

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0216

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IN THE MATTER OF:

L.B. and R.B.,

Youths in Need of Care.

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**BRIEF OF APPELLEE**

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

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## **STATEMENT OF THE ISSUE**

Whether the district court erred when it granted the petition for a decree of guardianship for L.B. and R.B., who are Indian children.

## **STATEMENT OF THE CASE**

In December 2021, the Department of Health and Human Services, Child and Family Services Division (DPHHS) placed R.B. (born in 2020) and L.B. (born in 2019) in foster care because their parents had repeatedly exposed them to substance abuse issues, domestic violence, and unstable/unsafe living conditions. (Doc. 1.)<sup>1</sup> Since the children are Indian children, DPHHS followed the requirements of both the Montana Code Annotated and the Indian Child Welfare Act (ICWA) throughout this case. (Docs. 1, 6, 15, 21.) The children were placed in foster care with R.D., a licensed, non-native, foster parent. (Docs. 11, 24, 80; 12/21/22 Tr.; 1/26/24 Tr. (Hr'g) at 36.)

C.C. (Mother) and M.B. (Father) stipulated to the court granting emergency protective services (EPS), adjudicating the children as youths in need of care, and granting temporary legal custody (TLC). (12/22/21 Tr.; 2/25/22 Tr.; Docs. 11, 12, 24.) The case was transferred to Treatment Court from March 9, 2022, until

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<sup>1</sup> Unless otherwise noted, citations to the district court record will be to *In re L.B.*, Cause No. DN-21-051.)

April 28, 2022. (2/23/21 Tr.; Docs. 17.10, 20, 23, 25.) DPHHS developed treatment plans for the parents, which were approved by the court. (Docs. 29-30, 32-33, 41-42; 7/1/22 Tr.)

The court extended TLC twice to allow the parents more time to complete their treatment plans. (9/30/22 Tr; 3/17/23 Tr.; Docs. 47, 58.) By the summer of 2023, given the parents' failure to successfully address the tasks and goals of their treatment plans, DPHHS consulted the parents' tribes and determined that it would be in the children's best interests to seek an order for guardianship. (Docs. 60-61, 71.)

The court extended TLC until the guardianship hearing could be conducted. (9/15/23 Tr.; Docs. 68-69.) On January 26, 2024, the district court granted the petition for guardianship. (Hr'g; Doc. 80.)

### **STATEMENT OF THE FACTS**

In the summer of 2021, this family was homeless and staying at the Samaritan House, a homeless shelter in Kalispell. (Doc. 1.) Shelter staff reported that when the parents were drinking alcohol, they did not feel safe, as the parents became verbally abusive and Father acted aggressively. (*Id.*) On July 1, 2021, Mother and Father were involved in a physical altercation, but left before law enforcement arrived. (*Id.*) Soon after, law enforcement received another call

about a domestic disturbance and located Mother, Father, and the two children.

(*Id.*) Father struck his hand on the pavement in frustration, and he had to go the hospital. (*Id.*) Mother also went to the hospital because she was overwhelmed and exhausted. (*Id.*) Child Protection Specialist (CPS) Brianna King (King) met with the parents and learned Samaritan House would not let the family back in for 30 days. (*Id.*) King confirmed that Mother was feeling better emotionally and that the family had access to WIC. (*Id.*)

DPHHS received an information-only report on August 1, 2021, that Father had been physical with the children and could not handle them when they were upset. (Doc. 1.) The reporter believed there was a warrant out for Father's arrest for breaking Mother's jaw in Wyoming. (*Id.*)

Two weeks later, law enforcement contacted DPHHS after being called to a disturbance between Mother and Father at a transient camp. (Doc. 1.) Father was intoxicated and Mother was asked to leave for the night. (*Id.*) However, within two hours, Mother returned and law enforcement was called back. (*Id.*) King met with the family. (*Id.*) Mother reported that Father drinks malt liquor and that their arguments are usually just shouting matches. (*Id.*) Mother was worried about affording diapers, formula, and milk. (*Id.*) Father told King he drank daily and explained he had recently lost his sister in an accident and his father to COVID. (*Id.*) King provided the family with a duffle bag of supplies (diapers, formula,



baby food) and initiated a Care Portal request that garnered over \$300 in gift cards. (*Id.*) Given the family's transient status and failure to stay in contact with DPHHS, King was not able to give the family the gift cards until she happened across the family on the local trail system. (*Id.*) King drove Mother to and from Walmart to help the family use the gift cards. (*Id.*)

Father was arrested for disorderly conduct on September 6, 2021. (Doc. 1.) The family was later trespassed from their location and many of the family's belongings were stolen. (*Id.*) The family planned to stay at Kalispell's new shelter, the Warming Center, when it opened in October 2021. (*Id.*)

On November 5, 2021, law enforcement was called to the Warming Center when Mother and Father were involved in a domestic disturbance. (Doc. 1.) Father, who was intoxicated, was aggressive and verbally abusive towards Mother and when staff tried to intervene, Father yelled at them. (*Id.*) Shelter staff reported that had someone not stopped the altercation, one of the children would have been kicked. (*Id.*) King learned Father was no longer allowed at the Warming Center, but Mother and the children could stay. (*Id.*) However, when King checked the center three days later, Mother was not there. (*Id.*) King attempted to locate the family by checking the fairgrounds, Depot Park, Walmart, the walking trail where she found them before, and the Samaritan House. (*Id.*) King could not locate the family. (*Id.*)

On November 12, 2021, Mother was evicted from a hotel (that a local shelter was paying for) because she kept allowing Father into the room. (Doc. 1.) Mother chose to leave the hotel with the children to join Father despite the fact Father continued to drink and was reportedly using inappropriate physical discipline. (*Id.*)

On December 14, 2021, Mother was charged with Partner/Family Member Assault. (Doc. 1.) Mother and Father had been drinking and the assault occurred in front of the children at the Motel 6. (*Id.*) King learned the family was not welcome back to the motel. (*Id.*) King met with Mother at the jail the next day. (*Id.*) Mother stated that she and Father had been drinking beer and they began arguing when Father yelled at and spanked L.B. for spilling soda. (*Id.*) Mother explained that Father had been kicked out of the Warming Center for arguing. (*Id.*) Mother agreed to go to DPHHS the next day to meet with King about a voluntary protection plan. (*Id.*) King attempted to find the family the next day, but was unsuccessful, so she contacted local law enforcement and requested an agency assist to locate the family. (*Id.*)

Law enforcement learned that the family would be at the Warming Center on December 18, 2021, and alerted DPHHS. (Doc. 1.) When the investigating CPS met with the parents and reviewed the recent domestic disturbances surrounding the parents' use of alcohol and the family's unstable living circumstances, Father argued with her. (*Id.*) Neither of the parents had secured

employment and were unable to name any family or friends they could turn to for support. (*Id.*) Based on the parents' continued pattern of substance abuse, domestic violence in the presence of the children, and inability to secure and maintain safe, stable living conditions despite months of supportive services, DPHHS placed the children in protective care. (*Id.*)

DPHHS learned that Mother is a member of the Blackfeet Tribe and Father is a member of the Northern Arapaho Tribe. (Docs. 1, 6.) In response to requests for verification of Indian child status, both tribes responded that the children were eligible for enrollment in that tribe.<sup>2</sup> (Docs. 1, 6.) Accordingly, the children met the definition of Indian children under ICWA and Montana's ICWA (MICWA). (*Id.*) DPHHS provided notice of involuntary child custody proceedings to the tribes, and the Northern Arapaho Tribe filed a notice of intervention and participated in the proceedings. (Docs. 4, 14.)

The parents stipulated to EPS and, upon their request, the show cause hearing was set for February 18, 2022, to give them time to work on the issues necessary to reunify the family. (12/22/21 Tr.; Docs. 11-12.) At the hearing, the parents confirmed DPHHS had made referrals for them to obtain chemical dependency (CD) and mental health evaluations at Gateway and for domestic

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<sup>2</sup> Eventually, the Blackfeet Tribe declined enrollment for the children and DPHHS facilitated getting the children enrolled with the Northern Arapaho Tribe. (Hr'g.)

violence prevention counseling. (*Id.*) DPHHS also provided drug/alcohol testing options. (*Id.*) The parents expressed interest in participating in Treatment Court, which the court encouraged. (*Id.*) The district court explained that through Treatment Court the parents could progress to community parenting more rapidly because they would be demonstrating sobriety through close monitoring. (*Id.*)

Both parents completed CD evaluations and were referred to Level 2.1 Intensive Outpatient treatment. (Doc. 42; Hr'g.) Father completed a mental health evaluation, which recommended weekly counseling. (*Id.*) Father tested positive for THC and alcohol on January 14, 2022, and failed to submit to further testing, so he was discharged from Compliance Monitoring Services (CMS). (*Id.*)

In February 2022, Mother separated from Father, obtained a temporary order of protection against him, and moved to the Abbey Shelter. (3/9/22 Tr.; Doc. 42.) The parents stipulated to adjudication and TLC on February 25, 2022. (2/25/22 Tr.; Doc. 24.) Father stopped visiting the children after he failed to attend his intake appointment at Bear Logic on February 26, 2022, despite confirming in open court the day before that he had the appointment. (Doc. 42; 2/25/22 Tr.; 3/9/22 Tr.) The case was transferred from district court to Treatment Court, but despite the court inviting him to join, Father chose not to participate. (2/25/22 Tr. at 23.) Upon inquiry from the court, Father reported he did not need help with

anything or have any specific problems the court should address. (*Id.*) Father reported that he had been rehired to work at Northern Plastic Industry. (*Id.*)

Mother attended only the first Treatment Court date on March 9, 2022. (3/9/22 Tr; 3/30/22; 4/27/22 Tr.; Hr'g; Docs. 26, 28, 42.) As of the end of March 2022, Mother had ceased all contact with DPHHS and stopped complying with alcohol monitoring or attending visits with the children. (*Id.*) Father failed to attend any counseling services at Gateway and was discharged from that provider. (*Id.*) Father contacted DPHHS on May 2, 3, and 16, 2022, but he did not have a phone so the CPS could not call him back. (Doc. 42; Hr'g at 46-47.) DPHHS secured a phone and paid for a call plan for Father, but could not deliver the phone because Father did not come to DPHHS or report where to find him. (*Id.*)

Since Mother was not attending Treatment Court, the case was transferred back to district court. (Doc. 26.) CPS Kim Fueston (Fueston) developed and forwarded proposed treatment plans for the parents in early May 2022 and requested the court set a hearing to approve the plans. (Docs. 29-30.) The parents did not appear on July 1, 2022, for the treatment plan hearing, but the court was advised that Father agreed with his plan's tasks and goals. (7/1/22 Tr.; Docs. 32-33, 41-42.) The court approved both the parents' plans. (*Id.*)

As of September 30, 2022, the parents' whereabouts remained unknown and, without objection, the court extended TLC. (9/30/22 Tr.; Docs. 39, 42.)

CPS Paulette Lawrence (Lawrence) finally located Father at the Warming Center on October 27, 2022. (Docs. 50-51.) Lawrence immediately set up weekly visits for Father, helped Father to sign up for Medicaid, and collected information to refer him for inpatient treatment. (*Id.*) After missing two visits due to illness, Father finally saw the children on November 21, 2022. (*Id.*) Father did not attend the next visit, but did attend the following one. (*Id.*) Lawrence gave Father a cell phone on December 5, 2022, but he failed to confirm the next two visits, so they did not occur. (*Id.*) On December 19, 2022, Father contacted Lawrence, complaining that his cell phone was not working properly. (*Id.*) Father was intoxicated and had been kicked out of the Warming Center, but was later allowed back in due to the cold temperatures. (*Id.*) Lawrence arranged for Father to see the children on December 27, 2022, but Father did not attend the visit. (*Id.*)

Lawrence diligently tried to get Father an updated CD evaluation so he could get into an inpatient treatment program as soon as possible. (Hr'g; Docs. 50, 51.) Although Father had stated he wanted to go to inpatient treatment, he failed to follow through with six bed dates that Lawrence had secured, along with transportation to get him there. (*Id.*) Lawrence inquired with the Northern Arapaho Tribe about any treatment options and learned about the White Bison program, but Father would not commit to attending that treatment facility. (*Id.*) Father told Lawrence he was an alcoholic and wanted to go to treatment but, based

on his behaviors, Lawrence did not believe Father was emotionally ready to attend or complete inpatient treatment. (*Id.*)

On January 26, 2023, Father was intoxicated at the Warming Center and initiated a fight during which he violently battered another man. (Doc. 51.) As a result, Father was permanently banned from the Warming Center. (*Id.*) Lawrence saw Father the next day at a gas station and brought him back to the DPHHS office where she fed him and provided over-the-counter medication for his injuries. (*Id.*) Within two weeks, Father was admitted to the hospital where he had to undergo medical detox. (*Id.*) Doctors noted he had damage to his lungs from excessive alcohol use and living in extreme cold temperatures. (*Id.*)

At the March 17, 2023 extension of TLC hearing, DPHHS reported Father had entered inpatient treatment in Missoula the day before. (3/17/23 Tr.; Docs. 58-59.) The program was designed for 60 to 90 days of treatment. (*Id.*) Mother's whereabouts remained unknown. (*Id.*) R.D. advised the court that R.B. was having seizures despite the medication he was taking, and they were planning to have genetic testing done for him at Shodair soon. (*Id.*) DPHHS was looking for a play therapist for L.B. (*Id.*) The court extended TLC without objection. (*Id.*)

On April 1, 2023, Father left inpatient treatment in Missoula and walked back to Kalispell. (Docs. 59-60, 68; Hr'g at 47.) Father was arrested in Pablo on outstanding warrants and Lawrence contacted the jail. (*Id.*) Father obtained an

updated CD evaluation from Cedar Creek in early May 2023, during which he disclosed that he first drank at age nine and currently drank daily. (*Id.*) Father entered inpatient treatment at Recovery Centers of Montana in Columbia Falls on May 10, 2023, but was discharged on June 8, 2023, having not completed the program. (*Id.*) His discharge summary reported that Father “did not put his sobriety first throughout treatment.” (Doc. 60 at 4.)

Lawrence tracked Father down at a public park two weeks later, encouraged him to reengage in visits, and emphasized she was available to help him. (Docs. 59, 60.) Father had facial injuries from being beaten up, but he declined to contact law enforcement. (*Id.*) Father returned to the Recovery Center on June 15, 2023, and stayed in the program until July 12, 2023, when Medicaid funding ran out. (*Id.*) Treatment staff noted Father engaged in treatment, but still struggled with accepting responsibility for his behaviors, and instead blamed his circumstances on other people and events. (*Id.*)

Shodair diagnosed R.B. with Alcohol Related Neurodevelopmental Delay and possibly with Parenti-Mignot Neurodevelopmental Syndrome. (Doc. 59.) This syndrome is characterized by impaired intellectual development, delays in motor skills and speech development, behavioral problems, and epilepsy. (*Id.*)

Attempts to arrange visits for Father proved challenging because he was homeless, and it was difficult to locate him to schedule times/places. (Doc. 60;



Hr’g at 52-54.) Lawrence asked Father if there was a time and place where he would be so the children could be brought to him, but Father was unable to provide such information. (*Id.*) Father could not participate in the summer program at the Warming Center due to his ongoing alcohol use and aggressive behaviors. (*Id.*) In the fall, Father was permitted to return to the Warming Center under specific rules, but staff reported Father continued to use alcohol to the point of intoxication. (*Id.*)

Given Mother’s complete lack of contact for over a year and Father’s inability to complete necessary substance abuse treatment or secure a safe/stable home, Lawrence consulted with both the Northern Arapaho Tribe and the Blackfeet Tribe about permanency options for the children. (Docs. 59, 61, 71.) Both tribal representatives supported R.D. becoming the children’s guardian. (*Id.*)

An Office of the Public Defender social worker, Jennifer Ball (Ball), began working on this case in June 2023 and arranged for Father to reenter treatment at the Recovery Center on July 25, 2023. (Doc. 74; Hr’g at 48, 114-16.) However, Father left treatment against staff advice six days later. (*Id.*) On August 31, 2023, Father re-enrolled in treatment at a Recovery Center in Clinton with the help of Mylene Widner (Widner) at Western Montana Health Center. (*Id.*) Lawrence consulted with Widner, who is Native American, about effectively communicating with Father. (Doc. 68; Hr’g.)

DPHHS sought a third extension of TLC to provide additional time to finalize the guardianship with R.D. and filed a petition to approve the guardianship permanency plan. (Docs. 60, 61.) Father's counsel took no position on extending TLC, but advised the court that Father opposed the permanency plan of guardianship and wanted to work towards reunification. (9/15/23 Tr.) The court extended TLC and approved the permanency plan. (*Id.*; Docs. 68, 69.)

Lawrence drove to Clinton to meet with Father on September 29, 2023. (Doc. 74; Hr'g.) Lawrence discussed Father's plans and how she could assist him. (*Id.*) They also discussed the children's tribal enrollment status. (*Id.*) Father was successfully discharged from treatment on October 4, 2023. (*Id.*) Lawrence arranged a visit for Father and the children on November 1, 2023. (*Id.*) When Ball was unable to pick Father up for the visit, Lawrence drove to the park to get him, but could not locate Father. (*Id.*)

Lawrence helped Father get into the Samaritan House and was trying, unsuccessfully, to help him obtain identification to secure permanent living quarters and a phone. (Docs. 71, 74.) At the end of November 2023, Father re-enrolled in treatment at the Recovery Center where he remained until January 1, 2024. (*Id.*)

DPHHS petitioned the court for an order appointing R.D. as the children's guardian on January 3, 2024. (Doc. 71.) Lawrence arranged a visit for Father and

the children for mid-January. (Hr’g at 49-50, 92-94.) Father arrived intoxicated and admitted to Lawrence that he had relapsed. (*Id.*) Lawrence allowed the visit to continue since Ball was with Father. (*Id.*)

The court conducted a guardianship hearing on January 26, 2024. (Hr’g.) Mother’s counsel requested a continuance because Mother had recently texted Lawrence. (*Id.* at 25-30.) Father’s counsel also asked for a continuance, explaining that Father wanted the opportunity to observe Treatment Court. (*Id.*) Father’s counsel acknowledged this request was late in the proceedings, but asserted that Father was “in a place now where he is wanting that service,” and asserted Treatment Court was “an active effort” that the State and court should make for Father. (*Id.* at 30.) The State opposed continuing the hearing, noting that Mother had not been in contact with DPHHS for two years and Father continued to drink despite attending multiple inpatient treatment programs and recently completing a program. (*Id.* at 30-31.) The court denied both motions to continue, noting that the children had been adjudicated as youths in need of care nearly two years ago. (*Id.*)

DPHHS presented testimony from Lawrence and Qualified Expert Witness (QEW) Anna Marie White (White) and Ball was the only witness called on Father’s behalf. (Hr’g.) Ball described the interactions she had with Father and the efforts she made to help him. (Hr’g at 113-37.)

Lawrence described the various and ongoing active efforts she made for Father, Mother, and the children. (Hr’g at 34-99.) Lawrence explained that Father had been in five inpatient treatment programs, but either failed to finish them or relapsed directly after discharge. (*Id.*) Lawrence also testified that the Warming Center had a licensed addictions counselor who offered to work with Father, but Father did not stay. (Hr’g at 54-57.) Lawrence praised the support Father received from Ball, who had helped Lawrence try to arrange visits with the children. (*Id.*) However, despite those efforts, since Lawrence took over the case in October 2022, Father had seen the children only five times and had arrived intoxicated to the visit two weeks before the hearing. (*Id.*) Lawrence specifically addressed and refuted Father’s challenge that she had not returned his calls, and testified that she had driven Father to Stepping Stones, a sober living facility. (*Id.* at 79-83.)

Lawrence described the children’s special needs, noting that L.B. participated in speech therapy and mental health counseling, having been diagnosed with depression and anxiety that stemmed from her fear responses. (Hr’g at 58-65.) R.B.’s seizures had stopped, but he was still being evaluated for fetal alcohol spectrum disorder. (*Id.*) R.B. was delayed, but improving, and also participated in speech therapy. (*Id.*) Lawrence explained that R.D. was dedicated to the long-term care of the children, which included incorporating their Native American heritage into their upbringing and maintaining contact with extended

family. (*Id.*) Lawrence testified that she tried to bring active efforts to all the families with whom she worked and believed she had made active efforts in this case that included specific Native American programs or providers. (Hr'g at 68-72.)

In Lawrence's opinion, the children needed permanency at this juncture and continued active efforts would not be productive as neither parent had demonstrated they were able to safely parent the children. (Hr'g at 60-70; 92-96.) In response to Father's request to continue the guardianship hearing for three months to allow him to enter Treatment Court, Lawrence, who had been a CPS in Treatment Court for six months, explained that it generally takes a year to complete Treatment Court and six to nine months before a person establishes consistent engagement. (*Id.*) Lawrence testified that the children's permanency should not be delayed for Father to begin Treatment Court given that he had been unable to achieve or maintain sobriety despite multiple opportunities to engage in treatment. (*Id.*) Lawrence added that if guardianship was granted to R.D. and DPHHS was no longer formally involved with this family, there were still community resources available to Father to address his substance abuse and lack of housing. (*Id.* at 95-97.)

White testified that in her opinion, returning the children to either parent would likely result in serious emotional or physical damage to the children. (Hr'g

at 99-112.) White acknowledged that as a non-native foster care parent, R.D. was the lowest on the continuum of preferred placements, but testified that DPHHS had made substantial efforts to find suitable familial placements, but had been unsuccessful. (*Id.*) White concurred with the two tribes' positions that guardianship was appropriate for these children. (*Id.*) In White's opinion, DPHHS had made active efforts to reunite this family, but additional efforts would not be productive. (*Id.*) White also testified that granting guardianship to R.D. was in the best interests of R.B. and L.B. (*Id.*)

In closing remarks, Father's counsel requested the court continue the guardianship proceeding to give Father the chance to participate in Treatment Court. (Hr'g at 141.) The children's attorney thought that guardianship should be granted, noting that she did not believe Father would demonstrate sustained sobriety and stability in the foreseeable future. (*Id.* at 142.) The children's attorney further stated that making R.D. the guardian to R.B. and L.B. would be in the children's best interests and further efforts to reunite the family would not be successful. (*Id.*)

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## **STANDARD OF REVIEW**

This Court reviews the factual findings of a district court to determine if they are clearly erroneous and reviews conclusions of law to determine if they are correct. *In re R.K.*, 2023 MT 161, ¶ 21, 413 Mont. 184, 534 P.3d 659. An appellant bears the burden of establishing error by the district court; therefore, it is the appellant's burden on appeal to establish that the district court's factual findings are clearly erroneous, and its conclusions of law are incorrect. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825 (citation omitted).

“A district court's application of the law to the facts of a case is a legal conclusion which [this Court] review[s] to determine whether the interpretation of the law is correct.” *In re J.S.*, 2014 MT 79, ¶ 14, 374 Mont. 329, 321 P.3d 103 (citation omitted). 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 this Court a mistake was made. *J.S.*, ¶ 14.

This Court reviews “the evidence in the light most favorable to the prevailing party when determining 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).

## **SUMMARY OF THE ARGUMENT**

Father challenges only two of the court's conclusions of law in its order granting guardianship: whether DPHHS made active efforts and whether further efforts to reunite Father with R.B. and L.B. would likely have been unproductive and reunification of Father with the children would have been contrary to the best interests of the children. The record contains clear and convincing evidence supporting the court's findings.

Father has not carried his burden to establish that the district court misapprehended the substantial, credible evidence that DPHHS made active efforts relative to both parents and the children and that those efforts proved unsuccessful. DPHHS's efforts were tailored towards the reason for the children's removal: the parents' substance abuse issues that led to unstable living environments and frequent domestic violence/disturbances. However, within a month of TLC being granted, Mother's whereabouts were unknown and Father chose not to participate in either CD or mental health programs.

Over the next year and half, DPHHS made affirmative, active, thorough, and timely efforts for this family, tailored for getting the parents substance abuse treatment. Many of the active efforts the CPSs made, particularly Lawrence, revolved around simply locating the parents. Lawrence made multiple referrals for Father to enter CD treatment. While he started five different programs, he did not



successfully complete them and failed to maintain contact with the CPSs despite being given a cell phone. Lawrence made extraordinary attempts to secure services for Father or simply locate him. Lawrence also reached out to Father's tribe for CD treatment (which Father declined to enter) and consulted with a Widner, a Native American service provider, to help her communicate better with Father. Unfortunately, Lawrence's efforts were not successful because of Father's apathy towards treatment opportunities and unwillingness/inability to consistently engage in offered services.

Although Father did finally complete an inpatient treatment program in early 2024, he relapsed soon after. With Father exhibiting no sustained progress despite years of attempts to assist him, the court's finding that continued active efforts would likely be unsuccessful was not erroneous. The court properly relied upon Father's past conduct as the best predictor of this ability to change and correctly concluded the children, who had special needs and were at vulnerable ages, should not wait any longer for permanency. Father had only recently demonstrated a willingness to address his substance abuse issue. Father lacked stable housing and offered no relapse prevention plan or intent to reenter treatment. Father's belligerent and uncooperative behaviors at the guardianship hearing further demonstrated it would be contrary to the children's best interests to be returned to his care.

## **ARGUMENT**

### **I. Applicable law and Father's limited challenges to the court's order granting guardianship.**

Pursuant to § 41-3-444(2), MCA (2023), a court may grant a guardianship if the court finds the following:

(a) the department has given its written consent to the appointment of the guardian, whether the guardianship is to be subsidized or not;

(b) if the guardianship is to be subsidized, the department has given its written consent after the department has considered initiating or continuing financial subsidies pursuant to subsection (8);

(c) the child has been adjudicated a youth in need of care;

(d) the department has made reasonable efforts to reunite the parent and child, further efforts to reunite the parent and child by the department would likely be unproductive, and reunification of the parent and child would be contrary to the best interests of the child;

(e) the child has lived with the potential guardian in a family setting and the potential guardian is committed to providing a long-term relationship with the child;

(f) it is in the best interests of the child to remain or be placed with the potential guardian;

(g) either termination of parental rights to the child is not in the child's best interests or parental rights to the child have been terminated, but adoption is not in the child's best interests; and

(h) if the child concerning whom the petition for guardianship has been filed is an Indian child, as defined in [ICWA and MICWA], the Indian child's tribe has received notification from the state of the initiation of the proceedings.

When the child at issue in a guardianship proceeding is an Indian child, additional criteria under ICWA and § 41-3-1301, et al, MCA (MICWA), must be established because placement of an Indian child in the home of a guardian constitutes a “foster care placement.” 25 U.S.C. § 1903(1);<sup>3</sup> §§ 41-3-1303(3), (6), MCA. Thus, in addition to the criteria under § 41-3-444, MCA, to grant a guardianship petition for an Indian child, the court must find that: (1) active efforts were made to provide remedial services and rehabilitative programs but those efforts were not successful; and (2) “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child,” as supported by testimony from a QEW. *See* §§ 1912(d), (e); §§ 41-3-1320(1)(a), (b), MCA.

The burden of proof in a guardianship proceeding concerning an Indian child is “clear and convincing evidence.” *In re G.S., Jr.*, 2002 MT 245, ¶ 33, 312 Mont. 108, 59 P.3d 1063; 25 C.F.R. § 23.121 (hereinafter Regulations); 81 Fed. Reg. 96,476-96,477 (December 16, 2016), § E.6 (hereinafter Guidelines).<sup>4</sup> In Dependent Neglect proceedings,

clear and convincing proof requires that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a

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<sup>3</sup> For convenience, short citations to ICWA will reference only the relevant subsection (*i.e.*, § 1903(1).)

<sup>4</sup> This Court applies ICWA Guidelines as persuasive authority. *In re A.L.D.*, 2018 MT 112, ¶ 14, 391 Mont. 273, 417 P.3d 342 (citation omitted).

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.

*G.S.*, ¶ 39 (citation omitted). The fact that evidence may conflict does not automatically preclude a determination that clear and convincing evidence supports a given position. *In re A.K.*, 2015 MT 116, ¶ 31, 379 Mont. 41, 347 P.3d 711.

Father challenges only two of the court's conclusions of law: (a) whether DPHHS made active efforts; and (b) whether further efforts to reunite Father with L.B. and R.B. would likely be unproductive and reunification of Father with the children would be contrary to the best interests of the children. (Opening Brief (Br.) at 15-38.) Accordingly, Father has waived appellate review of the court's findings under §§ 41-3-444(1)(a), (b), (c), (e), (f), (g) and (h), MCA, and § 1912(e) and § 41-3-1320(b), MCA. *See* M. R. App. P. 12(3); *State v. Myran*, 2012 MT 252, ¶ 19, 366 Mont. 532, 289 P.3d 118.

## **II. The district court did not err when it granted DPHHS's petition for guardianship.**

### **A. DPHHS provided active efforts, but they were unsuccessful.**

Under ICWA and MICWA:

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall

satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

§ 1912(d); § 41-3-1320(1)(a), MCA. “Active efforts” are defined as “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family,” and involve a CPS helping a parent “through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan” by implementing, when possible, applicable cultural and social norms with the child’s tribe. *See* §§ 41-3-1303(1), -1319, MCA; Regulation, § 23.2; Guideline, § E.1. ICWA Regulations further state that “[a]ctive efforts must be documented in detail in the record.” § 23.120.

This Court has noted that “[c]ommon sense construction of the meaning of ‘active efforts’ requires that ‘timely affirmative steps be taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services [designed] to remedy problems which might lead to severance of the parent-child relationship.’” *G.S.*, ¶ 36 (citation omitted). In meeting this “heightened responsibility,” the State “cannot simply wait for a parent to complete a treatment plan.” *See also In re T.W.F.*, 2009 MT 207, ¶ 27, 351 Mont. 233, 210 P.3d 174. When determining whether DPHHS has made active efforts, it is appropriate to consider efforts provided to the children and the other parent since consideration of all the efforts employed by DPHHS promotes the

purpose of § 1912(d) (prevent the breakup of the Indian family). *A.L.D.*, ¶ 8 (citing *In re D.S.B.*, 2013 MT 112, ¶ 17, 370 Mont. 37, 300 P.3d 702); *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556 (active efforts include services provided to other parent and children).

DPHHS made affirmative, active, thorough, and timely efforts for this family, beginning in July 2021, when King investigated the first referral and soon after implemented services and assistance to prevent removal of the children. These efforts included the following: investigating multiple reports and reviewing DPHHS history; continually assessing the family's circumstances and the safety/health of the children; diligently searching for the family; meeting with the parents; offering/providing referral assistance (*e.g.*, housing, transportation, Care Portal request that garnered \$300 in gift cards); reviewing DPHHS history; interviewing collateral contacts; offering/implementing voluntary protective services; collaborating with law enforcement and shelters; identifying and referring the parents to mental health, substance abuse, and peer support services; transporting the parents to obtain goods/services; visiting Mother in jail; and finding and visiting the parents at shelters, hotels, tent camps, and other temporary living locations. (Docs. 1, 11, 24; Hr'g.)

Once the children were removed and placed with R.D., DPHHS continued to implement the services already in place to help the parents address their substance

abuse issues, lack of housing/stability, and mental/emotional health. For example, DPHHS effectuated the following efforts: supervised visitation through Bear Logic; mental health and CD evaluations for both parents at Gateway; Treatment Court; alcohol/drug testing through CMS; (SCRAM; breathalyzer; UAs); Family Engagement Meetings (which tribal representative participated in); diligent search/inquiry for kinship placement options; and development of treatment plans specially tailored to address the conditions that led to the children's removal. (Docs. 28-30, 39, 41, 71; Hr'g.)

The CPSs made considerable efforts to keep the children together and follow ICWA placement preferences by repeatedly asking the parents for possible placement options, conducting several Seneca searches, reaching out to all the tribes involved to learn their placement preferences and obtain names of relatives or possible tribal foster families, and contacting all possible family placement options. (Docs. 11, 24, 39, 42, 47, 50-51, 58-61, 68-71, 74, 80; Hr'g.)

DPHHS also implemented numerous services for the children, including the following: counseling-play therapy referral for L.B.; speech therapy for L.B. and R.B.; occupational therapy for R.B.; surgeries to implant ear tubes for both children; evaluations for both children at the Child Development Center; Head Start for L.B.; regular home visits with the children; arrangements for R.B. to be tested at Shodair to rule out genetic problems and/or FAS; evaluation and

treatment for R.B.'s seizures; assessing R.B. to see if he qualified for SSDI; facilitating contact between R.D. and Cathy Calf Boss (Blackfeet Tribe) and Shelley Mbonu (Northern Arapaho Tribe) to promote continuation of Native American traditions in the children's upbringing; working with R.D. to set up a specific email account for the parents to communicate with her about the children; and assisting with the children's enrollment in the Northern Arapaho Tribe. (*Id.* .)

By September 2022 and the first TLC extension, Mother's whereabouts were unknown. (Docs. 42, 47.) Over the next year, DPHHS continued to implement active efforts for this family, including the following efforts relative to Mother, who had left the Kalispell area and gone to Missoula: repeatedly calling Mother's cell; sending Mother Facebook messages; contacting the Blackfeet Tribe (Calf Boss Ribs, Mary Cooper, Kerra Pretty Paint, Browning Family Services); contacting QEW White; contacting the Flathead Indian Reservation; calling and sending a letter to Mary Ann Madplume (relative of Mother); talking to Mother's step-mother (R.C.) throughout the case and trying to set up virtual visits; sending a Facebook message to the woman raising Mother's other two children; writing dozens of letters to persons identified through Seneca search; finding and calling Mother's sister (C.H.) about being a placement; calling Mother's brother six times about being a placement; obtaining a Missoula City Police report concerning Mother and calling Mother's number listed on the report; calling Missoula City



about homeless encampments; driving to Missoula and looking for Mother in areas where homeless people gather; calling Billings Police and U.S. Marshals to see if Mother had been arrested and to get a number; and, during the week before the guardianship hearing, replying to Mother's message, advising her about the hearing, encouraging her to accept services, and sending photos of the children. (Docs. 51, 58, 60-61, 68-69, 71; Hr'g.)

While Father stayed in the Kalispell area, the CPSs' attempts to effectuate services were hampered by Father's unwillingness to engage in treatment and the difficulty Lawrence had in locating and maintaining contact with Father. Every time Lawrence saw Father in the community, she stopped and talked with him, encouraged him to enter treatment, and tried to arrange visits. (Docs. 58, 68, 71; Hr'g.) Lawrence specifically sought assistance from Widner in improving her communications and interactions with Father. (*Id.* .) From the fall of 2022 until the guardianship hearing, Lawrence diligently tried to effectuate and implement active efforts for Father to help him obtain/maintain sobriety and stable housing. For example, Lawrence: repeatedly contacted shelters, treatment centers, and mental health providers to locate Father; reached out to Father's personal friend, "Aunt Mary;" went to homeless camps to find Father; arranged transportation to a treatment center; provided meals and OTC medication; had regular contact with Shelley Mbonu (Northern Arapaho Tribal representative) for guidance on how to

best proceed with the parents and the family and alternative CD treatment programs (*e.g.*, White Bison); called Tribal Police and the Pablo jail when Father was arrested there; provided multiple cell phones with call plans; made multiple referrals to CD treatment facilities; collaborated with Widner; drove Father to the Social Security office and Stepping Stones (a sober living facility) to help him apply for assistance/housing; tried to schedule visits for Father and work around his lack of phone and housing; collaborated with Ball in arranging and transporting Father to visits; sent a supportive letter and card to Father when he was in treatment; and drove to Clinton to see Father at treatment to encourage him, provide photos of the children, and make sure he had a phone. (Docs. 68, 71; Hr’g.)

The record here is replete with substantial, credible evidence supporting the district court’s findings that DPHHS implemented active efforts for Mother, Father, and the children. The diligent, active, and thorough efforts cannot be negated or diminished by Father’s inability or apathy to engage in the services offered or communicate with DPHHS. *D.S.B.*, ¶ 15.

This Court has consistently explained that, while active efforts imply a heightened responsibility to the Department, “in determining whether the state had made active efforts . . . a court may consider a parent’s demonstrated apathy and indifference to participating in treatment.” *A.N.*, ¶ 22 (citation omitted). “The

success of the remedial services and rehabilitative programs concomitantly depends on the parents' ability and willingness to develop the necessary skills to provide their child with a safe living environment.” *In re I.B.*, 2011 MT 82, ¶ 41, 360 Mont. 132, 255 P.3d 56 (citing *T.W.F.*, ¶ 27).

In *A.N.*, DPHHS held two family engagement meetings, paid for the father's sex-offender evaluation, and arranged a visit between the father and the children that the father did not attend. *A.N.*, ¶ 24. Other than one attempt to arrange a visit, the father “disappeared” for nearly a year, and DPHHS's attempts to set up telephone contact between the children and the father were stifled because of his failure to maintain contact with the social worker. *A.N.*, ¶¶ 6, 24. The father's treatment plans included services provided by DPHHS such as CD evaluations and treatment, random drug screens, counseling sessions, and parenting classes. *A.N.*, at ¶ 7. Despite these efforts, the father failed to achieve any of those tasks, mainly due to his failure to maintain contact with his social worker. *A.N.*, at ¶¶ 8-11. In affirming the lower court's order finding active efforts had been made, this Court explained that DPHHS could not have been more active given the father's complete unavailability, which “prevented” DPHHS from making additional referrals for more intensive services. *A.N.*, ¶ 25.

Similarly, in *D.S.B.*, the father failed to avail himself of services (*i.e.*, two treatment plans, social worker assistance, visitation, drug testing, chemical

dependency treatment, counseling, referrals to treatment providers, and parental coaching) prior to his incarceration. *D.S.B.*, *supra*. This Court concluded the father's unwillingness to participate did not negate DPHHS's active efforts.

*D.S.B.*, ¶¶ 15-17. Notably, the district courts' active efforts findings that this Court affirmed in *A.N.* and *D.S.B.* involved termination of parental rights where the burden of proof was beyond a reasonable doubt. When compared to the active efforts made in those cases, DPHHS's active efforts in this case were just as affirmative, timely, and comprehensive, and would have met even the beyond a reasonable doubt burden of proof. Yet, here, DPHHS had to establish the ICWA/MICWA and guardianship criteria by only clear and convincing evidence. DPHHS met its burden.

King, Fueston, and Lawrence implemented significant, diligent, timely, affirmative, and inclusive efforts to prevent the breakup of this family through the services provided for L.B. and R.B. and their parents. However, just as in *D.S.B.* and *A.N.*, Father's failure to accept those services, inability to follow through with treatment, and lack of desire to maintain contact with the CPSs who were trying to assist him rendered the litany of active efforts unsuccessful. *See I.B.*, ¶ 41. Father's apathy rendered Ball's efforts unsuccessful as well. *See Jude M. v. State*, 394 P.3d 543, 555 (Alaska 2017) (efforts made by other agencies can be considered when assessing efficacy of active efforts; ICWA requires finding only that "active efforts

have been made,” it does not mandate only efforts made by DPHHS are considered).

The crux of Father’s problems was his substance abuse history. Father’s treatment plan and the active efforts DPHHS tried to implement properly targeted Father’s need for CD treatment and accountability to achieve and maintain sobriety. *See* § 41-3-1303(1), MCA (active efforts should be “tailored” to the fact/circumstances of the parent/child/family). Unless and until he successfully addressed that issue, his ability to safely parent and maintain safe/stable housing or employment was limited. Only after two years of DPHHS intervention, during which Father declined the court’s invitation to participate in Treatment Court and left at least five treatment programs prior to completion, did Father commit to addressing his substance abuse problem. And then, despite finally completing a treatment program, within two weeks, Father relapsed and went to his visitation intoxicated. Father’s failure to successfully engage in offered services does not nullify the fact that DPHHS made active efforts for this family.

Father faults Lawrence for not providing more culturally appropriate and tailored services. Father’s claim fails to appreciate the lack of specific Native American services available to Lawrence locally and statewide as confirmed by Ball at the guardianship hearing. Both ICWA and MICWA recognize that there are limited Native American-focused treatment opportunities in many Montana

communities by qualifying the requirements for culturally appropriate services to be provided “to the maximum extent *possible*.” See Regulation, § 23.2; § 41-3-1319(4)(a), MCA (emphasis added).

Additionally, this argument ignores the extraordinary lengths Lawrence went to in identifying and securing services that incorporated Native American norms and beliefs. As the court noted, Lawrence had significant contact with members and services providers from both the Blackfeet Tribe and Northern Arapaho Tribe. Lawrence also sought specific advice from Widner to learn how to better communicate with Father. Lawrence went out of her way to track down Father, encourage him to seek and stay with treatment, and arrange for him to see the children. Lawrence also discovered a possible CD treatment opportunity at White Bison through Father’s tribe, but Father declined to participate. Additionally, Father refused the district court’s invitation to participate in Treatment Court where his sobriety would be closely monitored. The record establishes that DPHHS, “to the maximum extent possible,” searched for and offered culturally appropriate services.

Father suggests that all the CPSs did was make referrals. The record dispels this claim. The thrust of Lawrence’s efforts for Mother and Father was to simply locate them and convince them to take advantage of the services she was trying to get them to use. If and when she found them, Lawrence would advise them of the

referrals she could make and inquire what services they would engage in.

Lawrence used every chance she had to connect with the parents and convince them to hear what referrals she made/would make. The parents simply did not want to engage in any treatment, no matter what or how many referrals Lawrence attempted to make.

But, as Lawrence testified, Father's behaviors at the guardianship hearing (argumentative, resistant to assistance, belligerent) were consistent with his behaviors when she had interacted with him when he was intoxicated and declined the treatment opportunities she offered. These behaviors were also consistent with the circumstances that required DPHHS intervention in December 2021. They stemmed from Father's substance abuse issues, not his lack of employment or stable housing.

Contrary to Father's claim on appeal, DPHHS did not intervene with this family simply because of poverty and homelessness. The record clearly establishes that it was the parents' substance abuse and domestic violence that were the reason for DPHHS intervention. The parents' inability to remain sober led to disturbances, which in turn led to the parents being arrested or kicked out of safe shelters. The record refutes Father's complaint that DPHHS did not try to assist him in securing housing (*e.g.*, Lawrence drove Father to Stepping Stones to get an application, worked with Father to obtain identification). But, as the record

shows, Father's substance abuse and resulting aggressive/belligerent behaviors often caused him to be trespassed from housing opportunities. Even Ball testified that it was not until recently that she was able to assist Father with housing and employment.

Father complains that DPHHS should have made more efforts to assist him with employment and his mental health (*e.g.*, grief, historical trauma). (Br. at 20-21.) But the record shows Father did obtain a mental health evaluation and was offered counseling, but he chose not to attend. The record also shows that, after the children were adjudicated as youths in need of care, Father secured employment on his own by getting rehired by Northern Plastic Industry. Father offers no specific barrier to his ability to become gainfully employed.

Ultimately, just as with housing, unless and until Father achieved and maintained sobriety, he would not be able to engage in meaningful mental health services or maintain employment. Father finally appeared to be close to altering this vicious circle of instability when he completed CD treatment in early 2024. However, he returned to drinking within two weeks. Father faults DPHHS for not reassessing what he needed once he completed treatment. (Br.) However, Father did not complete treatment until early 2024, by which time DPHHS had petitioned for guardianship, and the hearing on the petition was held three weeks later.



Finally, the efforts documented in the record and discussed at the guardianship hearing clearly met Regulation § 23.10. During her testimony and statements to the court at hearings, Lawrence reviewed and referenced the multitude of efforts she made to assist Father with achieving sobriety and stability, to find Mother to get her engaged in treatment, and to ensure the children received supportive services for their special needs. Additionally, along with the court's orders and the CPSs' affidavits, the CASA reports and Foster Care Review reports also contain details about the efforts made for this family.

DPHHS made affirmative, active, thorough, and timely efforts for this family. Father's appeal essentially 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.K.*, ¶ 31. This Court has repeatedly held it is not in the position to evaluate the evidence for a different outcome, *see In re A.B.*, 2020 MT 64, ¶ 40, 399 Mont. 219, 460 P.3d 405, and it will not reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence for that of the district court. *In re A.N.W.*, 2006 MT 42, ¶ 28, 331 Mont. 208, 130 P.3d 619.

The district court's findings were supported by clear and convincing evidence from the hearings and affidavits that were not contested. The record in total establishes that the court did not misapprehend the effect of the evidence, and the court did not make a mistake. *J.S.*, ¶ 14. Substantial evidence establishes that “a rational trier of fact could have concluded that [DPHHS] had made ‘active efforts’ to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful.” *See D.S.B.*, ¶ 17. Father has not carried his burden of establishing error by the district court.

**B. Clear and convincing evidence established that further efforts to reunite Father and the children would have likely been unproductive and reunification of the children with Father would have been contrary to the best interests of the children.**

Determining whether continued efforts to reunify a parent and child would be productive under subsection § 41-3-444(2)(d), MCA, is akin to the findings required under § 41-3-609(1)(f), MCA (whether the conduct/condition rendering a parent unfit/unable to parent is likely to change in a reasonable period of time), as both of these criteria concern a parent's capacity to change. Also, under both these criteria, a parent's capacity for change is relative to the success/failure of intervention efforts.

Under the guardianship criteria, “efforts to reunite” are specifically contemplated when determining the likelihood of them being “unproductive.” Relative to findings for § 41-3-609(1)(f), MCA, this Court has explained, DPHHS’s efforts “may be a predicate for finding that the conduct or condition rendering a parent unfit, unwilling, or unable to parent is unlikely to change within a reasonable time.” *In re R.L.*, 2019 MT 267, ¶ 18, 397 Mont. 507, 452 P.3d 890; *In re C.M.*, 2019 MT 227, ¶ 22, 397 Mont. 275, 449 P.3d 806. As this Court further explained, “[w]hile, in some cases, a ‘conclusion that a parent is unlikely to change could be called into question if the Department failed to make reasonable efforts to assist the parent’ . . . , in other cases, ‘a parent’s unlikelihood of change may well be unaffected by the Department’s efforts.’” *In re A.M.G.*, 2022 MT 175, ¶ 22, 410 Mont. 25, 517 P.3d 149.

Thus, the principles employed to evaluate a court’s findings under § 41-3-609(1)(f), MCA, also inform evaluation of the court’s findings under § 41-3-444(2)(d), MCA.

As this Court has observed, when making determinations under § 41-3-609(1)(f), MCA, the inquiry is not “whether a parent has made progress or would make some progress in the future,” but rather, “whether the parent is likely to make enough progress within a reasonable time to overcome the circumstances rendering [the parent] unfit to parent.” *A.B.*, ¶ 27. When making this determination, this

Court has consistently advised that the district court is “required to assess the past and present conduct of the parent.” *A.B.*, ¶ 27.

On appeal, Father offers only speculation that he would succeed in obtaining and maintaining sobriety and stable housing. In contrast, Father’s past and present conduct strongly indicated that additional active efforts would not have been productive, and it was contrary to the children’s best interests to be returned to his care. As established, for nearly two years Father was unable/unwilling to address his substance abuse issues, which were the root cause of his inability to maintain housing or address his mental health.

Father is incorrect that he “successfully completed in-patient treatment four times.” (Br. at 32.) Father completed only one program after entering and leaving at least five others without successfully completing them. Sadly, Father chose not to stay at the Warming House where a specific program was designed to assist people with sobriety after treatment.

Although Father had finally completed an inpatient treatment program, he immediately relapsed and did not present any evidence of his plan to return to treatment or even describe to the court that he had a relapse plan in place.

Moreover, while evidence of rehabilitation may be germane to the issue of a parent’s ability to care for his child in the future, it does not render a district court powerless to find future danger to the child, it is simply evidence to be considered by the

district court and is subject to the same standard of review as any other evidence. *In re A.S.*, 2002 MT 265, ¶ 23, 312 Mont. 277, 59 P.3d 382; *In re A.J.E. III*, 2006 MT 41, ¶ 27, 331 Mont. 198, 130 P.3d 612 (“evidence of rehabilitation does not render a district court powerless to find future danger to the child, it is simply evidence to be considered by the district court”).

Father’s speculation that had he been able to attend Treatment Court he would have maintained sobriety is undermined by the record. Additionally, as Lawrence testified, it takes 6 to 12 months to complete Treatment Court. The children had been in foster care for 2 years and deserved permanency.

It would have been contrary to the children’s best interests to return them to Father’s care when he had recently relapsed after completing treatment. The children, who were under five years old, would have been completely dependent upon Father for their basic needs, which Father was unable to provide. Father also had a history of aggression when he was drinking and had not achieved or sustained sobriety. Finally, both children had special needs that would require a safe, consistent, and attentive caregiver. While Father exhibited caring and nurturing capacities during the few supervised visits he attended, that did not change the fact that Father had yet to successfully address his substance abuse problem. Until he did so, Father could not establish that he could provide the safety, security, and sober home-life the children needed.

Viewing the evidence in a light most favorable to DPHHS, substantial credible evidence supports the court's finding that clear and convincing evidence established that it was unlikely continued active efforts would have been productive and reunifying the children with Father would have been contrary to the children's best interests. *J.B.*, ¶ 10. The court's findings of fact are not clearly erroneous and its conclusion of law, that the criteria for issuing a decree of guardianship to R.D. were met, was correct. *J.S.*, ¶ 14. Father has not carried his burden to establish that the district court's findings were clearly erroneous. *D.F.*, ¶ 22.

### **CONCLUSION**

The district court's orders granting guardianship should be affirmed.

Respectfully submitted this 7th day of August, 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 9,491 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ *Katie F. Schulz*

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I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-07-2024:

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Riverton WY 82501  
Service Method: Conventional

Susan Blades CASA of Flathead County  
1203 U.S. Hwy 2 West  
Suite 37  
Kalispell MT 59901  
Service Method: Conventional

Electronically signed by Wendi Waterman on behalf of Kathryn Fey Schulz  
Dated: 08-07-2024