

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0550

IN THE MATTER OF

R.N.,

Youth in Need of Care

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable John Parker, Presiding.

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Diane Baird, *LCWS*, Caregiver change involving 2 year old

STATEMENT OF THE ISSUE

1. Did the District Court err when it Dismissed the Dependent Neglect case in violation of the mandatory criteria set out in MCA 41-3-424 because R.N. had only been placed with Birth Mother for three months.
2. Whether Dismissal was improper while a Petition for Termination and a Motion for Permanency Hearing and Emergency Placement were Pending and fully Briefed.

STATEMENT OF THE CASE AND FACTS

The Appellants, Ben and Charissa Wagner – the Intervenor – herein appeal the District Court decision to dismiss of the Youth in need of Care matter because the Department made its Motion before the child had been in Birth Mother’s care for a minimum of six months as required by MCA 41-3-424. At the time the Court granted the Department’s Motion, R.N. had been in Birth Mother’s care for three months. *Petition for Emergency Protective Services, Adjudication As Youth in Need of Care and Temporary Legal Custody* p.1. Although the case was dismissed on the Department’s motion, its Petition for Termination was still pending. *Petition for Termination of Parental Rights*. The Department’s Petition for Termination was mandatory under MCA § 41-3-604(1), because the child had been out of Birth Parents’ care for the last 25 and a half months of his 27-month life. Also pending at the time of dismissal was Wagner’s fully briefed Motion for Permanency Hearing and For Temporary Emergency Placement. *Notice of Issue*.

The child at issue here, R.N., was born on March 27, 2021. He was removed

from Birth Mother's care on April 12, 2021, while living in the Cameron Center. He was out of her care for the next 27 months. *Petition for Emergency Protective Services, Adjudication As Youth in Need of Care and Temporary Legal Custody* p.1. He was adjudicated a Youth in Need of Care on May 11, 2021. *May 26, 2021 Order* p. 4 He was placed in foster care with Foster Parents, the Wagners, on May 28, 2021. *Intervenors/Foster Parents Motion for Permanency Hearing and For Temporary Emergency Placement and Supporting Brief Exhibit C Affidavit of Benjamin Wagner* p.1 When he was placed with the Wagner's, R.N. was barely over two months old. The Wagner's had previously adopted two of his half-brothers—R.W. and H.W. (Birth Mother had relinquished her parental rights to two additional children.) *Id.* P 2

The Department filed its Petition for Termination of Parental Rights on March 14, 2022. The District Court set the matter for a hearing on May 10, 2022, but that hearing was postponed upon Birth Mother's motion until July 7, 2022 and again, upon Mother's request until August 25, 2022. *Motion to Continue Termination Hearing; Order Continuing Termination Hearing; Order Vacating and Resetting Hearing on State's Petition for Termination of Parental Rights.* Ultimately, the hearing on termination would be continued five times and was still pending when the case was improperly dismissed on August 28, 2023. *Order Dismissing Case.*

At the time of the Court's dismissal, R.N. was two years and five months –

or 29 months old. When the Department removed him from the Wagners' care on May 30, 2023, he had spent more than two full years in their exclusive care.

Interveners/Foster Parents Motion for Permanency Hearing and For Temporary Emergency Placement and Supporting Brief Exhibit C Affidavit of Benjamin

Wagner p.2 This time period constituted all but the first two months of his life, and the Wagners are the only true family he has ever known. He is bonded to the Wagners and his brothers.

From the time it placed R.N. with the Wagners, the Department gave every indication that they would adopt R.N., just as they had his two brothers. As of October 2022, the Department had established two permanency plans for R.N., "Plan A" and "Plan B," both of which contemplated "adoption" as the permanent placement plan for R.N. See *Interveners/Foster Parents' Motion for Permanency Hearing and for temporary Emergency Placement and Supporting Brief. Exhibit A*, page 1. It was further contemplated that the permanency plan would be finalized by April 19, 2023. *Id.*, p.2.

The Department's March 14, 2022, Petition for Termination sought to terminate both parents' parental rights. Petition for Termination of Parental Rights. The putative Birth Father, J.N., has never engaged with R.N. and has never been in the picture with respect to R.N. The Department's petition for termination of Birth Mother's parental rights was based on her failure to follow a treatment plan that the District Court had ordered for her on October 5, 2021. Petition for Termination of

Parental Rights. That plan included chemical dependency treatment service, drug testing and parenting education; and the plan was instituted because Birth Mother had a history of chemical dependency, which included methamphetamine use, and mental health issues. J.I. used methamphetamine while she was pregnant with R.N., and he was therefore exposed to methamphetamine in utero, as were his two siblings adopted by the Wagners.

As of December 2022, when the Findings of the Foster Care Review Committee, along with the Foster Care Case Plan, were filed with this Court, “R.N. continues under the care and placement responsibility of the agency because one or both parents have not successfully completed a treatment plan, and the parents are unable to meet R.N.’s needs.” *Intervenors/Foster Parents’ Motion for Permanency Hearing and for Temporary Emergency Placement and Supporting Brief*, Exhibit A, p. 1. And, as of December 2022, the “Reason for Removal” of R.N. from Birth Mother continued to be “Physical Neglect, Drug Abuse-Child; Meth Use-Adult; and Prenatal Drug Exposure.” *Intervenors/Foster Parents’ Motion for Permanency Hearing and for Temporary Emergency Placement and Supporting Brief*, Exhibit A, p. 1. Even after the Department changed course, the most recent Findings of the Foster Care Review Committee April 19, 2023, was that R.N. should be adopted by the Wagners. *Intervenors/Foster Parents Motion for Permanency Hearing and For Temporary Emergency Placement and Supporting Brief Exhibit A 5 pages*.

On or about April 6, 2023, without any prior notice, and with no explanation,

the Department abruptly informed the Wagners that the plan suddenly changed. R.N. was to be placed with the Birth Mother, and the Wagners needed to make him available within a few hours' notice to be physically turned over to Birth Mother for a few visits and then to be permanently returned to her care. And, without a transition plan or any meaningful notice to the Wagners, the Department simply initiated the new process where it abandoned its previous course and started R.N.'s transition without any input from the Wagners, his pediatrician or anyone else.

The Wagners moved to intervene in the Dependent Neglect matter on January 26, 2023, because Birth Mother was still not showing up for visitation with R.N., living in an inappropriate situation, and not finishing her program. The Court set it for hearing on April 18, 2023. *Order Setting Hearing on Motion to Intervene*. The Court did ultimately permit their intervention. *Order to Intervene*. However, the hearing on the Wagners' Motion to Intervene was split, as it did not finish on the first day. *4/18/2023 Minute Entry* After the first day of the hearing the Department informed the Wagners that R.N. would have to go with J.I. that weekend for three days to start his transition to her home. *Id.* The Court scheduled the balance of the hearing for three weeks later. *Order Continuing Hearing on Motion to Intervene*. The Department then, again without notice or explanation, set *two days before the hearing was to resume* as the date the R.N. would be required to be permanently placed with Birth Mother. *May 16, 2023 Motion to Intervene Hearing P. 48-49, L5-L14*. That date ultimately was put off because R.N. fell ill

after the first overnight stay with Birth Mother. The hearing on intervention was completed on May 16, 2023, and the Court granted intervention of May 30, 2023. *Order to Intervene*. The Department immediately removed R.N. from the Wagners' home and placed him with Birth Mother on May 31, 2023. The Department made that move despite its own documentation that Birth Mother had not followed through with visits. *April 18, 2023 Motion to Intervene Hearing P. 22-49, L5-L14* Ben Wagner's Affidavit specifically addresses Birth Mother's minimal compliance, stating that "Between July 13, 2021, and April 4, 2022, J.I. did not have any visits with R.N. He did not see her over those 258 days stretch." Affidavit of Ben Wagner attached as Exhibit C to Wagners' Motion for Permanency Hearing and Emergency Placement. And "As his Foster Parents, we had to make R.N. available for visits with his Birth Mother, when requested by the Department. Accordingly, I am familiar with his visit schedule. From September of 2022 until March of 2023 Birth Mother was given 27 opportunities to have a visit with R.N. She missed 19 of those visits and cut short three of the visits she did make." *Id.*

Upon gaining party status, the Wagners sent discovery to the Department requesting information that they had not been allowed access to before gaining party status. Discovery was sent on May 26, 2023. The Department did not timely respond to that discovery. On June 21, 2023, Wagners filed a Motion for Permanency Hearing and For Temporary Emergency Placement. The Department and Birth Mother filed their response brief on June 30, 2023, and July 5, 2023,

respectively. Before the Motion could be heard by the Court, the Department filed its Motion to dismiss on Friday August 26, 2023. Motion to Dismiss. R.N. had been in Birth Mother's care for less than three full months. The Court entered its Order Dismissing the Action on Monday August 28, 2023, denying the intervenors any opportunity to object to the Department's motion. Order Dismissing Case. The Wagners filed their Notice of Appeal on September 21, 2023. Supplemental facts are discussed below as necessary.

SUMMARY OF THE ARGUMENTS

The District Court erred when it Dismissed the Dependent Neglect case in violation of the mandatory criteria set out in MCA 41-3-424 because RN had only been placed with Birth Mother for three months and the affidavit in support of dismissal was inadequate.

By dismissing the case in violation of MCA 41-3-424 while the Department's Petition for Termination was still pending and the Wagner's Motion for a Permanency Hearing and Emergency Placement was fully briefed and the District Court erred, ignoring R.N.'s best interests.

STANDARD OF REVIEW

This Court's reviews de novo a district's court's order to dismiss a youth-in-need-of-care case. *In re L.V.-B.*, 373 Mont. 344, 317 P.3d 191, 194 (Mont. 2014), ¶ 12 ("We review de novo a district court's decision on a motion to dismiss.", citation omitted); *In re D.B.*, 2008 MT 272, ¶ 12 , 190 P.3d 1072, 1074 , 345 Mont.

225, 1072, ¶ 1, (“The question of whether a district court properly denied a motion to dismiss is a conclusion of law which we review to determine if the court’s interpretation and application of the law is correct.”, citation omitted).

In this case, this Court must review the Department’s affidavit filed in support of the motion to dismiss. The standard of review for the affidavit is de novo. *State v. Griffin*, 2021 MT 190, ¶ 11, 491 P.3d, 1288 ¶ 11 (Mont. 2021) (“Where the question is whether the affidavit in support of a motion for leave to file an information ... is legally or factually sufficient, it is a mixed question of law and fact that we will review de novo.”)

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT GRANTED THE DEPARTMENT’S MOTION TO DISMISS IN VIOLATION §41-3-424, MCA.

§41-3-424, MCA sets out the criteria for dismissing a youth in need of care case. The statute reads as follows:

§41-3-424. Dismissal.

Unless the petition has been previously dismissed, the court shall dismiss an abuse and neglect petition on the motion of a party, or on its own motion, in any case in which **all** of the following criteria are met:

(1) a child who has been placed in foster care is reunited with the child's parents and returned home;

(2) the child remains in the home for a **minimum of 6 months** with no additional confirmed reports of child abuse or neglect; and

(3) the department determines and informs the court that the issues that led to department intervention have been resolved and that no reason exists for further department intervention or monitoring.

Dismissal was not proper in this case as all the required criteria under §41-3-424 were not met. The six-month minimum was ignored, and the Department failed to adequately inform the Court that the issues that led to the Department intervention were resolved and that no reason exists for further intervention or monitoring.

R.N. was placed with birth mother on May 31, 2023, although it can hardly be said that he was returned home, as he was removed from the Cameron Shelter at 16-days-old and never lived with Birth Mother alone. Nonetheless, the first criterion was met.

The second criterion clearly has not been met. R.N. was placed with Birth Mother on May 31, 2023, and the Department moved to dismiss on Friday August 25, 2023, less than three months later. On Monday August 28, 2023, the District Court granted the Department's motion. The quick turnaround on the motion and order denied the Wagners any opportunity to object. Counsel did not see the Friday motion and by Monday the case was dismissed.

The Department's Affidavit in support of dismissal does not meet the requirements of the third criterion. The Department's Motion states that "things have

been addressed.” But the affidavit in support of dismissal merely states that “Mother has remained dedicated to addressing the concerns of the department and has shown tremendous progress over the last year.” It does not contain facts that support the conclusion that the issues that lead to the Department’s involvement have been resolved. The minimum six-month monitoring period is mandatory. Birth mother has been involved with the Department for more than a decade.

To inform the Court that the reasons for intervention have been resolved as required by MCA 41-3-424, it is only logical that “the reasons” should be specifically addressed. They were not. They are set forth below.

The State’s Petition for Emergency Protective Services, the areas of concern in the Department’s October 6, 2021, Court Ordered Treatment plan, and the facts supporting The Department’s March 14, 2022, Petition for Termination of Parental Rights show serious concerns that had existed for more than a decade and resulted in the termination or relinquishment of Birth Mother’s parental rights involving three other children, including the two children who were adopted by the Wagners and were raised for two-years with R.N. The following is the pertinent information contained in the various stages of this case.

The Petition for Emergency Protective services stated that there was clear and convincing evidence of abuse and neglect. The affidavit of the Protection Specialist in support of the Department’s petition stated the following:

Birth Mother J.I. and Birth Father J.N. on son, R.N. Birth Mother had admitted to using methamphetamine early in pregnancy and Birth Mother has also reported a prior history of illegal drug use. Page 3

Prior reports on child/family and found in November 2020 a CPI was made on Birth Mother due to testing positive for methamphetamine while pregnant and disengaging in out-patient chemical dependency treatment prior to the completion of treatment services. Page 4

In October 2013 a CPI was made stating Birth Mother was in prison and admitted to drug use during pregnancy. In July 2013 report was due to Birth Mother being in prison on 6 felony charges and was unable to care her children and history of drug use. Page 4

Birth Mother was substantiated on, and Birth Mother's parental rights were terminated in August of 2013 for all three children. Page 4

It was reported that Birth Mother had used methamphetamine and marijuana early in pregnancy but Birth Mother states she quit 3 months into her pregnancy. CPS Interviewed Gateway Treatment Center License Addiction Counselor, George Mederr stated Birth Mother was regularly testing positive for methamphetamine up until November 4th, 2020 during their appointments. Page 4

Birth Mother was last seen by LAC Mederr on November 18th, 2020 at a group meeting. LAC Mederr did not have an ROI for Birth Mother to call Probation Officer and ask why Birth Mother had stopped attending. CPS interviewed Birth Mother in the hospital room. Birth Mother stated that she has not used since July and quit using due to knowing she was pregnant and wanting a second chance at raising a child. Birth Mother stated she would like to work with Misfits for chemical dependency treatment once out of the hospital to have support postpartum and acknowledge she had an extensive history of drug use. Page 5

Birth Mother stated she lives with seven roommates but does not know if any of her roommates use drugs. Birth Mother also states she did not know all the names (first or last) of the people living in her home. However, Birth Mother did inform CPS of two of the roommate's names and those roommates were known to The Department as unsafe caregivers. Birth Mother made statements regarding having Birth Father continue to live in the home with her despite his positive drug test. Birth Mother also made further statements about not knowing if there were other drug users in her home. Page 5

Immediate Danger Threats: History of Reports, Child Unable to Protect Self, Parent is Out of Control, Situation Will and May Change Quickly. CPS D'Arpini served Notification of Removal. Birth Mother and child remained at Benefis Hospital for another night due to Birth Mother's cesarian-section. On April 1, 2021, CPS D'Arpini received notification from Benefis hospital that child tested positive for methamphetamine. Page 6

Based on the following facts: Birth Mother and Birth Father have a significant history of drug use Birth Father currently admitted polysubstance abuse (two or more times a week), parents unstable living situation where Birth Mother admits she does not know all the people who live in her home, would not want to be UA'd, could provide only two names regarding roommates in the home and they are known to the Department as unsafe caregivers. Birth Mother's inability to protect vulnerable child due to Birth Mother's claimed ignorance of drug use occurring around her, and by Birth Father. R.N.'s cord blood test was positive for Methamphetamine, indicating the child has been exposed to unreasonable risk of harm. Page 8

Birth Mother indicated that she has been clean for seven months, however the child's cord blood was positive and Birth Father uses regularly. Page 9

Affidavit in Support of Petition for Emergency Protective Services, Adjudication of Child as a Youth in Need of Care, and Temporary Legal Custody; pages 3-9.

The Court Ordered Treatment Plan cited the following:

A. Safety/Permanency/Well-Being Issue: The department became involved with a report concerning J.I. using illegal drugs while pregnant with her son R.N. J.I. hair sample and the child's cord blood were positive for methamphetamines. Birth Mother has not provided a clean drug screen or attended treatment with seeking Recovery in nearly a month.

TASKS:

1. J.I. will complete a chemical dependency evaluation through a department approved provider. J.I. will follow all recommendations of the evaluator and treatment program.
 - a.) J.I. will actively participate in Chemical Dependency Treatment and complete the aftercare services recommended. She will attend all scheduled group and individual sessions.
 - b.) J.I. will comply with random alcohol/drug testing.
 - c.) J.I. will learn about the effects drug exposure can have on her child and discuss with her counselor how drug use interferes with her ability to parent and protect her child.
 - d.) J.I. will develop a relapse prevention plan in her individual therapy.
2. The Department will request random alcohol/drug screen and will cover the cost of the testing.

What will success look like: J.I. will complete treatment as recommended, maintain sobriety, and will have no positive drug screens, J.I. will be able to discuss her chemical dependency, recognize her need for sobriety and the risk drug exposure poses to her child.

Expected Initiation Date: Date of Court Ordered Treatment Plan
Completion Date: 6 months after court ordered.

- B. Safety/Permanency/Well-Being Issue:** J.I. needs to have sufficient resources to meet her child's needs. In addition, J.I. needs a safe and stable home environment for her child.

TASKS:

1. J.I. will verify that she has the home.
2. J.I. will distance herself from people that use drugs or alcohol and not allow them into the home. J.I. will refrain from engaging in illegal activities.

What will success look like: J.I. will have adequate resources and be able to meet all of her child's needs on a monthly basis J.I. will refrain from engaging in illegal activities.

Expected Initiation Date: Date of Court Ordered Treatment Plan
Completion Date: 6 months after court ordered.

- C. Safety/Permanency/Well-Being Issue:** It has been reported from safety resources and the Cameron Center that J.I. has struggled caring for her child and his extensive medical needs. **She often becomes overwhelmed with the child and needs breaks from caring for him fulltime. J.I. needs to work with a provider to be able to have realistic expectations of the child and to be able to appropriately respond to the child's needs consistently. (emphasis added – mental health).**

TASKS:

1. J.I. will engage with a licensed provider by the Child Protection Specialist and follow all recommendations.
2. J.I. will address any concerns with her abilities to parent.
3. The Child Protection Specialist will check on J.I. status.
4. J.I. will sign releases allowing communication between the provider and the Child Protection Specialist.

What will success look like: J.I. will fully cooperate with a service provider and demonstrate parenting skills that have realistic expectations of the child and to be able to appropriately respond to the child's needs consistently.

Expected Initiation Date: Date of Court Ordered Treatment Plan
Completion Date: 6 months after court ordered.

D. Safety/Permanency/Well-Being Issue: In order to provide J.I. the necessary services to successfully complete her treatment plan the social worker must be able to exchange information with all service providers and discuss J.I.'s progress.

TASKS:

1. J.I. will sign all necessary Releases of Information to the Montana Department of Public Health and Human Services, Division of Child and Family Services, prior to engaging in any services with all approved and referred providers.
2. J.I. will contact the Social Worker, (phone #: 406-417-9107, 2300 12th Ave. S., Suite #211, Great Falls MT 59405) on a weekly basis to discuss problems, concerns, and progress or lack of progress on the tasks of the plan.

What will success look like: J.I. will cooperate fully with DPHHS, sign all necessary releases, and keep all scheduled appointments.

Expected Initiation Date: Date of Court Ordered Treatment Plan
Completion Date: 6 months after court ordered.

The Department's March 14, 2022 **Petition for Termination of Parental Rights**, filed 11 months after the child's removal, cited the following reasons for termination:

Birth Mother's conduct and/or condition rendering her unfit, unable, or unwilling to give the Youth adequate parental care includes struggles with chemical dependency and **mental health**, which affects Birth Mother's ability to care and provide for the Youth. In considering the factors in terminating the parent-child relationship between Birth Mother and the Youth the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the Youth. Petition for Permanent Legal Custody and Termination of Parental Rights. P5

. . .

Furthermore, 41-3-609(2)(a) states that “emotional illness, **mental illness, or mental deficiency** of the parent of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time” is also a factor the Court shall use to determine whether the parent's “conduct or condition rendering them unfit is unlikely to change with a reasonable time” pursuant to 41-3-609(1)(f)(ii) *Id* at p. 6

Petition for Termination of Parental Rights, pages 5 and 6.

The March 10, 2022--Affidavit in Support of Petition for Termination of Parental Rights and Permanent Legal Custody of Indian Child stated the following:

She also disclosed that she has been **struggling with her mental health and has been “super bipolar” and unmedicated.**

R.N. is turning 1 year old in a week and has no established relationship with the mother. Since the child was removed at 2 weeks old Birth Mother made minimal efforts to attend visits despite transportation being provided for her. Last time R.N. had contact with his mother he was a little over 3 months old. He is young child who needs consistency and stability to insure healthy emotional development and 24/7 care and supervision due to his young age. R.N. had contact with his mother he was a little over 3 months old. He is a young child who needs consistency and stability to insure healthy emotional development and 24/7 care and supervision due to his young age. R.N. is a

healthy child who shows appropriate bonding, healthy social/emotional development and strong relationship with his placement and his siblings.

Continuation of the parent-child legal relationship between Mother and the child will likely in continued abuse or neglect, and it is no longer in the best interests of the child to continue to work towards reunification with Mother.

Continued custody of the child by Mother is likely to result in serious emotional or physical damage to the child.

The best interests of the child would be served by terminating the parental rights of Mother and awarding CFS Permanent Legal Custody of the child with authority to consent to the child's adoption, guardianship, or other permanent placement.

Affidavit in Support of Petition for Termination of Parental Rights and Permanent Legal Custody of Indian Child, pgs. 4, 5.

In addition to the above referenced documents the following testimony was given by Department employees. The following testimony excerpts are from Child Protection Specialist Madison (Maddy) Scofield under Direct Examination from Valarie Winfield during the September 13, 2022 Proceedings of Placement: (TR. 37)

Q. Did she talk about why she disappeared between October 2021 and March 2022?

A. She did.

Q. Why did she say she wasn't engaged with the Department during that time?

A. She had stated that her **mental health had gotten very bad**. And that she was also struggling with her addiction. And did not feel comfortable being around R.N. and engaging in visits.

The following testimony excerpts are from Child Protection Specialist Dariya

Mowry under Direct Examination from Valarie Winfield during the September 13, 2022 Proceedings of Placement: (TR. 61)

Q. Given the length of time that mom has been involved with the Department?

A. That and her prior history. She has a chemical dependency history running approximately ten years that I can establish.

Q. At this point whose best interest is served by reunification?

A. The mother.

Q. Did you hear Ms. Sharp's cross-examination of Ms. Scofield?

A. Yes.

Q. Ms. Mowry, do you have – what is the Department's perspective on the timing of the filing of termination of parental rights and the Department's obligation to assist Birth Mother with the completion of her treatment plan?

A. As far as the completion of the treatment plan we will provide those services available up until termination has happened. So the fact that we filed the termination of parental rights does not mean that we cease the efforts to assist the parent with the treatment plan. In terms of the filing timeline it is case specific it depends on several factors. We can have a treatment plan but also met a statutory deadlines for abandonment. Which is what we had at this case, since Birth Mother did not see son for close to six months. We also do not have to run the case for fifteen months. It is actually against Federal guidelines to do so. By fifteen it's kind of a final guideline at which we would have to make serious decisions. At no point, I believe policy says we absolutely have to run the case for fifteen months.

....

(TR. 64)

Q. Now Ms. Mowry, have you also considered under what circumstances the Departments opinion might change?

A. If we have very good consistency from the mother at this point of the case it's a very difficult decision, because of how much time lapsed in R.N.'s life. We are talking about the entirety of his life. He saw his mother for fifteen times since the time he was removed. I believe he's seen Ms. Scofield more frequently than he saw mother. So when we are discussing the possibility of reunification, we are discussing the possibility of reunification, we have to consider at what point the parents progress on the treatment plan is secondary to the child's best interests, which is why they filed the petitions for permanent legal custody at the time R.N. was about a year old.

The above testimony shows that as of September 2022, the Department still had concerns about Birth Mother's mental health and her commitment and/or to change. More importantly, the Department workers recognized that too much time may have already passed to make "reunification" in R.N.'s best interests.

The affidavit in support of the Department's Motion to Dismiss failed to address the specific concerns raised throughout the Department's involvement in the case. It ignores issues that were specifically identified in the Treatment Plan and/or the Petition for Termination, and it glosses over others. Finally, the Motion itself offers the blanket assertion that "the State's concerns regarding Birth Mother's ability to safely care for the Youth and the issues that led to Department intervention have been resolved." Motion to Dismiss. The Motion and the affidavit supporting it are completely silent regarding the Birth Mother's mental health although those concerns were prevalent throughout. The worker affidavit is the only support that the Department provided to the District Court in support of its Motion to Dismiss. The District Court did not make any specific findings of fact when it granted the Department's Motion to Dismiss. That was insufficient, particularly in light of both Birth parents' long history with the Department and its specific assertion that Birth Mother was unlikely to change within a reasonable amount of time.

A. R.N.'S BEST INTERESTS WERE IGNORED

WHEN THE DISTRICT COURT GRANTED THE DEPARTMENTS MOTION TO DISMISS THE CASE

“In all custody matters, the best interests of the child [] must be the court's primary concern.” *In re Marriage of Johansen*, 261 Mont. 451, 455-56, 863 P.2d 407,410 (1993). Accord, *In re J.N.*, 1999 MT 64, ¶ 13, 293 Mont. 524, 977 P.2d 317 (holding that when considering the criteria for termination, courts must give primary consideration to the best interests of the child as demonstrated by the child's physical, mental, and emotional conditions and needs). To that end, Section 41-3-604, MCA sets out provisions for “When [a] petition [by the Department] to terminate parental rights [is] **required**.” (Emphasis added.)

Section 41-3-604(1) states:

(1) If a child has been in foster care under the physical custody of the state for 15 months of the most recent 22 months, the ***best interests of the child must be presumed to be served by termination of parental rights***. If a child has been in foster care for 15 months of the most recent 22 months or if the court has found that reasonable efforts to preserve or reunify a child with the child's parent or guardian are not required pursuant to 41-3-423, ***a petition to terminate parental rights must be filed*** unless:

- (a) the child is being cared for by a relative;
- (b) the department has not provided the services considered necessary for the safe return of the child to the child's home; or
- (c) the department has ***documented a compelling reason, available for court review***, for determining that filing a petition to terminate parental rights would not be in the best interests of the child.

§41-3-604(1), MCA (emphasis added). Here, the Department filed its Petition to

Terminate Parental Right as required on March 14, 2022. However, it failed to follow through and for all intents and purposes ignored its statutory obligation by subsequently dismissing the case.

As of May 30, 2023, when the Department removed R.N. from the Wagners' home and launched the surprising new plan to permanently place R.N. with Birth Mother, R.N., had "been in foster care for 15 of the most recent 22 months." Indeed, he had been in foster care for all 22 of the "most recent 25 months" (and for all but 16 days of his entire life). Therefore, as of May 30, 2023, the Presumption had long since arisen that R.N.'s best interests would be served by the Department's termination of Birth Mother's parental rights.

In light of the existence of the Presumption, the Department was *required*—i.e., had a mandatory, non-discretionary duty to terminate J.I.'s parental rights unless one of the exceptions in subparts (1), (a), (b) or (c) of 604(1) applied.¹ The record contains no evidence that *any* of the three exceptions applies. The Department did file the required Petition for Termination of Parental Right. Clearly, it is not the *filing* of the petition to terminate parental rights that furthers the best interest of the child, it is the termination itself. The obligation created by Section 41-3-604(1) is termination. It only stands to reason then that if the Department decides not to follow

¹ The terms—"required" and "must"—mean exactly what they say. Montana law is absolutely clear that, as a matter of statutory interpretation, the word "must" (along with the word "shall") is mandatory, not permissive or discretionary. *See, e.g., State v. Kortan*, 2022 MT 204, ¶ 21, 410 Mont. 336, 518 P.3d 1283 ("Both 'shall' and 'must' are mandatory, rather than permissive." Citing *Montco v. Simonich*, 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997)). And, of course, the plain meaning of "required" is "essential" or "obligatory." *American Heritage Dictionary of the English Language* (5th ed. 2011).

through on its petition, it is obligated to document a compelling reason why pursuant to Section 41-3-604(1) (c). The Department has not provided that compelling reason in this case. Failing to hold the Department to that requirement undermines the entire statute. Section 41-3-604(1) can be ignored and circumvented by simple procedural maneuvering.

**B. THE DEPARTMENT'S PETITION TO
TERMINATE PARENTAL RIGHTS WAS STILL
PENDING WHEN THE CASE WAS DISMISSED**

In this case, the hearing on the Department's March 14, 2022, petition was delayed five times. Then without dismissing the Petition or providing adequate explanation, the Department dismissed the case. By dismissing the case, the Department abandoned its petition to terminate J.I.'s parental rights without providing a compelling reason that termination was not in R.N.'s best interests.

Given that the Department failed to move forward with terminating J.I.'s parental rights, § 41-3-604 places a separate obligation on the Department. Section 41-3-604(3), MCA states:

(3) If a child has been in foster care for 15 months of the most recent 22 months and a petition to terminate parental rights regarding that child has not been filed with the court, the department *shall* file a report to the court or review panel at least 3 days prior to the next hearing or review detailing the reasons that the petition was not filed.

§ 41-3-604(3), MCA (emphasis added). Thus, by the time the Department had switched gears and decided to seek permanent placement with Birth Mother, its

mandatory, non-discretionary duty to file a § 41-3-604(3) report with the District Court applied. Allowing that legal obligation to be sidestepped by filing a petition and failing to follow through guts the “best interest of the child” presumption created by the Statute and cannot be allowed. That report was supposed to explain the Department’s reasons for failing to terminate J.I.’s parental rights and set out the evidence supporting that decision. The presumption created by § 41-3-604 specifically involves the best interests of the child. This Court has held that the district court has the “authority and **responsibility** to review placement decisions to assure that they do not arbitrarily ignore the child's best interests.” *In re M.L.M.* (1996), 278 Mont. 505, 509, 926 P.2d 694,696, citing *State ex rel. Frederick v. District Court* (1946), 119 Mont. 143, 150, 173 P.2d 626, 629.

R.N.’s best interests were ignored when the District Court dismissed this case, and by extension dismissed its Petition for Termination of Parental rights and the Wagner’s Motion for a Permancy Hearing and Emergency Placement.

Bringing R.N.’s best interest to the forefront of this case was the purpose of the Wagners’ Motion for a Placement Hearing. In support of that motion, they provided the expert opinion of Diane Baird, LCSW who clearly set forth the risks associated with moving a child at R.N.’s tender age. In further support of her opinion, Ms. Baird referenced that “the American Academy of Pediatrics has opinioned that changes of caregivers for children between the ages of six months

and three to three and a half years are so psychologically dangerous that this should be undertaken only in matters of extreme urgency, e.g., for physical safety.”

R.N.’s best interests are being ignored. The Department is prioritizing the Mother’s parental rights above all else. This is simply improper. It is the *child’s* best interests that are the preeminent concern in any child custody issue, not the parents’. *In re Marriage of Johansen, supra*, 261 Mont. at 455-56, 863 P.2d at 410; *In re J.N., supra*, 1999 MT 64, ¶ 13. Moreover, Montana law has long held or recognized that the child’s rights do not somehow give way to, or take a back seat to, the parent’s rights. *See, e.g., In re Gore*, 174 Mont. 321, 570 P.2d 1110 (1977) in which the natural parents of three minor children appealed from the judgment of the District Court awarding permanent custody of the children to the Department:

Children have the right under the “best interest test” to receive normal physical and emotional development. By looking at the totality of the circumstances the court may determine what is the child’s “best interest”. . . . This Court has been called on before to decide what is the best interest” for the children where the natural parents are involved. *In In re Declaring Olson Dependent*, 164 Mont. 431, 434, 524 P.2d 779, 780 (1974), this Court in quoting from *In re Bad Yellow Hair*, 162 Mont. 107, 509 P.2d 9 (1973) [*overruled on other grounds, In re Marriage of Miller*, 273 Mont. 286, 902 P.2d 1019 (1995)] stated:

“ ‘ * * * The children's best interest and welfare, **not that of the natural mother**, is the paramount consideration (citing cases). We are mindful that ordinarily a child's interests and welfare will best be served by retaining custody in the natural parents. However, the circumstances of the individual case may require a different result.’ ”

In re Gore, 174 Mont. at 328, 570 P.2d at 1114 (emphasis added). Similarly, in *In re Adoption of Biery*, 164 Mont. 353, 522 P.2d 1377 (1974), this Court stated:

The parent's right to the custody of her minor child is not an absolute one, even though it be conceded that she is a fit and proper person. In all such cases the crucial factor is the child's welfare, both material and psychological, considering in particular the ties of affection the child has formed and the consequences of breaking those ties. It is apparent that the district court took into consideration the fact that the child had lived with the petitioners the past four and one-half years, and that he had adapted to those surroundings. To remove the child from familiar surroundings might cause emotional disorientation in addition to that already caused by the death of his father. It is clear from the record that the relationship between petitioners and the child is extremely close. For these reasons the district court concluded that it would be in the child's best interests to remain with petitioners.

In re Adoption of Biery, 164 Mont. at 365, 522 P.2d at 1378-79 (emphasis added). *See also, e.g., In re M. A. M.*, 183 Mont. 434, 437, 600 P.2d 203, 205 (1979) (“[W]e have also noted that family unity need not be preserved at the expense of the best interests of the child.”); *Matter of Burgdorf*, 170 Mont. 116, 119-120, 551 P.2d 656, 659-59 (1976) (“While we appreciate the importance of the parent's custodial rights, the welfare of the children, **not the parent**, is the primary consideration. A child's best interests are not always served by retaining custody in the natural parent.”); *Foss v. Leifer*, 170 Mont. 97, 101, 550 P.2d 1309, 1311 (1976) (“In all [child custody] cases, the lodestar of the district court in exercise of its discretion is the welfare and best interests of the child, and **not the parent.**”) (Emphasis added in all cases.) *See also, e.g., Jamye P. v. Superior Court, supra*, 2002 WL 1067346 *6 (Cal. App. May

29, 2002) (“Children, too, have fundamental rights—including the fundamental right to be protected from neglect and to ‘have a placement that is stable [and] permanent.’ [Citations omitted.] Children are not simply chattel belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent. [Citation.]”); *In re Jasmon O.*, 8 Cal.4th 407, 419 (Cal. App. 1994) (“When a child has been placed in foster care because of parental neglect or incapacity, after an extended period of foster care, it is within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the care, custody and companionship of the child.”)

The Department should not have moved to dismiss this case and the District Court should not have granted the Department’s motion. In doing so, R.N.’s best interests were ignored. The Department did not have to address the questions regarding R.N.’s best interests. It simply dismissed and everything went away. The Department did not have to answer for the information that was not in the record. It did not present any information regarding the psychological impact the move would likely have on R.N. There is nothing in the record that the Department sought the opinion of R.N.’s pediatrician, or any early childhood development expert. The Court-appointed GAL made the same error in his report to the Court. His analysis of R.N.’s best interests starts with the presumption that “a child’s ideal best interests are met with a permanent safe and healthy childhood in a permanent placement with their parent(s)” GAL Report page 5. Then he attempts to balance mother’s best interest with that of the child. The

child's best interests should be of paramount concern to everyone in the case and particularly the GAL. It is also troubling that the GAL admitted, when addressing the court, that "he has not had time to observe the child." June 27, 2022 Status Hearing tr. Pgs 7-8. How can he attempt to make such a critical recommendation without having observed the child with the Wagners or Birth Mother?

**C. THE INTERVENORS' MOTION FOR A
PERMANENCY HEARING AND EMERGENCY
PLACEMENT WERE FULLY BRIEFED AND
PENDING**

By dismissing the case the Department not only sidestepped its obligation to protect R.N.'s best interest by terminating his Birth Parents' parental rights, it robbed the Wagners of the opportunity to have their Motion for a Permanency Hearing and Emergency Placement heard by the Court. The Wagners' attempt to bring R.N.'s best interests to the forefront of this case have been thwarted. R.N.'s rights must be considered in every aspect of this case. It is obvious that they have not been of paramount concern in these proceedings thus far. The Department has inappropriately sidestepped its obligations, and as a result R.N.'s best interests have been ignored in favor of Birth Mother. The record shows R.N. had been forced to put forth extraordinary effort while Birth Mother continued to struggle after more than a decade of Department involvement and the loss of her parental rights three previous times.

CONCLUSION

For these reasons, the Wagners respectfully request this Court reverse the order

of the District Court, Dismissing this Action and remand for further proceedings, specifically to hear the Wagners' Motion on Permancy and the State's Petition for Termination of Parental Rights.

Respectfully submitted this 8th day of February, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

s/s Tim Dick
TIM DICK

APPENDIX

Order to Dismiss.....A

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