IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0414

IN THE MATTER OF:

T.K.B. and N.Z.B.,

Youths in Need of Care.

BRIEF OF APPELLEE

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
BJORN BOYER
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
bjorn.boyer@mt.gov

SCOTT TWITO
Yellowstone County Attorney
LAURA WATSON
Deputy County Attorney
217 N. 27th Street, Room 701
P.O. Box 35025
Billings MT 59107

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

LAURA REED
P.O. Box 17437
Missoula, MT 59808

ATTORNEY FOR APPELLANT
MOTHER

SHANNON HATHAWAY
Hathaway Law Group
401 Washington St.
Missoula, MT 59802

ATTORNEY FOR APPELLANT
FATHER

KRIS COPENHAVER
P.O. Box 3081
Billings, MT 59103

GUARDIAN AD LITEM

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STATEMENT OF THE ISSUES

1. Whether Mother preserved her argument that the Department violated disability laws by not providing in-home services during her pregnancy and, if so, whether this case should be reversed for the alleged violations.

2. Whether Mother's counsel was ineffective for not hiring an expert to counter Michael Sullivan's evaluation.

3. Whether the district court abused its discretion by finding that Mother's conduct or condition rendering her unfit to parent was unlikely to change in a reasonable time.

STATEMENT OF THE CASE

M.B. (Mother) had six children, one of whom is deceased and none of whom are currently in her care. (*See In re N.B.*, Cause No. DN-20-219 (*N.B.*) Doc. 89 at 17.) Mother's oldest child, L.R., resides with her father in Arizona, but occasionally visits Mother. (12/5/22 Hr'g Tr. (Day 2 Tr.) at 251-52.) L.R. is not the subject of any abuse and neglect case. Mother's second child, N.B., was born on January 28, 2018. (*N.B.* Doc. 2 at 2.) N.B.'s father is J.G.B.-F. (*Id.*) J.G.B.-F. relinquished his rights to N.B. conditioned on Mother's parental rights being terminated. (Doc. 79.) T.B. was born on May 16, 2021. (*In re T.B.*, Cause No. DN 21-150 (*T.B.*) Doc. 2 at 2.) H.E. was identified as T.B.'s father through DNA

testing. (*T.B.* Doc. 33.) Two additional children, not involved in this appeal, were born while N.B. and T.B.'s cases were pending. (*See N.B.* Doc. 89 at 17.)

In August 2020, Mother's seven-month-old daughter, R.E., suddenly passed away while in Mother's care. (*N.B.* Doc. 2 at 3.) After R.E.'s death, Mother had J.G.B.-F. take care of N.B. (*Id.*) Soon thereafter, the Department of Public Health and Human Services, Child and Family Services Division (Department) removed N.B. due to J.G.B.-F.'s neglect and placed him with J.G.B.-F.'s mother, K.F. (*Id.* at 3-4.) Based on Mother's and J.G.B.-F.'s stipulations, the district court adjudicated N.B. as a Youth in Need of Care (YINC) on November 6, 2020. (*N.B.* Doc. 13.) The court ordered Mother to complete a treatment plan. (*N.B.* Doc. 18.)

After T.B.'s birth, the Department agreed to let him go home with Mother with an in-home safety plan. (*T.B.* Doc. 2 at 3-5.) On August 11, 2021, the court granted the Department temporary investigative authority for 90 days. (*T.B.* Doc. 23 at 3-4.) However, only 5 days later, Mother was involved in an altercation at the county fair in Billings, where she assaulted the mother and child from one of H.E.'s other relationships. (*T.B.* Doc. 25 at 3.) N.B. and T.B. were both with mother during the assault. (*Id.*) As a result, the Department petitioned the court for temporary legal custody (TLC). (*T.B.* Doc. 24.)

Both Mother and H.E. appeared at the adjudicatory hearing on December 1, 2021, and stipulated that T.B. was a YINC. (*T.B.* Doc. 34 at 2.) On January 12,

2022, the court ordered a second treatment plan for Mother with additional requirements. (*T.B.* Docs. 36-37.) Although both parents completed some treatment plan tasks, neither substantially improved their parenting deficits nor corrected the issues that led to removal. (4/19/23 Hr'g Tr. (Day 5) at 79-82.)

The court held a termination hearing, with testimony occurring over the course of five nonconsecutive days between September 21, 2022, and April 19, 2023. (*See T.B.* Docs. 50, 60, 68-69, 71.) After hearing the testimony, the district court concluded that neither Mother nor H.E. were successful with their treatment plans and that their conduct or condition rendering them unfit to parent was unlikely to change. (*T.B.* Doc. 74 at 8-23.) Accordingly, the Court terminated Mother's parental rights to N.B. and T.B. and H.E.'s parental rights to T.B. (*Id.*; *N.B.* Doc. 89.)

STATEMENT OF THE FACTS

Mother had a difficult upbringing. (*See* 9/21/22 Hr'g Tr. (Day 1) at 11, Ex. A.) She had a contentious relationship with her mother and moved out of the home when she was 16 or 17 years old. (Ex. A at 4.) Mother had her first child, L.R., when she was 20 years old. (Day 2 at 251.) Mother agreed with L.R.'s father that he could take L.R. to live in Arizona, and Mother was only able to see her sporadically when schedules and finances allowed. (*Id.* at 252-53.)

Around the time of L.R.'s birth, Mother began an approximately seven-year relationship with J.G.B.-F., which she described as extremely abusive, both emotionally and physically. (3/8/23 Hr'g Tr. (Day 3) at 14.) J.G.B.-F. was also verbally abusive toward N.B. (*Id.* at 5.) J.G.B.-F. was in and out of prison and ultimately relinquished his rights to N.B. from the Crossroads Correctional Facility in Shelby. (*See id.* at 131; *N.B.* Doc. 2 at 3; *N.B.* Doc. 79.)

Mother and H.E. had their first child, R.E., in early 2020. (*N.B.* Doc. 2 at 3.) H.E. was also abusive. (Day 2 at 248, Ex. C.) On July 25, 2020, H.E. became upset after Mother woke him up to confront him about nude photos of girls she had found on his iPad. (*Id.*) H.E. pushed Mother up against the wall, holding her by her neck for approximately one minute before letting go. (*Id.*) Mother reported that H.E. had been physical with her in the past, once breaking her nose and giving her a black eye. (*Id.*) H.E. was arrested and charged with partner or family member assault. (*Id.*) The court issued a no-contact order that prohibited H.E. from having contact with Mother. (Day 5 at 116-17.)

In early August 2020, J.G.B.-F. was watching N.B. (*N.B.* Doc. 2 at 3.) He went out drinking with his brother and became intoxicated. (Day 2 at 290.) J.G.B.-F. shared a video of himself on Snapchat, which showed him intoxicated in the vehicle with N.B. in the back seat and not buckled into a car seat. (*Id.*) The incident was reported to the Department on August 7, 2020. (*N.B.* Doc. 2 at 3.)

Once Mother learned of the incident, she went to J.G.B.-F.'s residence to confront him and retrieve N.B. (Day 2 at 290.) While at J.G.B.-F.'s residence, Mother engaged in an altercation with J.G.B.-F.'s brother's girlfriend, who she sprayed with mace. (*Id.* at 290-92.) Mother and the brother's girlfriend were both charged with assault. (*Id.*)

On August 10, 2020, R.E. died while in Mother's care. (*N.B.* Doc. 2 at 3.)[1] On August 11, 2020, Department worker Bre Buxbaum began investigating the allegations involving J.G.B.-F. drinking in the vehicle with N.B. as well as R.E.'s death. (*N.B.* Doc. 2 at 3.) At the time, due to R.E.'s death, Mother indicated she was "not in a good head space to be around [N.B.]" (*Id.*) N.B was initially placed with J.G.B.-F.; however, he was removed from J.G.B.-F.'s care a couple of days later because J.G.B.-F. again violated his parole by drinking alcohol. (*Id*.) The Department placed N.B. with J.G.B.-F.'s mother, K.F., where he remained for the rest of the case. (Day 5 at 24-25.)

Following N.B.'s removal, the district court ordered Mother to complete a treatment plan. (*N.B.* Doc. 18.) The plan required Mother to complete a psychological evaluation and attend individual counseling from an approved provider, attend a parenting class, attend visits with N.B., review progress with a

[1] Although law enforcement suspected R.E. died from asphyxiation from Mother rolling over on her while sleeping, no charges were ever filed. (*T.B.* Doc. 40 at 17.)

Department worker, obtain safe housing, and maintain a legal source of income. (*Id.*)

Mother initially made progress in complying with the tasks on her treatment plan. (Day 5 at 11.) However, despite a no-contact order prohibiting Mother from having contact with H.E., she was soon pregnant with his child, T.B. (*See id.*) Mother also acted aggressively toward K.F. and began harassing her, which resulted in K.F. obtaining a restraining order against Mother. (*Id.* at 37-38, 75.) Prior to the restraining order, Mother had been allowed to visit N.B. at K.F.'s residence, but thereafter she was required to visit him at visitation agencies. (*Id.*)

The day after T.B.'s birth, the Department received a report from the hospital that Mother was falling asleep with T.B. in her arms and was not picking up on T.B.'s cues. (Day 5 at 11-12.) There were also concerns about Mother following up with T.B.'s medical needs as a premature baby because Mother had missed many of her prenatal appointments. (*Id.*) Department worker Breanna Riesen (Riesen) responded to the hospital and spoke with staff. (*Id.*) The hospital staff expressed further concerns that Mother was not capable of caring for T.B. after leaving the hospital because she was not following advice from staff. (*Id.*)

Riesen spoke with Mother about the concerns and they agreed to a voluntary protection plan that would allow Mother to take T.B. home with established safety resources. (Day 5 at 17, Ex. H.) The protection plan required Mother to live with

her friend, Patty Zimmerman (Patty) and for Patty to supervise Mother and T.B. "24/7." (Ex. H. at 2.) The Department also planned on having weekly check-ins with Mother and T.B. (*Id.*)

Initially, the Department workers believed Mother was progressing and began planning for Mother to have unsupervised visits with N.B. (Day 5 at 18.) At T.B.'s planned adjudicatory hearing on August 11, 2021, the Department modified its TLC request to a request for temporary investigative authority on the condition that Mother complete a "SafeCare" class. (8/11/21 Hr'g Tr. at 3-4.)

However, only a few days later, Mother was involved in the assault at the fair, which substantially changed the trajectory of the case. (Day 5 at 19.) Mother was at the fair with N.B. and T.B. when she ran into the mother of one of H.E.'s other children, Jasmine. (Day 3 at 30.) Mother got into a physical altercation with Jasmine, which Mother blamed on Jasmine, even though she admitted Jasmine was running away from her when the altercation started. (*Id.*) Not only did Mother assault Jasmine, she also pushed Jasmine's child to the ground, injuring the child. (Day 5 at 19.) Mother initially went home from the fair, but was arrested two days later for the assault and for an outstanding warrant from the prior assault with J.G.B.-F.'s brother's girlfriend. (*Id.*; Day 2 at 292.) Mother ultimately pled guilty to all three assaults. (Day 3 at 33.)

After the fair, Mother returned N.B. to K.F. (Day 5 at 20.) Prior to her arrest, Mother left T.B. with a friend, identified as Angel. (*Id.* at 21.) The Department could not make contact with Angel, who blocked the Department's number. (*Id.*) Riesen went to Angel's residence, but Angel's husband told Riesen to leave the property. (*Id.* at 21-22.) Riesen also received a call from an individual in Texas purporting to be T.B.'s godmother, who reported that she had been asked to come retrieve T.B. and take him back to Texas. (*Id*. at 22.)

Later that night, an unknown individual dropped T.B. off at Patty's doorstep in the middle of a rainstorm. (Day 5 at 23.) As a result of Mother not following her in-home safety plan and not cooperating with the Department, it took the Department three days to find T.B. following Mother's arrest. (*Id.*) The Department removed T.B. from Mother's care and petitioned the court to adjudicate him as a YINC and to grant the Department TLC. (*T.B.* Docs. 24-25.) The court adjudicated T.B. as a YINC on December 14, 2021. (*T.B.* Doc. 34.)

Following T.B.'s removal, Patty became so hostile toward Riesen that Department supervisor Shelby Goodman (Goodman) did not feel comfortable sending Riesen to Patty's home for home checks by herself. (Day 5 at 27-28.) Consequently, Goodman determined that Patty was not an appropriate safety resource and required Mother to find a new residence for reunification. (*Id.* at 28.)

After T.B. was removed, it became increasingly difficult for the Department to work with Mother. (*See* Day 5 at 49-52, 77-78.) Mother began investigating Riesen on Facebook and contacting Riesen's friends. (*Id.* at 78.) Due to Mother inserting herself into Riesen's personal life, Department administrator Jason Larson did not believe it was safe for Riesen to continue working with Mother and he assigned Goodman to be the primary case worker in September 2021. (*Id.*)

Mother continued her impulsive and aggressive behaviors with Goodman. (Day 5 at 51-52.) When Goodman provided advice or instructions that Mother did not like, Mother would "get very angry and aggressive and defensive[.]" (*Id.*) Mother emailed Goodman incessantly, once emailing her 18 times in a single day. (*Id.* at 50.) Goodman attempted to respond to Mother, but Mother was not Goodman's only responsibility and she could not keep up with the quantity of emails Mother was sending. (*Id.*) When Goodman missed emailing Mother back, Mother accused Goodman of ignoring her. (*Id.*)

Goodman reported that she had more contact with Mother than she had had with any other parent during her eight-year career at the Department. (Day 5 at 48-49.) Goodman repeatedly expressed to Mother what she needed to do on her treatment plan. (*Id.*) However, to appropriately respond to Mother's voluminous

emails,[2] Goodman also proposed that Mother either condense her emails into one email sent on a weekly basis or, alternatively, send all communications through her attorney. (*Id.* at 50.) Mother chose to have all communications go through her attorney. (*Id.*) Despite this abnormal amount of communication, Mother continued to blame Goodman for what she perceived to be a lack of communication, claiming Goodman never responded to her emails, text messages, or phone calls. (Day 3 at 109.)

Following Mother's assaults at the fair, the court ordered a second treatment plan. (*T.B.* Doc. 36.) The second treatment plan added conditions that required Mother to complete a SafeCare class, complete an anger management assessment, and follow all recommendations from the assessment. (*Id*.) The other requirements from the first treatment plan remained the same. (*Id.*; *compare N.B.* Doc. 18.)

The Department used a visitation agency, Family Support Network (FSN), to coordinate visits between Mother, N.B., and T.B., which began in September 2021. (Day 2 at 37.) Mother immediately had problems with her visit supervisor because she would miss visits and frequently wanted her visiting time changed. (*Id.* at 39.) Mother did not like the visitation supervisor prompting her and did not appear to retain the things the supervisor taught her. (*Id*.) Mother struggled to

[2] Goodman printed the emails in response to a request from Mother's attorney and the printed emails were approximately "six, seven inches thick[.]" (Day 5 at 49.)

divide her attention between N.B. and T.B., and N.B. was often "left to his own means" because Mother could only focus on T.B. (*Id.* at 40.)

Mother was never able to progress to the point where FSN supervisors believed she could handle her children in a community setting. (Day 2 at 44-45.) FSN terminated Mother from the SafeCare class because she had cancelled too many times and was not progressing. (*Id.* at 45.) FSN also wanted to stop providing visitation services to Mother due to her frequent cancellations. (*Id.* at 47.) Mother often missed visits, claiming she was sick, did not have transportation, or had doctor appointments that were running long. (*Id.* at 46.) However, Goodman insisted that FSN continue to work with Mother. (*Id.* at 47.)

After FSN terminated Mother from its SafeCare class, Mother began attending the class at a different provider, Growing Together. (Day 2 at 63.) Mother's visitations were also switched over to Growing Together to consolidate her providers, starting in early March 2022, while Mother was pregnant with her fifth child, L.E., the result of a brief relationship with Patty's grandson, K.S. (*See* Day 2 at 254-55; 3/9/23 Hr'g Tr. (Day 4) at 20.) Mother also had poor attendance in the SafeCare classes and visitations at Growing Together. (Day 4 at 8-9.)

Shannon Johnston (Johnston), the owner of Growing Together, explained that she would typically close out a parent's case after 3 unexcused absences.

(Day 4 at 10-11.) Johnston reported that Mother had 11 unexcused absences, which did not include a period between April 11, 2023, and May 9, 2023, when Mother missed all her in-person visitations because of her pregnancy. (*Id.* at 11-12.) In April 2023, Johnston received a doctor's note from Mother saying she was excused from work. (*Id.* at 12.) Relying on the note, Mother explained she was on bedrest and requested Growing Together provide her with in-home visits. (*Id.*) Goodman consented to Mother's request. (*Id.* at 17.)

Johnston had been on bedrest before during her own pregnancy. (Day 4 at 13.) During Johnston's bedrest, the doctor had ordered her to stay in bed except to go to the bathroom. (*Id.*) Johnston observed that Mother's note was very vague and did not include any limitations or restrictions other than an excuse to miss work. (*Id.* at 12-13.) Johnston did not know whether Mother could play with her children, get out of bed to feed them, lift them, etc. (*Id.* at 13.) Johnston was concerned with the liability to her company if she provided in-home visits and required Mother to do parenting tasks she was not capable of performing. (*Id.*) Accordingly, Johnston requested clarification on Mother's capabilities. (*Id.*) Mother never provided any additional clarification or doctor's instructions. (*Id.*) Johnston refused to provide in-home visitation under the circumstances, but she agreed to coordinate Zoom visitations. (*Id.* at 13-14.)

Mother's later actions made Johnston doubt that she was under any bedrest restrictions at all. (Day 4 at 14.) During a Zoom visit, Mother mentioned to N.B. that she had been to the store and that she would go back to the store in a couple of days. (*Id.*) Johnston observed that if Mother was going to the grocery store, there did not seem to be any reason she could not attend her visits at Growing Together. (*Id.*) Next, two weeks prior to L.E.'s birth, L.R. visited Mother from Arizona. (Day 5 at 154-55.) Since L.R. was in town, Mother asked Goodman if she could have a supervised visit at the trampoline park so all the siblings could see each other. (*Id*. at 155-56.) Goodman accommodated the request and Mother went with all three children and Goodman to the trampoline park, despite her claimed bedrest restrictions. (*Id.*)

Growing Together provided visitation and SafeCare services to Mother between March and August 2022. (Day 4 at 18.) During that time, Mother never progressed in her visits to where the Growing Together staff felt comfortable with Mother doing community visits. (*Id.*) Even during visits in the Growing Together office, Mother needed help from a worker. (*Id.*) To approve community visits, a parent had to demonstrate an ability to parent without staff assistance, which Mother was never able to do. (*Id.*)

After L.E.'s birth, between June and August 2022, Mother missed an additional 7 visits (included in the 11 total missed visits described above). (Day 4

at 30, 53.) Johnston explained that she gave Mother "a lot of grace and lot of leeway" because of the pregnancy, but even after Mother had L.E. in May 2022, she failed to make any progress. (*Id.* at 50.) Eventually Johnston "ran out of grace" and decided to terminate Mother from her program, despite Goodman's request that she continue to make accommodations. (*Id.* at 51.)

While Growing Together was providing visits and SafeCare, the Department also offered visits for Mother at the Department, beginning in June 2022. (Day 2 at 87.) The visits were exclusively at the Department after Growing Together terminated services. (*Id*.) However, Mother frequently missed those visits as well, missing all her scheduled visits in July 2022. (*Id.* at 88.) Mother would frequently cancel her visits at the last minute, when the children had already been transported to the Department. (*Id.* at 100.) Even during the pendency of the termination hearing, Mother missed seven visits between November 2022 and March 2023. (Day 4 at 69-74.)

The visitation coaches continued to observe that Mother struggled with her parenting. (*See* Day 4 at 75.) For example, Mother would call her children demeaning names, did not offer encouragement, and generally acted more like a sibling to her children than a parent. (*Id.*) Department workers who supervised Mother's visitations also opined that Mother could not safely parent her children in the community. (*Id.* at 82.)

Mother never completed the SafeCare class, even though she had an additional seven months to do so during the span of the termination hearing. (Day 3 at 119.) Mother blamed the providers for her failure to complete SafeCare, saying they sabotaged her efforts by "gossiping" about her and constantly instructing her on "things that really don't matter." (*Id.*)

Mother completed her anger management assessment with Michael Sullivan (Sullivan), a licensed clinical social worker, in February 2022. (Day 1 at 8-9.) Sullivan diagnosed Mother with an Other Specified Personality Disorder with Histrionic/Turbulent Features. (Ex. A at 10.) Sullivan explained that it caused Mother to frequently "go from highs to lows" and struggle with "impulsivity and reactivity." (Day 1 at 19.) People with such diagnoses "tend to be egocentric and emotionally immature." (*Id.*) Sullivan noted that Mother had a history of poor decision-making with her children and with her intimate relationships, which had "been very unhealthy and volatile." (Ex. A at 11.)

Sullivan concluded that Mother was "a young woman whose personality lends to acting out, lends to relationship difficulties, and is consistent with a young woman who has had some history of difficulty with anger and modulating how she expresses that." (Day 1 at 19.) Due to her personality disorder, Mother had a "great[er] probability of engaging in future acts of violence than the typical person." (*Id.* at 27.) People with similar personality deficits tend to project

responsibility externally rather than assuming responsibility and tend to have poor judgment and blame others for their faults. (*Id.* at 28-29.)

Sullivan opined that Mother's personality disorder prevented her from assuming responsibility for the reasons her children had been removed from her and that, unless she improved that insight, she was not equipped to have her children primarily in her care. (Day 1 at 31.) Sullivan recommended that Mother engage in directive, cognitive-based mental health therapy to address these concerns. (Ex. A at 11.)

Sullivan's analysis was supported by Mother's own testimony at the termination hearing. Mother projected blame onto everyone else, starting with accusations that her sisters had made false reports to the Department. (Day 2 at 262-63.) Mother refused to discuss certain topics with the Department, such as concerns raised by R.E.'s suspicious death. (*Id.* at 279.) When the Department confronted Mother, instead of trying to resolve the concerns, she believed the Department workers were trying to antagonize and provoke her. (*Id.* at 277-80.) When Mother did not get the responses she wanted from Riesen or Goodman, she immediately filed complaints with their supervisors and with Department personnel in Helena, asking for them to be removed from her case. (*Id.* at 281.)

Mother did not accept responsibility for her falling-out at FSN or Growing Together, instead blaming Goodman for sabotaging her relationship with the

service providers. (Day 3 at 44.) Mother believed there was a conspiracy between Goodman and Sullivan to provide a report reflecting negatively on her. (*Id.* at 51.) Mother believed Goodman filed her affidavit supporting termination because Mother had just found her own apartment and Goodman wanted to disrupt her progress. (*Id.* at 61.) Mother faulted Goodman for failing her treatment plan. (*Id.* at 116.)

Rather than take responsibility for her actions, Mother resolved to fight the Department. (Day 2 at 271.) During her testimony at the termination hearing, Mother candidly admitted: "With this situation in court, I'm going to fight until I can't fight anymore." (*Id.*)

The Department provided Mother's counselor, Kelly Ogger (Ogger) with Sullivan's report. (Day 5 at 178.) Ogger never expressed any disagreements with Sullivan and worked with Mother on the deficits identified by Sullivan through cognitive behavioral therapy and dialectical behavioral therapy. (*Id.*) At the time of the April 19, 2023 termination hearing, Mother had attended 15 sessions with Ogger. (*Id.* at 179.)

Ogger noted that she had only worked with Mother for a short period of time, approximately six months, and could not say that she had "visually see[n] changes in her" but that Mother was starting to open up and talk about where she needed to make changes. (Day 5 at 180.) Despite some initial progress, Ogger

opined that it could take a "substantial amount of time" for Mother to make needed changes. (*Id.* at 185-86.) Ogger could not identify a time frame on how long it would take for Mother to address the issues identified in Sullivan's report, but noted that it could take "years." (*Id.* at 196.) Ogger acknowledged Mother's difficult road ahead, stating that "to heal to the point of being a safe parent or, you know, hit that standard of safety that she would need to hit, I don't know [how long it would take]." (*Id.* at 198.) Ogger did not believe that it would take "years and years[,]" but it would take a long time to work through because "she's got a lot of trauma." (*Id.*)

Following the termination hearing, the district court issued a written order terminating Mother's parental rights. (*T.B.* Doc. 74.) In the order, the district court found that Mother had not complied with her treatment plan, the treatment plan had not been successful, and Mother's conduct or condition rendering her unfit to parent was unlikely to change within a reasonable time. (*Id.* at 15.) The court noted that Mother had "blame[d] the Department for absolutely everything." (*Id.*) The court relied on Sullivan's testimony that found Mother had "poor parental judgment" and "[did] not appear equipped to have children primarily in her care." (*Id.* at 16.)

The court observed that Ogger, who testified on Mother's behalf, had accepted Sullivan's findings and worked with Mother on Sullivan's

recommendations. (*T.B.* Doc. 74 at 17.) Ogger "would not speculate as to how long it might be before [Mother] was able to parent safely on her own." (*Id*.) Mother's ability to parent was further complicated by the fact that she had a fifth child (L.E.) during the pendency of the hearings and she was pregnant with her sixth child at the time of the termination hearing. (*Id*.) The court believed that Mother's limited parenting skills would be further taxed by the addition of two more children. (*Id.*) Mother had not resolved her parenting deficits over the course of the abuse and neglect proceedings and, pursuant to Ogger's testimony, would be unable to resolve the issues "within a reasonable period of time, if at all." (*Id.* at 17-18.)

The court found that Mother had not completed her treatment plan. (*T.B.* Doc. 74 at 18.) Mother had been inconsistent with her visitations. (*Id.*) Visitation supervisors observed Mother had not made parenting growth and had never progressed to unsupervised visits. (*Id.* at 18, 20-21.) Mother had also failed to complete SafeCare, having been terminated from that service by FSN and Growing Together. (*Id.* at 18-19.) Finally, although Mother was working with Ogger, she had failed to make the necessary changes Sullivan had identified and there were ongoing concerns with her behavior, especially her propensity for fighting with the Department. (*Id.* at 19.) The court found that the tasks Mother did complete on her treatment plan were her just "checking boxes," but not implementing what she had learned. (*Id.* at 21.)

The court noted Mother's argument that the Department had failed to provide reasonable efforts to reunify. (*T.B.* Doc. 74 at 21.) However, the court found that Mother's argument "could not be farther from the truth." (*Id.*) The court observed that "the entire Department top to bottom" had been involved in Mother's case toward the "specific purpose of reuniting [her] family." (*Id.* at 22.) Despite the Department's efforts, the court found that placing "these two children with [Mother] was unsuccessful because of [Mother]." (*Id.*) The court concluded that clear and convincing evidence established it was in N.B.'s and T.B.'s best interests to have Mother's parental rights terminated. (*Id.* at 24.)

SUMMARY OF THE ARGUMENT

Although Mother asked the Department and Growing Together for in-home visits during her pregnancy with L.E., she never objected, and only brought the issue to the attention of the district court at the termination hearing. Mother's reference to the issue at the termination hearing, without any argument that the Department had violated Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), was insufficient to preserve the argument for appeal.

Even if she had preserved the argument, it is without merit. First, Mother has failed to show that her pregnancy qualified as a disability under the Rehabilitation Act. Second, regardless of whether her pregnancy was a disability or not, the

Department was required to take her pregnancy into consideration in implementing her treatment plan. Here, the Department and its service providers tried to accommodate Mother's pregnancy, first by requesting additional information related to her pregnancy restrictions and then by providing her with video visits. Finally, Mother's missed visits while she claimed to be on bedrest were not counted against her. Instead, Mother continuously missed visits, both before and after her bedrest period, which led to her termination from Growing Together. Throughout the case, the Department and its providers made herculean efforts to work with Mother. Mother's claims that the Department discriminated against her because of her pregnancy are without merit.

Mother has not met her burden of showing she received ineffective assistance of counsel. Mother's contention that her attorney did not consult with any experts is mere speculation. Furthermore, Mother's counsel called Ogger as an expert witness, who was a therapist Mother had found herself without Department help. Ogger concurred in Sullivan's findings and began treating Mother for the issues Sullivan identified. Mother's counsel was not deficient for failing to expert shop until he could find a third expert to contradict Sullivan and Ogger.

The district court's finding that Mother's conduct or condition was unlikely to change was not clearly erroneous. Mother had almost three years to work with the Department related to N.B.'s case and almost two years related to T.B.'s case.

During that time, Mother was inconsistent with visitations, failed to complete her SafeCare class, failed to implement the lessons she had learned, and failed to remedy Sullivan's concerns through her therapy with Ogger. Ogger could not opine on how long it would take Mother to be a safe parent. The children deserved permanency and could not be expected to wait on Mother's timeline. Despite ample opportunity, Mother could not demonstrate that her conduct or condition would change within a reasonable amount of time. The district court did not err by terminating Mother's parental rights.

ARGUMENT

I. Standard of review

This Court reviews a district court's evidentiary rulings and its decision to terminate parental rights for abuse of discretion. *In re D.D.*, 2021 MT 66, ¶ 9, 403 Mont. 376, 482 P.3d 1176. A court abuses its discretion if it terminates parental rights based on clearly erroneous findings of fact or conclusions of law, or otherwise acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *D.D.*, ¶ 9. "A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record

convinces the Court a mistake was made." *In re A.B.*, 2020 MT 64, ¶ 23, 399 Mont. 219, 460 P.3d 405.

II. Mother failed to preserve her argument that the Department and its providers violated pregnancy discrimination laws; however, even if preserved, the argument lacks merit.

A. Mother waived her argument by not objecting to the Department's actions in the district court.

Generally, this Court will not address arguments raised for the first time on appeal. *In re C.B.*, 2019 MT 294, ¶ 14, 398 Mont. 176, 454 P.3d 1195. This court may review unpreserved claims of error under the plain error doctrine, but will not do so when the appellant first requests plain error review in her reply brief. *State v. Beaudet*, 2014 MT 152, ¶ 18, 375 Mont. 295, 326 P.3d 1101.

A parent waives the right to argue on appeal that a treatment plan was inappropriately ordered or implemented if the parent does not object to the treatment plan in the district court. *In re T.S.*, 2013 MT 274, ¶ 25, 372 Mont. 79, 310 P.3d 538. In *T.S.*, the father argued for the first time on appeal that the treatment plan had not appropriately considered his hearing disability. *T.S.*, ¶ 27. The father had stipulated to the plan and had not objected to the propriety of the plan in the district court. *Id.* Instead, he only raised the issue with the Department workers a week or two before the termination hearing. *Id.* This Court held that "[i]f the Father believed his hearing impairment was impeding his treatment, he could

have objected to his treatment plan either at its inception or when the issue arose." *Id.* The father waived the argument when he failed to object to the issues with his treatment plan in a timely manner in the district court. *T.S.*, ¶ 25.

Here, Mother stipulated to both treatment plans. In approximately March or April 2022, while Mother was pregnant with L.E., she requested the Department provide her in-home visitations with N.B. and T.B. Previously, when Mother was pregnant with T.B., the Department accommodated a similar request by allowing in-home visits with N.B. However, during L.E.'s pregnancy, Johnston refused, citing Mother's vague doctor's note and concerns about liability.

Despite Mother raising the issue with Johnston and the Department, she did not raise a timely objection with the district court. She first complained about the issue at her termination hearing, almost a year after L.E. was born—long after the court could have provided her with a remedy. Mother certainly never objected on the basis she now argues on appeal, that the Department's actions violated the Rehabilitation Act. Mother never provided the district court with an opportunity to assess the propriety of the treatment plan or the Department's manner of implementing the plan. Pursuant to *T.S.*, she has waived the argument on appeal.

/ / /

B. The Department did not fail to consider Mother's pregnancies in developing and implementing her treatment plan.

1. Mother has failed to show a reasonable accommodation was necessary under the Rehabilitation Act.

On appeal, Mother argues that "while pregnancy itself is not a disability, medical issues resulting from pregnancy can qualify as a disability under [the Rehabilitation Act]." (Appellant's Brief (Br.) at 17.) Mother fails to cite any legal authority for this position. (*See id.*) Citation to legal authority is required by M. R. App. P. 12(1)(g). "It is the appellant's burden to establish error by a district court and such error cannot be established in the absence of legal authority." *State v. Bailey*, 2004 MT 87, ¶ 26, 320 Mont. 501, 87 P.3d 1032. Furthermore, "it is not this Court's obligation to conduct legal research on appellant's behalf, to guess as to [her] precise position, or to develop legal analysis that may lend support to [her] position." *In re Estate of Bayers*, 1999 MT 154, ¶ 19, 295 Mont. 89, 983 P.2d 339.

Mother has failed to provide any legal support that her pregnancy qualified as a "disability" requiring "reasonable accommodations" under the Rehabilitation Act. (*See* Br. at 16-17.) It is neither the Department's duty, nor this Court's obligation, to provide legal support for Mother's conclusory argument. Therefore, her argument fails.

Mother's position also fails on its merits. In order to state a claim for disability discrimination under the Rehabilitation Act, a plaintiff must allege: "(1) [she] is an 'individual with a disability'; (2) [she] is 'otherwise qualified' to receive the benefit; (3) [she] was denied the benefits of the program solely by reason of [her] disability; and (4) the program receives federal financial assistance." *Weinreich v. L.A. Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997) (quoting 29 U.S.C. § 794). Under the Rehabilitation Act, "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ." *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1005 (9th Cir. 2007) (citing 42 U.S.C. § 12102(2)).

Here, Mother has not shown she had a "disability." Even if complications from a pregnancy could meet the definition of a "disability" under some circumstances, Mother has not met that burden here. First, Mother did not provide evidence that she was on bedrest and required in-home services. She only had a doctor's note stating she was excused from work. Second, Mother must show her physical impairment "substantially" limited a "major life activity." *Walton*, hn.1. The doctor's note provided by Mother only restricted her ability to work for a limited amount of time. Mother apparently obtained the note in March 2022 and delivered T.B. only two months later, in May 2022. Even if her ability to work was

a "major life activity," the limited amount of time she was ordered to miss work before delivery was transient and not a substantial limitation.

Moreover, even if Mother met the definition of being disabled and, therefore, qualified for a benefit, she has failed to show that the Department denied her the benefit solely by reason of her disability. Rather, Johnston testified that she refused to offer in-home visitation to Mother because Mother had not identified the limitations of her bedrest. Johnston did not know whether Mother could lift, play with her children, or even get out of bed. Johnston was understandably concerned about requiring Mother to do those things during an in-home visit if they could cause Mother injury and invite a lawsuit against Growing Together.

At first, Johnston only sought clarification on Mother's abilities, which Mother never provided. Neither the Department nor Johnston refused Mother services because of her pregnancy but, instead, only delayed providing the services until Mother could provide additional information. Mother has failed to show that the Department was required to provide her a reasonable accommodation under federal law.

2. Mother has not shown the Department failed to take her pregnancies into consideration in implementing the treatment plan.

A parent's treatment plan "must 'take[] into consideration the particular problems facing both the parent and the child.'" *In re K.L.N.*, 2021 MT 56, ¶ 17,

403 Mont. 342, 482 P.3d 650 (citation omitted). If a parent is disabled, the treatment plan must consider the parent's disability and be "customized to meet those particular needs." *Id.* (quoting *In re X.M.*, 2018 MT 264, ¶ 19, 393 Mont. 210, 429 P.3d 920).

In *K.L.N.*, the mother argued the Department failed to provide her with reasonable accommodations required by the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act. *K.L.N.*, ¶ 23. This Court emphasized that the Department must make reasonable accommodations for parents with disabilities in the reunification services and programs it provides. *K.L.N.*, ¶ 25. However, the requirements of the ADA "to provide reasonable accommodations 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." *Id.* "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." *Id.*

More generally, "[t]he department shall make reasonable efforts to . . . reunify families that have been separated by the state." Mont. Code Ann. § 41-3-423(1)(a). "'[R]easonable efforts' means the department shall in good faith develop and implement voluntary services agreements and treatment plans that are

designed to preserve the parent-child relationship and the family unit and shall in good faith assist parents in completing voluntary services agreements and treatment plans." Mont. Code Ann. § 41-3-423(1)(b)(i).

"Reasonable efforts" do not require "herculean efforts," and "each case must be evaluated on its own facts." *In re A.G.*, 2016 MT 203, ¶ 17, 384 Mont. 361, 378 P.3d 1177 (quoting *In re K.L.*, 2014 MT 28, ¶ 41, 373 Mont. 421, 318 P.3d 691). In evaluating the totality of the circumstances to determine if the Department made reasonable efforts, the district court may consider the entire history of the case, even facts that predate the current action. *In re B.N.Y.*, 2006 MT 34, ¶ 25, 331 Mont. 145, 130 P.3d 594.

The determination of whether the Department made reasonable efforts to reunify is not a finding the district court is required to make separate from the finding that a parent's conduct or condition is unlikely to change within a reasonable time. *In re C.M.*, 2019 MT 227, ¶ 22, 397 Mont. 275, 449 P.3d 806. Rather, "a 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." *Id.* On the other hand, "a parent's unlikelihood of change may well be unaffected by the Department's efforts" and the reasonable efforts requirement "does not replace the two-prong statutory inquiry mandated by § 41-3-609(1)(f), MCA." *Id.* (quoting *In re D.B.*, 2007 MT 246, ¶ 25, 339 Mont. 240, 1698 P.3d 691).

Here, even if Mother's pregnancy did not qualify as a "disability," the Department was still required to consider her pregnancies while implementing the treatment plan. In this case, the Department made herculean efforts to get Mother to comply with her treatment plan. However, Mother was more interested in fighting with the Department than she was in making progress with her parenting.

During Mother's pregnancy with T.B., the Department provided Mother with in-home visitation. Mother did not request in-home visitation during her pregnancy with L.E. until the last two months of her pregnancy. The Department asked Johnston to provide in-home services. However, Johnston understandably refused, asking Mother to provide a more detailed doctor's note. Importantly, Johnston's refusal was conditional. She never expressed a blanket refusal to provide the service but, rather, made a reasonable request of Mother to provide a doctor's note indicating her limitations. Mother never obtained the note.

Furthermore, Johnston and the Department had reason to doubt Mother needed an accommodation at all. Contrary to her request for in-home services, Mother spoke openly about going out shopping. Mother also asked Goodman to allow N.B. and T.B. to accompany her to the trampoline park. That visit occurred approximately two weeks prior to L.E.'s birth. Mother's request for in-home services due to a bedrest restriction did not appear to be a genuine need.

Nevertheless, Johnston and Goodman attempted to accommodate Mother with services while awaiting the doctor's note. Johnston offered video visitation with the children, which Mother only took advantage of one time. Accordingly, the Department made reasonable efforts. Mother simply did not take advantage of the Department's efforts to provide her with services.

Furthermore, Johnston did not count any of the missed visits between the in-home services request and L.E.'s birth against Mother. Mother missed four visits prior to the request and an additional seven after L.E.'s birth. The period between April and May 2022, was not counted in those missed visits. Johnston terminated Mother from Growing Together services due to the multiple missed visits that occurred either before or after Mother had claimed a need for in-home visits.

In her opening brief, Mother states that she was "pregnant during most of the case." (Br. at 18.) Although she delivered two children during the pendency of the case and was pregnant with a third at the time of termination, she was only under bedrest restrictions for a small percentage of that time. There is no evidence in the record that Mother requested in-home services during her last pregnancy that was ongoing at the time of the termination hearing. In fact, Johnston only refused in-home services for approximately 2 months, a small fraction of the

approximately 32 months N.B. and the 20 months T.B. had been removed from Mother's care as of the last day of the termination hearing.

Finally, although the Department is required to make reasonable efforts at reunification, that is not a predicate finding for termination. Here, even if the Department failed to accommodate Mother's pregnancies in implementing the treatment plan, Sullivan still found Mother was unfit to parent, and Ogger could not identify when Mother's conduct or condition might change. The two months of missed visits while Mother claimed to be on bedrest did not affect the greater issue of Mother working through her personality disorder to be able to safely parent her children. The issues leading to removal would not have been remedied by in-home visits and SafeCare while Mother claimed to be on bedrest.

C. The Department did not discriminate against Mother for being pregnant.

In her opening brief, Mother claims the Department discriminated against her because of her frequent pregnancies. Although the Department may not discriminate against a mother because she is pregnant, there is also no reliable evidence in the record that occurred.

Mother argues Goodman prejudiced her by expressing concerns about her pregnancy. (Br. at 23-24.) However, Goodman being concerned about Mother's pregnancies does not mean Goodman engaged in pregnancy-related discrimination. Mother was not a safe parent. She exposed her children to domestic violence and to

violence perpetrated by her on other individuals. The children's fathers were violent individuals. Sullivan opined that Mother's personality disorder made her an unfit parent.

Goodman's concerns about Mother being pregnant were justified. Mother was not capable of raising a child. The fact that Mother was pregnant again was a concern because she was having another child that the Department would, unfortunately, need to remove. However, simply because Goodman was concerned about Mother being pregnant does not mean Goodman discriminated against Mother because of the pregnancy. The record indicates the opposite.

Goodman spent more time communicating with Mother than she had with any other parent during her eight years at the Department. Goodman advocated for Mother with FSN staff and then with Growing Together staff when each of those agencies wanted to terminate Mother from services. Goodman advocated for Mother to have in-home services through Growing Together in the final two months of her pregnancy with L.E. However, Mother could not fulfill Johnston's simple request to provide a doctor's note identifying her bedrest restrictions. Goodman staffed the case with many of her supervisors. The record shows Goodman and the rest of the Department went above and beyond in their efforts to aid Mother. There is no evidence of discrimination.

Mother further claims that Sullivan told her Goodman had asked him why Mother never tried to "keep [her] legs closed." (Br. at 24 (citing Day 3 at 197).) However, the only evidence of Goodman saying that to Sullivan came from Mother's own testimony. The district court found that Mother was not a reliable witness and, instead, that Mother simply "blame[d] the Department for absolutely everything." (*T.B.* Doc. 74 at 15.) In fact, it does not appear that anyone else in the courtroom found Mother's statement to be credible because no attorney, including Mother's, asked Sullivan about the statement. The district court did not err by not assigning any weight to Mother's comment.

Mother next faults the Department for providing her with a bus pass instead of a gas card. (Br. at 26.) Although it may have been difficult for Mother to use the bus after she obtained the doctor's note excusing her from work, there is no reason in the record why she could not take the bus for the remaining 30 months of N.B.'s case or 19 months of T.B.'s case. Providing Mother with a bus pass was reasonable. If Mother truly needed gas vouchers, and had the Department refused those vouchers, she should have brought the issue to the attention of the district court in a timely manner. The district court's finding that the bus passes aided the Department's reasonable efforts was not clearly erroneous.

Mother argues the court erred by not giving her additional time to complete SafeCare, given she had completed 18 out of 21 modules at the time of the final

termination hearing. (Br. at 26.) The court first ordered Mother to complete SafeCare as part of T.B.'s temporary investigative authority in August 2021, and as part of her second treatment plan in January 2022. (*T.B.* Doc. 36.) At the conclusion of the termination hearing in April 2023, Mother had had 20 months to complete the course. T.B. had been in foster care for 20 months and termination of Mother's parental rights was presumed to be in his best interest. *See* Mont. Code Ann. § 41-3-604(1). Although N.B. was placed with kin and, therefore, the presumption did not apply to him, it would still have been unreasonable for the court to force N.B. and T.B. to forego permanency to accommodate Mother's preferred timeline.

There is no indication Mother would have completed SafeCare in a timely manner had the court given her additional time, especially given that she had an additional seven months to complete it while the termination hearing was ongoing. The district court did not err by refusing to give Mother additional time to complete her treatment plan.

Finally, Mother argues the Department failed to provide reasonable efforts by not providing in-home services after she delivered L.E. in May 2022. However, Mother has failed to give any indication why she would have needed in-home services after her bedrest restrictions ended with L.E.'s birth. The Department did

not fail to provide reasonable efforts by not providing in-home services after L.E.'s birth.

D. The Department did not retaliate against Mother by requiring her to obtain her own residence.

Mother argues the Department was not justified in requiring her to obtain her own residence and that doing so was a retaliation for the complaints Mother made to Goodman's superiors. Obtaining safe and stable housing was a requirement of Mother's second treatment plan. (*T.B.* Doc. 36 at 3.) Mother never objected to the requirement that she obtain her own housing.

Contrary to Mother's assertion that the requirement was retaliatory, Goodman explained at the termination hearing that Mother could not live with Patty because Patty had become openly hostile toward the Department. Patty was so hostile that Goodman would not allow Department workers to go to her residence unless accompanied by another worker. Patty had been Mother's safety resource when Mother was arrested for the fair assault and T.B. then went missing for three days. Under those circumstances, Patty was unable to help keep T.B. safe when Mother failed. The Department did not violate its duty of good faith because it had valid reasons for requiring Mother to obtain her own residence.

Mother's conclusory argument that the Department did not act in good faith by requiring an anger management assessment similarly lacks merit. Mother had two assault cases, one of which involved a minor. Mother was impulsive and had

violent tendencies. Mother did not object to the anger assessment requirement, which was included in her second treatment plan. (*T.B.* Doc. 36.) The Department acted in good faith by requiring the anger assessment.

IV. Mother did not receive ineffective assistance of counsel.

Parent's have a due process right to effective assistance of counsel during abuse and neglect proceedings. *In re Z.N.-M.*, 2023 MT 202, ¶ 34, 413 Mont. 502, ___ P.3d ___. "When examining an ineffectiveness claim in termination proceedings, this Court analyzes two nonexclusive factors: (1) counsel's training and experience, and (2) the quality of counsel's advocacy provided during the proceedings." *Id.* Even if a parent can show that her counsel was ineffective, the parent must also show "that counsel's ineffectiveness caused them prejudice." *Id.*

Although failure to call or consult with an expert witness may lead to a claim of ineffective assistance of counsel in a criminal case, it does not appear that this Court has ever extended that theory to an abuse and neglect case. Even in criminal cases, defense counsel is not required to call "an equal and opposite expert" for every expert called by the prosecution. *St. Germain v. State*, 2012 MT 86, ¶ 37, 364 Mont. 494, 276 P.3d 886. "[F]ailure to consult with an expert witness is not per se unreasonable." *Id*. In criminal cases, a defense attorney "may forego

the use of an expert if the investigation would be fruitless or might be harmful to the defense." *Id*.

On appeal, Mother claims her counsel was ineffective for not consulting with or calling an expert to rebut Sullivan's report. Mother does not raise any objections to her counsel's training or experience. Instead, Mother argues she was prejudiced by the quality of her counsel's representation.

First, Mother's argument that her counsel did not consult with any experts is entirely speculation. Nothing in the record indicates who her counsel spoke to in preparing to cross-examine Sullivan or who he considered calling as a witness. Second, Mother did call an expert witness. Kelly Ogger had the training, education, and experience to testify about Mother's mental health. Ogger could have rebutted Sullivan's findings, had she disagreed with them. However, Ogger appears to have agreed with Sullivan's findings because she worked with Mother on Sullivan's recommendations. There is no indication that Mother's counsel could have found an expert who disagreed with Sullivan or that calling a third expert to rebut Sullivan and Ogger would have made a difference in the proceedings.

Nor can Mother fault Ogger for her opinion. Mother found Ogger herself by looking up counselors on Google. (Day 3 at 153.) Although Mother claims Sullivan's evaluation was a "hit job," she cannot make the same claim about Ogger because the Department was not involved in connecting Mother and Ogger. Given

her professional obligations to Mother, had she disagreed with Sullivan, Ogger could have made alternative recommendations. Ogger did not do so and only went to work trying to help Mother with the issues Sullivan had identified. Given the apparent concurrence of opinion between Sullivan and Ogger, Mother's counsel was not deficient for failing to expert shop until he found someone who disagreed.

Furthermore, although Mother faults Sullivan on appeal for the tests he chose to conduct, Sullivan's findings were not controversial. Sullivan identified that Mother had poor judgment, a history of poor decisions related to intimate relationships, anger issues, and she projected blame onto others. Sullivan's findings were supported by Mother's own testimony. Mother agreed that she had been in several abusive relationships and that she had pled guilty to three assaults. Throughout her two days of testifying, Mother continuously placed blame for her situation on the Department instead of acknowledging her role in her children's removal. Instead of working with the Department, Mother resolved to "fight until I can't fight anymore." (Day 2 at 271.) Because Mother's condition was readily apparent, her counsel was not deficient for not calling a hired expert witness.

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V. The district court's findings that Mother had failed to complete her treatment plan and that her conduct or condition was unlikely to change were not clearly erroneous.

To terminate parental rights to a child who has been adjudicated as a YINC, a district court must find "by clear and convincing evidence that: (1) an appropriate court-approved treatment plan was not complied with by the parents or was not successful; and that (2) the conduct or condition of the parents rendering them unfit was unlikely to change within a reasonable time." *In re B.J.J.*, 2019 MT 129, ¶ 20, 396 Mont. 108, 443 P.3d 488 (quoting *X.M.*, ¶ 18); Mont. Code Ann. § 41-3-609(1)(f)(i)-(ii).

"Complete compliance with a treatment plan is required, as opposed to partial or even substantial compliance." *In re A.J.C.*, 2018 MT 234, ¶ 38, 393 Mont. 9, 427 P.3d 59. Furthermore, "[e]ven if a parent technically completes all of the tasks in a treatment plan, [she] does not successfully complete the plan unless [she] effectuates the purposes for which the plan is designed." *Id.* The district court does "not have a crystal ball to look into to make th[e] determination" of whether a parent can change her conduct in a reasonable amount of time, so "it must, to some extent, be based on a person's past conduct." *In re Custody & Parental Rights of D.A.*, 2008 MT 247, ¶ 23, 344 Mont. 513, 189 P.3d 631.

Moreover, "[a] child's need for a permanent placement in a stable, loving home supersedes the right to parent a child." *D.A.*, ¶ 21. If a child has been in

foster care for 15 of the most recent 22 months, then termination of parental rights is presumed to be in the best interests of the child. *Id.* (citing Mont. Code Ann. § 41-3-604(1)). As noted above, "[i]t is not reasonable . . . for the courts to force children to adjust their timelines and subordinate their needs to meet their parents' timelines." *In re T.N.-S.*, 2015 MT 117, ¶ 28, 379 Mont. 60, 347 P.3d 1263.

Mother first renews her argument that the Department discriminated against her due to her pregnancy and then claims that the treatment plan was not appropriate because it did not provide her with adequate time after her pregnancy to complete SafeCare and demonstrate consistent visitation. (Br. at 35-36.) However, assuming Mother is referring to her pregnancy with L.E., she still had ample time to demonstrate compliance with her treatment plan after L.E.'s birth. L.E. was born in May 2022 and the final day of the termination hearing was not until April 2023. Mother had almost a year after L.E.'s birth to complete her SafeCare class and to demonstrate consistency in visitation. However, even after L.E.'s birth, Mother continued to miss her SafeCare class and visitations with Growing Together to the point that Growing Together terminated her from services. Mother had sufficient time to complete all her tasks.

Furthermore, Mother claims that the Department retaliated against her by demanding she obtain her own residence. (Br. at 36.) However, even if that component of the treatment plan was motivated by retaliatory factors, it did not

prejudice Mother because it was one of the few requirements Mother successfully accomplished.

Mother also renews her complaints about Sullivan's anger assessment and states that neither Sullivan nor Goodman followed up with her to determine if she was following the recommendations. (Br. at 36.) Mother's assertions are simply not true. Goodman followed up several times with Ogger about Mother's compliance with Sullivan's recommendations.

Mother next argues that the court erred by determining her conduct or condition was unlikely to change. Mother first cites her lack of assaultive behavior for 18 months after the fair and her lack of domestic violence incidents later in the case. However, Mother misses the point. Mother's assaultive behavior and propensity toward violence in intimate relationships, while concerning, were mostly symptoms of the larger issues—Mother's impulsivity, anger, and poor judgment. Sullivan recognized those issues with Mother and recommended cognitive behavioral therapy to remedy the concerns. Although Mother began this process with Ogger, Ogger could not identify when she would work through the issues sufficiently to be a safe parent.

Mother faults the court for not crediting her successes. To be sure, Mother had successes. However, measuring compliance with a treatment plan does not require the district court to compare successes and failures and "pass" a parent if

her successes outweigh the failures. Rather, complete compliance with the treatment plan is required. Here, Mother failed several aspects of her treatment plan, including visitations, SafeCare, and completing cognitive behavioral therapy. Mother had ample time to complete the requirements and her children deserved permanency. N.B. and T.B. were not required to wait forever to see if Mother could make lasting progress. In T.B.'s case, termination was presumed to be in his best interest. In N.B.'s case, Mother had only made limited progress in her almost three years of work. The district court did not err by finding Mother's conduct or condition was unlikely to change.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's termination of Mother's parental rights.

Respectfully submitted this 13th day of December, 2023.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Bjorn Boyer*
BJORN BOYER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,996 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Bjorn Boyer
BJORN BOYER

CERTIFICATE OF SERVICE

I, Bjorn E. Boyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-13-2023:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: M. N. B., E. H.
Service Method: eService

Kathryn Fey Schulz (Govt Attorney)
215 North Sanders
P.O. Box 201401
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Scott D. Twito (Govt Attorney)
PO Box 35025
Billings MT 59107
Representing: State of Montana
Service Method: eService

Laura Marie Reed (Attorney)
P.O. Box 17437
Missoula MT 59808
Representing: M. N. B.
Service Method: eService

Shannon Colleen Hathaway (Attorney)
401 Washington Street
Missoula MT 59802
Representing: E. H.
Service Method: eService

Kris Copenhaver (Attorney)
PO Box 3081
Billings MT 59103
Service Method: eService
E-mail Address: copenhaverlaw@gmail.com

Electronically signed by Janet Sanderson on behalf of Bjorn E. Boyer
Dated: 12-13-2023