

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0205

IN THE MATTER OF,

L.A.O.-B.,

A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Fourteenth Judicial District Court,
Musselshell County, The Honorable Randal I. Spaulding, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
CORI LOSING
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Cori.losing@mt.gov

ADAM M. LARSEN
Musselshell County Attorney
506 Main Street
Roundup, MT 59072

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

SHANNON HATHAWAY
Hathaway Law Group
401 Washington Street
Missoula, MT 59802

ATTORNEY FOR APPELLANT
MOTHER

CRAIG WAHL
Attorney at Law
2722 3rd Avenue North, Suite 400
Billings, MT

GUARDIAN AD LITEM

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	2
SUMMARY OF THE ARGUMENT	13
STANDARD OF REVIEW	14
ARGUMENT	15
I. The district court did not violate Mother’s due process rights by conducting a show cause hearing and approving a treatment plan outside of the statutory deadlines	15
A. Mother cannot establish that the show cause hearing being conducted outside the 20-day deadline violated her right to due process	17
B. Mother cannot establish that the district court approving her signed treatment plan more than 30 days after the district court granted temporary legal custody violated her right to due process	19
II. The district court did not abuse its discretion when it terminated Mother’s rights.....	21
A. The district court properly concluded that termination of Mother’s parental rights was presumed to be in L.A.O.-B.’s best interests	30
CONCLUSION	32
CERTIFICATE OF COMPLIANCE.....	32

TABLE OF AUTHORITIES

Cases

<i>In re A.A.</i> , 2005 MT 119, 327 Mont. 127, 112 P.3d 993	20
<i>In re A.B.</i> , 2020 MT 64, 399 Mont. 219, 460 P.3d 405	22, 30, 31
<i>In re A.N.W.</i> , 2006 MT 42, 331 Mont. 208, 130 P.3d 619	16, 30
<i>In re B.P.</i> , 2001 MT 219, 306 Mont. 430, 35 P.3d 291	16
<i>In re C.B.</i> , 2019 MT 294, 398 Mont. 176, 454 P.3d 1195	14, 16, 18, 19
<i>In re C.J.</i> , 2010 MT 179, 357 Mont. 219, 237 P.3d 1282	16
<i>In re C.M.</i> , 2019 MT 227, 397 Mont. 275, 449 P.3d 806	26
<i>In re D.B.J.</i> , 2012 MT 220, 366 Mont. 320, 286 P.3d 1201	16
<i>In re J.B.</i> , 2016 MT 68, 383 Mont. 48, 368 P.3d 715	22
<i>In re K.L.N.</i> , 2021 MT 56, 403 Mont. 342, 482 P.3d 650	25
<i>In re R.J.F.</i> , 2019 MT 113, 395 Mont. 454, 443 P.3d 387	25, 26
<i>In re Z.N.-M.</i> , 2023 MT 202, 413 Mont. 502, 538 P.3d 21	15
<i>State v. Myran</i> , 2012 MT 252, 366 Mont. 532, 289 P.3d 118	21

Other Authorities

Montana Code Annotated

§ 41-3-432(1)	18
§ 41-3-432(1)(a)	17
§ 41-3-432(1)(c)	17
§ 41-3-437	19
§ 41-3-438	19
§ 41-3-443	19
§ 41-3-443(7)	19
§ 41-3-604(1)	31
§ 41-3-609	21, 25
§ 41-3-609(1)(f)	21
§ 41-3-609(1)(f)(ii)	22
§ 41-3-609(2)	22
§ 41-3-609(3)	22

Montana Rules of Appellate Procedure

Rule 12(3)	21
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STATEMENT OF THE ISSUES

1. Whether the district court violated Mother's rights to due process when it did not follow proper statutory timelines.
2. Whether the district court abused its discretion when it terminated Mother's parental rights.

STATEMENT OF THE CASE

On December 7, 2021, while L.A.O.-B. remained in the home, the Department petitioned the district court for emergency protective services and temporary investigative authority. (Doc. 1 at 1.) The district court initially set a show cause hearing for December 27, 2021. (Doc. 2.) After the Department moved twice to continue the show cause hearing because the Office of the State Public Defender had not yet appointed Mother counsel, the district court reset the show cause hearing for February 7, 2022. (Docs. 9-12.) The district court continued the show cause hearing again to allow the Department time to amend its petition. (2/7/22 Tr. at 3-4, 6.)

On February 14, 2022, the Department filed its Petition for Emergency Protective Services, Adjudication of Child as Youth in Need of Care, and Temporary Legal Custody (Amended Petition). (Doc. 17.) Mother did not appear at the show cause hearing on February 22, 2022, but through her counsel, she

stipulated to the relief requested in the Department's Amended Petition. (2/22/22 Tr. at 1, 3.) Subsequently, and without objection, the district court approved Mother's signed treatment plan in June 2022. (Docs. 24, 25.) Fifteen months after the Department removed L.A.O.-B., the Department petitioned to terminate Mother's parental rights, which the district court granted following a three-day termination hearing. (Docs. 50, 147.) Mother timely appeals.

STATEMENT OF THE FACTS

Mother first began abusing substances when she was 14. (12/7/23 Tr. at 81.) After L.A.O.-B.'s father died by suicide in June 2021, Mother relapsed. (Doc. 1 at 12.)

A few months later, in October 2021, Mother was traveling with her friend, Colton Brosz, and L.A.O.-B. to Missoula. (*Id.* at 12-14.) Near Livingston, Mother and Brosz exited the vehicle and were seen running in and out of traffic on Interstate 90. (*Id.* at 13.) Mother and L.A.O.-B. were transported to the hospital in Livingston. (*Id.* at 12-13.) Because Mother was behaving erratically, hospital staff refused to leave Mother unsupervised with L.A.O.-B. (*Id.* at 13.) Mother ultimately admitted to using methamphetamine but stated that Brosz had "tricked her" into using methamphetamine during the trip. (*Id.* at 13.)

Because L.A.O.-B. already resided in maternal grandmother's, K.P.'s (Grandmother), home with Mother at the time, the Department was able to implement an in-home safety plan and Mother enrolled in urinalysis testing. (*Id.* at 1, 11, 13.) Mother tested positive for methamphetamine on October 21, 2021. (12/7/23 Tr. at 156; Ex. 11.)

A few weeks later, on November 15, 2021, L.A.O.-B. discharged a .243 rifle that Mother reported was in her control. (Doc. 1 at 15; 12/7/23 Tr. at 75-76, 174.) The bullet went through a wall, shattered a window, and broke the TV inside the home. (12/7/23 Tr. at 174.) At the time, Mother was trying to unstick the bolt of the rifle. (*Id.* at 76-77.) Mother did not believe her actions with the rifle posed a danger to L.A.O.-B., in part, because L.A.O.-B. "giggled" after the rifle went off. (*Id.*)

On November 24, 2021, Mother tested positive for methamphetamine.¹ (12/7/23 Tr. at 156; Ex. 11.) Mother's urine sample was marked dilute² on December 8, 2021. (12/7/23 Tr. at 156; Ex. 11.) Mother tested positive for methamphetamine on December 9, 2021. (*Id.*) By late January, Mother reportedly

¹ In response to discussing the November 24, 2022 drug test results, Mother reported "[t]hat was on my birthday." (12/7/23 Tr. at 156.) Mother's birthday, however, is May 20. (Ex. 11.)

² Mother's former friend, Tawny Gray, who also is a recovering methamphetamine user, testified that Mother had requested her to pick Mother up drug cleaner that purifies a person's urine so that the UA is negative or inconclusive. (2/6/23 Tr. at 162-63, 167.)

had chosen to be absent from the home and not see L.A.O.-B. for at least 20 consecutive days. (Doc. 17 at 28.)

By February 2022, the Department had removed L.A.O.-B. from Mother's care, resulting in L.A.O.-B. staying in her childhood home with Grandmother and Mother moving out of the residence. (*Id.* at 18.) Following L.A.O.-B.'s removal, Mother received visitation for two hours each day. (Doc. 17 at 18; 2/7/22 Tr. at 5.)

Mother began individual therapy with Maurice Pritchard at the Roundup Mental Health Center in March 2022.³(12/7/23 Tr. at 95, 121.) On March 18, 2022, Mother was cited with partner family member assault after Mother was in an altercation with Grandmother with L.A.O.-B. present. (*Id.* at 143, 176.) Mother was using methamphetamine at the time of the altercation. (12/7/23 Tr. at 162; 2/6/24 Tr. at 83; Ex. 11.)

By August, Mother had enrolled in parenting classes, also through Growing Together, but had not yet completed a class. (Doc. 31 at 8.) Notably, Mother did not believe that she needed any help with her parenting skills. (12/7/23 Tr. at 68.) Mother cancelled her visit with L.A.O.-B. on August 3. (11/17/23 Tr. at 33.)

Mother completed a chemical dependency evaluation on August 24, 2022, with Katherine Calovis, LAC. (State's Ex. 6.) Mother questioned Calovis's

³ Mother no longer was attending therapy in September 2022. (12/7/23 Tr. at 121; State's Ex. 6.)

conclusion that Mother still had issues with substance abuse because Mother was not using drugs. (12/7/23 Tr. at 80.) Mother also disagreed with Calovis that her diagnosis could not be “severe” because she only ever used methamphetamine “at parties and things like that.” (*Id.* at 82.)

Mother, however, had tested positive for methamphetamine on July 21, 2022, July 29, 2022, and August 5, 2022.⁴ (12/7/23 Tr. at 31-32.) And, on August 10, 2022, law enforcement received a report that involved concerns of drug use or drug paraphernalia by several individuals, including Mother, at a house. (*Id.*) The report involved minors. (*Id.*)

Calovis ultimately diagnosed Mother with Amphetamine Use Disorder-severe and Alcohol use disorder-severe and recommended that Mother attend level I outpatient treatment with Calovis or a provider from Rimrock. (State’s Ex. 6 at 1-2.) Mother, however, declined to receive outpatient treatment with Calovis, reporting she was already receiving treatment from Dustin Duke with the Rimrock Foundation. (12/7/23 Tr. at 97.) But, by June 8, 2022, Mother had declined future sessions with Duke after completing only five sessions.⁵ (State’s Ex. 8; Resp’t’s Ex. F.; 12/7/23 Tr. at 96-99.) Mother “didn’t see a reason to keep going since [she’d]

⁴ Mother’s patches collected on each date were marked as tampered. (12/7/23 Tr. at 32.)

⁵ Mother stated she did not decline future sessions, but that Duke, when asked by Mother, said future sessions were not necessary. (*Id.* at 98.)

been sober for over a year at the time or long enough.” (12/7/23 Tr. at 96.) The month prior to Mother terminating her sessions with Duke, Mother tested positive for methamphetamine.⁶ (*Id.*)

Mother cancelled her visit with L.A.O.-B. on September 21, 2022, because she was ill, but she did not provide a clinician’s note, so it was considered unexcused pursuant to Growing Together’s policy. (11/17/23 Tr. at 33.) Mother’s patch tested positive for methamphetamine and THC on October 4, 2022.⁷ (12/7/23 Tr. at 32, 42.) And, by the end of October 2022, Mother had not showed for three parenting classes. (11/17/23 Tr. at 35.)

On November 25, 2022, Mother was cited for a broken tail lamp and driving while suspended. (12/7/23 Tr. at 145.) Mother had contacts with law enforcement on December 13, 2022, as a victim of an alleged offense. (*Id.* at 145.) Mother was cited on December 26, 2022, with failure to register vehicle⁸ and for failure to

⁶ Notably, on April 29, 2022, Mother was cited with reckless driving. (12/7/23 Tr. at 143.) Two weeks later, Mother was cited for careless driving on May 15, 2022. (*Id.* at 144.) Mother, accordingly, tested positive for methamphetamine approximately two weeks and three days after each citation was issued, respectively.

⁷ Mother had no explanation for why her patch tested positive in October. (*Id.* at 89.)

⁸ Mother stated that it was for failure to register an aircraft. (*Id.* at 145-46.)

carry proof of insurance. (*Id.* at 179.) On January 10, 2023, Mother was cited for an obstructed license plate.⁹ (*Id.* at 146.)

In January, Mother completed parenting classes and engaged in trauma therapy with Dr. Tamara Greeling, PhD, LCPC, LAC. (Resp't's Ex. J; 11/17/23 Tr. at 143, 145-46.) Mother also completed a four-hour anger management class on February 22, 2023. (Resp't's Ex. C.) Mother, however, was required to engage in anger management *classes*, not just one four-hour course. (12/7/23 Tr. at 232.) By the end of February 2023, Mother had also been terminated from sweat patch testing based on Mother never returning to have her February 2, 2023 patch removed. (*Id.* at 31, 34-35.)

Nonetheless, based on Mother's overall progress, the Department transitioned visits from supervised to unsupervised by March 2023. (*Id.* at 216-17.) During the unsupervised visitation period, Mother had her truck towed after it had crashed in the ditch on Highway 87. (*Id.* at 147.) Mother, however, said she did not wreck the vehicle, but that it was just stuck in the mud. (*Id.*) Mother cancelled the visitation on March 22, 2023, but provided documentation to excuse the missed visit. (11/17/23 Tr. at 36.)

⁹ Mother stated that she had a cover over her license plate because she did not realize that it was illegal since places sold the covers. (*Id.* at 146.)

In April 2023, Dr. Greeling reported to the Department that Mother had been inconsistent with her attendance. (11/17/23 Tr. at 146-47; State's Ex. 3.) As Dr. Greeling explain, Mother would attend regularly for a period of time, request Dr. Greeling write a letter to the Department saying she is attending, and then would immediately have sporadic attendance after Dr. Greeling sent the letter. (11/17/23 Tr. at 147.)

L.A.O.-B. had a difficult time when the visits changed from supervised to unsupervised. (11/17/23 Tr. at 77.) Specifically, L.A.O.-B. "became a little bit more aggressive [and] angry," which the head start staff had not seen before from L.A.O.-B. (*Id.* at 77.) L.A.O.-B. also reported that Mother had taken L.A.O.-B. shooting, which scared L.A.O.-B. (2/6/24 Tr. at 103.) Mother, however, stated that L.A.O.-B. was recalling the time she went shooting with Mother and L.A.O.-B.'s father when he was still alive. (*Id.* at 116.) During that shooting outing, L.A.O.-B. reportedly was in Mother's lap while Mother had a .22. (*Id.*) Because Father passed away in June 2021, L.A.O.-B. would have been no older than 2 at the time of that outing.

Based on Mother's inconsistent therapy attendance and concerns of L.A.O.-B.'s safety while in Mother's care during the unsupervised visits, the Department switched the visits back to supervised. (12/7/23 Tr. at 217-18.) Mother and the Growing Together provider jointly agreed to cancel the visit on April 19,

2023, due to Mother's mental health, as that was the day that Mother's unsupervised time had been removed by the Department. (11/17/23 Tr. at 37.) Notably, L.A.O.-B. appeared to "adjust and not show that aggressive behavior" once unsupervised time ended. (*Id.* at 78.)

Mother cancelled the visit on May 24, 2023. (*Id.* at 37.) Mother was 45 minutes late to her visitation on June 7, 2023. (*Id.*) June 7 was L.A.O.-B.'s birthday. (*Id.* at 38.) When Mother arrived late to visits, L.A.O.-B. "show[ed] some obvious distress . . . and was afraid her mom was not going to show." (*Id.* at 78.)

Mother cancelled the June 14, 2023 visit without any clinician's note. (*Id.* at 39.) L.A.O.-B. said "that her mom was lying, that she didn't believe she was sick" and appeared "very frustrated and disappointed by the missed parenting times." (*Id.* at 78.) Mother did not show up to the visit on June 21, 2023. (*Id.* at 39.)

The Department referred Mother for urinalysis testing on July 14, 2023. (12/7/23 Tr. at 37, 39.) Mother's urine sample was negative for all tested substances. (*Id.* at 37-39.) Mother cancelled the visit on July 19, 2023, and did not provide documentation to excuse her cancellation until six days later. (11/17/23 Tr. at 40-41.) Because Mother had exceeded the allotted unexcused absences within a 60-day period and had been warned about her previous absences at a re-engagement hearing, Growing Together closed Mother's case on July 26, 2023. (11/17/23 Tr. at 40-41; State's Ex. 5.)

Mother became more consistent within the last four weeks of completing EMDR therapy with Dr. Greeling, which she completed on August 1, 2023.

(11/17/23 Tr. at 147.) Mother, however, declined to engage in chemical dependency treatment with Dr. Greeling, stating that she had already completed chemical dependency treatment with the Rimrock Foundation. (*Id.* at 150.)

To maintain visitation, the Department arranged for one of its social service techs (SST), who was based in Lewistown, to provide weekly visits. (12/7/23 Tr. at 215-16.) Mother cancelled a visit on September 29, 2023 because she was out of town for a funeral. (Resp't's Ex. S.) When the SST twice tried to set up a visit for October 11, 2023, the SST did not hear back from Mother until October 13, 2023. (*Id.*) Mother reported that she could not text back because her phone fell in mud.¹⁰ (*Id.*) Mother cancelled the visit scheduled for October 30, 2023 because she reportedly had food poisoning. (*Id.*)

Mother paid for urinalysis testing on October 24, 2023, which was negative. (12/7/23 Tr. at 35-39.) Mother cancelled visitation when the SST was about 20 minutes away from Roundup because Mother's brother's dog's nose was bleeding, and she was the only one that could take care of the dog. (Resp't's Ex. S.)

¹⁰ Mother had also reported she was delayed in texting back on September 25, 2023, due to her phone falling in mud. (Resp't's Ex. S.)

On November 15, 2023, law enforcement observed taillights and headlights off a roadway on state land. (12/7/23 Tr. at 184-85.) Law enforcement approached the vehicle because vehicles are not allowed to drive on state land without a permit. (*Id.*) Mother was in her vehicle with a friend. (*Id.* at 185.) Law enforcement observed “quite a bit of stuff around the vehicle, trash and whatnot” and a firearm outside of the vehicle that looked like it had been run over by the vehicle. (*Id.* at 185, 198.) Mother and her friend both admitted to using marijuana. (12/7/23 Tr. at 185.) Law enforcement advised the pair that he “did not want them driving and getting a DUI on the roadways,” so he asked them to have someone come and pick them up. (*Id.*)

At the conclusion of day one of the termination hearing on November 17, 2023, the Department requested Mother submit to a hair follicle test.¹¹ (11/17/23 Tr. at 206.) Mother refused, later explaining that she would have rather taken a urinalysis test or use a sweat patch because she was concerned that the hair follicle¹² would test positive due to secondhand exposure. (11/17/23 Tr. at 207; 2/6/24 Tr. at 151.)

¹¹ The Department had previously requested, outside of court, that Mother submit to hair follicle testing. (11/17/23 Tr. at 206.) Mother did not do so, but notably appeared at the November 17, 2023 termination hearing with bleached blond hair. (*Id.* at 206-07.)

¹² Hair follicle testing can detect drug use for up to 90 days. (2/6/23 Tr. at 151.)

Mother paid for a urinalysis test on December 6, 2023, which was negative. (12/7/23 Tr. at 35-39; Resp't's Ex. O.) Mother began attending NA weekly in Roundup starting one week before the December 7, 2023 setting of the termination hearing. (12/7/23 Tr. at 114.) On December 18, 2023, the SST tried to schedule a visitation, but Mother declined saying that she had numbness in her hand. (Resp't's Ex. S.)

On her own, Mother obtained a chemical dependency evaluation from Warren Beck on December 27, 2023. (Resp't's Ex. Q.) Beck diagnosed Mother, in relevant part, with Cannabis Use Disorder, moderate; Stimulant Use Disorder (Methamphetamine, non-IV use), moderate; and Alcohol Use Disorder, moderate. (*Id.* at 1.) Despite Beck's recommendation to do so, Mother declined to sign a release so that her evaluation could be shared with the Department. (*Id.*) As part of Beck's recommendations, he welcomed Mother to attend Level I Outpatient group services with the Community Crisis Center. (*Id.* at 3.)

Mother cancelled her visit last minute on January 8, 2024, due to being stuck in a rut in her driveway that broke her tire. (Resp't's Ex. S.) By this time, Mother also had allegedly stole items from the golf course that included computers and a toolbox, resulting in the State charging Mother. (2/6/24 Tr. at 133, 170, 174-75.)

Even though every chemical dependency evaluation Mother had received throughout Department involvement had diagnosed her with a substance abuse disorder, Mother, at the termination hearing, did not believe she had issues with substance abuse. (12/7/23 Tr. at 78.) As CPS Viviano explained, her biggest concern with Mother was her lack of accountability. (2/6/23 Tr. at 248.) Mother, herself, reported that “she does not believe that she has a substance abuse problem,” has been “very dismissive of some of her previous actions that . . . have caused major concern,” and, in general, it seems “easier for [M]other to blame others than to take accountability and responsibility for her own part in this.” (12/7/23 Tr. at 249.)

SUMMARY OF THE ARGUMENT

Mother cannot establish that she was prejudiced by her show cause hearing being continued or by her treatment plan being approved more than 30 days after the dispositional hearing. First, the district court was required to twice continue the show cause hearing because OPD had not yet appointed Mother counsel, and the district court properly found that good cause supported continuing the show cause hearing a third and final time to February 22, 2022. At the final setting of the show cause hearing, Mother ultimately stipulated to emergency protective services, adjudicating the child as a youth in need of care, and temporary legal custody.

Second, Mother did not object to her treatment plan, which she signed, being approved more than 30 days after the district court granted the Department temporary legal custody. Nor did the district court's delayed approval result in Mother not receiving services. In fact, Mother was engaged in chemical dependency testing, counseling services, and receiving regular visitation. Accordingly, the district court did not violate Mother's right to due process when it conducted a show cause hearing and approved her treatment plan outside of the statutory timeframes.

Nor did the district court abuse its discretion when it terminated Mother's parental rights after concluding Mother's conduct or condition was unlikely to change in a reasonable time. The Department engaged Mother in services for over two years. Yet, Mother continued to miss visits with L.A.O.-B. and never completed chemical dependency treatment, even though chemical dependency and Mother's inconsistent parenting were both reasons that led to Department involvement.

STANDARD OF REVIEW

This Court's review of whether a parent was denied her right to due process is plenary. *In re C.B.*, 2019 MT 294, ¶ 13, 398 Mont. 176, 454 P.3d 1195.

This Court reviews for abuse of discretion a district court’s decision to terminate a person’s parental rights. *In re Z.N.-M.*, 2023 MT 202, ¶ 10, 413 Mont. 502, 538 P.3d 21. The district court abuses its discretion when it acts “arbitrarily, without conscientious judgment, or in an unreasonable fashion that results in substantial injustice.” *Id.*

This Court reviews the district court’s factual findings to determine if they are clearly erroneous. *Id.* A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces the Court a mistake was made. *Id.* This Court reviews for correctness the district court’s conclusions of law. *C.B.*, ¶ 13.

ARGUMENT

I. The district court did not violate Mother’s due process rights by conducting a show cause hearing and approving a treatment plan outside of the statutory deadlines.

Mother contends that the district court abused its discretion when it terminated her parental rights because two statutory timelines were not adhered to during the pendency of L.A.O.-B.’s case. (Appellant’s Br. at 24.)

The right to the care and custody of a child is a fundamental liberty interest, so “[f]undamental fairness and due process require that a parent not be placed at an

unfair disadvantage during the termination proceedings.” *In re A.N.W.*, 2006 MT 42, ¶ 34, 331 Mont. 208, 130 P.3d 619. The “[k]ey components of a fair proceeding are notice and an opportunity to be heard.” *In re C.J.*, 2010 MT 179, ¶ 27, 357 Mont. 219, 237 P.3d 1282. “[T]he process that is due in any given case varies according to the factual circumstances of the case and the nature of the interests involved.” *In re D.B.J.*, 2012 MT 220, ¶ 27, 366 Mont. 320, 286 P.3d 1201. Due process “is a flexible concept which must be tailored to each situation in such a way that it meets the needs and protects the interests of the various parties involved.” *In re B.P.*, 2001 MT 219, ¶ 31, 306 Mont. 430, 35 P.3d 291 (internal quotations and citations omitted). “For a parent to establish a claim for violation of due process, he or she must demonstrate how the outcome would have been different had the alleged due process violation not occurred.” *C.B.*, ¶ 18.

Mother asserts two statutory timelines that were not complied with. First, Mother contends that her due process rights were violated by the district court not conducting a show cause hearing for over two months after the Department filed its initial petition. (Appellant’s Br. at 26.) Second, Mother argues her due process rights were violated because the district court did not approve Mother’s treatment plan until nearly four months after the district court adjudicated L.A.O.-B. as a youth in need of care and granted the Department temporary legal custody. (*Id.* at 28.) Mother, however, only objected, and therefore preserved, the challenge to the

delay in the show cause hearing. Nonetheless, Mother cannot establish a due process violation for either statutory untimeliness claim.

A. Mother cannot establish that the show cause hearing being conducted outside the 20-day deadline violated her right to due process.

Montana Code Annotated § 41-3-432(1)(a) requires a show cause hearing be “conducted within 20 days of the filing of an initial child abuse and neglect petition” unless, in relevant part, “an extension of time is granted by the court.” A district court is authorized to “grant an extension of time for a show cause hearing only upon a showing of substantial injustice and shall order an appropriate remedy that considers the best interests of the child.” Mont. Code Ann. § 41-3-432(1)(c).

Here, the district court set the show cause hearing within 20 days of the Department’s initial petition being filed. The Department then had to move to continue the show cause hearing, twice, due to Mother not being appointed counsel. At the February 7, 2022 show cause hearing, the Department informed the district court that it intended to amend its initial petition to a petition for emergency protective services, adjudication of the child as a youth in need of care, and temporary legal custody. (2/7/22 Tr. at 3-4.) In response, Mother’s counsel stated:

Well, that’s what concerns me, Your Honor, I guess at this time. We’ve been out here for a while, and the matter has been continued a couple times by the State. Now we’re asking for more time. I guess

that just concerns me about the delay and where we're at at this point I guess.

(2/7/22 Tr. at 4-5.) The district court continued the show cause hearing, explaining, in relevant part:

Due process would further dictate that the mother have an opportunity to receive a copy of that paperwork and review it together with any discovery with her counsel to decide whether she wants a contested hearing or to stipulate or something in between.

That being the case, I do find good cause to continue, and will continue the matter as requested.

(2/7/22 Tr. at 6.) The district court ultimately conducted the show cause hearing on February 22, 2022. (2/22/22 Tr.)

To the extent the above expressed concerns amount to an objection, Mother cannot establish that the district court violated her due process rights by continuing the show cause hearing because good cause existed. *See* Mont. Code Ann.

§ 41-3-432(1). First, the district court initially set the show cause hearing within the statutorily required 20 days. *See C.B.*, ¶ 20. Second, the district court would have violated Mother's due process rights by conducting the show cause hearing on the December 27, 2021 or January 11, 2022 settings, because Mother, at that time, had not been appointed counsel despite the district court's order requesting OPD to appoint counsel. (*See* Docs. 9-12.)

Even so, Mother has not established that the show cause hearing within 20 days would have resulted in an outcome other than her parental rights being

terminated. Nor can Mother establish that the untimeliness of the show cause hearing prejudiced her. For all but one month of the time between when the initial petition was filed and the show cause hearing occurred, L.A.O.-B. remained in the home with Mother pursuant to an in-home safety plan. Moreover, Mother ultimately stipulated to the relief requested in the Amended Petition at a hearing that she had notice of the opportunity to be heard. *See C.B.*, ¶ 18. Mother's due process claim is without merit.

B. Mother cannot establish that the district court approving her signed treatment plan more than 30 days after the district court granted temporary legal custody violated her right to due process.

In support of her argument, Mother cites Mont. Code Ann. § 41-3-437, asserting that the treatment plan must be ordered within 20 days after adjudication. (Appellant's Br. at 28.) Mother's reliance on Mont. Code Ann. § 41-3-437, however, erroneously conflates the disposition hearing with approval of the treatment plan. *See* Mont. Code Ann. §§ 41-3-438, -443. Instead, treatment plans must be ordered within 30 days of the dispositional hearing except for good cause shown. Mont. Code Ann. § 41-3-443(7). Accordingly, here, the district court granting temporary legal custody on February 22, 2022 triggered the 30-day treatment plan deadline.

Although Mother's treatment plan was approved outside the 30-day treatment plan deadline, Mother signed her treatment plan without mention of any

objection or concerns of the treatment plan being approved by the district court outside the statutory timeframe. In doing so, the district court was precluded from concluding whether good cause excused the delay or not. Mother's decision to stipulate to the treatment plan and not to challenge the delay likewise precludes her from challenging the delay on appeal. *See In re A.A.*, 2005 MT 119, ¶ 26, 327 Mont. 127, 112 P.3d 993.

However, even if this Court reviews Mother's claim, Mother cannot establish that her right to due process was violated by her formal treatment plan not being approved until four months after the district court granted the Department temporary legal custody. Mother, before her treatment plan was approved, was enrolled in urinalysis drug testing, receiving visitation, and began counseling services, all of which were tasks required in her treatment plan. Once her treatment plan was approved, Mother was enrolled in parenting classes, started in chemical dependency treatment, and had obtained a chemical dependency evaluation. And, ultimately, the Department's evidence of Mother's inability to successfully complete her court ordered treatment plan¹³ does not focus on the delay between granting temporary legal custody and approving the treatment plan. Instead, the evidence presented was from before the case was initiated throughout the two

¹³ Notably, Mother does not challenge the district court finding that Mother did not successfully complete her treatment plan.

years it was pending, which established the increasing concerns the Department had regarding Mother's ability to safely parent L.A.O.-B. Simply put, Mother has not established that the district court violated her right to due process.

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

Montana Code Annotated § 41-3-609 sets forth the criteria available to the district court to terminate a parent's right to maintain the care and custody of their child. To terminate a parent's rights to a non-Indian child pursuant to Mont. Code Ann. § 41-3-609(1)(f), the district court must find that clear and convincing evidence establishes that: (1) the child was adjudicated as a youth in need of care; (2) the parent had not successfully completed an appropriate treatment plan approved by the district court; and (3) the parent's conduct or condition "rendering them unfit is unlikely to change within a reasonable time."

On appeal, Mother challenges only the district court's determinations that her conduct or condition rendering her unfit to parent was unlikely to change in a reasonable period of time.¹⁴ (Appellant's Br. at 38.) This Court reviews "the evidence in the light most favorable to the prevailing party when determining

¹⁴ Mother accordingly has waived review of the district court's remaining conclusions of law. *See* M. R. App. P. 12(3); *State v. Myran*, 2012 MT 252, ¶ 19, 366 Mont. 532, 289 P.3d 118.

whether substantial credible evidence supports the district court’s findings.”

In re J.B., 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715 (citation omitted).

Montana Code Annotated § 41-3-609(1)(f)(ii) requires the district court to find that a parent’s conduct or condition rendering them unfit to parent is unlikely to change within a reasonable amount of time. As part of that determination, the district court must find that “continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care.” Mont. Code Ann. § 41-3-609(2). When making this determination, the district court must give primary consideration to the “physical, mental, and emotional conditions and needs of the child.” Mont. Code Ann. § 41-3-609(3). In addition, the district court shall consider the non-exhaustive list of factors codified at Mont. Code Ann. § 41-3-609(2).

The inquiry is not “whether a parent has made progress or would make some progress in the future.” *In re A.B.*, 2020 MT 64, ¶ 27, 399 Mont. 219, 460 P.3d 405. Rather, the district court must answer “whether the parent is likely to make enough progress within a reasonable time to overcome the circumstances rendering [the parent] unfit to parent.” *Id.* In answering this question, the district court remains “required to assess the past and present conduct of the parent. [District

courts] do not have a crystal ball to look into to make this determination, so it must, to some extent, be based on a person's past conduct." *Id.*

The district court did not err when it concluded that the conduct or condition rendering Mother unfit to parent was unlikely to change within a reasonable amount of time. Notably, the in-home safety plan was terminated and L.A.O.-B. was removed from Mother's care, based in part on Mother choosing to be absent from the home, and L.A.O.-B., for a period of 20 days. Throughout the 2 years of the case, Mother missed numerous visits with L.A.O.-B. And, although a few of Mother's absences were excused, most of the absences were unexcused, and included choosing to attend a funeral out of town instead of spending time with L.A.O.-B. and not being able to attend a visit because Mother's hand felt numb. Mother's cancellations were often last minute. Other times, Mother would arrive late for visits, including showing up 45 minutes late to the visit on L.A.O.-B.'s birthday because Mother overslept.

L.A.O.-B. showed signs of notable distress when her Mother cancelled or was late attending the visits. L.A.O.-B. would also behave in controlling and aggressive ways towards her peers following Mother cancelling the visits. (See 12/7/23 Tr. at 13, 77.) And at times, L.A.O.-B. thought Mother was lying about being sick to miss the visits. In other words, Mother's inconsistent visitation

attendance, which Mother admitted to, had a detrimental effect on L.A.O.-B.'s wellbeing.

Throughout the case, Mother also failed to address her sobriety. The Department became involved with Mother and L.A.O.-B. after Mother admitted to using methamphetamine when she was transported to a hospital in Livingston after being seen running in and out of traffic on Interstate 90. L.A.O.-B., who was two, was with Mother at the time. Despite Mother's history of substance abuse, Mother reported her friend tricked her into using methamphetamine.

From October 2021 to October 2022, Mother had a series of urinalysis or sweat patches test positive for methamphetamine. Mother tested positive for methamphetamine around the time L.A.O.-B., who again was only two, managed to pull the trigger of a hunting rifle in Mother's hands, which caused a bullet to go through a wall, TV, and a window. Also, while Mother was using methamphetamine, she was cited for an altercation with Grandmother, that occurred when L.A.O.-B. was present.

After Mother began testing negative for methamphetamine, Mother tested positive for THC for a series of tests between October 2022 and February 2023. Mother admitted to using marijuana when law enforcement approached her in her vehicle that was parked on state land that she was not allowed to access onto.

Later, Mother was terminated from sweat patch testing because Mother did not return to have her February 2, 2023 patch removed.

Although recommended twice, Mother did not complete Level I Outpatient treatment. Instead, Mother attended five sessions with Duke, which was insufficient time for Duke to implement a treatment plan for Mother. And, despite as recent as December 2023, Mother being diagnosed with a methamphetamine use disorder, Mother only “slightly” agreed that she had substance abuse issues. (12/7/23 Tr. at 69.) Substantial, credible evidence therefore supported the district court’s findings that the condition rendering Mother unfit was unlikely to change in a reasonable time.

Nonetheless, Mother argues that the Department failed to make reasonable efforts, ensuring that Mother would be unable to parent in a reasonable amount of time. (Appellant’s Br. at 32.) Montana Code Annotated § 41-3-609 does not require the district court find that the Department provided reasonable efforts to terminate a parent’s rights. *See In re K.L.N.*, 2021 MT 56, ¶ 18, 403 Mont. 342, 482 P.3d 650. This Court has consistently held that whether reasonable efforts were made “is not a separate requirement for termination.” *In re R.J.F.*, 2019 MT 113, ¶ 26, 395 Mont. 454, 443 P.3d 387. Rather, this Court had held that consideration of the Department’s efforts is relevant at termination only to the extent the alleged lack of efforts may have influenced determination of the

likelihood a parent may change in a reasonable period of time. *In re C.M.*, 2019 MT 227, ¶¶ 16, 22, 397 Mont. 275, 449 P.3d 806. As this Court explained, while the capacity for a parent to change may be impacted by the Department's efforts, in other circumstances, "a parent's unlikelihood of change may well be unaffected" by allegedly lacking efforts. *Id.*

The Department's obligation to provide reasonable efforts does not equate to an obligation to provide herculean efforts. *R.J.F.*, ¶ 37. Parents remain required to "avail [themselves] of services arranged or referred by the Department and engage with the Department to successfully complete [their] treatment plan." *Id.*, ¶ 38. This Court will fault the Department when the Department's failure to provide reasonable efforts contributes to a parent's lack of progress on their court ordered treatment plan. *Id.*

Here, the Department provided reasonable efforts to reunify L.A.O.-B. with Mother, but ultimately those efforts were not successful due to Mother's inability to consistently attend visits with L.A.O.-B. and complete chemical dependency treatment. The Department's intervention began in October 2021. Despite Mother admitting to using methamphetamine while L.A.O.-B. was in her care, the Department implemented an in-home safety plan that allowed L.A.O.-B. to reside in the home with Mother and Grandmother. During that time, Mother enrolled in urinalysis testing. After Mother had multiple positive drug tests for

methamphetamine and allowed L.A.O.-B. access to a hunting rifle that L.A.O.-B. discharged into the house, the Department formally intervened by petitioning for emergency protective services and temporary investigative authority. However, L.A.O.-B. remained in the home.

Then, Mother was absent from the home for approximately 20 days. This coupled with concerns of ongoing methamphetamine use, lead to the Department removing L.A.O.-B. from Mother's care. Throughout this entire time, Mother was enrolled in urinalysis testing.

Shortly after the show cause hearing was conducted, Mother started counseling sessions with Pritchard. The Department also referred Mother to Growing Together for parenting classes and weekly supervised visits with L.A.O.-B. on the date that the treatment plan was approved by the district court. The Department switched Mother from urinalysis testing to drug patch testing. Around this same time, Mother had engaged in chemical dependency services with Rimrock. Mother also obtained a chemical dependency evaluation from Calovis. Mother, however, refused to continue with Level I outpatient treatment with Calovis, instead stating she would continue with her treatment at Rimrock. But by that time, Mother had already declined future sessions of chemical dependency treatment at Rimrock.

Mother began receiving services from Dr. Greeling for trauma therapy. And the Department transitioned supervised visits to unsupervised visits in late February 2023. However, due to Mother's inconsistent attendance in trauma therapy and concerns about L.A.O.-B.'s safety in Mother's care, the Department returned to supervised visits.

Throughout her time with Growing Together, Mother accumulated too many unexcused absences requiring her to attend a re-engagement meeting. Despite being put on notice, Mother continued to not comply with Growing Together's policy and was terminated from the program. In response, the Department arranged for one of its own SSTs to travel weekly from Lewistown to Roundup to supervise Mother's parenting time with L.A.O.-B. Mother, however, cancelled visits, often at the last minute. Even so, the Department timely rescheduled all missed visits.

In sum, the Department did provide reasonable efforts aimed at reunifying Mother with L.A.O.-B. However, Mother's inability to commit to chemical dependency treatment let alone her resistance to confirming what her chemical dependency evaluations all concluded—that Mother has a substance abuse problem—hamstrung the Department's continual reunification efforts. As did Mother's admitted inconsistencies in attending her parenting time with L.A.O.-B.

Nonetheless, Mother highlights two efforts that the Department did not make that she argues contributed to her conduct or condition being unlikely to change

within a reasonable time. First, Mother argues that the Department's not covering the costs of drug testing after the termination petition was filed amounted to the Department not providing reasonable efforts. Mother, however, has not established that the Department paying for testing while the termination petition was pending would have altered the fact that Mother did not complete chemical dependency treatment or consistently attend her scheduled parenting time with L.A.O.-B. In other words, Mother has not established that being drug tested while the termination petition was pending would have resulted in the district court finding that her conduct or condition was likely to change in a reasonable period of time.

Second, Mother asserts that the Department did not provide reasonable efforts by requiring Mother to collect gas vouchers from the Department office in Billings to fund Mother's roundtrips to Billings to meet other service providers. Mother requested gas vouchers once from CPS Viviano, who explained that the gas vouchers must be printed on color paper and embossed and she was unable to do that from her office. (12/7/23 Tr. at 241.) However, CPS Viviano explained that Mother could pick up the gas voucher from the Billings office and that voucher would still cover her costs to and from Billings. (*Id.*) CPS Viviano not being able to, at that moment, provide a gas voucher that was otherwise available to Mother, does not undermine the numerous reasonable efforts the Department made as discussed above. Nor has Mother established that had she been provided with one

gas voucher, that her conduct or condition rendering her unfit to parent would have changed within a reasonable amount of time.

Essentially, Mother requests this Court to conduct a *de novo* review and reweigh the evidence and come to an alternate conclusion than the district court. However, that is not this Court's role. It is well-established that when reviewing a district court's findings this Court does not consider whether the evidence could support a different finding, nor does it substitute its judgment for that of the factfinder regarding the weight given to the evidence. *A.N.W.*, ¶ 28. This Court has repeatedly held it is not in the position to evaluate the evidence for a different outcome; rather, it must review the case to determine if the district court abused its discretion. *A.B.*

Because substantial, credible evidence supported the only finding Mother challenges on appeal—that Mother's conduct or condition was unlikely to change in a reasonable period of time—the district court did not err when it terminated Mother's parental rights and found that it was in L.A.O.-B.'s best interests to do so.

A. The district court properly concluded that termination of Mother's parental rights was presumed to be in L.A.O.-B.'s best interests.

The Department removed L.A.O.-B. from Mother's care on January 24, 2022. The Department petitioned for termination on May 2, 2023. By that time,

L.A.O.-B. had been out of Mother's care for 15 months. Montana's Legislature implemented the following statutory presumption for children in dependent neglect proceedings: "[i]f 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." Mont. Code Ann. § 41-3-604(1). This presumption is rebuttable. *A.B.*, ¶ 33. Mother did not present sufficient evidence to the district court to overcome this presumption.

Moreover, termination of Mother's parental rights was in L.A.O.-B.'s best interests. For Mother to successfully parent L.A.O.-B., she would need to be "able to consistently be in [L.A.O.-B.'s] life, and provide chemical free care for her." (12/7/23 Tr. at 21.) Mother, however, was unable to establish that she could consistently be present for L.A.O.-B. Nor could Mother establish that her issues with chemical dependency had stabilized enough for her to safely parent L.A.O.-B. Because Mother's inability to consistently attend chemical dependency treatment and visits, places L.A.O.-B. "in a situation which may constantly revisit the missed visits" which "in the long run that will do more harm to [L.A.O.-B.]," L.A.O.-B.'s best interests supported the district court terminating Mother's parental rights. (*Id.*)

CONCLUSION

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

Respectfully submitted this 31st day of July, 2024.

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

By: /s/ Cori Losing
CORI LOSING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,118 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Cori Losing
CORI LOSING

CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-31-2024:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: K. A. O.
Service Method: eService

Adam M. Larsen (Govt Attorney)
506 Main Street
Roundup MT 59072
Representing: State of Montana
Service Method: eService

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

Shannon Colleen Hathaway (Attorney)
401 Washington Street
Missoula MT 59802
Representing: K. A. O.
Service Method: eService

Craig Wahl (Attorney)
2722 3rd. Ave. North
Ste. 400
Billings MT 59101
Service Method: eService
E-mail Address: craig@craigwahlhllaw.com

Electronically signed by LaRay Jenks on behalf of Cori Danielle Losing

Dated: 07-31-2024