
IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA 24-0011

IN THE MATTER OF:

A.G.D.J.,

A Youth In Need Of Care.

ANDERS BRIEF

On Appeal from Montana's Eleventh Judicial District Court,
Flathead County, The Honorable Heidi J. Ulbricht Presiding

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STATEMENT OF THE ISSUE

Whether, pursuant to the criteria set forth in *Anders v. California*, 386 U.S. 738 (1967) and Mont. Code Ann. §46-8-103, counsel for Appellant should be permitted to withdraw from this cause of action.

STATEMENT OF THE CASE

Mother and Appellant A.P.L. appeals the Order, entered December 13, 2023 by the Montana's Eleventh Judicial District Court, Flathead County, terminating her parental rights to A.G.D.J. (5 years old). (Appendix A) The rights of the child's birth father were also terminated.

Procedural History

The case originated June 7, 2021, when the Flathead County Attorney filed a Petition for Emergency Protective Services (EPS), Adjudication as Youth In Need of Care (YINC), and Temporary Legal Custody (TLC) on behalf of the Department of Health and Human Services (the Department) for A.G.D.J. and supported by the Affidavit of CPS Brianna King. (DC001) The Department advised the district court the child was Native American and ICWA did not apply. (*Id.*) The district court granted EPS and set a show cause hearing. (DC008)

July 16, 2021 the district court held the show cause hearing. (DC022) A.P.L. stipulated to adjudication. (*Id.*) The district court adjudicated A.G.D.J. as YINC and awarded the Department TLC. (*Id.*) August 10, 2021 the district court entered

its adjudication order. (DC031)

August 6, 2021 the district court conducted a disposition hearing. (DC029) After discussion, the district court approved the treatment plan without objection and entered its written order on August 10, 2021. (DC032) November 10, 2021 A.P.L. requested transfer to treatment court. (DC039) The request was granted, and her case was transferred on December 1, 2021. (DC041)

The district court entered orders extending TLC on March 21, 2022; July 20, 2022; September 14, 2022 and again on March 1, 2023. (DC064, DC074, DC085) July 6, 2023 the Department petitioned for termination of parental rights and permanent legal custody. (DC096) The Department filed amended petitions for termination of parental rights on September 20, 2023 and September 27, 2023. (DC117, DC120) October 24, 2023, after hearing testimony and argument, the district court ordered termination of the parental rights of both natural parents. (DC134, DC135) December 13, 2023 the district court entered its written order terminating the rights of both parents to A.G.D.J. (Appendix A) January 2, 2024 A.P.L. filed a notice of appeal. (DC139)

Facts of the Case

Affidavit of CPS Brianna King – June 7, 2021. CPS Brianna King swore an affidavit in support of the Department’s Petition for EPS, YINC and TLC. (DC001) CPS King stated A.G.D.J. was removed due to the parents’ history of

significant domestic violence and substance abuse and specific allegations that the birth father, C.J. had been violent with both A.P.L. and A.G.D.J., A.P.L. had been observed in an apparently impaired state, and A.G.D.J. was reported to be afraid of C.J. (*Id.*) CPS notes A.P.L. was displaying similar behavior when she was using methamphetamine, and that both parents “are currently on probation for possession charges.” (*Id.*) CPS King reports that, when located, A.P.L. and C.J. misinformed her about the whereabouts of A.G.D.J., absconded from probation, and were subsequently arrested for probation violations. (*Id.*) CPS King detailed her difficulties in locating the child, finally finding her in the custody of her paternal grandparents, who cursed at CPS King and attempted to leave the scene with A.G.D.J., forcing CPS King to seek the assistance of law enforcement in taking the child into Department care. (*Id.*)

Show Cause Hearing – July 16, 2021. A.P.L. was present for the hearing and was represented by counsel. (DC022) A.P.L. stipulated to adjudication and TLC. (*Id.*) The district court granted the Department EPS, adjudicated A.G.D.J. as YINC and granted TLC. (*Id.*)

Disposition Hearing – DATE. After reviewing the proposed treatment plan with A.P.L., the district court approved the treatment plan without objection. (DC029) The treatment plan adopted by the court specifically addresses key five areas of treatment:

1. Parenting Skills: A.P.L. will: enroll in and complete Department-approved parenting classes; regularly attend visitations and maintain contact with A.G.D.J., follow recommendations of parenting professionals and therapists, cooperate with in-home service providers; provide a safe environment for the child, not exposing her to drugs, alcohol, or violence; provide adequate food, clothing and necessities; and ensure the child attends medical, dental and other service appointments.
2. Chemical Dependency: A.P.L. will: complete a CD evaluation, follow all recommendations, attend resafe and counseling with a Department-approved provider; demonstrate understanding of the effect of her substance use on A.G.D.J.; refrain from possession and use of any alcohol and drugs not prescribed by a doctor; not expose the child to alcohol or drugs or anyone using alcohol or drugs; cooperate with and submit to random testing as requested by the Department, probation, CD professional or any other professional working with her; contact the Department within 24 hours if she misses a scheduled test; develop a Department-approved relapse prevention and safety plan that addresses the need to keep A.G.D.J. safe, and follow the plan.
3. Mental Health Issues: A.P.L. will: complete a mental health evaluation with a Department-approved provider; follow all care recommendations; enroll in, attend, and successfully participate in counseling and therapy; learn how her behavior impacts A.G.D.J. and how to modify her behavior to meet the needs of the child.
4. Housing Concerns: A.P.L. will: obtain and maintain appropriate housing that provides heat, electricity, water, and is sanitary and safe for A.G.D.J.; not allow anyone not approved by the Department to reside in the home; not allow people with criminal convictions for drugs, violence, or sexual offenses in the home; not expose the child to drug or alcohol use by herself or another except as prescribed by a doctor; keep the Department advised regarding the whereabouts of the child, inform the Department of any new address or phone number before moving;
 - a. A.P.L. understands A.G.D.J. will not be placed with her if the birth father is residing with her, but not following his treatment plan, or if anyone residing with her presents a safety risk to the child – such as a criminal conviction for drugs, violence, sexual offenses, or is listed in the Sexual of Violent Offender Registry.
5. Criminal Behavior: A.P.L. will: inform the Department of any criminal charges, arrests, fines, community service obligations or sentencing

orders in relation to any current criminal charges; inform the Department if she, a relative, or a household member is listed on a sexual or violent offender registry; provide the Department with the name and contact information for any probation or parole officer assigned to her; comply with sentence requirements including conditions, pre-trial supervision, probation, parole or pre-release; report any contact with law enforcement within 3 days; abstain from criminal conduct; obey any no-contact order or order of protection issued against her.

(DC027)

Treatment Court – December 1, 2021 – August 9, 2023. A.P.L.

participated in Family Treatment Court for nearly two years. (DC041, et al) A.P.L. reported negative drug tests for several months, (see, e.g. DC042, DC057) Around June 2, 2022 A.P.L. was given home visitation with A.G.D.J. (DC060) August 27, 22 the district court noted a positive drug test, which A.P.L. confirmed, saying she “did smoke weed due to regression in visitation....” (DC065) The court also expressed concerns that birth father, C.J., was in the home, which A.P.L. denied. (*Id.*) Positive drug tests were again reported on September 14, 2022, as well as further concerns about A.P.L.’s contact with C.J. (DC073) Negative drug tests were reported on February 8, 2023, though ongoing discussions continued regarding A.P.L.’s relationship with C.J. (DC084) May 24, 2023 A.P.L. did not appear for treatment court and, on June 7, 2023 the district court noted she was in custody. (DC093, DC094) A.P.L.’s next appearance in treatment court was August 9, 2023 at which time she was discharged from treatment court, and jurisdiction was returned to district court. (DC105, DC106)

First Petition for Extension TLC – January 18, 2022. CPS Fueston swore an affidavit in support of the Department’s first petition to extend TLC. (DC048) CPS Fueston stated A.P.L. had not completed several tasks on her treatment plan, but she had completed CD evaluation, and all her CD tests were negative “from October 2021 to the present.” (*Id.*) She described A.P.L. as having “great communication” with treating professionals, consistently making and keeping appointments and engaged in services. (*Id.*) CPS Fueston said A.P.L. had completed her parenting class and was consistent in visitation with A.G.D.J. (*Id.*)

Second Petition for Extension TLC – June 22, 2022. CPS Fueston swore an affidavit in support of the Department’s second petition to extend TLC. (DC061) CPS Fueston detailed that A.P.L. had largely completed her treatment plan (*Id.*) CPS Fueston stated the extension of TLC was necessary so the Department could “assess the child’s safety during her Trial home Visit with Mother for up to 6 months.” (*Id.*)

CASA Report – December 7, 2022. CASA Rebecca Slater reported that A.P.L. was maintaining employment and housing. (DC078) A.P.L. is reported to have been “consistent in her testing, CD counseling and DV counseling. She also attends a domestic violence survivors’ group.... A.P.L. has progressed from supervised visits with A.G.D.J. to monitored visits. She arrives for parenting visits prepared and stays in touch with the visit supervisor... during visits.... A.P.L. is

skillful at helping A.G.D.J. transition to return to her foster family at the end of visits.” (*Id.*)

Third Petition for Extension TLC – January 13, 2023. CPS Jodi Black-Fucci swore an affidavit in support of the Department’s third petition to extend TLC. (DC084) CPS Black-Fucci stated A.P.L. had been engaged with her treatment plan since October 2021 but, after testing positive for THC, was referred for an additional CD evaluation. (*Id.*) CPS Black-Fucci said A.P.L. “continues to test positive for THC. (*Id.*) CPS Black-Fucci reports A.P.L. to be engaged in mental health treatment and able to maintain housing and employment. (*Id.*) According to CPS Black-Fucci, after learning A.P.L. and C.F. “maintain separate households and plan to coparent A.G.D.J.,” the Department “intends to initiate a 6-month Trial Home Visit Placement” of the child with the parents. (*Id.*) The extension of TLC was, therefore, requested to allow the Department six months “to evaluate the trial home placement and ensure the child’s continued safety and stability in this placement.” (*Id.*)

Petition for Termination of Parental Rights – July 6, 2023. CPS Kim Fueston swore an affidavit in support of the Department’s Petition for Termination of Parental Rights and Permanent Legal Custody. (DC096) CPS Fueston alleged A.P.L. had failed to meet the tasks or goals of her treatment plan. (*Id.*) CPS Fueston stated that, “on several occasions during this case, A.P.L. put her daughter

A.G.D.J. in situations that exposed her to potential domestic violence situations and/or active domestic violent situations between birth mother, A.P.L. and birth father, C.J.” (*Id.*) CPS Fueston cited reports of A.P.L. seen in the company of C.J. though C.J. “ was not engaged with the Department, was not participating in testing and had not received any Domestic Violence counseling.” (*Id.*) A.G.D.J. was allegedly “adamant that her daddy, C.J. was currently in the home and that, when mommy came to pick her up from daycare, her daddy was waiting at home for them.” (*Id.*)

CPS Fueston reported that, on March 17, 2023, CPS receive information A.P.L. was assaulted in her home by C.J.” (DC096) Though A.P.L. is reported to have denied A.G.D.J. being in the home during the altercation, the child told her foster parents she was in there and “provided details such as A.P.L. and C.J. throwing bottles of juice at each other, which [the child] would have not known unless she was present. Additionally, A.G.D.J. stated she had stepped in between her parents while they were fighting and her daddy, C.J. hit her in the nose.” (*Id.*) A.G.D.J.’s play therapist is reported to have left CPS Fueston a voicemail in which she expressed concerns that the child’s play therapy indicated she was not feeling safe at home. (*Id.*)

According to CPS Fueston, A.G.D.J. was on a trial home visit during the time of the assault. (DC096). CPS Fueston reported two attempts at trial home

visits, both of which ended with A.G.D.J. being placed back in foster care. (*Id.*) CPS Fueston said that A.P.L.'s "have been consistent until April 27, 2023. A.P.L. missed visits on April 30, 2023, May 2 and 4, 2023. A.P.L. had a visit on May 11, 2023. A.P.L. missed visit on May 16, 2023. Visitation was suspended by [the visitation facilitator] on May 22, 2023 due to lack of engagement. A.P.L. was remanded to Flathead County Jail on April 24, 2023 where she currently remains at this time."

CPS Fueston alleged, though A.P.L. was participating in mental health counseling until April 2023, she failed to follow recommendations that she resolve all criminal matters, work with a licensed therapist in person to "help her address PTSD symptoms and improve her judgment about interpersonal relationships.... and cease having any interaction with C.J. Their interactions lead to substance use and/or violence." (DC096)

CPS Fueston stated A.P.L. failed to complete the Chemical Dependency goals of her treatment plan despite numerous evaluations and participation in several treatment programs.¹ (DC096) According to CPS Fueston:

A.P.L. began testing for Compliance on October 11, 2021 and tested negative for all substances. A.P.L. entered Treatment Court on December 15, 2021. A.P.L. changed testing from Compliance Monitoring Systems to testing through Bear Logic on March 28,

¹ The full recitation of evaluations, referrals and programs in which A.P.L. participated is lengthy, and should be reviewed in the Affidavit, filed in conjunction with the Petition to Terminate Parental Rights (DC096)

2022 per Treatment Court procedures. A.P.L. began testing on April 7, 2022 and tested negative for all substances until August 1, 2022. A.P.L. testing positive for THC on August 1, 2022 - December 26, 2022. A.P.L. was positive for Methamphetamine, Amphetamine, and THC on March 11, 2023. A.P.L. tested positive for Methamphetamine on March 17, 2023. A.P.L. tested positive for Methamphetamine, Amphetamine, THC and Fentanyl on March 31, 2023. A.P.L. tested on April 23, 2023 and was positive for Amphetamine and Methamphetamine. A.P.L. has missed 12 UA drug tests, on February 10, 17, 25, 2022, March 29, 2022, April 2, 2022, July 18, 2022, August 18, 2022, September 17, 2022, January 5, 2023, February 13 and 19, 2023, March 12, 2023. A.P.L. has not tested for the Department since April 23, 2023.

(DC096)

CPS Fueston alleged A.P.L. failed to maintain stable housing and failed to maintain employment, reporting “A.P.L. was incarcerated on June 2, 2021 and was not released from Passages until September 22, 2022. A.P.L. did obtain employment upon her release. A.P.L. was then arrested on February 1, 2022 for Criminal Possession of Dangerous Drugs. A.P.L. worked at Firehouse Subs and Frugals. She lost her job at Frugals in March 2023. A.P.L.’s inability to keep a job for the past few months has interfered with her ability to maintain housing.”

(DC096)

CPS Fueston concludes that:

Overall, Mother’s Treatment Plan was unsuccessful because A.P.L. continues to have relapse of substance use despite two reassessments of Chemical Dependency Treatment upon discharge from Passages Treatment Program. A.P.L. continues to engage in criminal behavior which has led to her recent incarceration to Flathead County Jail for Probation Revocation. A.P.L. continues to

put A.G.D.J. in unsafe situations that allow for A.G.D.J. to be present to witness the domestic violence that occurs between A.P.L. and C.J.
(DC096)

CASA Report – July 19, 2023. CASA Rebecca Slater reported that, though A.P.L. loved A.G.D.J. and “they have demonstrated a close relationship.... C.J. and A.P.L. would need to get sober, maintain sobriety, and control the violent behaviors between them to provide a safe, stable environment for A.G.D.J. to grow up in.” (DC099) Ms. Slater detailed events occurring since her last report including, domestic violence between C.J. and A.P.L., A.P.L.’s arrest for DUI and possession of paraphernalia, A.P.L.’s incarceration for probation violation and a pending petition to revoke her probation. (*Id.*)

The CASA offered the opinion that A.G.D.J. was “comfortable and happy” in her placement, “a safe home where her physical and emotional needs can be met.” (DC099) Ms. Slater stated, “I believe that A.P.L. was unable to provide safety and security for A.G.D.J. beginning in mid to late February during her Trial Home Visit. While in part due to being a victim of domestic violence, A.P.L. repeatedly made decisions that put A.G.D.J. and herself at risk. These decisions included the people that A.P.L. chose to associate with during this time.” (*Id.*) Despite counseling after an assault by C.J. on March 17, 2023, the CASA states, “She did not persist in advocating for A.G.D.J.’s safety prior to her removal on 03/29/2023. The Department provided some nights in a motel, but she and

A.G.D.J. repeatedly returned to her apartment to sleep when a motel was not available, despite this being where C.J. had come to assault her on 03/17 /2023. I believe her decisions put A.G.D.J. at grave risk.” (*Id.*) The CASA recommended termination of A.P.L.’s parental rights. (*Id.*)

First Amended Petition for Termination of Parental Rights – September 20, 2023. September 18, 2023 the Department filed an unopposed motion for leave to file an amended petition for termination of parental rights on the grounds that A.G.D.J.’s parents “were each sentenced for crimes and are, or will be, incarcerated for more than 1 year and CFS seeks to modify the petition for termination of parental rights filed in July 2023 to explicitly allege this as separate grounds for termination of parental rights.” (DC115)

September 20, 2023, upon leave of the district court, the Department filed an Amended Petition for Termination of Parental Rights and Permanent Legal Custody. (DC117) In her supporting affidavit, CPS Kim Fueston detailed A.P.L.’s criminal history dating back to 2016. (*Id.*) CPS Fueston reported that, on September 15, 2022 A.P.L. was sentenced to 24-month Department of Corrections, all suspended for Criminal Possession of Dangerous Drugs.² (*Id.*) April 30, 2023 A.P.L. was involved in an auto accident, and was cited for Criminal Possession of

² Referencing Flathead County District Court Cause No. DC-2022-11.

Dangerous Drugs, Driving Under the Influence, and failure to drive in the right hand lane. (*Id.*) May 24, 2023, A.P.L. was arrested and taken into custody. (*Id.*) During processing, law enforcement found “a suspected methamphetamine pipe” tucked under A.P.L.’s armpit, resulting in a charge of possession of drug paraphernalia. (*Id.*) July 28, 2023 A.P.L. was sentenced to the DOC for 2 years, none suspended. (*Id.*) CPS Fueston asserted that, “Mother is or will be incarcerated for over 1 year, and unavailable to parent.... Based on the facts set forth in this affidavit and in the record, CFS seeks termination of Mother’s parental rights pursuant to Mont. Code Ann. §41-3-609(1)(f) and, alternatively, Mont. Code Ann. §41-3-609(1)(f) as modified by 609(4)(c).”

Second Amended Petition for Termination of Parental Rights –

September 27, 2023. September 25, 2023 the Department filed an unopposed motion for leave to file an amended petition for termination of parental rights on the grounds that “the parental rights of the above-named youth’s mother and father to an older sibling were involuntarily terminated in Flathead County Cause No. DN-2017-50 and the circumstances related to the termination of parental rights are relevant to the parents’ ability to adequately care for the child at issue in this case. CFS seeks to modify the 1st Amended Petition for termination of parental rights to explicitly allege grounds for termination of parental rights to the above-named youth pursuant to Mont. Code Ann. §41-3-609(1)(d) and 41-3-423(2)(e). grounds

for termination of parental rights.” (DC118)

September 27, 2023, upon leave of the district court, the Department filed a Second Amended Petition for Termination of Parental Rights and Permanent Legal Custody. (DC117) In her supporting affidavit, CPS Kim Fueston asserted that, August 8, 2017, an newborn infant (C.L.J.) was removed from the care of A.P.L. and C.J. due to “abuse and neglect, which included each parent’s incarceration at Flathead County Detention Center... on felony charges stemming from possession of dangerous drugs.” (*Id.*) The Department subsequently filed a petition for termination of the parental rights of A.P.L. and C.J. and for permanent legal custody of C.L.J.³ (*Id.*) September 19, 2018 a hearing was held, after which the district court terminated the parental rights of A.P.L. and C.J. to the infant C.L.J. “based on parents’ failed treatment plans that involved Mother’s conduct and/or condition/s that rendered her unfit, unable or unwilling to provide C.L.J. with adequate parental care, namely Mother’s excessive use of intoxicating liquor or dangerous drug that affects her ability to care and provide for C.L.J., including use of methamphetamine; and Father’s excessive use of intoxicating liquor or dangerous drug that affects his ability to care and provide for C.L.J., including use of methamphetamine and THC and Father’s history of violent behavior, namely

³ Referencing Flathead County District Court Cause No. DN-2017-50(B)

domestic violence toward Mother.” (*Id.*) CPS Fueston alleged that, the circumstances underlying the termination of A.P.L. and C.J.’s parental rights to C.L.J. were relevant to their ability to care for A.G.D.J. and, “the relevant circumstances include Mother’s and Father’s excessive use of intoxicating liquor or dangerous drug that affects their ability to care and provide for A.G.D.J., including use of methamphetamine and THC, are present in this case; Father’s history of violent behavior, namely domestic violence toward Mother, is present in this case, and Parents’ inability to conform their conduct to the law leading to incarceration causing them to be unavailable to parent A.G.D.J., is present in this case.” (*Id.*) October 10, 2023 the Department filed a motion for the district court to take judicial notice of prior judgments against A.P.L. and C.J., the criminal histories of the parents and the order entered November 13, 2018, terminating their parental rights to C.L.J. (1 year old), all of which were entered as exhibits. (DC123)

Termination Hearing – October 23-24, 2023. Judge Heidi J. Ulbricht presided over the Termination Hearing. (DC134) A.P.L. appeared by Zoom. (*Id.*) Dr. Susan Day, Ph.D., testified regarding her evaluation and treatment of A.P.L. (10/23/2023 Hrg. Tr. 15:22, et seq.) Dr. Day testified testing of A.P.L. was similar to other “who had many difficulties with the legal system, as well as substance abuse problems. These individuals have a hard time conforming to the

requirements of the law.... They tend to act out impulsively.” (*Id.* 18:16-24) Dr. Day said she diagnosed A.P.L. with PTSD, Stimulant Use Disorder (methamphetamine) and Opioid Use Disorder. (*Id.* 19:9-12) Dr. Day testified her prognosis for A.P.L. safely parenting a child was “guarded..., meaning many of the negative prognostic factors outweighed the positive.” (*Id.* 20:24-21:3) Dr. Day testified that, “On the upside, I viewed her as trying very hard.... And she doesn’t have any serious cognitive deficits.... She could learn new concepts.” (*Id.* 21:10-16) Dr. Day said her recommendation was for A.P.L. to first, resolve all criminal matters, then participate in individual therapy “to help her work on her PTSD and improve her choices regarding relationships” and, finally, to “refrain from interacting with problematic individuals who had ongoing substance use or legal problems” – specifically C.J. because, “when they do interact, it tends to wind up in violent episodes.” (*Id.* 22:1-19)

Play Therapist Nellie O’Reilly testified regarding her treatment of A.G.D.J. commencing in 2021, when the child was three years old. (10/23/2023 Hrg. Tr. 36:21, et seq.) Ms. O’Reilly said, “Through play themes, I’m able to assess how the child is functioning....” (*Id.* 45:6-8) Ms. O’Reilly stated that, in her opinion, suffered from generalized anxiety disorder, and that A.G.D.J.’s brain – as a result of being exposed to domestic violence – was “wired for protection in that anxious state.” (*Id.* 46:22-48:9) Ms. O’Reilly testified that, on both occasions when

“reunification was attempted”⁴ A.G.D.J.’s play behavior “greatly regressed.” Ms. O’Reilly confirmed that, on February 27, 2023 she left a message that A.G.D.J.’s “play themes shifted from value/self-worth, competency/master and self-care/healing to then aggression, revenge and more safety/security. She was playing out stories where the cops were putting the bad guys in jail or cages, and princesses were being rescued by Paw Patrol and moving them from scary figures.... Soon after, I learned she had been transitioned back into Mom’s home. (*Id.* 63:2-64:21)

Licensed addiction counselor Rob Degolier testified regarding his CD evaluations of A.P.L. (10/23/2023 Hrg. Tr. 105:12, et seq.) Mr. Degolier testified A.P.L. met the diagnostic criteria for “methamphetamine use disorder, severe” and “alcohol use disorder, mild.” (*Id.* 112:14-24)

Gateway Community Services licensed addiction counselor Christina Purvis testified regarding her treatment of A.P.L. commencing November 24, 2021. (*Id.* 120:15, et seq.) Ms. Purvis said A.P.L. responded well to treatment for substance use disorder and was discharged on May 5, 2022. (*Id.* 122:23-123:4) Mr. Purvis said she began seeing A.P.L. again January 17, 2023 when she was referred for violating orders of treatment court by consuming cannabis. (*Id.* 124:2-13) Ms. Purvis testified A.P.L. “appeared to be doing well up until maybe March of 2023.”

⁴ i.e. home trial visits.

(*Id.* 125:1-3) At that time, Ms. Purvis said, “she was missing a few appointments, and there was an emerging pattern of suspected use.” (*Id.* 125:13-15) A.P.L. admitted to use of some use of methamphetamines and Mr. Purvis, suspecting dishonesty, recommended intensive outpatient treatment. (*Id.* 127;1-128:9) Mr. Purvis testified her last session with A.P.L. was May 22, 2023, after which “I believe she became incarcerated.” (*Id.* 129:13-20)

Montana Highway Patrol Trooper Wayne Bieber testified regarding his investigation of A.P.L.’s April 30 2023 auto accident. (10/23/2023 Hrg. Tr. 169:18, et seq.) Trooper Bieber responded to a report to locate a vehicle driving erratically that, a short time later crossed the center line and crashed into a light pole in Ravalli, Montana. (*Id.* 171:23-172:5) Trooper Bieber arrived at the scene to find A.P.L. inside the vehicle. (*Id.* 172:18-24) Trooper Bieber said A.P.L.’s behavior was “consistent with possibly being impaired,” and that a search of the vehicle yielded a pair of binoculars, gas cans, a garden hose consistent with siphoning gas, license plates with magnets glued to the back consistent with covering another license plate, a ski mask, gloves and two crow bars. (*Id.* 175:8-176:8) Trooper Bieber stated officers on the scene also located a scale and baggies “consistent with distribution,” two loaded syringes and a “baggie” containing four and a half grams of a crystal substance. (*Id.* 176:4-178:4) Trooper Bieber said A.P.L. was cited for driving under the influence, criminal possession of drug

paraphernalia, and improper lane use. (*Id.* 179:6-10; 180:421)

CPS Kim Fueston testified, in conformance with her affidavits, regarding her handling of the case. (10/23/2023 Hrg. Tr. 211:4, et seq.) CPS Fueston described the circumstances under which A.P.L. was found unfit to care for C.L.J., and testified that, because those same circumstances continued, A.P.L. was unfit to parent A.G.D.J. “A.P.L. still continues to use substances. She continues to be in domestic violence situations where A.G.D.J. is present, and se also continues with criminal behavior that leads to her incarceration. (*Id.* 218:1-20) CPS Fueston testified that, despite some successes, A.P.L. did not successfully complete her treatment plan. (*Id.* 226:24, et seq.) CPS Fueston testified that, after significant progress, the Department attempted reunification in June of 2022 and again in January of 2023. (*Id.* 228:5-17) According to CPS Fueston, the first trial home visit was ended after about two weeks when the Department received evidence A.P.L. was involved with C.J., including A.G.D.J.’s “very adamant” statement that her father lived in the home and sometimes hurt her mother. (*Id.* 228:18-229:14) The second trial visit lasted from January 13, 2023 to March 29, 2023. (*Id.* 229:15-20) The reunification effort was ended after a report that A.P.L. was assaulted by C.J. in A.G.D.J.’s presence and the child’s play therapist expressed concerns that she was “having behaviors over her not feeling safe.” (*Id.* 229:21-230:19) CPS Fueston testified that, despite repeatedly telling the Department she and C.J. were staying

separated, “A.P.L. kept putting A.G.D.J. in positions where she kept being exposed to domestic violence. And then, of course we had the positive substance on March 11th that A.P.L. was using again.” (*Id.* 230:23-231:12) CPS Fueston said that, after A.G.D.J. was placed back in foster care in March 2023, A.P.L. was initially consistent with visitation “for about a couple of weeks – a week or two – and then she started having inconsistent visits and then dropped off altogether.... She just stopped really contacting us, wasn’t really coming in to test, and she wasn’t arrested until May 24th.” (*Id.* 232:10-25)

CPS Fueston testified that, as of May 2022, A.P.L. was in compliance with the substance use tasks of her treatment plan. (10/23/2023 235:3-4) A.P.L. had a relapse in July 2022 and did not successfully reengage in treatment since “she started testing positive for THC consistently up through the end of December. And then ... she started testing positive for methamphetamine on March of 2023.” (*Id.* 235:5-17)

According to CPS Fueston, A.P.L. did not succeed in the mental health portion of her treatment plan because it was determined, based on her continued involvement with C.J., A.P.L. could not make lasting changes necessary to protect A.G.D.J. (10/23/2024 Hrg. Tr. 236:17-237:13) Similarly, CPS Fueston testified that A.P.L. was unable to maintain stable employment or stable housing, having several jobs and several places of residence over the two years of the case. (*Id.*

237:14-138:3) CPS Fueston said A.P.L. failed to meet the criminal behavior requirement of her treatment plan by continuing to engage in criminal activities, culminating in her incarceration on May 24, 2023. (*Id.* 238:13-239:23)

CPS Fueston testified that, in her opinion, the conduct or conditions that rendered A.P.L. unfit to safely parent C.L.J. had persisted for six years and were unlikely to change within a reasonable time. (10/23/2023 Hrg. Tr. 239:24-240:14)

A.P.L. testified in opposition to the termination of her parental rights. (10/24/2023 Hrg. Tr. 470:5, et seq.) A.P.L. testified that, in her opinion, she completed the tasks on her treatment plan. (*Id.*) A.P.L. acknowledged having a relapse, but maintained she got back on track. (*Id.* 473:8-14) A.P.L. said she tried to do the recommended individual mental health counseling, but it was difficult to find a counselor. (*Id.* 477:1-4) A.P.L. professed her love for A.G.D.J., and recounted her time spent with the child. (*Id.* 477:13-478:23) A.P.L. testified that “for the most part” she was able to maintain safe and stable housing until she became incarcerated. (*Id.* 478:23-479:7) A.P.L. maintained she that, throughout the case she had employment, saying she worked as a hotel housekeeper briefly before getting a job at Firehouse Subs, which she kept for “about a year and a half.” (*Id.* 479:8-23) A.P.L. left Firehouse Subs when they started cutting her hours and worked at Frugals “until the middle of April, I believe.” (*Id.* 479:24-480:5) A.P.L. said she expected to be in pre-release after about eight months, at which time she

intended to go to cosmetology school. (*Id.* 480:11-481:1) A.P.L. testified she hoped to get into a sober-living home for mothers with children “so that way I could have the security, the safety and the help that I need as a parent struggling with drug addiction.” (*Id.* 481:2-13) A.P.L. read a statement accepting responsibility for her actions, vowing to fight her addiction and asking the district court to give her a chance to “show you that I am that mom that can give A.G.D.J. the things she needs and the security she needs.” (*Id.* 481:24-483:5)

After hearing testimony, the district court, heard closing arguments and held that A.P.L. failed to successfully complete her treatment plan, that she had a prior termination of parental rights, that she had continued to relapse and use “illicit drugs,” and that she had a commitment with the DOC for two years rendering her unable to parent A.G.D.J. (10/24/2023 499:19-500:13) The court found, after taking judicial notice of A.P.L.’s criminal history, and in consideration of “your mental state, your violent behavior, your long-term commitment and the pattern of conduct, that you’re unfit, unable or unwilling to give A.G.D.J. the adequate parenting care that she needs” (*Id.* 500:14-20)

Findings of the District Court. In the Order entered December 13, 2023 the district court recounted the relevant testimony of the witnesses and made the following pertinent Findings of Fact in support of its decision to terminate A.P.L.’s parental rights:

1. A.P.L. failed to successfully complete her treatment plan.
2. A.P.L. was unable to meet A.G.D.J.'s needs for safety security, stability and well-being because she placed the child in situations that exposed her "to domestic violence on multiple occasions during this case, was incarcerated during this case, and is currently incarcerated long-term, causing her to be unavailable to parent A.G.D.J."
3. A.P.L. did not meet the mental health requirements of her treatment plan because she did not follow Dr. Day's recommendations to address her PTSD symptoms, improve her judgment about interpersonal relationships or cease contact with C.J.
4. A.P.L. did not meet the CD requirements of her treatment plan because she remain free from drugs and alcohol and, after April 23, 2023 did not engage in substance testing.
5. A.P.L. did not meet the criminal behavior requirements of her parenting plan because, on April 30, 2023 she was involved in an auto accident and was cited for driving under the influence, failure to drive in the right lane and possession of dangerous drugs.
6. A.P.L. did not complete the housing requirements of her treatment plan because her housing was "unstable, for the most part, throughout this case." She has also been incarcerated during this case, including long-term incarceration as of May 2023.
7. A.P.L. did not complete the treatment plan requirement she maintain legal sources of income adequate to provide for her child's needs because her criminal behavior resulted in incarceration making her unable to maintain employment.
8. "Overall, A.P.L.'s treatment plan was unsuccessful because she continued to relapse and use illegal drugs, including methamphetamine and fentanyl.... In addition, A.P.L. continues to engage in criminal behavior which has led to her arrest, revocation of her probation, incarceration... and has been committed to the Department of Corrections to serve a 2-year sentence...."
9. The conduct or conditions rendering A.P.L. unfit, unable, or unwilling to provide adequate parental care to A.G.D.J. are unlikely to change within a reasonable time based on A.P.L.'s history of exposing the child to violence, excessive use of intoxication liquor or dangerous drugs, despite multiple evaluations and treatment opportunities – including in-patient and outpatient – and her inability to refrain from using illicit drugs.

10. The conduct or conditions rendering A.P.L. unfit, unable, or unwilling to provide adequate parental care to A.G.D.J. are unlikely to change within a reasonable time based on her long history of engaging in criminal conduct, including criminal conduct that led to the revocation of her probation and her present incarceration and sentence to 2 years DOC, leading to her being unavailable to parent A.G.D.J. for more than 1 year.

(Appendix A, DC136)

STANDARDS OF REVIEW

A natural parent's right to care and custody of a child is a fundamental liberty interest which must be protected by fundamentally fair procedures. *In re J.N.*, 1999 MT 64, ¶12, 293 Mont. 524, 977 P.2d 317. When the State seeks to terminate a parent's fundamental liberty interest in the care and custody of a child, due process requires the parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, 2004 MT 62, ¶12, 320 Mont. 268, 87 P.3d 408. Whether a person has been denied his or her right to due process is a question of constitutional law. *Id.* at ¶9 The Montana Supreme Court's review of questions of constitutional law is plenary. *In re A.S.*, ¶9 (citing *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290) For a parent to prove violation of due process, he or she must demonstrate how the outcome would have been different had the alleged due process violation not occurred. *In re B.J.J.*, 2019 MT 129, ¶13, 396 Mont. 108, 443 P.3d 488 (citing *In re A.N.W.*, 2006 MT 42, ¶38, 331 Mont. 208, 130 P.3d 619).

Beyond due process concerns, the Montana Supreme Court reviews a district

court's decision to terminate parental rights for an abuse of discretion. *In re K.A.*, 2016 MT 27, ¶19, 382 Mont. 165, 365 P.3d 478.

In abuse and neglect cases, the burden of proof lies with the Department to prove by clear and convincing evidence all required elements for termination of a parent's rights. Mont. Code Ann. §41-3-422(5)(a), *In re K.L.*, 2014 MT 28, ¶14, 373 Mont. 421, 318 P.3d 691. "The district court, as the fact finder, evaluates if the Department has met its burden of presenting clear and convincing evidence regarding all required elements for termination of a parent's rights. The district court's findings of fact and conclusions of law summarize the court's evaluation as to whether the Department has met its burden of proof that a preponderance of the evidence is definite, clear, and convincing." *In re B.J.J.*, 2019 MT 129, ¶10, 396 Mont. 108, 443 P.3d 488.

Upon appeal of a district court's findings of fact, conclusions of law, and order terminating a parent's parental rights, the Montana Supreme Court does not substitute its judgment as to the strength of the evidence for that of the district court. *In re A.N.W.*, 2006 MT 42, ¶29, 331 Mont. 208, 130 P.3d 619. Rather, the Court reviews findings of fact to determine if they are clearly erroneous, conclusions of law for correctness, and the evidence found by the district court to determine whether, on the whole, a preponderance of the evidence is definite, clear, and convincing. *In re B.J.J.*, ¶10.

A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces the Court a mistake was made. *In re J.B.*, 2016 MT 68, ¶10, 383 Mont. 48, 368 P.3d 715.

To reverse a district court’s evidentiary ruling for an abuse of discretion, the Court “must determine the district court either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice.” *In re I.M.*, 2018 MT 61, ¶13, 391 Mont. 42, 414 P.3d 797 (citing *In re O.A.W.*, 2007 MT 13, ¶32, 335 Mont. 304, 153 P.3d 6).

ARGUMENT

1. Counsel for A.P.L. should be permitted to withdraw from this cause in accordance with *Anders v. California* and Mont. Code Ann. §46-8-103.

The Fourteenth Amendment of the United States Constitution and Article II, Section 17 of the Montana Constitution guarantee every defendant the right to a fair trial and due process of law, including fair representation. 386 U.S. 738, 742 (1967). When appellant’s counsel “finds his case to be wholly frivolous” he should, after conscientious examination of the case, advise the court and request permission to withdraw. *Id.* at 744

To ensure protection of appellant’s rights, counsel’s request to withdraw must be accompanied by a brief that references anything in the record that might

arguably support an appeal (an *Anders* brief). *Id.* A copy of the brief should be provided to the appellant and the appellant must be afforded the time to respond to counsel's motion and brief. *Id.*

The State of Montana has codified the requirements of *Anders v. California* in Mont. Code Ann. §46-8-103(2). If, after reviewing the entire record and researching the applicable law, counsel concludes that an appeal would be frivolous or wholly without merit, counsel must file a motion with the Montana Supreme Court requesting permission to withdraw. *Id.* A memorandum discussing any issues that arguably support an appeal must accompany the motion to withdraw. *Id.* The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, along with appropriate citations to the record and the law bearing on each issue. *Id.*

An *Anders* brief meets the requirements of both *Anders v. California* and Mont. Code Ann. §46-8-103(2). The brief is intended to assist the appellate court in determining that counsel has conducted the required detailed review of the case and that the appeal is so frivolous that counsel's motion to withdraw should be granted. *Penson v. Ohio*, 488 U.S. 75, 81–82 (1988). The requirements of an *Anders* brief are not meant to force counsel to argue against appellant. *Anders*, 386 U.S. at 745.

Pursuant to Mont. Code Ann. §46-8-103(2), counsel for Appellant

reluctantly advises the Court that, after conducting diligent review of the record and the relevant law, counsel has not found any non-frivolous issues appropriate for appeal in this matter. While counsel has great sympathy for the Appellant, he can find no meritorious grounds for appeal. In accordance with the requirements of *Anders* and Mont. Code Ann. §46-8-103(2), counsel provides this memorandum (Anders Brief) discussing any issues that arguably support an appeal, a summary of the procedural history of the case and any jurisdictional problems with the appeal, and appropriate citations to the record and the law bearing on each issue. *Id.*

2. The record may arguably support A.P.L.'s assertion the district court erred when it terminated her parental rights because it failed to prove by clear and convincing evidence that the condition rendering her unfit or unable to safely parent A.G.D.J. was unlikely to change within a reasonable time.

The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence that the child is an adjudicated youth in need of care, an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful, and the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time. Mont. Code Ann. §41-3-609(1)(f); *In re D.B. and D.B.*, 2007 MT 246, ¶20, 339 Mont. 240, 168 P.3d 691.

An order terminating an individual's right to parent his child must be supported by clear and convincing evidence that the statutory criteria for

termination have been met. *In re A.T. and J.T.*, 2003 MT 154, ¶10, 316 Mont. 255, 70 P.3d 1247. Clear and convincing evidence is:

simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure—that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

In re C.M.C., 2009 MT 153, ¶23, 350 Mont. 391, 208 P.3d 809.

Once the criteria for termination of parental rights are met, the decision whether or not to terminate those rights is within the court’s discretion

If a district court has found, based on clear and convincing evidence, that a child has been adjudicated a YINC and the child’s parent has failed to comply with an appropriate treatment plan, the court can only order the parent’s rights terminated if it also makes a finding that the conduct or condition that rendered the parent unfit is unlikely to change within a reasonable time. Mont. Code Ann. §41-3-609(1)(f)(ii). To make that determination, the district court must enter a finding that continuation of the parent-child relationship will likely result in the child’s continued abuse or neglect or that the conduct or the condition that renders the parent “unfit, unable or unwilling to give the child adequate parental care” is unlikely to change in a reasonable time. Mont. Code Ann. §41-3-609(2). The

district court must consider whether the parent has an emotional or mental illness or deficiency that renders the parent unable to care for the child, whether there is a history of violent behavior by the parent, whether the parent has a history of substance abuse, and whether the parent is or will be incarcerated for a long period of time. *Id.*

The district court should look both at the parent's past and present conduct to assess the likelihood of the parent's condition or conduct to change in a reasonable time. *In re D.H.*, 2001 MT 200, ¶32, 306 Mont. 278, 33P.3d 616. An important measure of whether the parent's condition or conduct making her unfit to parent is unlikely to change in a reasonable amount of time involves a review of the parent's progress in regard to the treatment plan designed to resolve the condition or conduct. *In re C.J.M. and A.J.M.*, 2012 MT 137, ¶19, 365 Mont. 298, 280 P.3d 899. What constitutes a reasonable time is case specific because it is largely dependent upon the needs of the child. *In re D.F.*, 2007 MT 147, ¶43, 337 Mont. 461, 161 P.3d 825. The child's best interest is paramount over an individual's right to parent in a proceeding to terminate the parent's rights and the district court "must give primary consideration to the physical, mental and emotional conditions and needs of the child." *In re D.H.* ¶32.

Failure to abide by the terms of the treatment plan and continuing to engage in inappropriate conduct up until a petition for termination of parental rights is

filed are sufficient to warrant termination of parental rights. *In re E.D., N.T., & M.S.* 2008 MT 216, ¶7, 344 Mont. 228, 186 P.3d 1283.

In this case, A.P.L. may argue that she was making progress toward sobriety and had reasonable plans for vocational training and employment upon entering prerelease. She engaged in treatment and was drug and alcohol free for several months during the pendency of the case. There was testimony that A.P.L. had the intelligence and tools to maintain sobriety, if she could stick with the program.

CONCLUSION

After thorough review of the entire record and researching applicable statutes, case law, and rules, counsel has determined that A.P.L.'s appeal presents no non-frivolous issues and is, therefore, wholly without merit. Counsel respectfully requests the court grant the motion to withdraw on direct appeal.

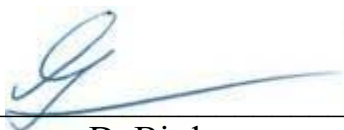
Respectfully submitted this June 4, 2024.



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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 not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



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CERTIFICATE OF SERVICE

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