westerhold faulted T.P. because he failed to open the Owlet app to check vital signs and that he failed to protect P.P. from a wife/mother he did not know was abusing P.P. Based on this, the Department concluded early that neither treatment plan nor reunification efforts would be extended to T.P., even after K.P. was ultimately alone charged, convicted, and sentenced.

P.P. was discharged from the hospital in December 2021, and the Department sent her to live in Plevna, MT., with K.P.'s parents. She lived there for five months. During that time, K.P. lived at her parent's house in a separate building from the main family house "about a hundred yards from the house." (Tr. at 388). T.P. also spent time there. While in Plevna, P.P. was receiving "courtesy visits" from a CPS supervisor. That person sent regular reports to Ms. Westerhold about the "interactions [P.P.] was having with her parents. (Tr. at 534). Ms. Westerhold never heard any concerns expressed by the courtesy worker.

While P.P. was in Plevna, "she was seeing therapists in Miles City, and she was still going through appointments with the Logan Health doctors at an outreach clinic in Bozeman." (Tr. at 389). T.P. attended most, if not all, of the appointments.

In May, the Department made the decision – consistent with T.P. and K.P.'s request – to move P.P. to Oregon to live with T.P.'s parents. (Tr. at 389). The reason for the request was that P.P. would have better access to medical care than she would have in Plevna. T.P., who had returned to work, would try to drive the 1,500 miles from Choteau to Oregon every-other-week if not each week to visit his daughter and "spend time with her, so [he] can be there. She's growing up." (Tr. at 390).

When he was not in Oregon, T.P. got updates from his parents on P.P.'s doctors' appointments. When P.P. saw her specialists, T.P. attends remotely. (Tr. at 392). T.P. also did "daily video chat[s] with [his] folks and her." (Id.)[4] When he is in Oregon, T.P. played with P.P., fed her, and took care of her. (Tr. at 393).

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[4]To be clear, this process was continuing at the time of the hearing on the Combined Petition and continues to this day.

Throughout the course of the DN proceeding, a separate but related criminal action was proceeding against K.P. Lewis & Clark County Sheriff's Office Detective Josh Van Dyke was the lead investigator and also testified at the hearing on the Department's Combined Petition. Det. Van Dyke obtained a search warrant for the apartment. In the course of his search he did not find evidence of drug use, alcohol use, or anything that "might be dangerous to a four month old child." (Tr. at 665). Det. Van Dyke was able to determine P.P. had her own room, clothing, a crib, blankets, baby formula, and a bottle warmer. Det. Van Dyke affirmed he had similar items in his house for his own infant. (Tr. at 668). Det. Van Dyke also testified to a pattern he and the 3 R's employees noted, which was generally that T.P. would be out of town working, K.P. and P.P. were home alone, and P.P. would not be in day care. Then, when P.P. returned to day care, she had bruising. (Tr. 669-670).

T.P. was not charged and cooperated with law enforcement and counsel for the State in the criminal prosecution against K.P.. He interviewed with Det. Van Dyke and gave a statement. (Tr. at 361).

T.P. also testified for the State against K.P. during her criminal trial. Throughout the criminal case he remained (and remains) a supervisor with the Montana Highway Patrol and still drives thousands of miles a month to visit his daughter in Oregon.

At the hearing on the Combined Petition, T.P. was emphatic that if P.P. was returned to him, the "first and foremost" priority would be to "protect [P.P.]" He understood that included protecting P.P. from her biological mother, K.P. T.P. continued:

> [M]y understanding is that there is also a court ordered restriction on her access to [P.P.]. I've enforced the law for the last 17 and a half years of my life, and I don't intend to stop doing that side of things, right, and just ignoring those things. But yeah, I will – [P.P.'s] safety will be paramount.

(Tr. at 401).

Even the court inquired of T.P.: "I'm trying to figure out how [K.P.'s counsel's questioning] plays into would you protect this child today if you saw injuries. Would you?" To which, T.P. replied simply: "Of course." (Tr. at 476). The court went on: "Have you learned from this case that you need to be aware and responsive to injury in the child?" Again, T.P. replied: "Sure, yes." The court pressed its point:

"Do you think your attitude about that might have changed?" T.P.'s understated reply was, "Yeah, I would say so." (Tr. at 477).

Following up on the court's questions, counsel for the Department[5] pressed the point with T.P. "So now you know that a lot of people think that bruising on a baby, these injuries on a one month old, this is abuse. What would you do now if you saw bruises on [P.P.'s] face? You're a mandatory reporter." T.P. agreed he was a mandatory reporter and stated "I think I would treat it differently. I think i would go and get [P.P.] checked." Counsel for the Department justifiably followed up: "You think or you will?" T.P. replied unequivocally: "I would go treat it differently. . . . I would go get it checked." He affirmed he would "go right to the doctor." (Tr. at 478).

K.P. was ultimately convicted of abusing P.P. after a nine-day jury trial. (Appendix A at 3). She was sentenced to a twenty-year term of imprisonment the same day as the court began the hearing on the Department's combined motion. During the hearing on the combined

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[5]The questioning for the Department was conducted by the deputy county attorney who prosecuted K.P., however, it is clear the deputy county attorney was acting for the Department in this matter.

motion, K.P.'s attorney asked the court to take "judicial notice about the sentencing and incorporate that evidence into this hearing." (Tr. at 194). The court agreed. K.P. did not testify at the hearing on the Combined Petition.

Over objection from T.P., the court also took judicial notice of the testimony in the criminal proceedings with the exception of T.P.'s testimony, for which he had immunity. The immunity granted to T.P. in the criminal proceeding extended to the DN proceeding. (Tr. at 196). Therefore, while the court indicated it would not be considering T.P.'s testimony against K.P. in the criminal case, it considered every other aspect of the criminal case in evaluating the DN hearing.

As for P.P., she was woefully unrepresented during the majority of the lower court proceedings. On November 10, 2021, CASA filed notice that Loretta Miller had been assigned as the CASA/GAL on behalf of P.P. (Dkt. 9-10). Ms. Miller filed her first report with the court on February 15, 2022. (Dkt. 56). She filed an Addendum to that report on March 24, 2022. (Dkt. 89). A second report was filed on July 5, 2022. (Dkt. 138). In this last report, Ms. Miller informed the court

she was not comfortable making a recommendation that the court terminate parental rights with no reunification efforts. (Dkt. 138 at 5). Specifically, Ms. Miller recommended "that treatment plans be written for both parents, so they have an opportunity to demonstrate their parenting abilities." (Id.)

On October 20, 2022, Ms. Miller's supervisor, Erin Gilmore, filed a "Notice of Removal" requesting an order that CASA be removed from P.P.'s case. Ms. Gilmore asserted removal was necessary because the "case has extended beyond the ability of a citizen volunteer to effectively advocate for the best interest of" P.P. (Dkt. 141). Ms. Gilmore concluded by "respectfully request[ing] that the Court consider appointing an attorney to represent the youth in lieu of a CASA/GAL volunteer." (Id.) On November 9, 2022, the district court issued an order granting CASA's removal but did not appoint either a new CASA or an attorney for P.P. (Dkt. 143). P.P. went without an advocate from that date until April 20, 2023, when the termination hearing began.

In an effort to ensure P.P. had someone to represent her, counsel for T.P. filed a motion asking the court to appoint P.P. an attorney on

April 6, 2023. That motion was not ruled upon until the morning the hearing started. (Tr. at 25). This April 2023 motion was the second time T.P.'s counsel had sought counsel for P.P. The first was made during a Pre-Termination hearing held on May 9, 2022. The motion was denied due "to the youth's young age." (Dkt. 124).

On the morning of the termination hearing, the court appointed Ms. Sara Corbally to act as guardian *ad litem* for P.P. That means, between T.P.'s initial request to appoint P.P. counsel on May 9, 2022, and the commencement of the termination hearing on April 20, 2023, P.P. was without an advocate for almost a year.

Still, Ms. Corbally found it "to be a hard stretch" to hold T.P. accountable for any abuse P.P. suffered. (Tr. at 993). She also opined that she did not "believe that termination of parental rights would be in P.P.'s best interest based on, at this point, the significant relationship, the bond that [P.P.] has with her parents." (Tr. at 1016). In regard to T.P. specifically, Ms. Corbally testified the court should not terminate T.P.'s parental rights based on her perception that there was not "clear and convincing evidence that [T.P.] subjected his child to aggravated

circumstances to the point that he shouldn't have been offered a treatment plan if, you know, all of the things that [T.P.'s counsel] set for are true." (Tr. at 1017). As P.P.'s advocate, Ms. Corbally continued: "I don't think that given the current circumstances, and [K.P.'s] conviction, and her sentence that [T.P.] presents a risk to [P.P.'s] safety at this point that it would make it in her best interest to terminate her – his parental rights." (Tr. at 1017-1018).

Ms. Corbally supported her conclusion with her knowlege of both the evidence and with T.P.'s performance toward P.P. and his own self-initiated attempts to cobble together a parenting plan of his own, without assistance of the Department. Ms. Corbally affirmed T.P. had "learned the ability to provide for the safety of his daughter." (Tr. at 1018). She supported her conclusion. "I think he has taken numerous parenting classes. I think he's engaged in a year and a half of consistent counseling. I think he has demonstrated insight. I think his initial response to all of it was appropriate, and the steps he's taken since demonstrate an appropriate response as well given the situation." (Tr. at 1018).

In the end, the court terminated the parental rights of both T.P. and K.P. P.P. was "permanently awarded to the Montana Department of Public Health and Human Services, Child and Family Services Division, with the right to consent to adoption or guardianship." (Appendix A at 21). At the time of termination, P.P. was receiving "excellent care from the [parental] grandparents." (Appendix A at 15).

At the time of the hearing on the Combined Petition, P.P. had been living with her paternal grandparents in Oregon since May 6, 2022. (Tr. at 535). Ms. Westerhold agreed that in the that year, T.P. had "driven about 1500 miles two to four times a month to be with his daughter in Oregon." (Id.) Ms. Westerhold also did not disagree that T.P. attended at least a significant number of P.P.'s medical appointments by Zoom and had daily Zoom meeting with P.P. (Tr. at 536-537). As far as Ms. Westerhold knew, T.P. had done everything asked of him by the Department. (Tr. at 538).

Summary of the Arguments

The district court violated T.P.'s right to due process when it took judicial notice of the record of K.P.'s criminal trial at the hearing on the

Combined Petition. The constitutional error was further compounded by the court's ultimate order which referenced facts that must have been found in the criminal trial, as the record created in this matter does not support the court's findings.

The district court erred in terminating T.P.'s parental rights before even considering its ability to deny the Department's motion that reunification services need not be provided or without P.P. having any type of individual looking out for her best interests throughout a vast majority of the proceedings.

Further, the Department failed to follow the required statutory processes especially when it combined in one single motion and hearing its desire that the court (a) conclude it was not required to make reasonable efforts to preserve the parental relationship with T.P. and P.P., or in the alternative reunify father and daughter; (b) that it was to be awarded permanent legal custody; and (c) that the court terminate T.P.'s parental rights.

Standards of Review

This Court reviews a district court's decision to terminate

parental rights for an abuse of discretion. 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. This court reviews a district court's findings of fact for clear error and conclusions of law for correctness. An actual finding is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces the Court a mistake was made. To reverse a district court's evidentiary ruling for an abuse of discretion, this Court must determine the district court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice.

See: In re R.F.J., 2019 MT 113, ¶ 20, 395 Mont. 454, 443 P.3d. 387 (internal citations and quotations omitted.)

"Whether a person has been denied a due process right presents a question of constitutional law, and we exercise plenary review." *In re A.S.*, 2004 MT 62, ¶ 9, 320 Mont. 268, 87 P.3d 408.

Argument

I. The District Court Violated T.P.'s Due Process Right by Taking Judicial Notice of K.P.'s Criminal Proceeding at Which T.P. Had No Ability To Challenge the State's Evidence.

"Whether a parent has been denied his or her right to due process is a question of constitutional law over which this Court's review is plenary." *In re D.A.D.*, 2021 MT 2, ¶ 13, 402 Mont. 399, 478 P.3d 809. "A parent's due process rights to the custody of their children requires 'fundamentally fair procedures at all stages of termination proceedings.'" *In re K.B.*, 2019 MT 73, ¶ 11, 395 Mont. 213, 437 P.3d 1042. The district court violated T.P.'s rights to due process and abused its discretion when, over T.P.'s objection, the court took judicial notice of the criminal proceedings against K.P. and her conviction. Notably, K.P.'s conviction included a specific finding by the jury that K.P.'s actions resulted in serious bodily injury to P.P. That legal finding was the mechanism by which the court was able to sentence K.P. to twenty years in prison the morning before the termination hearing started. *Mont. Code Ann. § 45-5-212(2)(c).*

Rule 201 of the Montana Rules of Evidence provides when a court

may take judicial notice of facts. "A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." *Mont. R. Evid. 201(b).*

The morning the contested hearing on the Combined Motion began, K.P.'s counsel moved the court to "take judicial notice about the sentencing hearing and incorporate that evidence into this hearing." (Tr. at 194). K.P.'s sentencing had occurred earlier that morning. Given the nature of a criminal proceeding, T.P. was not allowed to question witnesses or present conflicting evidence.

The court responded to the request by saying "I think the state was asking me to take judicial notice of the criminal case in general." (Tr. at 195). T.P.'s counsel objected.

> And I don't agree to that because that wouldn't be fair to the party who wasn't involved in that case. This is just the DN, but it's certainly appropriate for the sentence of part of [K.P.] and we don't want to have to bring all those [sentencing] witnesses back next week. So narrow is the sentencing hearing because we have similar witnesses and that that part would be part – you know, taking judicial notice of and be part of the record.

(Tr. at 195).

Department's counsel attempted to clarify. "I think, [Judge], you know where the state's going and we ask you take judical notice of the criminal proceedings. That would be as just to [K.P.], not as to [T.P.]." (Id.)

The court disagreed. "I'm not sure how I would partition off the sentencing part and say that's okay to use but not the whole case. I'm not sure I totally agree with that, Ms. Penner.[6] As far as [T.P.'s] testimony, I think I could take judicial notice of that." (Id.) Where upon it was pointed out to the court that T.P. had immunity for his testimony for his testimony in favor of the State at the criminal hearing, and the immunity ran to the DN proceeding. (Tr. at 195-196).

The court ultimately concluded that, with the exception of T.P.'s testimony, it would "take judicial notice of the testimony." (Tr. at 196). Presumably, this was intended to include the testimony at the criminal trial. Obviously, T.P. was not able to cross-examine any witness in the criminal trial whether that witness supported the State or K.P.

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[6]Counsel for the Department.

Further, the fact finder in the criminal case was the jury not the judge. It is presumed that conflicting evidence regarding P.P.'s medical conditions was presented by both the prosecution and K.P. in her defense. How the court in a DN proceeding could ascertain what testimony from the criminal proceeding was "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned," for the purpose of taking judicial notice is unknown. For the court to take judicial notice under those circumstances, this violated the fundamental fairness of T.P.'s DN proceeding and his guarantee of due process.

There is ample evidence that information the court heard in the criminal proceeding bled into the DN proceeding. For example, the court found "[a]n ophthalmologist examined [P.P.'s] eyes and found bilateral 360-degree retinal hemorrhages." (Appendix A at 11). There was no testimony presented at the DN hearing to support this finding. There is evidence about consultation with ophthalmologists, (Tr. at 723), but the specificity of the finding, e.g., 360-degree retinal hemorrhages, appears unsupported by the record.

Additional evidence of the cross-over from the criminal to this DN can be found in the court's factual finding number 78, in which the court explicitly referenced the criminal case: "[e]very **treating** profession who testified in this case *and the criminal case* opined that [P.P.'s] injuries were the result of non-accidental trauma." (Appendix A at 17) (italics added). While that may be an appropriate factual finding for K.P., it is inappropriate for inclusion against T.P.

One of the basic tenants of due process is the ability to question adverse witnesses. "Fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during the termination proceeding." *In re A.N.W.*, 2006 MT 42, ¶ 34, 331 Mont. 208, 130 P.3d 619. By taking judicial notice of lengthy criminal proceedings that significantly overlapped with the issues relating to the DN case, T.P. was placed at an unfair disadvantage, especially since the prosecutor in the criminal proceeding also acted as co-counsel for the Department in the DN matter. Regardless, the criminal proceedings focused solely on the culpability of K.P. for the abuse sustained by P.P. There were never charges filed against T.P. in that

case or any other.

II. The District Court Abused Its Discretion by Terminating T.P.'s Parental Rights and Finding the Department Need Not Seek Reunification between T.P. and His Daughter

The district court erred in finding that the Department need not engage in reunification or preservation efforts and, at the same time, terminating his parental rights.

On July 26, 2022, T.P. stipulated that a preponderance of the evidence showed P.P. was a youth in need of care. (Dkt. 140). He did not, however, stipulate to all of the facts contained in the original Petition. The stipulation was entered without K.P.'s agreement, because T.P. believed it was in P.P.'s best interests that P.P. remain in the temporary custody of her grandparents. (Id.) T.P. did not stipulate that P.P. had been subjected to "aggravated circumstances" as defined in *Mont. Code Ann. § 41-3-423(2)(a)* or that his neglect of P.P. had resulted in serious bodily injury to P.P. The court's order adopting the stipulation and adjudicating P.P. a YINC did not include any language or judicial finding that P.P. had been subjected to aggravated circumstances or that P.P. had suffered serious bodily injuries.

After (and before) the stipulation was signed in July, 2022, and P.P. was adjudicated a YINC, T.P. continued to do everything the Department asked him to do and much more. Despite his consistent compliance, the Department continued to pursue termination with no attempts at preservation or reunification even in the absence of a court finding that aggravating circumstances existed or that P.P. had sustained serious bodily injury. Simultaneously, the Department allowed mostly unfettered and frequent contact between T.P. and P.P. That allowance continues to this day.

"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)). Both the constitutions of the United States and Montana "require strict compliance with the statutory requirements governing proceedings involving the termination of parental rights, and the failure to strictly comply with the statutory

requirements should generally result in the reversal of the termination." *In re R.K.*, 2023 MT 161, ¶ 27, 413 Mont. 184, 534 P.3d 659 (citing *In re C.J.*, ¶ 53).

"[I]t must be noted that the first goal of the Department, the court, CASAs, and guardian ad litems [*sic*] is to seek reunification before suggesting termination of parental rights." *In re R.K.*, ¶ 31. In T.P.'s case, this "first goal" was never even considered. Certainly the statutes make exceptions. One such exception is *Mont. Code Ann. § 41-3-423(2)*, which states in relevant part: "A court **may** make a finding that the department need not make reasonable efforts to provide preservation or reunification services *if the court finds that the parent has (a) subjected the child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child* . . . or (d) committed neglect of a child that resulted in serious bodily injury. . ." (emphasis added). Absent such findings, the statutes require reasonable efforts be made toward reunification and preservation of the parent-child relationship.

The district court made no such finding in the case of P.P. until

the termination hearing. Almost nine months passed between the time T.P. signed the stipulation that P.P. was a YINC and the termination hearing. In the interim, the Department made no reasonable efforts with regard to T.P. "'Reasonable efforts' means the department shall in good faith develop and implement voluntary service agreements and treatment plans that are designed to preserve the parent-child relationship . . . and shall in good faith assist parents in completing voluntary services agreements and treatment plans." *Mont. Code Ann. § 41-3-423(1)*

Throughout the proceedings, T.P. asked for a treatment plan. (Tr at 736). Until she was removed by her supervisors, the CASA believed a treatment plan was warranted. (Tr. at 721). The GAL believed T.P. should have been offered a treatment plan. (Tr. at 1017). However, no plan was ever offered because the Department unilaterally decided, in the absence of any judicial finding, that T.P. had neglected P.P. to the point that she suffered serious bodily injury or that T.P. had subjected P.P. to aggravating circumstances.

While the use of the word "may" in *Mont. Code Ann. § 41-3-423(2)*

typically designates discretionary conduct by a court, *Gustad v. City of Columbus*, 265 Mont. 379, 381, 877 P.2d 470, 471 (1994), it would be a mistake to apply that interpretive cannon against T.P. in light of both the statutory text as a whole and to avoid a statutory reading that results in an absurdity. "We construe a statute by reading and interpreting the statute as a whole, 'without isolating specific terms from the context in which they are used by the Legislature.'. . .Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898 (citing an quoting *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003.)

The whole purpose of *Mont. Code Ann. § 41-3-423* is to ensure the Department makes reasonable efforts to prevent a child's removal and to "reunify families that have been separated by the state." *Id.* Within the overall statue are exceptions, which are permissive should the Department seek such an exception. An absurd result would occur if the statute was read to allow the Department to proceed without good

faith reasonable efforts contrary to the statute without a court concluding that it may do so. Support for this reading is found in subsection *Mont. Code Ann. § 41-3-423(4)*, which reads: "A judicial finding that preservation or reunification services are not necessary under this section *must* be supported by clear and convincing evidence." *(emphasis added).* Subsection (5) also supports T.P.'s reading.

> If the court finds that preservation or reunification services are not necessary pursuant to subsection (2) or (3), a permanency hearing must be held within 30 days of that determination and reasonable efforts, including consideration of both in-state and out-of-state permanent placement options for the child must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

Mont. Code Ann. § 41-3-423(5).

"In fact," *Mont. Code Ann. § 41-3-423(1)(a)* "'plainly contemplates the department will make reasonable efforts to reunify families throughout the proceedings.'" *In re R.K.*, ¶ 31 (citing and quoting *In re C.M.G.*, 2020 MT 15, ¶ 14, 398 Mont. 369, 456 P.3d 1017). This sentiment was echoed by T.P.'s counsel and affirmed by the GAL at the hearing. (Tr. at 1017).

The process clearly contemplated by the statute as a whole is that if the Department wants to proceed without providing preservation or reunification services, it must ask, and the court may, make a finding that such services are not necessary. That finding must be based on clear and convincing evidence and must, within 30 days, be followed by a permanency hearing.

In T.P.'s case, the Department neither sought nor pursued an order allowing it to proceed without providing preservation or reunification services. Rather and in the absence of such an order or finding, the Department simply concluded that T.P.'s alleged conduct met the statutory criteria, which is otherwise reserved for a court, and that the Department could ignore its main goal even in the face of the CASA and T.P.'s own requests.

The court's finding that such services were not necessary occurred at the same time and after the hearing on the Department's request that T.P.'s rights be terminated. Absent compliance with the statutory procedures and in the face of an overarching goal of preservation or reunification, the court's decision that the Department need not engage

in reunification efforts was an abuse of discretion.

"To reverse a district court's evidentiary ruling for an abuse of discretion, this Court must determine the district court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *In re R.F.J.*, ¶ 20 (internal citations and quotations omitted.) Failure to follow an explicit, plainly worded statute requiring efforts toward reunification was a substantial injustice. Further compounding the substantial injustice that occurred was that the court ignored CASA's request and the request by T.P.'s counsel that P.P. be appointed an attorney, especially after CASA voluntarily removed itself citing the case's complexity. "The best interests of the child take precedence over parental rights." *In re M.A.L.*, 2006 MT 299, ¶ 18, 334 Mont. 436, 148 P.3d 606.

To that end, CASAs "are factual investigators that effectively serve as the eyes and ears of the court." *In re J.D.*, 2019 MT 63, ¶ 44, 395 Mont. 141, 437 P.3d 131. The role of a guardian *ad litem* "is to represent children's best interests, and perform general duties and

conduct investigations to ascertain the facts constituting the alleged abuse or neglect." *In re B.F.*, 2022 MT 233, ¶ 33, 401 Mont. 185, 472 P.3d 142. Because P.P. had neither GAL nor CASA for a significant majority of the time because of the district court's own ruling against T.P.'s request for P.P. to have counsel and CASA's own request that the court appoint an attorney, the court willfully denied itself of the eyes and ears necessary to conduct an investigation. The court exceeded the bounds of oft-stated policy in case law clearly recommending factual investigations by a GAL to consider the best interests of the child. Instead the court relied solely on its conscience in determining the termination of T.P.'s rights. That conscientious decision totally ignored the findings and conclusions of the GAL and the prior recommendations of CASA as well as the Foster Care Review Committee. This resulted in a substantial injustice, and the court's ultimate ruling was an abuse of discretion.

Conclusion

It is impossible from the record in the DN case for a court to draw a causal connection between T.P.'s alleged neglect and the serious

injuries P.P. sustained. Both the testimony and Appendix B reflect T.P. was absent a significant majority of September 2021. He was unaware his child was being abused until he was specifically told she had suffered nonaccidental trauma. When he learned, he threw up. From that day on he practically begged the Department to let him have a treatment plan so that he may be reunified with P.P. He went above and beyond what many parents subject to the Department do, at the least driving 3,000 miles a month to see his child.

In the face of an unwavering Department and a system that allowed P.P. to go without either a GAL or a CASA for months, T.P. labored under his own self-imposed treatment plan in an effort to prove himself as a fit parent. He testified unequivocally that he would protect P.P. going forward. K.P. is serving a 20-year prison sentence and is subject to a no-contact provision with P.P.

T.P. requests this Court reverse the district court's ruling on termination and ruling that the Department need not seek reunification. At minimum, he would like to be given the opportunity to accomplish reunification efforts.

Respectfully submitted this 1st day of December, 2023.

/s/ Colin M . Stephens
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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates, is 9,970.

Dated this 1st day of December 2023.

/s/ Colin M. Stephens
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CERTIFICATE OF SERVICE

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