IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0415

IN THE MATTER OF:

P.P.,

A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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GUARDIAN AD LITEM

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STATEMENT OF THE ISSUES

1. Whether it was reversible error for P.P. to not have a guardian ad litem (GAL) appointed for her from October 2022 until the termination hearing in April 2023.

2. Whether the district court erred when it did not timely set a hearing on DPHHS's petition for no reasonable efforts and did not *sua sponte* mandate DPHHS provide reasonable efforts pending a decision on DPHHS's request.

3. Whether Mother's counsel was ineffective for agreeing to the GAL's appointment at the termination hearing and failing to compel DPHHS to make efforts pending the district court's decision on DPHHS's request not to make reasonable efforts.

4. Whether the district court abused its discretion when it terminated Mother's parental rights.

5. Whether the district court violated Mother's procedural due process rights.

STATEMENT OF THE CASE

On September 29, 2021, four-month-old P.P. was life flighted in critical condition to Logan Medical Center (Logan Health) in Kalispell from St. Peter's Hospital (St. Pete's) in Helena. (April 20, 21, 24, 26, 28, 2023 Tr. (Tr.) at 34-35,

803; Doc. 216.) P.P.'s medical team ultimately concluded that P.P.'s extensive injuries were a result of non-accidental trauma. (*Id*. at 810.) The Montana Department of Public Health and Human Services, Child and Family Services Division (DPHHS) intervened and petitioned for emergency protective services and temporary investigative authority (TIA). (Doc. 1.)

K.P. (Mother) and T.P. (Father) stipulated to TIA on November 3, 2021, and the district court set an adjudicatory hearing for January 2022. (Doc. 11.) Mother was charged with felony aggravated assault for the injuries suffered by P.P. (DC Doc. 4.)[1] Prior to the continued adjudicatory hearing, DPHHS petitioned for adjudication of P.P. as a youth in need of care, determination that reasonable efforts were not required, and termination of parental rights (Termination Petition). (Docs. 62, 79, 85, 91-92, 124-25.)

The parties stipulated that the termination hearing should be continued until after Mother's trial. (Doc. 125.) Mother was convicted in December 2022 of felony assault on a minor and was sentenced to the Montana State Prison for a term of 20 years in April 2023. (DC Doc. 319.)

[1] At the termination hearing, the district court took judicial notice of Mother's ancillary criminal case, *State v. Proctor*, First Judicial District Court Cause No. CDC 2022-30, which this Court has supplemented to the instant record on appeal.

The district court conducted a five-day termination hearing in April 2023. On July 7, 2023, the district court entered its order granting DPHHS's Termination Petition. (Doc. 216.)

STATEMENT OF THE FACTS

I. Facts related to P.P.'s removal

Full of excitement, Mother and Father (jointly, Parents) welcomed P.P., a healthy baby girl, into the world on May 28, 2021. (Doc. 85 at 11; Tr. at 299, 307, 831-32.) Father, a then-canine supervisor for the Montana Highway Patrol (MHP), and Mother, a then-Assistant Attorney General employed with the Medicaid Fraud Unit, took leave to care for P.P. following her birth. (Doc. 85 at 12; Tr. at 298, 301, 319.)

By the time she turned one month old, Father had noticed an abrasion on her nose and noticeable redness in her right eye. (Tr. at 407-08, 410; State's Ex. 44.) After seeing the abrasion, Parents discussed whether P.P. was "rubbing her face" on the blankets during tummy time. (Tr. at 408-09.)

On July 3, 2021, Father was carrying P.P., who was buckled in her car seat, in one hand and his thermos in the other hand when he tripped going from the house into the garage. (*Id*. at 320-21.) As he was falling, Father tried to grab the car seat and "end[ed] up kind of trapping her leg against the soft foam cover piece"

and the car seat ended up "hitting the concrete." (*Id*. at 321.) Although P.P. initially cried following the incident, P.P. stopped and did not cry more as Father checked her over. (*Id*. at 322.)

Nonetheless, out of an abundance of caution, Parents took P.P. to the emergency room the following day to make sure that P.P. was not injured. (*Id*. at 322-23.) Based on the x-ray results of P.P.'s leg involved in the incident, the doctor decided to have an x-ray conducted on P.P.'s other leg. (*Id*. at 324, 567.) No obvious fractures, however, were noted on P.P.'s x-rays. (*Id*.)

At P.P.'s two-month checkup on July 28, 2021, Parents inquired with Dr. Loomis about a red spot on P.P.'s right eye but did not mention any other injuries. (*Id*. at 914-15.) By that time, the spot was only a few millimeters and given the information provided, Dr. Loomis was not concerned. (*Id*. at 914-16.)

In early August, Mother sent Father a picture of P.P. that showed she had bruising on her right cheek. (Tr. at 413; State's Ex. 49.) P.P. started attending daycare on August 16. (Tr. at 152, 316.) After Father dropped P.P. off on the morning of August 20, 2021, the daycare noted that P.P. had a bruise on her upper forehead and jawline. (Tr. at 416; State's Ex. 51, 107.)

In late August, Father laterally transferred to being a MHP field supervisor based in Great Falls. (Tr. at 304-05.) Because Father had to be located within an hour of his base, Father moved to the Choteau property, which Parents had

purchased in July 2021. (*Id*. at 302, 304-05.) The Choteau property, however, "was not really ready for a full time family of three." (*Id*. at 302-03.) And Mother's request to work remotely full time was still pending with the Attorney General's Office. (*Id*. at 302.) Until the entire family could reside together in Choteau, Parents listed their house located on Bootlegger Dr. in Helena (Bootlegger residence) and entered into a lease for an apartment in Helena, where Mother and P.P. would primarily reside. (*Id*.)

The family traveled from Helena to Miles City and Plevna for Labor Day weekend. (Tr. at 336-37; Father's Ex. D.) During that weekend, Father noticed that P.P. had a bruise on her forehead. (Tr. at 339; State's Ex. 55.) P.P. also had a bruise on her right cheek. (State's Ex. 55.) And, on September 7, 2021, the daycare noted that P.P. arrived with bruises on both cheekbones and on her forehead. (State's Ex. 108.)

After being in Choteau or Great Falls since September 6, Father returned to Helena for only the evening of September 11. (Tr. at 341; Father's Ex. D.) Father was next in Helena from September 18 to 23 to care for P.P. because she was sick, and Mother was traveling for work on September 23. (Tr. at 342-43, 426-27.) After Mother was delayed from returning from Kalispell on September 23, Father became frustrated because he needed to return to Choteau that evening. (*Id*. at 427.)

When Father left P.P., he did not notice any bruises on P.P. (*Id*. at 346-47.) On September 24, 2021, P.P. had a bruise on her forehead, which Father noticed on September 25, when P.P., Mother, and maternal grandfather moved items from Helena to the Choteau property. (Tr. at 347, 428; State's Ex. 61.) Father also noticed "dark" or maybe "dried blood" underneath her eye. (Tr. at 428; State's Ex. 61.) After speaking with Mother, Father's "hypothesis" was that the bruising happened while P.P. "was playing with a toy during tummy time." (Tr. at 433.)

Father returned to Helena the morning of September 28, 2021. (Father's Ex. D.) That same day, the daycare noted that P.P. was starting to roll a little more onto her belly and was crying more than normal. (Mother's Ex. BB.) The daycare had also observed that P.P.'s black eye, that was noted the day before, and which Mother had explained was likely caused by P.P. hitting herself with a toy, remained. (State's Ex. 111; Mother's Ex. BB.) Father picked P.P. up from daycare on September 28, 2021. (Tr. at 28.) Although P.P. "normally cries and is fussy" when she is buckled into her car seat, she was not fussy that evening. (*Id*.)

The daycare became concerned after Mother's explanation for P.P.'s black eye because the daycare providers did not believe that was "developmentally appropriate" for P.P. to be able to injure herself in the manner Mother described. (Tr. at 234.) Accordingly, on September 28, daycare staff met to discuss the pattern of P.P. being absent from daycare and then returning with documented injuries.

(*Id*. at 236, 670.) The daycare decided that the daycare owner would report the staff's concerns to DPHHS the next day. (*Id*. at 236.)

Parents continued to pack up their belongings at the Bootlegger residence while P.P. was either in her car seat or lying on the living room floor. (*Id*. at 356-57.) P.P. drank her normal bottle amount of 100 to 125 mL at 6 p.m. (*Id*. at 359-60.) Father returned P.P. to the living room before Father met with his supervisor outside the Bootlegger residence for 15 to 25 minutes. (*Id*. at 361-62.) Although Father reportedly did not hear P.P. cry, Father's supervisor did. (*Id*. at 363.) When Father returned inside the house, P.P. was sleeping in her car seat. (*Id*. at 364.)

While Mother continued to pack, Father took P.P. to the apartment to sleep that night. (*Id*. at 365.) P.P did not eat her normal bottle amount at 10 p.m., consuming only 25 mL. (*Id*. at 366-67.) After Mother arrived at the house, she helped Father find the Owlet monitor, and placed it on P.P. (*Id*. at 367-68.) At some point during the night, P.P.'s Owlet monitor indicated that her heart rate dropped into the 70s. (*Id*. at 30.) P.P.'s heart rate is normally above 100. (*See* State's Exs. 4-22.)

When Parents went to wake P.P. up around 6 a.m., on September 29, P.P. was not responsive. (*Id*. at 29, 374, 450.) P.P. slightly opened her eyes but was not able to keep them open. (*Id*. at 374.) Father rubbed P.P.'s body, but that did not rouse her. (*Id*. at 375.) Nor did Father talking loud enough for P.P. to hear. (*Id*. at

450.) P.P. did not fuss like normal when Father changed her diaper. (*Id*. at 57.) P.P. did not want to eat. (*Id*.)

Despite being five minutes away from St. Pete's and Father being a trained first responder, Parents decided to call the pediatrician, who reportedly stated that if P.P. had a fever, they should take her to the emergency room. (*Id*. at 57, 454, 379-80.) Because Parents could not locate a thermometer, they decided to take P.P. to the emergency room. (*Id*. at 57.) After buckling her into her car seat, Father noticed "a rhythmical jerking" of one of P.P.'s hands. (*Id*. at 377.)

P.P. was admitted into the St. Pete's emergency room shortly after 7 a.m. (*Id*. at 27.) Dr. Andy Coil, an emergency room physician, examined P.P. (*Id*.) Dr. Coil's immediate thought upon seeing P.P. was that it did not take a doctor to realize that P.P. was dying. (*Id*. at 47.)

During his initial exam of P.P., Dr. Coil noted a bruise on her eye and on her forehead. (*Id*. at 27-28.) When he asked Parents about the bruising, Parents explained that P.P. was "starting to do tummy time and she may have hit her head on the floor or she was playing with toys and she dropped a toy on her face." (*Id*. at 30-31.) Dr. Coil has never seen a four-month-old being able to hold a toy up and then drop it on their face with enough force to cause bruising. (*Id*. at 31.)

There were no reports of P.P. having a fever, diarrhea, or vomiting. (*Id*. at 29-30.) P.P.'s blood work was good. (*Id*. at 34.) Yet, P.P. was not responding like a

normal four-month-old infant should. (*Id*. at 27.) She "was breathing, but she was not conscious." (*Id*. at 39.) Dr. Coil observed that P.P.'s anterior fontanelle, an infant's "soft spot," was "tense" and "firm." (*Id*. at 31.) Dr. Coil was concerned for "bleeding, or swelling, or edema of some kind." (*Id*.) P.P.'s "jerking of one of her arms [was] consistent with a seizure." (*Id*. at 33.)

A CT scan showed that P.P. "had a large hypoxic anoxic brain injury, meaning her brain did not get oxygen to sustain life for a certain amount of time and her brain was dying." (*Id*. at 34.) P.P. became hypoxic and had to be intubated. (*Id*. at 35.) During P.P.'s treatment, Father, multiple times, wanted "to make sure that [Dr. Coil] knew that [Father] was gone the past few weeks," which Dr. Coil found strange. (*Id*. at 36.)

Dr. Timothy Stidham, a pediatric intensivist at Logan Health, coordinated with Dr. Coil to transfer P.P. so that Logan Health's pediatric neurology team could help manage P.P.'s life-threatening brain injury. (*Id*. at 34, 801-02.) The initial report to Dr. Stidham was that they had "a four month old child who was having seizures with concern for a possible sort of SIDS type of . . . picture or near SIDS and had a very concerning CT as well as a very concerning neurological exam." (*Id*. at 802.) In preparation for transfer, P.P. was placed on a "Versed drip, which is a continuous infusion of a medication to help control her seizures." (*Id*. at 804.)

Father left St. Pete's to pack bags for Mother and P.P. before they were flown to Kalispell. (*Id*. at 380-81.) Although P.P. left St. Peter's in "extremely critical" condition, she "had a fairly safe and stable transport process" with no significant deteriorations. (*Id*. at 35, 804.) Father drove to Kalispell later that day after arranging to sign the closing paperwork for the Bootlegger residence. (*Id*. at 381.)

As Dr. Stidham transitioned P.P. off the Versed medication to medication at Logan Health, P.P.'s seizure activity increased quickly, making treating her seizures Dr. Stidham's priority. (*Id*. at 805.) During Dr. Stidham's head-to-toe exam of P.P., he observed that P.P.'s pupils reacted sluggishly. (*Id*. at 805-06.) Dr. Stidham, like Dr. Coil, also noted that her "soft spot was quite tense and ful[ly] consistent with high pressure in the brain," she had a "healing bruise on her right frontal scalp," and a smaller, older bruise below her right eye. (*Id*.)

Mother explained to Dr. Stidham that P.P. had hit herself in the face with a toy a couple of weeks prior. (*Id*. at 806-07.) Dr. Stidham found Mother's explanation to be "fairly implausible," especially "in the context of [P.P.'s] other injuries." (*Id*. at 807.)

After P.P.'s chest x-ray, the radiologist "called with concerns for at least one and possibly two healing rib fractures on the right side." (*Id*. at 805, 808.) P.P. also had a CT, skeletal survey, and a MRI completed within her first 24 hours at Logan Health. (*Id*. at 808.) The MRI of P.P.'s brain "showed significant, extensive injury

with hypoxic ischemic injury to the brain and some degree of subdural hemorrhage" and a "cerebellar laceration." (*Id*. at 808-09.) The MRI of the spine "showed significant ligamentous injury." (*Id*. at 809.) The skeletal survey "showed bilateral healing rib fractures including the right, 5th, 9th, 10th, 11th posterior right ribs, and 9th, 10th, and 11th posterior left ribs." (*Id*. at 809-10.) All the rib fractures were "in healing phase." (*Id*.) P.P. also had a healing fracture of the distal fifth metatarsal. (*Id*. at 826.) P.P. had retinal hemorrhages. (*Id*. at 810.)

Within the first 24 hours of her care at Logan Health, it became "abundantly clear" that P.P.'s "extensive traumatic injuries," were "conclusively consistent with non-accidental trauma or child abuse." (*Id*. at 810.)[2] None of P.P.'s other providers disagreed with Dr. Stidham's diagnosis. (*Id*. at 815.)[3]

Doctors at Logan Health repeatedly told Parents that they did not think that P.P.'s injuries were "survivable." (*Id*. at 383.) Given the severity of P.P.'s injuries, Dr. Stidham "encourage[ed] palliative care to be part of the team to help be supportive for families in making decisions." (*Id*. at 828.)

After Dr. Stidham talked with Parents about how P.P. had "fairly clearly experienced non-accidental trauma and that it was quite significant," Father "threw

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[2] Dr. Coil and Dr. Loomis both agreed that P.P.'s injuries were caused by non-accidental trauma. (Tr. at 36, 917.)

[3] P.P. was being cared for by at least three pediatric intensivists, four or five pediatric hospitalists, one pediatric trauma surgeon, a pediatric neurosurgeon, and a pediatric neurosurgical nurse practitioner. (Tr. at 815.)

up" in the bathroom. (*Id*. at 822.) Jennifer Blodgett, the Child and Family Services Regional Manager for Region 6, responded to Logan Health to interview Parents. (*Id*. at 56, 58.) Father appeared "shocked by what was happening" and was "pretty tearful." (*Id*. at 57.) In comparison, Mother "was pretty closed off," "agreed it was stressful" but "said that she was fine." (*Id*. at 58.) She did not cry and appeared "flat," choosing to only question Blodgett about the process. (*Id*. at 58-59.)

Blodgett returned to Logan Health on October 1, 2021, to conduct additional interviews of Parents. (*Id*. at 61-62.) Father expressed that "he felt guilty for how much [Mother] had to do as far as . . . moving and the caretaking of [P.P.] while [Father] was in Choteau." (*Id*. at 70.) Mother continued with her "it is what it is" mentality and that she was "fine." (*Id*. at 70.)

Blodgett inquired with Parents about P.P.'s bruises. (*Id*.) Parents volunteered that P.P. "had absolutely had bruising on her face prior to [September 29]." (*Id*. at 70.) Specifically, Parents explained that P.P. once had a bruise on her forehead that they speculated was from "lift[ing] her head and fall[ing] on a fist or toy." (*Id*. at 71-72.) Parents further explained that P.P. "flails a lot" and that she could have hit herself in the head with a toy in her hand to cause the bruise. (Tr. at 72-73.) Despite Blodgett having never seen a four-month-old injure themselves hard enough to cause bruising, Parents believed that P.P. was strong enough to give herself a bruise. (*Id*.) Following the interview with Parents, Blodgett attempted to

follow up individually with Parents that same day. (*Id*. at 73.) Father agreed, but Mother refused. (*Id*.)

While P.P. remained at Logan Health, P.P.'s "subdurals became larger and she needed to drain to relieve that pressure." (*Id*. at 812.) On October 11, 2021, P.P.'s medical team started to conduct "spontaneous breathing trials" to determine if P.P. would be able to breathe on her own. (*Id*. at 813.) Dr. Stidham extubated P.P. on October 12. (*Id*.)

DPHHS ultimately removed P.P. on October 15. (*Id*. at 73, 140.) P.P. was discharged on October 31, 2023, and placed with her maternal grandparents in Plevna. (*Id*. at 387, 533, 812.) Parents relocated to Plevna, residing on maternal grandparents' property, but in a different residence, to be close to P.P. (*Id*. at 387-88.)

II. Pre-termination proceedings

In its order granting DPHHS emergency protective services of P.P., the district court appointed a CASA representative to act as P.P.'s GAL. (Doc. 3 at 4-5.) On November 10, 2021, Loretta Miller was assigned as CASA/GAL for P.P., along with Michele Tillotson, a courtesy CASA/GAL. (Docs. 9-10.)

Following DPHHS filing its Termination Petition, the district court set a pre-adjudication/termination conference for April 13, 2022. (Docs. 85, 88.) At the pre-adjudication/termination conference hearing, the district court denied Father's request to appoint counsel to represent P.P. because of her age and set a termination hearing for June 27, 2022. (Doc. 124.) On June 8, 2022, DPHHS moved, unopposed, to continue the termination hearing until after Mother's criminal trial. (Doc. 135.) At the July 6, 2022 status hearing, the parties, again, stated that all stipulate to continuing the termination hearing until after Mother's criminal trial. (Doc. 139.)

On October 20, 2022, the executive director of CASA moved the district court to issue an order removing CASA/GAL Miller from the case as the CASA program believed that the case "has extended beyond the ability of a citizen volunteer to effectively advocate for the best interest of the above-named youth." (Doc. 141.) None of the parties objected. (*Id*.) The CASA director also requested that the district court *consider* appointing an attorney to represent P.P. in lieu of a CASA/GAL. (*Id*. (emphasis added).) The district court issued its order removing CASA/GAL Miller from the case on November 9, 2022. (Doc. 143.)

Parents both moved separately to continue the termination hearing. (Docs. 159, 161.) DPHHS opposed both motions. (*Id.*) At a hearing held on January 18, 2023, the district court granted Parents' respective motions to continue, resetting the termination hearing to start on April 20, 2023. (Doc. 175.)

On March 15, 2023, Father moved to have the district court appoint counsel for P.P. (Doc. 192.) DPHHS objected to Father's motion. (*Id.*)

III. Termination hearing

By the termination hearing, Parents decided it would be best for P.P. to reside with paternal grandparents in Oregon to receive care from better medical providers. (Tr. at 388-89.) Mother had moved to a camper trailer on paternal grandparents' property, and Father had been traveling to see P.P. two weekends each month. (*Id.* at 390.) Just as DPHHS did when Parents relocated to Plevna, DPHHS consented to Parents residing near P.P., and having unlimited contact with, P.P., so long as all contact was supervised. (*Id.* at 727, 735.) Father, on his own, had completed parenting classes. (*Id.* at 395-99.) Father also was attending individual therapy, in which he was working on parenting skills. (*Id.* at 394-95, 883.)

At the start of the termination hearing, the district court addressed the motion to appoint counsel for P.P. (*Id*. at 10-11.) After Father's attorney confirmed to the district court that no notice of submittal on the motion was filed, the district court exclaimed that it was "a little bit late in the game to be appointing an attorney for the child when we are at the termination hearing." (*Id*. at 11.) Father's counsel then reminded the district court of the statutory requirement that the child has an attorney or GAL. (*Id*.)

DPHHS acknowledged that it was aware of the statutory mandate, but that the situation proved different in that a CASA/GAL had been appointed for the first year of the case but had rescinded its own involvement. (Tr. at 11-12.) DPHHS then stated that, in past cases, a youth was not represented by a GAL or an attorney due to shortages in the district, and that in cases such as P.P.'s, the State "presume[s] that the child wants to be with their parents." (Tr. at 12.)

Father's counsel responded that she had a "remedy or solution for the court to consider" to avoid continuing the termination proceedings, proposing that Sarah Corbally be appointed to represent P.P. (Tr. at 14.) Because Mother had paid Corbally to be a consultant and to testify at Mother's sentencing hearing, the district court immediately interjected, "No, she's a witness. She's not going to be an attorney." (Tr. at 14-15.)

Mother enjoined Father's motion for the district court to appoint Corbally to represent P.P. (Tr. at 17.) Mother explained that they expected Corbally to testify to the same thing Corbally was paid to testify to at Mother's sentencing hearing. (*Id*.) In response, the district court continued to express appropriate concern of Corbally's appointment, explaining that:

> She's been hired. Let's face it, she's getting money from mother. I am troubled, very troubled here. First of all, there was a motion or some sort of notice about here not being a GAL. Nobody objected. I did not sign an order on that because I waited to see if there was going to be anything filed from any of the parties. Nobody did. Then I find you did file on March 15th and then a supplemental on April 6th that looks—April 19th, 6th, somewhere in here your notice about she needs to have someone represent her. I see no notice of submittal.
>
> I don't know you all think you're going to get a reaction to things. This feels like you kind of just left it laying there so we could come in today and try to deal with this. I am not pleased by that, and now I'm guess I'm in a position of allowing somebody to be the attorney for the child's interest who has already weighed in as a witness for mom.

(Tr. at 18.) DPHHS did not object to Corbally being appointed so long as Corbally was not called as a witness. (Tr. at 19.)

Later, Mother's counsel moved the district court to take judicial notice of Mother's sentencing hearing for purposes of the termination hearing. (Tr. at 195.) Father's counsel objected to the district court taking judicial notice of the entire criminal proceeding, arguing that it would be unfair to Father, but did not object to the district court taking judicial notice of only Mother's sentencing hearing. (*Id*.)

The district court then explained that it was not sure how it "would partition off the sentencing part and say that's okay to use but not the whole case." (*Id.*) After Father's counsel explained that Father's immunity afforded to him for the criminal trial also extended to the dependent neglect action, the district court took judicial notice of Mother's criminal proceeding, except for Father's testimony. (*Id.* at 195-96.)

After hearing from 22 witnesses, including Father, over the course of 5 days, the district court issued its order terminating Parents' respective rights on July 7, 2023. (Doc. 216.) The district court found that clear and convincing evidence supported that Mother had "physically abused [P.P.] over a period of months," but that Father was not "directly involved" in P.P.'s physical abuse. (Doc. 216 at 14.) The district court, however, found that clear and convincing evidence supported that Parents "were or should have been aware that [P.P.] was injured on multiple occasions," but Parents chose not to take any action to address P.P.'s noticeable injuries. (Doc. 216 at 14.) The district court also found that clear and convincing evidence established that Parents "failed to obtain immediate care" for P.P. when they found her unresponsive around 6 a.m., on September 29, which was especially troublesome for Father, who is a trained first responder. (Doc. 216 at 14-15.) Accordingly, the district court concluded that the evidence supported that Parents submitted P.P. to aggravating circumstances, warranting the district court relieving

DPHHS of its obligation to make reasonable efforts to reunify P.P. and Parents and terminating Parents' respective rights. (Doc. 216 at 18-21.)

Although P.P.'s prognosis is better than what was anticipated when she was hospitalized at Logan Health, P.P. remains vulnerable. P.P. is legally blind. (Tr. at 629.) P.P. is now able to pull and hold herself up with the assistance of an object. (Tr. at 628.) P.P. attends occupational therapy, speech therapy, visual therapy, and physical therapy. (Tr. at 904.) She is only two years old.

SUMMARY OF THE ARGUMENT

This Court should decline to review Mother's claim that the district court committed reversible error when P.P. went from October 2022 until April 20, 2023, the day of the termination hearing, without having a GAL appointed to represent her interests. First, Mother does not have standing to assert a violation of P.P.'s right to a GAL. Second, Mother's claims are not appropriate for appellate review because Mother did not object to the six-month lapse in GAL appointment before the district court, nor has Mother established that plain error review is warranted. And, ultimately, Mother cannot establish that her rights were prejudiced by the six-month lapse in GAL appointment for P.P.

Mother likewise has not established that plain error review of her no reasonable efforts claim is warranted. The statutes and this Court's jurisprudence

support that DPHHS had no obligation to make reunification efforts pending the district court's decision on the Termination Petition, which was filed early in the case. Nor can Mother establish that she was prejudiced by the district court not "timely" conducting a termination hearing. Mother either filed motions to continue the hearing or did not object to motions to continue the hearing, and then agreed that the termination hearing should be held after Mother's criminal trial.

Mother also cannot establish that she was prejudiced by counsels' performance. It was in Mother's interests for her counsel to agree to Corbally's appointment after the six month lapse in GAL appointment for P.P. Mother had hired Corbally as a consultant, which resulted in Corbally testifying the morning of the termination hearing at Mother's sentencing hearing in support of a sentence that would allow Mother to parent P.P. Corbally continued in her belief at the termination hearing, testifying based on her interviews, the trial transcript, and other DPHHS documents, that termination of Mother's parental rights was not in P.P.'s best interests. Counsel also appropriately agreed to continuing the termination hearing until after Mother's criminal trial as the facts of the trial overlapped with the dependent neglect proceeding and the outcome of that trial was unknown at the first setting of the termination hearing.

Furthermore, the district court did not abuse its discretion when it terminated Mother's rights. P.P. was primarily in Mother's care when P.P. exhibited various

bruises throughout the first four months of her life. P.P. was also primarily in Mother's care when she had to be life flighted to Logan Health in critical condition. Doctors diagnosed P.P. with multiple healing rib fractures, retinal hemorrhages, a broken toe, cerebellar laceration, and a subdural hemorrhage. P.P.'s treating physicians all agreed that P.P.'s injuries were caused by non-accidental trauma.

Finally, Mother cannot establish that the district court violated her right to due process. The record supports that the district court conducted a fair termination hearing that Mother received appropriate notice of and had the opportunity to be heard at.

STANDARDS OF REVIEW

This Court's review of whether a parent was denied her right to due process is plenary. *In re C.B.*, 2019 MT 294, ¶ 13, 398 Mont. 176, 454 P.3d 1195. This Court reviews de novo claims of ineffective assistance of counsel. *In re Z.N.-M.*, 2023 MT 202, ¶ 10, 413 Mont. 502, 538 P.3d 21.

This Court reviews for abuse of discretion a district court's decision to terminate a person's parental rights. *Id*. The district court abuses its discretion when it acts "arbitrarily, without conscientious judgment, or in an unreasonable fashion that results in substantial injustice." *Id*.

This Court reviews the district court's factual findings to determine if they are clearly erroneous. *Id.* 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. *Id*. This Court reviews for correctness the district court's conclusions of law. *C.B.*, ¶ 13.

ARGUMENT

I. The district court did not commit reversible error when it did not appoint a GAL to represent P.P. until the termination hearing, six months after P.P.'s GAL had been rescinded.

Mother complains, for the first time on appeal, that the district court violated Mont. Code Ann. § 41-3-425(2)(b) by not appointing a new GAL after P.P.'s CASA/GAL rescinded her appointment in October 2022. (Br. at 21-25.) Mother asserts this failure constituted a violation of the statute and prejudiced *both* Mother and P.P. (Br. at 24 (emphasis added).) Mother, however, does not have standing to assert a statutory violation on behalf of the child. Nor has Mother established that this Court invoking plain error review is warranted.

A. Mother does not have standing to assert a violation of P.P.'s right to a GAL.

The Montana Constitution precludes a court from resolving "a case brought by a plaintiff who does not show 'that he has personally been injured or threatened

with immediate injury by [an] alleged constitutional or statutory violation.'" *In re T.D.H.*, 2015 MT 244, ¶ 24, 380 Mont. 401, 356 P.3d 457 (quoting *Olson v. Dep't of Revenue*, 223 Mont. 464, 470, 726 P.2d 1162, 1166 (1986)). And "a litigant may assert only his own constitutional rights." *T.D.H.*, ¶ 24.

Because Mother cannot assert P.P.'s rights, this Court should decline to review Mother's appellate claim that P.P. was prejudiced by not having a GAL appointed for six months of the entire dependent neglect proceeding. However, even if Mother could assert a claim on behalf of P.P., Mother still cannot establish that P.P. was prejudiced by the six-month lapse. No critical litigation occurred during that six-month period and P.P. was represented at every critical stage, including the termination hearing. *See generally In re M.V.R.*, 2016 MT 309, ¶ 51, 385 Mont. 448, 384 P.3d 1058.

B. Mother's claims are not appropriate for appellate review because Mother did not object to the lapse in appointment before the district court, nor has Mother established that plain error review is warranted.

The district court appointed a CASA/GAL to represent the child when it granted DPHHS emergency protective services in October 2021. A year later, when CASA rescinded its involvement, Mother did not object. For the next six months, P.P. did not have a CASA/GAL assigned to her. While Father moved to have counsel appointed for P.P., Mother neither took a position on the request nor filed a written response. Instead, the first time Mother expressed any interest in

P.P. being represented was after Father raised the issue at the termination hearing and requested the district court appoint Corbally.

Nonetheless, Mother seeks to have this Court invoke the plain error doctrine to review her claims. Mother's passing reference to plain error review with no legal analysis or discussion, however, remains insufficient to overcome her waiver. *See C.B.*, ¶ 14. Even still, Mother has failed to establish either prong of the plain error doctrine.

This Court invokes sparingly, in limited situations, the doctrine of plain error review. *C.B.*, ¶ 14. To invoke plain error review, the appellant must demonstrate that (1) the asserted error implicates a fundamental right, and (2) not reviewing the asserted error may result in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *C.B.*, ¶ 14.

Although Mother cites to various cases discussing the fundamental constitutional rights of children and parents in dependent neglect actions, Mother does not clearly articulate which fundamental right of *hers* was implicated when P.P. went six months without a GAL appointed to represent *P.P.'s best interests*. Furthermore, at the same time as citing to those cases, Mother states that it was a "statutory violation," not a constitutional violation, that prejudiced her and P.P. Mother, therefore, has not satisfied the first prong of the plain error doctrine.

Even if Mother could establish that the alleged error implicates *her* fundamental right, Mother has not demonstrated that this Court declining to exercise plain error review may result in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the proceedings, or compromise the integrity of the proceedings. To warrant invoking the plain error doctrine, the alleged error must be "obvious" and supported by more than "[a] mere assertion that failure to review the claimed error may result in a manifest miscarriage of justice." *In re H.T.*, 2015 MT 41, ¶ 15, 378 Mont. 206, 343 P.3d 159.

During her year of advocating for P.P.'s best interests, CASA/GAL Miller never wavered in her belief that Parents should receive treatment plans and that DPHHS should work towards reunifying Parents with P.P. (*See* Tr. at 722-23, 725; Docs. 56, 89, 138.) No substantive decisions were made during the six-month lapse in the appointment of a GAL that would have altered the position that DPHHS presumed, which is that P.P., given her age, would want to be reunified with Parents. (*See* Docs. 174, 175, 190, 197.) And there is no evidence that the six-month lapse in GAL appointment for P.P. hindered Mother's ability to contest the Termination Petition.

Furthermore, at the termination hearing, CASA/GAL Miller continued in her belief that P.P.'s best interests would be served by DPHHS working towards reunifying P.P. with Parents. (*See* Tr. at 725, 737-38, 749-52.) Corbally also

testified that it was not in P.P.'s best interests to have Parents' rights terminated. (Tr. at 993, 1016-19.) Mother accordingly cannot establish that had P.P. had a GAL representing her from October 2022 to April 2023, that DPHHS would have handled the case any differently or that her rights would not have been terminated.

Additionally, Mother's claim that Corbally did not receive ample time to formulate the opinion that favored Mother is unsupported. (Br. at 10.) Corbally had been hired by Mother as a consultant in her criminal case. As part of that work, Corbally read the entire transcript from Mother's nine-day criminal trial and various DPHHS documents in Mother's possession. (Tr. at 980-81.) During the termination hearing, Corbally read various additional documents in DPHHS's file and interviewed additional family members. (*Id*. at 977-84.) Throughout her consulting work for Mother and her appointment as P.P.'s GAL, Corbally remained adamant that Mother's rights should not be terminated. The district court considered Corbally's opinion, but in its discretion, gave it the appropriate weight. *See In re C.M.*, 2019 MT 227, ¶ 21, 397 Mont. 275, 449 P.3d 806; *In re A.N.W.*, 2006 MT 42, ¶ 28, 331 Mont. 208, 130 P.3d 619.

Mother cannot establish that she was prejudiced by the six-month lapse in a GAL being appointed for P.P., nor has Mother satisfied either prong required to invoke the plain error doctrine. *See H.T.*, ¶ 21. Accordingly, this Court should decline to invoke the plain error doctrine.

II. DPHHS had no obligation to make reunification efforts pending determination of its request for exemption from making reunification efforts.

On appeal, Mother contends that the district court erred when it did not *sua sponte* mandate DPHHS make reasonable efforts and when it did not timely hold a hearing on DPHHS's Termination Petition. (Br. at 26-30.) Because Mother did not object or otherwise raise these claims and acquiesced in continuing the termination hearing, Mother has waived appellate review of these claims. *See In re A.A.*, 2005 MT 119, ¶ 26, 327 Mont. 127, 112 P.3d 993.

Nonetheless, just as with the GAL issue, Mother again attempts to rely upon the plain error doctrine to review her no reasonable efforts challenge. And, just as with the preceding issue, Mother fails to assert how these errors implicated her fundamental rights let alone that this Court's failure to address the asserted errors may result in a manifest miscarriage of justice, leave unsettled the question of fundamental fairness of the proceedings, or compromise the integrity of the judicial process. *C.B.*, ¶ 14.

Typically, before DPHHS requests termination of parental rights, DPHHS "must engage in reasonable efforts to reunify the family." *In re C.S.*, 2020 MT 127, ¶ 16, 400 Mont. 115, 464 P.3d 66. The notion of reasonable efforts is derived from Montana's policy "to protect children whose health and welfare may be threatened by those persons responsible for their care . . . in a manner that preserves the

family environment, *if possible*." *In re C.J.*, 2010 MT 179, ¶ 23, 357 Mont. 219, 237 P.3d 1282 (emphasis added). DPHHS makes "reasonable efforts" when DPHHS "*in good faith* develop[s] and implement[s] voluntary services agreements and treatment plans that are designed to preserve the parent-child relationship and the family unit" and assists, in good faith, "parents in completing voluntary services agreements and treatment plans." Mont. Code Ann. § 41-3-423(1)(b)(i) (emphasis added).

The health and safety of children, however, are always of paramount concern when making decisions about preserving or reunifying families. *C.J.*, ¶ 23; Mont. Code Ann. § 41-3-423(1)(c). To that end, Mont. Code Ann, § 41-3-609(1)(d) authorizes the district court to terminate parental rights, in a non-ICWA case, without DPHHS providing reasonable efforts so long as the district court finds clear and convincing evidence supports "that the parent has subjected a child to the aggravated circumstances" listed at Mont. Code Ann. § 41-3-423(2). These statutes and this Court's jurisprudence concerning these provisions undermine Mother's arguments on appeal.

First, Mother's argument that DPHHS should have provided reasonable efforts pending the district court's decision on DPHHS's Termination Petition would have required DPHHS to violate Mont. Code Ann. § 41-3-423(1)(b)(i)'s mandate that DPHHS act "in good faith" when implementing reasonable efforts. To

force DPHHS to implement services and treatment plans if it has no intent to reunify the family after petitioning for no reasonable efforts pursuant to Mont. Code Ann. § 41-3-423(2), would require DPHHS to act in bad faith. Moreover, the Legislature has specified that DPHHS may request to not make reunification efforts in its first petition, which would make forcing DPHHS to make efforts pending the determination counterintuitive.

Second, the argument advanced by Mother has been rejected by this Court. *See C.B.*, ¶ 29; *In re J.W.*, 2013 MT 201, 371 Mont. 98, 307 P.3d 274. In *C.B.*, the mother argued it was a violation of due process for DPHHS to not provide reasonable efforts prior to the court making a determination that reunification services were not required. *C.B.*, ¶ 17. In affirming the district court's termination order based on its determination of "no reasonable efforts," this Court explained that Mont. Code Ann. § 41-3-423(2) and (4) "does not provide a timeline for a hearing" or order determining that reasonable efforts were not required. *C.B.*, ¶ 29.

Just as the mother in *C.B.*, Mother cites only to DPHHS's statutory obligation to offer reunification services as support that a judicial determination must be entered prior to DPHHS being absolved from its obligation. (Br. at 26.) This tautological argument is unsupported and fails to establish how Mother's due process rights were infringed since the key components of due process are "notice"

and "opportunity to be heard," and the record clearly establishes that Mother was afforded those due process protections. *See C.B.*, ¶ 18.

Third, this Court has already held that the statutes governing DPHHS's request to be exempt from making reasonable efforts were constitutional and do not subject parents to unfair disadvantage. *See In re A.P.*, 2007 MT 297, ¶ 22, 340 Mont. 39, 172 P.3d 105; *In re T.S.B.*, 2008 MT 23, ¶¶ 37-40, 341 Mont. 204, 177 P.3d 429. Additionally, this Court affirmed application of the "no reasonable efforts" statutes in *C.J.*

In *C.J.*, the parent challenged the district court's "failure to conduct an earlier 'reasonable efforts' hearing" when her parental rights were ultimately terminated pursuant to Mont. Code Ann. §§ 41-3-609(1)(d) and -423(2), (3). *C.J.*, ¶ 22. This Court concluded that the parents' due process rights were not violated when four and one-half months passed between DPHHS's petition for exemption from the reasonable efforts' requirement and the hearing on the petition. *C.J.,* ¶¶ 25-28.

Here, DPHHS did provide reasonable efforts to prevent the removal of P.P. Before the removal, DPHHS interviewed the daycare provider, discussed P.P.'s diagnosis with her medical providers, and interviewed Parents before concluding, over two weeks later, that evidence supported that Parents had abused or neglected P.P. (Doc. 1; Tr. at 49-51, 73, 140, 173-74, 179.) Based on P.P.'s needs, DPHHS did not prevent Parents from relocating to where P.P. was placed. Nor did DPHHS

prevent Parents from accessing P.P. Instead, DPHHS appropriately allowed Parents unlimited contact with P.P. so long as the contact was supervised.

However, within months of P.P.'s removal, DPHHS, in its discretion, elected to petition for no reasonable efforts and termination of Parents' rights based on the severity of P.P.'s injuries that left her in a permanent disabled and vulnerable state. At that time, which was before P.P. was adjudicated as a youth in need of care and temporary legal custody was granted, there was no legal requirement to impose a treatment plan. *See* Mont. Code Ann. § 41-3-443(7). And, after P.P. was adjudicated and while the Termination Petition was pending, DPHHS would have been acting in bad faith if it implemented services aimed at reunifying P.P. with Parents.

Nor would have any efforts made have been legally relevant to the district court's decision based on the petition filed. The theory of termination DPHHS petitioned for relief pursuant to did not require the district court to make a finding that Mother did not successfully complete her treatment plan and that Mother's conduct or condition was unlikely to change in a reasonable time. And any evidence provided that Mother, if she would have completed services on her own, would not have negated that clear and convincing evidence supported that Mother had physically abused P.P. over a period of months, which, itself, supported the district court finding that Mother had subjected P.P. to an aggravated circumstance.

Finally, Mother's argument that the district court should have conducted a hearing on the petition sooner is undermined by the record. The district court set a termination conference for April 13, 2022, which was continued one week based on Father's *unopposed* motion. At the termination conference, the district court set the termination hearing for June 27 through July 1. (Doc. 124.) On June 8, 2022, DPHHS, based on the agreement of *all parties*, moved to continue the termination hearing until after Mother's criminal trial. The parties confirmed that they *all* wanted to continue the termination hearing until after Mother's criminal trial on the record on July 6, 2022. Accordingly, the district court reset the termination hearing for January 23 through January 27. Because her counsel changed, Mother moved to continue the termination hearing, which the district court granted over DPHHS's objection.

Mother, therefore, has failed to establish that plain error review is warranted to consider the timing of the termination hearing or whether the district court should have *sua sponte* ordered DPHHS to engage in reunification efforts. *See C.B.*, ¶ 14.

III. Mother cannot establish that she was prejudiced by her counsels' performance.

Mother contends her counsel was ineffective by (1) proceeding to a termination hearing "under the assumption that the appointment of [Corbally]

during the first half hour of the hearing would satisfy the policy and provisions of [Mont. Code Ann. § 41-3-425(2)(b)] after a six month period of critical litigation preparation without a GAL or attorney for the child" and (2) failing to request a timely hearing on the Termination Petition or "seek a judicial determination that reasonable efforts should have been provided pending resolution" of the termination petition. (Br. at 31.)[4]

In determining whether counsel was ineffective in cases involving termination, this Court will evaluate the training and experience of the attorney and the attorney's advocacy. *In re A.S.*, 2004 MT 62, ¶ 26, 320 Mont. 268, 87 P.3d 408. Each category contains its own non-exhaustive list of factors. *Id*. Even if a "parent shows that counsel provided ineffective assistance under the two factors listed above, relief may be granted only if the parent further demonstrates that counsel's ineffectiveness caused them prejudice." *Z.N.-M.*, ¶ 34. Because Mother does not allege that any of her attorneys lacked sufficient training or education, only the alleged advocacy of her counsel and possible prejudice will be addressed. *See Z.N.-M.*, ¶ 35.

When reviewing the quality of counsel's advocacy, this Court may consider:

> whether counsel has adequately investigated the case; whether counsel has timely and sufficiently met with the parent and has researched the

[4] Mother was represented by Toby Cook from October 2021 until January 2023. (*See* Doc. 158.) Mother was represented by Scott Albers and Hertha Lund at the termination hearing. (*Id*.)

> applicable law; whether counsel has prepared for the termination hearing by interviewing the State's witnesses and by discovering and reviewing documentary evidence that might be introduced; and whether counsel has demonstrated that he or she possesses trial skills, including making appropriate objections, producing evidence and calling and cross-examining witnesses and experts.

Z.N.-M., ¶ 35. Here, the record does not support that any of Mother's attorneys were ineffective in representing Mother.

First, the record undermines Mother's claim that the district court pressured the parties into not continuing the termination hearing. Although the district court expressed understandable frustration that the parties brought late to her attention that P.P. needed to have a GAL or counsel appointed to proceed with the termination hearing that the district court had already set aside various days for, the district court never once stated that it would not continue the hearing.

Second, it was in Mother's interests to agree to Corbally being appointed as GAL for P.P. Corbally, the former division head of Child and Family Services, has extensive knowledge of how DPHHS functions. (Tr. at 965-72.) Mother hired Corbally to testify at Mother's sentencing hearing. Because of her testimony at sentencing, Corbally was incredibly familiar with Mother's criminal case, the genesis of which was P.P.'s injuries that resulted in her removal. At Mother's sentencing held the morning of the termination hearing, Corbally advocated for a sentence that would allow Mother to still be available to parent P.P. (CDC 2022-30 4/20/23 Tr. at 9-15.) At the termination hearing, Corbally continued to express her

opinion that P.P.'s best interests would be served by not terminating Mother's parental rights. Mother has not established how agreeing to Corbally's appointment at the beginning of the termination hearing, which lasted for several days, constituted inferior advocacy by her attorneys.

Finally, even if it was erroneous for the district court to not appoint a GAL or attorney to represent P.P. for six months, as argued above, that lapse in appointment did not result in any prejudice. First, as previously stated, the lapse in GAL appointment did not prevent Mother from being able to contest DPHHS's Termination Petition. Moreover, other than motions to dismiss and a motion to disqualify the prosecutor, there was no active litigation that occurred that input from a GAL on behalf of P.P. would have altered the district court's denial of each of those motions. (*See* Docs. 145, 170.) Instead, P.P. was adequately represented when it counted most—the termination hearing. Mother, therefore, has failed to establish that she was prejudiced by her counsel in not objecting to the six-month lapse in the appointment of a GAL for P.P.

Mother's second alleged ineffective assistance of counsel claim is equally unavailing. Mother's counsel again made a strategic decision to not request a "timely" hearing on the termination petition. All parties agreed, both in a written motion and in an on-record stipulation, that the termination hearing should be continued until after Mother's criminal trial. Although Mother was ultimately

convicted at her trial of abusing P.P., the outcome of Mother's trial was unknown at the time the parties agreed to continue the termination hearing. Furthermore, Mother's argument that her counsel should have required the district court force DPHHS to make reasonable efforts while a no reasonable efforts petition was pending presupposes that request, in itself, would have changed DPHHS's position. It also would have required the district court to order that DPHHS act in bad faith, which it is statutorily required not to do.

Nor would any reasonable efforts have changed the outcome of the case. The petition before it was whether DPHHS was required to make reasonable efforts based on Mother chronically abusing P.P. and neglecting P.P., which resulted in her serious bodily injuries. The petition did not allege that Mother's conduct or condition was unlikely to change in a reasonable time. The district court, accordingly, was not required to consider anything the parents had done during the pendency of the case. Furthermore, the record does not support that Mother would have availed herself of services, if offered. Mother was free to locate and attend services herself as Father did. Mother did not do so, nor did Mother present any evidence of her ability to safely parent P.P. for the district court to consider. To be sure, any evidence Mother could have presented could not have negated the fact that P.P. was in her care when P.P.'s various physical injuries occurred. Because

Mother cannot establish prejudice, Mother cannot establish that her counsel was ineffective. *See Z.N.-M.*, ¶ 34.

IV. The district court did not abuse its discretion when it terminated Mother's rights.

Mother contends the district court abused its discretion when it granted termination because the district court "failed to properly take into account the Child's best interests, the constitutional right of parents and Child to a relationship with each other, and the significant bond and frequent contact between parents and child during the length of this case." (Br. at 32.) In other words, Mother contends that the district court incorrectly weighed the severity of the injuries to the child over Parents love and bond with P.P.

This Court, on appeal, determines whether substantial evidence supports the district court's findings not whether the evidence presented could have supported different findings. *In re J.A.B.*, 2015 MT 28, ¶ 43, 378 Mont. 119, 342 P.3d 35. "In non-jury trials, witness credibility and the weight to be given to witness testimony is squarely within the province of the district court." *C.M.*, ¶ 21. When reviewing a district court's findings, this Court does not consider whether the evidence could support a different finding, nor does it substitute its judgment for that of the factfinder regarding the weight given to the evidence. *A.N.W.*, ¶ 28.

The cumulative testimony supports that Mother subjected P.P. to chronic abuse and that Mother's neglect resulted in serious bodily injury to P.P. Mother was P.P.'s primary caregiver. While in Mother's care, P.P. had an unexplained abrasion on her nose, bruises on her forehead, bruises on her cheek, and a black eye. These injuries all occurred within P.P.'s first four months of life. The evening she turned four months old, she was with Parents, who were continuing to pack up the Bootlegger residence and move into the apartment, which Mother and P.P. would reside in while Father remained living primarily at the Choteau property. P.P. was behaving normally before Father left P.P. alone with Mother for a period of 15 to 25 minutes. When he came back inside the residence, P.P. was sleeping in her car seat. Later that evening, Father took P.P. to the apartment. P.P. took a bottle, but the amount was far less than what she normally eats.

Parents placed the Owlet monitor on P.P. while she slept. P.P.'s heart rate was in the 70s, which was well below her normal rate. P.P. was unresponsive at 6 a.m., when Parents attempted to wake her. She barely moved her eyes open when they rubbed her body. P.P. did not react when her diaper was being changed, register Father speaking out loud to rouse her, or want to eat. Despite living only five minutes away from the hospital, Parents waited an hour to seek medical attention for P.P.

When P.P. arrived at the hospital, Dr. Coil immediately thought P.P. was going to die. CT scans confirmed that P.P.'s brain was dying from not receiving enough oxygen. She was life flighted to Logan Health, where it was discovered that P.P. had healing rib fractures, a toe fracture, retinal hemorrhages, cervical damage, subdural hemorrhages, and severe brain damage. It was unclear if she would survive.

Despite CASA Miller's and family members' beliefs otherwise, none of P.P.'s medical providers disputed that the only mechanism that supported P.P.'s injuries was non-accidental trauma. Furthermore, P.P. has not suffered another injury while out of Parents' care and with her interactions with Parents supervised.

Mother's argument that the district court did not weigh her love and bond with P.P. over the injuries, which she agrees left P.P. "hovering between life and death," (Br. at 34) and which evidence supported Mother caused, is without merit. Although DPHHS does not dispute that Mother loves P.P., love is "not sufficient to establish fitness to parent." *In re J.B.K.*, 2004 MT 202, ¶ 29, 322 Mont. 286, 95 P.3d 699. Furthermore, Mother's contention would have required the district court to disregard that the health and safety of P.P. is of paramount concern.

Despite Mother's contention otherwise, the district court, here, correctly found that termination was in P.P.'s best interests and made its finding based on more than P.P.'s severe injuries that resulted in P.P.'s removal and Mother's

criminal conviction. Although P.P. survived her injuries, P.P. is permanently disabled. P.P. is legally blind. P.P., at the age of 2, is now able to hold herself up to a standing position with the support of objects. P.P. attends speech, visual, physical, and occupational therapy. Given P.P.'s disability status, P.P. will remain vulnerable for the remainder of her life.

The district court accordingly did not err when it concluded that "[t]he physical, mental, and emotional conditions of [P.P.] include the physical need for a safe caregiver to meet her every need, including her basic needs." (Doc. 216 at 16.) Nor did the district court err when it ultimately concluded that it "must give primary consideration to the physical and mental conditions and needs of this vulnerable child who is, and likely permanently will be, entirely dependent on a safe caregiver." (*Id*. at 20.) Because substantial, credible evidence supported that Mother had physically abused P.P. over a period of months, rendering her permanently disabled, the district court did not err when it terminated Mother's rights, and found that it was in P.P.'s best interests to do so.

V. Mother was not denied due process.

Mother contends that the district court not appointing P.P. a GAL for six months, not *sua sponte* compelling DPHHS to make reasonable efforts, "intermingling the criminal and civil proceedings in a confusing and prejudicial

way," and "showing disparate demeanor in dealing of the parties and their counsel" violated "Mother's and other parties'"[5] right to due process. (Br. at 37.) Mother's first two asserted errors were raised earlier in Mother's brief and addressed above in Sections I and II. Just as her first two issues, as argued above, lack merit, so do Mother's last two alleged errors.

The right to the care and custody of a child is a fundamental liberty interest, so "[f]undamental fairness and due process require that a parent not be placed at an unfair disadvantage during the termination proceedings." *A.N.W.*, ¶ 34. The "[k]ey components of a fair proceeding are notice and an opportunity to be heard." *C.J.*, ¶ 27. "[T]he process that is due in any given case varies according to the factual circumstances of the case and the nature of the interests involved." *In re D.B.J.*, 2012 MT 220, ¶ 27, 366 Mont. 320, 286 P.3d 1201. Due process "is a flexible concept which must be tailored to each situation in such a way that it meets the needs and protects the interests of the various parties involved." *In re B.P.*, 2001 MT 219, ¶ 31, 306 Mont. 430, 35 P.3d 291 (internal quotations and citations omitted).

Here, the record supports that Mother was afforded process that was due to protect her fundamental right to parent P.P. First, the record does not support that

[5] Mother does not have standing to assert constitutional rights of other litigants. *T.D.H.*, ¶ 24.

the district court confusingly mingled the termination proceeding with Mother's criminal proceeding. The district court took judicial notice of Mother's criminal proceeding, which Mother did not object to and, therefore, was authorized to reference evidence received during that proceeding.

Second, Mother is incorrect that the district court treated her counsel unfairly while favoring DPHHS. The district court, as is common, expressed frustration at the length of time the proceeding was taking, in part, because redundant information was being presented. The district court, nonetheless, never thwarted *any party* from presenting their case. Furthermore, it is unclear how Mother can discern the district court's "demeanor" from the transcript.

Even so, Mother cannot establish that any of the alleged due process violations, if true, prejudiced her. Mother was present and represented by counsel. Mother, at any given time, had appropriate notice and the ability to be heard. The district court did not err when, based on the overwhelming evidence of P.P.'s injuries being caused by abuse when in the care of Mother, it terminated Mother's parental rights after finding that aggravated circumstances supported DPHHS not having to make reasonable efforts to reunify P.P. with Mother.

CONCLUSION

This Court should affirm the district court's order terminating Mother's parental rights.

Respectfully submitted this 22nd day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced 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 10,000 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Cori Losing
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