
IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA 24-0346

IN THE MATTER OF:

B.B., C.B. AND A.B.,

Youths In Need Of Care.

ANDERS BRIEF

On Appeal from Montana's Eleventh Judicial District Court,
Flathead County, The Honorable Amy Eddy Presiding

APPEARANCES:

ATTORNEYS FOR MOTHER AND
APPELLANT:

GREGORY D. BIRDSONG
Birdsong Law Office
P.O. Box 4051
Santa Fe, NM 87502

ATTORNEYS FOR PLAINTIFF AND
APPELLANT:

Austin Miles Knudsen
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401

Travis R. Ahner
Flathead County Attorney's Office
820 S. Main
Kalispell, MT 599-1

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STATEMENT OF THE ISSUE

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

STATEMENT OF THE CASE

Mother and Appellant M.A.F. , appeals the Order, entered May 8, 2024 by the Montana's Eleventh Judicial District Court, Flathead County, terminating her parental rights to B.B. (5 years old), C.B. (4 years old) and A.B. (2 years old). (Appendix A) The rights of the child's birth father, K.B., were also terminated.

Procedural History

The case originated March 8, 2022, when the Flathead County Attorney filed a Petition for Emergency Protective Services (EPS), and Temporary Investigative Authority (TIA) on behalf of the Department of Health and Human Services (the Department) for B.B. (3 years old), C.B. (2 years old) and A.B. (2 months old) and supported by the Affidavit of CPS Lorna Oden. (DC001) The Department advised the district court that, after diligent efforts to determine applicability of the Indian Child Welfare Act (ICWA), it found no reason to believe the children were Native American subject to ICWA. (*Id.*) March 9, 2022, the district court held a hearing after which it granted EPS and set a show cause hearing. (DC014, DC015, DC016)

March 18, 2022 the district court held the show cause hearing. (DC018)

After getting stipulation from both parents, the court granted the Department's petition for TIA and continued EPS. (*Id.*, DC020)

June 22, 2022 the Department filed a Petition for Adjudication of Children as Youths in Need of Care (YINC) and Temporary Legal Custody (TLC). (DC024) June 28, 2022 the district court held a hearing on the petition. (DC026) M.A.F. was not present. (*Id.*) The court granted the petition for TLC based on the affidavit of CPS Meagen Johnson after M.A.F.'s counsel advised she had no communication with M.A.F. and did not have a position on the petition. (*Id.*) August 16, 2022 the district court entered its written order adjudicating all three children as YINC and granting TLC. (DC033).

August 12, 2022 the Department submitted a Motion for Approval of Unsigned Treatment Plan for Birth Mother with a proposed treatment plan. (DC028) July 15, 2022 the district court conducted a disposition hearing. (DC031) Neither parent appeared and, after being advised neither parent had been in communication with counsel, the district court approved the treatment plan and entered its written order the next day. (*Id.*, DC032) January 25, 2023 the parents were accepted into family treatment court, and on March 23, 2023 the parents terminated from treatment court for failing "to attend any Treatment Court sessions, engage in any of the requirements of Treatment Court, including abstaining from the use of illegal drugs, consistent drug testing, attending parenting

time and meeting with the Treatment Court Coordinator.” (DC031)

The district court entered orders extending TLC on January 20, 2023 and August 11, 2023. (DC056, DC075) December 28, 2023 the Department filed a Petition for Termination of Birth Parent’s (sic) Parental Rights with Permanent Legal Custody and Right to Consent to Adoption. (DC078) The district court held the termination hearing February 2, 2024 (DC094) Neither parent attended. (*Id.*) After hearing testimony and argument, the district court ordered termination of the parental rights of both natural parents to all three children. (*Id.*) May 8, 2024 the district court entered its written order terminating the rights of both parents to the children. (Appendix A) May 31, 2024 Mother and Appellant M.A.F. filed a notice of appeal with the Montana Supreme Court. (DC111)

Facts of the Case

Petition for EPS and TIA – March 8, 2022. CPS Oden swore an affidavit in support of the Department’s Petition for Emergency Protective Services and Temporary Investigative Authority for B.B. (Age 3), C.B. (Age 2) and A.B. (Age 2 months). (DC001) CPS Oden states the children’s maternal grandmother said the children had no tribal affiliation. (*Id.*)

CPS Oden said on January 25, 2022 the Department received a report that, two days earlier, M.A.F. had left A.B. with a maternal aunt (MA) and left B.B. and C.B. with their maternal grandmother (MG). (DC001) CPS Oden was told M.A.F.

“made intermittent communication, is active on social media, however, she will not disclose what her plans are for returning and caring for her children. The parents are together and are believed to be using unknown substance.” (*Id.*) Family members expressed concerns that the infant A.B. had not peed or pooped for five hours or longer and “appears very pale.” (*Id.*) CPS Oden said the family was concerned that the parents weren’t meeting the children’s basic needs.

CPS Oden stated that a second report came in on February 4, 2022 that, two weeks earlier, M.A.F. left all three children with a great aunt (MGA) “for the night” and had not come back for the children. (DC001) “While text messaging back and forth with A.H. and Maternal Grandmother, M.A.F. sounds like she doesn’t want to come back and pick up the children.” (*Id.*) The family members expressed concern they didn’t have “appropriate legal paperwork” to get the children vaccinations, WIC, medical care or emergency medical treatment. (*Id.*)

CPS Oden reported that, in weekly conversations A.H. reported Facebook contact with M.A.F. “once, maybe twice a week.” (DC001) M.G. advised CPS Oden the parents were staying at her house while M.G. spent most of her time at MGA’s home with the children. (*Id.*) An ongoing concern was the inability of the children’s caretakers to take them for medical appointments because, though the parents had given verbal consent for treatment, the medical providers required written consent. (*Id.*) Throughout the time preceding the filing of the petition,

M.A.F. repeatedly missed appointments to meet with CPS Oden and maintained only sporadic communication with the maternal family members caring for the children. (*Id.*) CPS Oden reports, “The maternal family have willingly turned their lives upside down to support the needs of the children by relying on each other to meet BB, C.B. and AB’s needs.... The family is concerned with the parents’ behaviors as they have not seen or come to the home to visit the children.” (*Id.*)

March 1, 2022 M.G. reported to CPS Oden the parents had started staying at her home “about two nights a week.” (DC001) M.G. had not seen them, but “noticed their activity in her home” when she went there to feed her cat.¹ (*Id.*) M.G. was upset because with M.A.F. because of the condition of her home, “Dishes, food and clothing everywhere.” (*Id.*) March 2, 2022 CPS Oden visited the home. “C.B.’s room has adult clothing on his crib as well as on the floor. BB’s room all furniture removed and walls being painted, paint and rollers left out to dry on the floor.... where the living area is... the conditions are of concern.... Decaying food within reach of children, marijuana bong as well as a pouch with drug paraphernalia within reach of the children.... In the bedroom, CPS Ogden again observed decaying children within reach of a small child as well as a marijuana pipe.” (*Id.*)

¹ M.G. was spending most of her time at MGA’s with the children.

CPS Oden asserted the parents physically neglected the children, “based on the failure to provide... basic necessities including, but not limited to, appropriate and adequate nutrition, protective shelter from the elements and appropriate clothing.... Failure to provide general supervision and exposing or allowing the [children] to be exposed to an unreasonable physical or psychological risk....” (DC001) “Family, as well as CPS Oden have attempted contact with Mother, M.A.F. and Father K.B. for the purpose of supporting the family.... Parents have not communicated clear plans for the children, attempts at communication have, for the most part, been met with silence or promises of contact with no follow through from the mother.” (*Id.*)

EPS Hearing – March 9, 2022. M.A.F. attended the prehearing conference but was not present for the hearing.² (DC014) Counsel advised the district court the parents agreed to participate in services and did not object to the kinship placements of the children. (*Id.*)

TIA Hearing – March 18, 2022. M.A.F. was not present for the hearing and was represented by counsel.³ (DC018) Counsel advised the district court the parents stipulated to TIA.

² The district court did not provide a transcript of the EPS hearing (DC014).

³ The district court did not provide a transcript of the TIA hearing. (DC018).

Petition for YINC and TLC – June 22, 2022. CPS Johnson swore an affidavit in support of The Department’s Petition for Adjudication of Children as Youths in Need of Care and Temporary Legal Custody (DC024) After recounting the circumstances leading to the removal of the children from parental custody, CPS Johnson said that neither parent had engaged in “any services to remedy the safety concerns” and they were “continuing the out-of-control behaviors” that led to the district court’s orders granting EPS and TIA. (*Id.*)

CPS Johnson reported that M.A.F. had completed a CD evaluation – which diagnosed her with severe substance use disorder and recommended Level 1 outpatient treatment. (DC024) CPS Johnson said the evaluator told her the diagnosis and recommendation were mad “entirely off M.A.F.’s self-reports and history.” (*Id.*) M.A.F. was reported to have failed to engage in the recommended treatment, failed to participate in testing (resulting in her dismissal from treatment), and failing to maintain contact with the Department. (*Id.*) CPS Johnson stated that, despite agreeing to participate in Compliance Monitoring Systems (CMS), M.A.F. has not followed through. (*Id.*)

CPS Johnson reported that the parenting facilitator (Bear Logic) advised that M.A.F. “is missing most of her visits and in fact declined further visits at Bear Logic. She is currently not seeing any of her children. She has not contacted the Department to request visits at another location.... M.A.F. has not completed any

services and has had little contact with the Department to remedy the immediate danger identified in the EPS petition as well as the TIA petition.” (DC024)

Hearing on the Department’s petition for TLC was held June 28, 2022. (DC026) M.A.F. did not attend the hearing. (*Id.*) M.A.F.’s attorney advised the district court she had no communication with M.A.F. (6/28/2022 Hrg. Tr. 5:2) The court granted TLC without objection. (*Id.* 5:7-12)

Treatment Plan – July 15, 2022. July 12, 2022 the Department filed a Motion for Approval of Unsigned Treatment Plan for Birth Mother. (DC028) The district court held the disposition hearing July 15, 2022. (DC031) M.A.F. was not present for the hearing, and counsel reported there had been no communication from M.A.F. (7/15/2022 Hrg. Tr. 5:18-22) CPS reported M.A.F. had called and advised she would not attend the hearing because the parents had been evicted and had car trouble. (*Id.* 6:1, et seq.) After determining the neither the Department nor counsel had an opportunity to discuss the treatment plan, the court approved the proposed treatment plan. (DC031, 7/15/2022 Hrg. Tr. 6:9-21)

M.A.F.’s treatment plan specifically addresses five areas of treatment:

1. Parenting: M.A.F. must: complete approved parenting classes; regularly attend parenting visits; follow recommendations of visitation supervisors and treatment providers; show that she can meet the physical and emotional needs of the children; cooperate and regularly meet with any in-home service providers and follow their recommendations; provide appropriate supervision of the children; not allow the children to be

- exposed to alcohol, unprescribed drugs, drug paraphernalia, or any person who is violent or under the influence of alcohol or prescribed drugs; demonstrate she has adequate food, clothing and other necessities to meet the children's basic needs; and ensure the children attend medical, dental and other appointments;
2. Chemical Dependency: M.A.F. must: complete a CD evaluation by an approved provider and follow all recommendations; regularly attend recommended CD counseling with an approved provider and follow all recommendations; identify and show understanding of the effects of her substance use on the children and her ability to meet the children's needs; not use or possess alcohol or unprescribed drugs, not expose her children to anyone using alcohol or unprescribed drugs; cooperate with random and requested drug and alcohol testing; and develop a relapse plan and a safety plan to keep the children safe if she has a relapse;
 3. Mental Health: M.A.F. must: complete a mental health evaluation by an approved provider and follow all recommendations, including in-patient or out-patient mental health treatment; attend, actively participate in and complete domestic violence counseling and follow all recommendations of the counselor; learn how domestic violence and disorderly behavior negatively impact the children and how to protect the children; enroll in, attend, and complete individual counseling or therapy by an approved provider and follow all recommendations; and learn how her behavior affects her children and how to modify her behavior to meet the children's physical and emotional needs;
 4. Housing: M.A.F. will obtain and maintain a safe, sanitary home with adequate space, heat, electricity, running water to meet the needs of the children; not allow in the home, or expose the children to, anyone who uses or possesses alcohol or unprescribed drugs, or has criminal convictions for drugs, violence or sexual offenses; not allow anyone to reside in the home unless approved by the Department; immediately inform the Department if anyone in the home is violent, destroys property or otherwise poses a safety risk to the children; keep the Department informed to the whereabouts of the children when they are in her care;
 5. Communication/Cooperation/Releases: M.A.F. must: maintain consistent weekly contact with her assigned CPS to discuss the needs of her children and progress on completing her treatment plan; notify her CPS if she has problems completing the treatment plan; sign all necessary releases of information "including criminal justice information and

medical/mental health records” related to her treatment plan to enable all professionals involved with her to communicate;
(DC028)

Status Hearing – August 26, 2022. M.A.F. was present for the Hearing.
(DC037) Counsel advised the district court M.A.F. was making “some really good progress” and were trying to reengage with Bear Logic for parenting visits. (*Id.*, 8/26/2022 Hrg. Tr. 7:7-11) After inquiring about her efforts to complete housing, employment, and CD evaluation tasks on her treatment plan, the district court admonished M.A.F. she needed “to get real active in problem solving” because, in the next couple months, what you’re looking at is termination of parental rights.”
(DC037, 8/26/2022 9:14-12:1)

Status Hearing – September 30, 2022. M.A.F. was not present for the Hearing. (DC037) Counsel advised the district court M.A.F. completed an updated CD evaluation, in which in-patient treatment was recommended but, “they have not seen her since that time.” (9/30/2022 Hrg. Tr. 6:6-7-21) The district court inquired about M.A.F.’s participation in Family Treatment Court and was advised it had been discussed and “The information and opportunity is there.” (9/30/2022 Hrg. Tr. 8-4-14) The court determined that, “in light of no parental engagement at this point in time, I’m not going to set it out for a separate status hearing but, if the parents to start engaging, then just have someone request a status hearing....” (*Id.* 8:23-9-5, DC038)

Family Treatment Court – November 30, 2022-March 22, 2023.

November 30, 2022 M.A.F. and birth father K.B. personally requested admission to family treatment court. (DC041, 11/30/2022 Hrg. Tr. 5:24, et seq.) At the January 20, 2023 hearing on the Department's motion to extend TLC, the district court made record that, though both parents were identified in minute entries from the Family Treatment Court, neither parent was actually enrolled in the court. (1/20/2023 Hrg. Tr. 5:25-6:8) The court was advised M.A.F. "would go to Treatment Court and observe ever so often, but not have her appearance consistent enough to actually enroll in the program...." (*Id.* 6:11-20) January 25, 2023 both parents attended treatment court for the first time. (DC047) Orders transferring the parents to treatment court were subsequently entered by the district court and the treatment court. (DC048, DC049) March 22, 2023 both parents were terminated from treatment court based on failure to participate. (DC058, 3/22/2023 Hrg. Tr. 5:17-21) Orders to that effect were entered, transferring jurisdiction back to the district court. (DC061, DC062)

First Petition to Extend TLC – December 28, 2022. CPS Lawrence swore an affidavit in support of the Department's Petition for First Extension of Temporary Legal Custody. (DC044) CPS Lawrence stated that, "M.A.F. has gone through a very challenging time during the summer and fall months of 2022. She admits to use of methamphetamine and opiates (fentanyl) and was in and out of

Logan Health ER several times as well as checking herself out of Pathways and refusing to take the medications prescribed.” (*Id.*) CPS Lawrence reported that M.A.F.’s CD evaluation on September 2, 2022 yielded a diagnosis of “opiate dependence, other stimulant dependence, cannabis dependence and alcohol dependence which was in full remission.” (*Id.*) M.A.F. was reported to have been discharged from treatment services on September 8, 2022 for noncompliance, and on September 12, 2022, to have advised her primary provider she had been smoking two fentanyl tablets a day. (*Id.*)

CPS Lawrence reported that:

On October 3, 2022 Ocytocin was able to place M.A.F. at the Recovery Center for treatment. However, the next day Recovery Center staff called and said that they did not know what to do with M.A.F. due to psychotic statements which included homicidal statements. At this time M.A.F. was admitted to Loga Health EF, however she checked herself out the same day.... M.A.F. was then admitted to the Badlands Treatment Center in Glendive, Montana on October 18, 2022. Onn October 21, 2022 M.A.F. left this treatment center as she said her “head was going to explode.” ... M.A.F. has not completed a parenting class, nor has she had consistent visits with her children.... M.A.F. has not completed an updated mental health evaluation, or has she engaged with domestic violence counseling.
(DC044)

January 20, 2023 the district court heard the petition. (DC046) M.A.F. was not present. (*Id.*) After noting that it didn’t see “any particular effort” to complete the treatment plan, the district court granted the petition without objection. (*Id.*
1/20/2023 Hrg. Tr. 5:18-24)

First CASA Report – April 20, 2023. March 20, 2023 the Department filed a Motion for Approval of Permanency Plan which recommended reunification. (DC057) April 20, 2023 CASA Volunteer, Sandy Smith filed her report to the district court in which she asserted, “I am not in favor of reunification. I believe that it is in the children’s best interests that the parental rights of their biological parents, K.B. and M.A.F., be terminated due to their lack of participation on their respective Treatment Plans.” (DC063) CASA Smith said her concern arose from the fact that the two older children “were exposed to drugs during the earliest months of their lives, and that there may likely be cognitive and emotional challenges that could surface as they grow older.... B.B. has already had behavioral issues and C.B. has shown some aggression when playing with other children.... A.B. was born without drugs in his system and has been in (maternal aunt) A.H.’s care since birth.” (*Id.*)

At the permanency plan hearing on April 28, 2023, counsel for the children and CASA Smith both advised termination of parental rights, noting that the parents “have made no efforts toward reunification.” (DC066, 4/28/2023 Hrg. Tr. 7:12-25) The district court said the decision was up to the Department and suggested that, if not termination, guardianship might be an acceptable alternative, noting, “I mean we have parents who have not engaged in the process substantively in many months....” (DC066, 4/28/2023 Hrg. Tr. 8:1-8)

Second CASA Report – June 9, 2023. In her June 9, 2023 report, CASA Smith recommended termination of the parental rights of M.A.F. and K.B. and adoption by the children’s current (kinship) foster placements. (DC069) “Neither K.B. nor M.A.F. are able to safely parent the children at this time. They have not addressed their ongoing use of substances, domestic violence, stayed in contact with CPS and other professionals involved in their case, completed parenting classes, participated in individual therapy to address possible untreated mental health issues, maintained sobriety, or visited their children on a consistent basis since the children were removed on 03/05/2022.” (*Id.*)

Second Petition to Extend TLC – July 14, 2023. CPS Lawrence swore an affidavit in support of the Department’s Petition for Second Extension of TLC. (DC070) After extensively recounting the history of the case, CPS Lawrence reported M.A.F. had made no further progress on her treatment plan and that M.A.F. “will not follow through” on invitations to meet to discuss her treatment plan.” (*Id.*) August 11, 2023 the district court granted the second petition to extend TLC without objection. (DC073)

Petition for Termination of Parental Rights – December 28, 2023. December 11, 2023 CASA Smith filed a third report to the district court in which she recommended termination of parental rights and adoption by the kinship foster parents. (DC077) December 28, 2023 CPS Lawrence swore an affidavit in support

of the Department's Petition for Termination of Birth Parent's (sic) Parental Rights with Permanent Legal Custody. (DC078) After recounting the procedural and factual history of the case, CPS Lawrence stated M.A.F. had failed to complete her parenting plan tasks. (*Id.*) Specifically, CPS Lawrence alleged:

1. Parenting: Despite numerous referrals to parenting classes and supervised visitation, M.A.F. participated in visitation only 12 times from March 2022 until the date of the petition, and had not exercised visitation since March 10, 2023 and cancelled or did not show for all other scheduled sessions; Despite attempts by CPS and the referring providers for parenting classes numerous times, M.A.F. failed to respond or follow through on the referrals; "M.A.F. does not make her children a priority in her life. M.A.F. will occasionally make the effort to see them for a holiday but has not attended their many medical appointments, therapy sessions, school performance or school activities. She has not attended one appointment with them or called to ask how a medical appointment or surgery went. She has not completed any parenting classes. M.A.F. did not complete this part of her treatment plan"; "M.A.F. shows no interest in reunification except to tell CPS Lawrence, once every two to four months, how much she loves her sons and wants them back with her. M.A.F. has not taken any actual steps to be involved in their lives, even in small ways";
2. Chemical Dependency: In the summer of 2022 M.A.F. 'was in and out' of the emergency room and checked herself out of treatment after refusing to take prescribed medications; September 2, 2022 M.A.F. was evaluated, and it was "highly recommended" she seek residential treatment; September 8, 2022 M.A.F. was discharged from treatment for non-compliance; October 3, 2022 M.A.F. was placed in residential treatment at Recovery Centers of Montana; The next day, staff called to report "they did not know what to do with M.A.F. as she was making psychotic statements which included homicidal statements; M.A.F. was transported to the emergency room, but immediately checked herself out; October 18, 2022 M.A.F. was admitted to Badlands Treatment Center; October 21, 2022 M.A.F. left treatment; January 25, 2023 at M.A.F.'s request, she was enrolled in Family Treatment Court; M.A.F. never showed up and, March 22, 2023 she was terminated from treatment

court; January 9, 2023 M.A.F.'s primary treatment provider advised CPS Lawrence M.A.F. had missed nine appointments, and they were closing the referral; M.A.F.'s responded to CPS Lawrence's attempts to make contact "every two to three months"; May 2, 2023 – at M.A.F.'s request – she was referred to Compliance Monitoring for UA's; The referral was closed after the provider was unable to make contact with M.A.F.; "M.A.F. has not been honest about her involvement with chemical dependency services. It is concerning to CFS that M.A.F. has had many years of untreated and serious drug addiction. The Department is very concerned that M.A.F.'s drug use is currently still out of control, and she has not taken any consistent steps to get into treatment during the course of the many years of CFS involvement;

3. Mental Health: The Department "has worked closely" with agencies to build a "solid and helpful plan to help M.A.F. succeed" in addressing her mental health issues, but "M.A.F. has not followed through and engaged in an updated mental health evaluation or individual counseling"; Despite disclosing she has been physically abused by K.B., M.A.F. has not engaged in any services for victims of domestic violence. M.A.F. has a history of suicidal ideation and has had at least one psychotic episode during this case, which included homicidal statements;
4. Housing: M.A.F.'s "living situation is unpredictable"; It is often unknown where M.A.F. is living; Despite several months living at her mother's home, "this has never been consistent"; M.A.F. has not found work during the pendency of the case;

(DC078)

CPS Lawrence concludes M.A.F.'s treatment plan was unsuccessful "because M.A.F. has untreated chemical dependency and mental health issues and has not been willing to seek services for herself. She does not follow through with referrals, even as CFS has made the same referrals for her numerous times. M.A.F. states that she loves her children and will do anything for them but is not able to make positive steps in her recovery to be reunified with them. M.A.F. is not able to

offer safety and security for her children, even after this much time. She has not seen her children on a regular basis for over a year.” (DC078) CPS Lawrence says that, given her unwillingness or inability to address her mental health and addiction problems, the conduct or conditions that render M.A.F. unfit, unable or unwilling to adequately care for her children is unlikely to change in a reasonable time. (*Id.*)

Termination Hearing – February 2, 2024. January 11, 2024 CPS

Lawrence swore an affidavit in support of the Department’s Motion for Leave to Serve by Publication. (DC083) CPS Lawrence stated that M.A.F.’s “current whereabouts, address, employment status, or location of any place of employment... is unknown and personal service upon this parent cannot be accomplished.” (*Id.*) M.A.F. was served by publication at the order of the district court. (DC085-DC089) February 2, 2024 Judge Amy Eddy presided over the Termination Hearing. (DC094) M.A.F. was not present. (*Id.*)

Addiction Therapist Derek Dalton testified regarding his evaluation and treatment of M.A.F. (2/2/2024 Hrg. Tr. 10:14, et seq.) Mr. Dalton stated his assessment showed M.A.F. had a substance severe abuse disorder and “she was still very into opiate use and stimulants” using methamphetamines “grams at a time” and as many as “20 pills a day” of fentanyl. (*Id.*, 11:24, et seq.) Because of the severity of M.A.F.’s substance disorder, concerns about withdrawal, her “long history of mental health issues,” her readiness for change, her potential for relapse,

and her recovery environment, Mr. Dalton said he recommended inpatient treatment. (*Id.*) “She was verbalizing a strong level of motivation, but her history shows that what she tends to do is always verbalize a strong level of motivation, but her follow through is very, very poor.” (*Id.*, 16:21-25)

Mr. Dalton testified that his treatment recommendation for M.A.F. was, “An inpatient program so she could get some sobriety under her belt. And then probably we could have -- they would have recommended a longer-term sober support sober living home or something like that, if she would have been willing to do that.” (2/2/2024 Hrg. Tr. 17:25-18:7) After describing, in detail, the pretreatment and posttreatment processes, Mr. Dalton testified that M.A.F. “didn’t return for any session” and was discharged. (*Id.* 18:10-19:23) Mr. Dalton stated M.A.F.’s prognosis was “Very poor.... Because she didn’t show. We know her history of – when she’s not showing, she’s using.” (*Id.* 20:1-24)

CPS Paulette Lawrence testified in conformity with her affidavit. (DC078, 2/2/2024 Hrg. Tr. 34:7, et seq.) According to CPS Lawrence, M.A.F. initially “had some engagement” in reunification services, but she did not complete parenting class and had “minimal involvement” with the children. (*Id.* 39:22-40:2) CPS Lawrence said she had several discussions with M.A.F. regarding her treatment plan, and that CPS Lawrence believed M.A.F. understood her responsibilities under the plan. (*Id.* 40:20-41:1) CPS Lawrence addressed every area of the

treatment plan in detail. (*Id.* 41:18, et seq.) CPS Lawrence testified that M.A.F. failed the Parenting requirements of her treatment plan, concluding, “She’s failed in her visitation, and she’s failed in completing a parenting class, but the biggest issue is that she’s shown no interest in the boys.” (*Id.* 41:20-45:25) CPS Lawrence testified that M.A.F. failed the Mental Health requirements of her treatment plan, because she failed to address her chemical dependency, failed to engage in treatment and withdrew or was discharged from several referrals for service. (*Id.* 46:1-47:12) CPS Lawrence testified that M.A.F. had failed to complete the Chemical Dependency requirements of her treatment plan because – though she completed one CD evaluation – she did not follow through on treatment recommendations, ceased all attempts at treatment in October 2022, did not show up for drug testing, and continued to engage in drug use. (*Id.* 47:13-50:2) CPS Lawrence testified that M.A.F. had failed to complete the Housing requirements of her treatment plan because M.A.F. had no housing stability and often – including on the day of the termination hearing – neither her family nor the CPS Lawrence knew where she was living. (*Id.* 50:3-20)

CPS Lawrence conclude that M.A.F. was unfit to safely parent her children because of her untreated substance use (“I’m concerned she’s actively using...), her mental health stability, and “a lack of interest in her children.” (2/2/2024 Hrg. Tr. 50:25-51-8) CPS Lawrence said the condition rendering M.A.F. unfit, unable,

or unwilling to safely parent her children was unlikely to change because, “Well, it’s been two years that we’ve been working on it.” (*Id.* 51:18-20)

CPS Lawrence testified the children had stable homes with their kinship foster parents and that, though initially the Department and the foster parents were inclined toward a guardianship, “as time has gone along the family – they deeply love M.A.F. and care about K.B. – but they also don’t see things changing. So, they are in agreement with termination.” (2/2/2024 59:25-61:14) CPS Lawrence testified the recommended permanency plan would be for the children’s maternal aunt, A.H. to adopt AB, and for their maternal great grandmother, M.G.A. to adopt B.B. and CB. CPS Lawrence noted, “their homes actually share a wall, so really it’s one big, happy family.” (*Id.* 66:16-25)

After hearing testimony, the district court heard argument from the Department requesting termination of parental rights. (2/2/2024 Hrg. Tr. 67:21-68:19) Upon inquiry by the court, M.A.F.’s attorney replied that, without M.A.F.’s presence, counsel had no argument to present. (*Id.* 68:20-22) The CASA expressed support for the petition. (*Id.* 69:1-3) The made a statement of its findings and granted the Department’s petition, terminating the parental rights of M.A.F. and K.B. to the children BB, C.B. and AB. (*Id.* 69:4-72:15)

Findings of the District Court. In the Order entered May 8, 2024 the district court recounted the relevant testimony of the witnesses and made the

following pertinent Findings of Fact in support of its decision to terminate the parental rights of birth mother, M.A.F. and birth father, K.B. to the children B.B. (five years old), C.B. (four years old) and A.B. (two years old). with permanent legal custody and the right to consent to adoption:

1. The Department removed the children from birth parents' care March 5, 2022 after the parents left the children with family members and did not return.
2. There were concerns of domestic violence, drug abuse, lack of safe and stable housing and mental health concerns.
3. There were also concerns that Baby A.B. was failing to thrive.
4. The family members were not given supplies to care for the children or the ability to consent to medical treatment.
5. The Department left the children in the care of the family members, who lived next door to one another. None of the children was ever returned for a home visit because neither parent made substantial progress on their treatment plans.
6. The matter is not subject to the Indian Child Welfare Act.
7. March 18, 2022 the court granted the Department TIA. June 28, 2022 the children were adjudicated YINC and the Department was granted TLC. January 20, 2023 and August 11, 2023, the court granted extensions of TLC. July 15, 2022 the court approved a treatment plan for each parent.
8. Neither parent appeared at hearings on March 9, 2022, July 15, 2022, September 30, 2022, November 9, 2022, November 30, 2022 January 20, 2023, February 8, 2023, February 22, 2023, March 22, 2023, April 28 2023, August 11, 2023 and September 15, 2023.
9. Birth mother's treatment plan has not been successful.
10. Birth mother failed to complete a parenting class and failed to consistently visit her children. She attended twelve visits between March 2022 and March 2023 and cancelled or no showed to all other visits. Birth mother has not seen her children since Easter 2023.
11. Birth mother failed to complete a mental health evaluation, engage in

counseling for mental health or domestic violence despite significant mental health issues. None of her mental health concerns have been addressed.

12. Birth mother completed a CD evaluation and was diagnosed with active opioid dependence, active stimulant dependence and active cannabis dependence. She failed to follow recommended treatment, leaving or being discharged for noncompliance from three facilities. Birth Mother entered the Flathead Family Treatment Court but was terminated after two months for failing to participate. She has completed no CD treatment and has failed to test for the Department throughout the case.
13. Birth mother has failed to obtain safe and stable housing. It is unknown where she is currently living or whether it is stable.
14. Continuation of the parent-child relationship will likely result in continued neglect, or Birth Mother's conduct or condition renders her unfit, unable, or unwilling to give the children adequate parental care due to her fundamental inability to safely parent the children.
15. Birth Mother's consistent, active drug use, inability to remain mentally stable, lack of participation with her children and her inability to obtain and maintain safe and stable housing as a result of these and other issues, indicates an inability to exercise her fundamental parental right in a responsible manner.
16. Given Birth Mother's lack of engagement in her treatment plan, failure to communicate with the Department and failure to physically see her children in close to a year, termination of her parental rights is appropriate and is in the children's best interests.

(App. A)

STANDARDS OF REVIEW

Whether a person has been denied his or her right to due process is a question of constitutional law. *In re A.S.*, 2004 MT 62, ¶9, 320 Mont. 268, 87 P.3d 408. The Montana Supreme Court's review of questions of constitutional law is plenary. *Id.* (citing *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290)

Beyond due process concerns, the Montana Supreme Court reviews a district court's decision to terminate parental rights for an abuse of discretion. *In re K.A.*, 2016 MT 27, ¶19, 382 Mont. 165, 365 P.3d 478.

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

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

clear, and convincing. *In re B.J.J.*, ¶10.

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

ARGUMENT

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

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

To ensure protection of appellant's rights, counsel's request to withdraw must be accompanied by a brief that references anything in the record that might arguably support an appeal (an *Anders* brief). *Id.* A copy of the brief should be provided to the appellant and the appellant must be afforded the time to respond to counsel's motion and brief. *Id.*

The State of Montana has codified the requirements of *Anders v. California*

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

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

Pursuant to Mont. Code Ann. § 46-8-103(2), counsel for Appellant reluctantly advises the Court that, after conducting diligent review of the record and the relevant law, counsel has not found any non-frivolous issues appropriate for appeal in this matter. While counsel has great sympathy for the Appellant, he can find no meritorious grounds for appeal. In accordance with the requirements of

Anders and Mont. Code Ann. §46-8-103(2), counsel provides this memorandum (Anders Brief) discussing any issues that arguably support an appeal, a summary of the procedural history of the case and any jurisdictional problems with the appeal, and appropriate citations to the record and the law bearing on each issue. *Id.*

2. The record may arguably support M.A.F.’s assertion the district court committed reversible error when it terminated her parental rights.

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

An order terminating an individual’s right to parent his children must be supported by clear and convincing evidence that the statutory criteria for termination have been met. *In re A.T. and J.T.*, 2003 MT 154, ¶10, 316 Mont. 255, 70 P.3d 1247. Clear and convincing evidence is:

simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the

requirement of criminal procedure—that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

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

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

a. M.A.F. may assert the district court violated her right to Due Process when it conducted the termination hearing without her present.

A natural parent’s right to care and custody of a child is a fundamental liberty interest which must be protected by fundamentally fair procedures. *In re J.N.*, 1999 MT 64, ¶12, 293 Mont. 524, 977 P.2d 317. When the State seeks to terminate a parent’s fundamental liberty interest in the care and custody of a child, due process requires the parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, ¶12.

For a parent to prove violation of due process, he or she must demonstrate how the outcome would have been different had the alleged due process violation not occurred. *In re B.J.J.*, ¶13. (citing *In re A.N.W.*, ¶38).

In this case, M.A.F. may arguably assert that, if the district court had delayed holding the termination hearing until she could be located, she may have been able to present evidence that would have resulted in a different outcome.

b. M.A.F. may assert the district court's termination of her parental rights when she was not present for the hearing was an abuse of discretion.

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

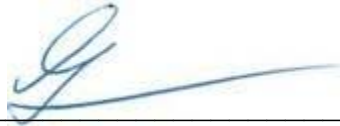
In this case, M.A.F. may argue that the district court's decision to hold the termination hearing without requiring the Department to make further efforts to locate her and provide her with notice of the hearing was not an exercise of conscientious judgment in light of the fundamental nature of the right to parent her child.

CONCLUSION

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

///


Respectfully submitted this August 23, 2024.

A handwritten signature in blue ink, appearing to read 'Gregory D. Birdsong', is positioned above a horizontal line.

Gregory D. Birdsong
Birdsong Law Office
P.O. Box 4051
Santa Fe, NM 87502
406-529-6988
birdsonglaw@gmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.



Gregory D. Birdsong

CERTIFICATE OF SERVICE

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 08-24-2024:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: M. A. F.
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

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Travis R. Ahner (Govt Attorney)
820 South Main Street
Kalispell MT 59901
Representing: State of Montana
Service Method: eService

M A F
1831 Bluestone Drive
Kalispell MT 59901
Service Method: E-mail Delivery

Electronically Signed By: Gregory Dee Birdsong
Dated: 08-24-2024