IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0514

IN THE MATTER OF:

D.L.L. and J.T.L.,

YOUTHS IN NEED OF CARE.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighth Judicial District, Cascade County, the Honorable David J. Grubich, Presiding.

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I. Whether the Department violated Mother's rights under ICWA when they failed to adhere to cultural practices and failed to comply with ICWA placement preferences by failing to conduct a thorough search for qualified ICWA placements and improperly finding there was "good cause" to deviate.

II. Whether the District Court erred in terminating Mother's rights when the evidence in support of guardianship overcame the presumption that termination was in D.L.L. and J.T.L.'s best interests.

STATEMENT OF THE CASE AND FACTS

E.C.-L. (Mother) appeals the Eighth Judicial District Court's (District Court) Order terminating her parental rights to her children, D.L.L. and J.T.L. (D.C. Doc. 259.[1]) (Attached as Appendix A) The Department of Public Health and Human Services (Department) filed a Petition for Emergency Protective Services (EPS), Termination of Parental Rights, and Permanent Legal Custody (PLC) on September 24, 2021. The Petition alleged physical neglect, physical abuse, and psychological abuse of the children by both parents. The children were removed on September 20,

[1] All citations to the D.C. Record are to DN 24-0514 unless otherwise noted

2021, after the Department received a report where Mother alleged that Father had sexually abused the children.

The Petition cited several prior Department involvements with the family dating back to 2016, including allegations of parental substance abuse, neglect, endangerment, and Father's incarceration. The children had been removed three times previously; Mother and Father's most recent case with the Department was dismissed in August 2021. (1/14/22 Hearing Transc. 10:13-16.) The Department originally asserted that, based on its initial and prior Indian Child Welfare Act (ICWA) inquiries, it had no reason to know that D.L.L. and J.T.L. were Indian children. (D.C. Doc. 1.) Due to the aggravated nature of the allegations, specifically the alleged sexual abuse, the Department cited § 41-3-609(1)(d) and (4), MCA, and requested immediate termination of parental rights without a treatment plan or reasonable efforts. (Id.) A Show Cause and Termination Hearing was subsequently set. (D.C. Doc. 12.)

Mother was not present at the Show Cause Hearing held on November 3, 2021, due to her receiving inpatient treatment at the Montana Chemical Dependency Center. (D.C. Doc. 17.) Father stipulated to probable cause and advised the parties of his intention to file a brief regarding placement of the children. (Id.) Mother's attorney advised parties that Mother supported the

children returning to Father's care. (Id.) The District Court found probable cause and granted the Department Temporary Investigative Authority (TIA.) (Id.)

On November 8, 2021, Father filed a brief requesting the return of D.L.L. and J.T.L. to his care, arguing that law enforcement had investigated and dismissed the sexual abuse allegations, and that Mother had pled guilty to making and falsifying information regarding the alleged sexual abuse. (D.C. Doc. 21.) Mother subsequently filed a response supporting Father's motion to place the children with him. (D.C. Doc. 25.) The Termination Hearing was reset to March 11, 2022, and a Placement Hearing on Father's Motion was held on January 14, 2022. (D.C. Doc. 28.)

At the January 14, 2022 Placement Hearing the Department opposed Father's motion, citing ongoing concerns regarding both parents. The caseworker testified to the family's history of Department involvement, including the prior removals for substance abuse and domestic violence, and expressed concerns about the condition of the home. (1/14/22 Hearing Transc at 6-32.) Father testified about improvements made to the home and his commitment to ensuring Mother remained out of the home until her treatment was complete. (1/14/22 Hearing Transc at 52:1-16.) Mother also testified that she was committed to following the Department's rules.

(1/14/22 Hearing Transc. at 71:7-15.) The District Court denied Father's motion, finding ongoing concerns related to Mother's chemical dependency and the parents' volatile relationship. (Hearing Transcr. 1/14/22 at 91:9-19) The Court ordered increased parenting education and family-based services for Father. (Id.)

Three months after the Placement Hearing, the Department learned D.L.L. and J.T.L. were Indian children under ICWA after they were approved for enrollment with the Little Shell Tribe of Chippewa Indians of Montana (Little Shell Tribe)[2]. (D.C. Doc. 40 & 41.) As a result, the Department moved to vacate the Termination Hearing and filed an Amended Petition for Adjudication as Youths in Need of Care (YINC) and Temporary Legal Custody (TLC) on March 7, 2022. (D.C. Doc. 40.) The Amended Petition recognized the applicability of ICWA and the requirement to provide active efforts toward reunification prior to seeking termination. The Little Shell Tribe was notified and District Court vacated the previously scheduled Termination Hearing and set an Adjudicatory Hearing for March 16, 2022. (D.C. Docs. 43, 48.)

[2] In December 2019, the Little Shell Tribe received federal recognition, which changed both the enrollment criteria and the applicability of ICWA.

At the May 4, 2022 Adjudication Hearing, Mother stipulated to the Amended Petition without admission of the alleged facts. (D.D. Doc. 59.) Father objected to the State's motion for adjudication and moved for dismissal of the case and requested full custody of the children. (Id.) Father informed the Court that he and Mother were in the process of getting divorced. The State requested Father file a Brief in support of the Motion to Dismiss and asked that they be given time to respond which the District Court granted. (Id.) The District Court's subsequent Order acknowledged the children were Indian children under ICWA, that ICWA applied, the children's placement was in their best interests and continued the Adjudicatory Hearing to June 1, 2022. (D.C. Doc 61.)

At the Continued Adjudication Hearing on June 1, 2022, Mother and Father were present with their respective counsel. (D.C. Doc. 64.) The State advised the Court that the QEW, Anna Fisher, was unavailable for the hearing. (Id.) Father moved again to dismiss the case and grant him full custody of the children, noting that he had filed a brief in support of his motion. (Id.) The State objected to Father's motion and requested fourteen days to respond to his brief. Mother's counsel advised the Court that her client intended to contest adjudication, but did not support Father receiving sole custody. (Id.) Mother further objected to any continuance due to the

"stagnant status" of the case. (Id.) The District Court overruled Mother's objection and granted the State and Mother fourteen days to respond to Father's brief. Father was then given seven days to reply to the responses and the Adjudicatory Hearing was reset for June 29, 2022. (Id.)

At the Continued Adjudication Hearing on June 29, 2022, Mother and Father were again present with their counsel. (6/29/22 Hearing Tr. at 4:5-9.) The District Court noted that it had received the State's response to Father's motion to dismiss "yesterday afternoon" and acknowledged that neither Mother nor the State were ready to proceed with Adjudication. (6/29/22 Hearing Transc. at 5:13-25, 6:1-3.) Mother's counsel stated her client supported Father's motion to dismiss. (6/29/22 Hearing Tr. at 8:5-6.) Father's counsel stated he was under the impression the parties had reached a " …tentative agreement with the State for dismissal providing…we agreed to certain conditions in a parenting plan which would be adopted after dismissal…" (6/29/22 Hearing Tr. at 6:16-24.) The parties all requested a short continuance, which the District Court granted, stating it would be appropriate to address the Motion to Dismiss and Adjudication at the next hearing. (6/29/22 Hearing Tr. at 7:1-17.)

At the next hearing on July 6, 2022, both parents were present with counsel. (D.C. Doc. 77.) The State called Child Protection Specialist (CPS),

Christa Waliezer McKay, as their first witness. (7/6/22 Hearing Tr. at 14:3-4) CPS McKay testified that the Department consulted with the Little Shell Tribe and confirmed that the Tribe did not object to the children's current placement. (7/6/22 Hearing Tr. at 15:11-22) She further stated that the Department continued to have safety concerns about both parents. (7/6/22 Hearing Tr. at 17:75-20.)

Regarding Mother specifically, CPS McKay testified that the Department was working with her to address her sobriety and mental health. (7/6/22 Hearing Tr. at 18:15-17, 27:6-14.) CPS McKay reported Mother had been expressing a desire for increased visitation and wishes for the children to participate in Native American cultural activities, but the Department was unwilling to increase her visitation because they had concerns about her sobriety. (7/6/22 Hearing Tr. at 38:8-12, 39:1-8.) Due to time constraints, the District Court adjourned the Adjudication Hearing and continued it to July 22, 2022. (D.C. Doc. 74 & 77.)

At the July 22, 2022, continued Adjudication Hearing the State re-called CPS McKay, who was cross-examined by Mother's attorney. During her cross-examination, Mother's attorney emphasized that the children were indeed ICWA eligible and that the Department had not

worked to increase Mother's visits or allow the children to attend powwows despite Mother's continued requests. (7/22/22 Hearing Tr. at 20:11-25, 21:1-35, 22:1-16). Mother also personally testified that she supported the children being placed with Father. (7/22/22 Hearing Tr. 59:7-24.)

A Dispositional Hearing was held on August 10, 2022. The parties discussed the proposed treatment plans and various proposed changes. (8/10/22 Hearing Tr. at 5-9.) Mother objected to language regarding missed or diluted drug tests, however, the Department explained that the language is standard, and the District Court overruled her objection. Mother then once again objected to D.L.L. and J.T.L's placement due to it not being ICWA compliant and requested the children be placed with Father. (8/10/22 Hearing Tr. at 32:1-25.)

Mother's treatment plan was Ordered on August 18, 2022, and required the following tasks: participate in therapeutic family support services, attend regular visits with the children, follow parenting recommendations, attend appointments with the children, complete a chemical dependency evaluation and follow all recommendations, attend counseling, maintain sobriety, complete random drug tests, complete a mental health evaluation and follow all, obtain and maintain a safe home

where no unapproved people live with or have contact with the children, and maintain contact with the Department. (D.C. Doc. 87.)

On September 19, 2022, the Department filed a Permanency Plan Report, which stated the Department's proposed Permanency Plan was reunification with parents and an estimated timeline of six months. (D.C. Doc. 89.) The Report also indicated that the Little Shell Tribe was not taking jurisdiction of this case, and it did not have an available family to place the children with. (Id.) The Tribe additionally stated that they would support "what is in the best interest of the youth with priority on their safety and wellbeing." (Id.)

A Status Hearing was held on November 2, 2022, the Department sought approval of their proposed Permanency Plan of reunification and an out-of-state Christmas vacation for the children with their foster parents. (11/2/22 Hearing Tr. at 5:6-13.) The Department offered Father a Christmas visit on December 22, however, he objected to the children going on vacation with the foster family. (11/2/22 Hearing Tr. at 8:9-13.) Mother's counsel noted that Mother had not been offered a reciprocal Christmas visitation opportunity, nor was she aware of any potential vacation plans. (11/2/22 Hearing Tr. at 9:11-22.)

When updating the parties on Mother's progress, the Department noted she had relapsed, was in a pre-release program, but was still engaging well with her treatment providers. (11/2/22 Hearing Tr. at 13:13-17.) CPS McKay stated Mother was currently receiving two two-hour visits per week and was working well with providers. (11/2/22 Hearing Tr. at 13:4-7.) The District Court set a follow-up hearing to address the travel request for November 16, 2022. (D.C. Doc. 103.)

At the November 16, 2022 hearing, Mother objected to the children traveling due to safety concerns and lack of information about the people the children would be around. (11/16/22 Hearing Tr. at 8:5-11.) Mother's attorney also stated she was concerned the Department had not been actively exploring all potential ICWA-compliant placement options. (11/16/22 Hearing Tr. at 8:19-25, 9:1-5). In response to concerns over an ICWA compliant placement the Department claimed, "a variety of tribes…are really struggling with finding placements for children in general…" (11/16/22 Hearing Tr. 10:16-22.) Mother's attorney asserted that general contact with Tribes does not meet the active efforts requirement required under ICWA. (11/16/22 Hearing Tr. 11:14-23.) Despite the objections, the District Court ultimately allowed D.L.L. and J.T.L to travel out of state with their placement. (11/16/22 Hearing Tr. at 13:17-25.)

On January 31, 2023, The Department filed a Motion to Extend TLC. (D.C. Doc. 107.) In the Motion, the Department acknowledged that the children's placement did not comply with ICWA preferences and stated they contacted the Little Shell Tribe to see if they could identify any additional family members. (Id.) The District Court Ordered a Hearing on the State's Motion to Extend TLC be held on February 8, 2023. (D.C. Doc. 109.)

At the February 8, 2023 hearing, Mother stipulated to the extension of TLC. (D.C. Doc. 111.) The Department noted that both parents had shown progress, and indicated they were working towards moving supervised visits to the women's shelter where Mother was staying. (2/8/23 Hearing Tr. at 10:14-19.) Parties acknowledged Mother's positive progress and continued engagement with services. (2/8/23 Hearing Tr. at 5:10-23, 6:7-13.) The Department stated the extension of TLC was necessary to give parent's additional time to work their Treatment Plans. (2/8/23 Hearing Tr. at 10:14-18.) The District Court granted the extension of TLC and set two Status Hearings for March 22, 2023, and May 10, 2023, and a Review Hearing for August 2, 2023. (D.C. Doc. 111 & 112.)

At the March 22, 2023 Status Hearing, CPS McKay reported that Mother remained in the women's shelter but was actively seeking housing. (D.C. Doc. 113.) CPS McKay also stated that Mother had maintained

sobriety for an extended time and was doing well. Both parents were engaged in co-parenting classes. (Id.)

At the May 10, 2023 Status Hearing Mother reported that she had completed her treatment plan, and expressed concerns that the children remained in a non-Native American, non-kinship foster home where she believed they were losing their heritage. (D.C. Doc. 116.) Mother also reported that her requests to attend the children's soccer games and have the children attend Native American events, like powwows, had been denied by the Department (Id.) Mother also expressed her concern over the fact J.T.L. had reported being hit at the foster home. (Id.) The Guardian ad Litem (GAL) noted the children were enjoying visits with Mother and she had demonstrated great parenting skills. (Id.) The GAL also expressed that the children needed increased exposure to their Native American culture. (Id.) The Court instructed the Department to ensure the children were being exposed to their culture. (Id.)

On July 28, 2023, the Department filed a second Motion to Extend TLC to provide parents with additional time to complete their Treatment Plan. (CITE.) In the supporting Affidavit, CPS McKay stated she had attempted to contact Sarah Crawford at the Little Shell Tribe to find out their position on the Petition to Extend TLC with no success. (D.C. Doc. 131, see

Affidavit.) CPS further indicated that her last, and seemingly only contact, with the Little Shell Tribe was when she originally reached out to the Tribe after the children were determined to be Indian Children under ICWA. (Id.)

On August 29, 2023, the Department filed a Permanency Plan Report which stated that its Permanency plan was now adoption. (D.C. Doc. 142.) Unlike the previous Permanency Plan Reports this Report did state that the Department "inquired with the Tribe as to available approved foster homes" and "inquired with the Tribe about appropriate institution which has programs suitable to meet the Indian child's needs." (D.C. Doc. 142, see Affidavit.)

At the September 8, 2023 Hearing, Mother, Father, the Department, and counsel for the Little Shell Tribe were present. (9/8/23 Hearing Tr. at 4:5-13.) Mother's counsel objected to the Department unilaterally enrolling J.T.L in a private Christian school and requested the Department place him back in public school, as requested by Mother and Father, due to their more robust Native American cultural programs. (9/8/23 Hearing Tr. at 7:22-25, 8:1-5.) Mother's attorney argued:

> "…this brings us back to the days of the boarding school. It's wholly inappropriate, especially [given] the Court has heard me, time and time again, express concern that these children in non-kinship, non-

Native American foster placement have lost and are losing their cultural identity that this family cares about immensely." (9/8/23 Hearing Tr. at 9:5-12). She stated that the Department's actions violated ICWA and potentially the Montana Indian Child Welfare Act (MICWA). (9/8/23 Hearing Tr. at 17:1-18.) Mother's attorney also stated that the Department's failure to incorporate the parents into the children's extracurricular activities for the last two years was not consistent with active efforts.(9/8/23 Hearing Tr. at 10:6-12.)

Mother's attorney asserted that the Department failed to provide services in a manner consistent with "the prevailing social and cultural conditions and the way of life of the Indian child." (9/8/23 Hearing Tr. at 11:13-19.) Mother's attorney admitted that Mother had recently been arrested for a DUI but objected to the permanency plan of adoption, arguing that Mother had completed her treatment plan and "done everything that she can to make that [the DUI] better and to fix it…she is complying with all of her providers." (9/8/23 Hearing Tr. at 20:6-23, 21:1-5.)

Despite the District Court acknowledging that Mother had shown progress toward reunification, it adopted the permanency plan of adoption but stated "I'm going to tell you that the Department has some work cut out for it here..." (9/8/23 Hearing Tr. at 32:5-8.) The Court scheduled briefing

on the school issue and set another Review Hearing. (D.C. Doc. 142.) The District Court filed the Order Approving the Permanency Plan on September 20, 2023. (D.C. Doc. 143.)

On September 27, 2023, Mother filed a Motion to Compel DPHHS to Disenroll Child from Private Christian School and Enroll Child in Public School and a Brief in Support. (D.C. Doc. 146.) Mother's counsel citied ICWA, MICWA, the Indian Education for All Act, Article X, Section 1(2) of the Montana Constitution, and provided a robust historical overview of the boarding school era and subsequent assimilationist government policies to back her arguments. (Id.) She argued that J.T.L.'s placement in a non-Native American foster home, coupled with enrollment in a private Christian school, was not in his best interests, was harming his connection to his Indigenous heritage, and amounted to a modern-day "boarding school," echoing historical injustices. (Id.)

Mother's counsel highlighted the lack of American Indian curriculum at Foothills, noting the stark contrast with the culturally relevant curriculum and programming available in Great Falls Public Schools. (Id.) She asserted the Department was failing to provide active efforts under ICWA and MICWA by prioritizing the foster parents' preferences over the parents' right to direct J.T.L.'s education and involvement in cultural activities, and

by denying her repeated and longstanding requests for increased visitation and opportunities for the children to participate in cultural events. Mother stated, “It was not until a few weeks ago when the Department stated their intent to file a petition for termination of parental rights that they finally allowed parents to take the children to a powwow.” (Id.)

Mother’s counsel continued arguing that the Department’s unilateral decision to enroll J.T.L. in Foothills, against the parents’ express wishes and cultural objections, was detrimental to J.T.L.’s cultural identity and "…mirrors government assimilation policies and practices…" and had already caused concerning statements from J.T.L., such as, “I don’t like Native Americans.” (Id.) To prevent further harm and protect J.T.L.'s connection to his heritage, Mother requested an order compelling J.T.L.’s immediate removal from Foothills and enrollment in public school. (Id.) The Motion was supported by several sources detailing relevant Montana and federal statutes, the Department of Interior’s investigative report on the boarding school system, and research on the importance of cultural identity for Indigenous youth. (Id.)

On October 2, 2023, the Department filed its Petition for Termination of Parental Rights. (D.C. Doc. 147.) The Petition alleged that both parents failed to comply with or successfully complete their treatment plans.

Regarding Mother, the Department alleged that she "struggles to follow recommendations of professionals working with her children…[and] struggles to demonstrate her ability to consistently and safely meet the emotional, physical, and medical needs of her children." (Id.) The Department requested termination of both parents' rights and permanent legal custody of D.L.L. and J.T.L. with the right to consent to adoption. (Id.) A Termination Hearing was set for December 22, 2023. (D.C. Doc. 149.)

On October 30, 2023, Mother filed a Motion to Deem Motion to Compel DPHHS to Disenroll Child from Private Christian School and Enroll Child in Public School and Brief in Support Well Taken as the Department had not filed its response within the 14 days provided under Rule 2 of the Montana Uniform District Court Rules. (D.C. Doc. 167.) The State untimely filed its response to Mother's Motion the same day on October 30, 2023. (D.C. Doc. 169.) The State alleged that Foothills Christian School did have a Native American Curriculum and his foster parent's incorporate Native American culture in his everyday life such as seeing bison at Yellowstone, hanging a dream catcher above J.T.L.'s bed, shooting a children's bow, and spending as much time as possible outdoors. (Id.) However, it is unclear from the record how those actions "incorporate Native American culture into his everyday life." (Id.) The District Court set a Hearing on Mother's Motion

to Compel DPHHS to Disenroll Child from Private Christian School and Enroll Child in Public School for December 6, 2023. (D.C. Doc. 174.)

At the December 6, 2023 hearing, the State advised the Court it would only be proceeding with a status hearing, and that an attorney needed to be appointed for the children before a termination hearing could proceed. (D.C. Doc. 180.) Mother, through counsel, did not object to the continuance and requested the matter be heard as soon as possible. (Id.) The parties discussed scheduling, with Mother asserting that she would require three full days for the termination hearing, given the number of witnesses, while the State asked that the Court limit the termination hearing to two days. (Id.). The District Court vacated the termination hearing previously scheduled for December 22, 2023, and set a Scheduling Hearing for that day, while encouraging the parties to work together to streamline the Termination schedule. (Id.)

On December 15, 2023, the District Court Ordered that counsel immediately be assigned to the Youth[3]. (D.C. Doc. 181.) On January 29, 2024, Mother filed a Motion to Continue the Hearing on Motions scheduled

[3] On May 19, 2023, Montana Passed Senate Bill 148 which guarantees right to counsel for children experiencing the child protection system by statute.

for February 2, 2024. (D.C. Doc. 201.) Mother's counsel stated that Mother was receiving inpatient treatment at the Montana Chemical Dependency Center and could not attend hearings until she was discharged. Mother also stated that counsel for D.L.L. and J.T.L. had still not been assigned. (Id.) On February 1, 2024, counsel was assigned to the Youths. (D.C. Doc. 202.) The District Court reset the Hearing on Motions to March 28, 2024. (D.C. Doc. 203.)

On February 23, 2024, the State filed a Motion to Extend TLC and asked the District Court to set a hearing on the Motion for the same time as the scheduled Review Hearing. (D.C. Doc. 204.) In the Supporting Affidavit, CPS McKay stated that both Mother and Father had relapsed and reported using methamphetamine and fentanyl. (Id, see Affidavit.) The District Court set a hearing on the State's Motion to Extend TLC for March 6, 2024. (D.C. Doc. 206.)

At the March 6, 2024 Hearing, Mother's counsel requested a two-week continuance to review the affidavit with her client due to its length. (3/6/24 Hearing Tr. at 13-20.) The District Court granted the continuance, maintained TLC with the Department, and reset the hearing for March 20, 2024. (3/6/24 Hearing Tr. at 17:16, 6:24-25.) At the reset hearing, the

District Court granted the State's Motion to extended TLC for six months, set a review hearing in three months, and confirmed the Termination Hearing set for April 25 and 26, 2024. (D.C. Doc 208.1.)

At the March 28, 2024, hearing on Mother's Motion to Compel, Mother argued that enrolling J.T.L. in Foothills Christian School violated ICWA, MICWA, and J.T.L.'s best interests, hindering his access to crucial cultural education and resources, made worse by his current placement in a non-Native American foster home. (D.C. Doc. 210.1.) Mother's attorney called Dugan Coburn, Director of the Indigenous Education Program for Great Falls Public Schools, and Iris Kill Eagle, QEW for the Little Shell Tribe, to testify. (3/28/24 Hearing Tr. at 7:2-5, 24:14-16). Mr. Coburn testified about the Indigenous Education Program in Great Falls Public Schools, explaining that services were only available to Native American students enrolled in those public schools. (3/28/24 Hearing Tr. at 11:19-25.) He detailed the cultural classes, ceremonies, and support systems provided, highlighting their positive impact on academic performance, attendance, and cultural identity. (3/28/24 Hearing Tr. at 17:1-25, 18:1-9.) Ms. Kill Eagle underscored the importance of cultural education for Native children, stating that "…children need to know their identity." (3/28/24 Hearing Tr. at 31:13-14.)

Ms. Kill Eagle was called back to the stand after CPS McKay testified and expressed concern about the so-called cultural activities J.T.L. was engaged in and the potential harm with losing connection with his Native heritage. She advocated for greater cultural involvement, stating, "I believe there has to be interaction with other Native Americans, his own peers. Definitely needs to do more community—yeah, just the interaction needs—I believe needs to be more." (3/28/24 Hearing Tr. at 83:22-25, 84:1.) CPS McKay testified that the cultural activities J.T.L. engaged in were receiving books that his mother provided to him, playing basketball, encouragement to participate in outdoor activities, owning a children's bow and arrow set, going to the Great Falls Public Library, and visiting Yellowstone. (3/28/24 Hearing Tr. at 83:8-15.)

During the rest of CPS McKay's testimony, she stated that she had contacted the Tribe and other cultural experts, and had confirmed Foothills provides some Native American cultural education. (3/28/24 Hearing Tr. at 56:20-25, 77:3-9.) She explained that she had communicated with Tribal representatives Donna Woodward and Edith Coleman regarding J.T.L.'s educational needs. (3/28/24 Hearing Tr. at 44:6-7, 45:6-18). CPS McKay admitted that, despite Mother's prior request for J.T.L. to attend either Longfellow or West Elementary, the Department did not contact West

Elementary School in 2023 prior to J.T.L.'s enrollment in Foothills. (3/28/24 Hearing Tr. at 74:1-7.) When asked about active efforts under ICWA and MICWA, CPS McKay testified that the parents had not been fully involved in decisions about J.T.L.'s education and stated that the educators and providers were "in the driving seat in making the decisions about what educational environment is to his [J.T.L.'s] benefit. (3/28/24 Hearing Tr. at 69:6-11.) She blamed parent's lack of educational decision-making power on the parents' individual struggles. (3/28/24 Hearing Tr. at 52:15-23).

Despite hearing the testimony to the contrary from Native American cultural experts, the District Court denied Mother's Motion finding that removing J.T.L. from Foothills so late in the school year would be detrimental. (3/28/24 Hearing Tr. at 117:1-18, 118:1-20) In acknowledging Mother's arguments regarding cultural education and ICWA compliance, the Court asked the parties to "…re-evaluate how they can expose him [J.T.L.] more, or open him up more to those cultural programs, community activities so that he can have contact with Indian people and that he can have that education." . (3/28/24 Hearing Tr. at 118:6-12.)

On April 23, 2024, Mother filed a Motion to Continue the Termination Hearing and cited the need for discovery litigation prior to the

hearing and scheduling conflicts that multiple parties were experiencing. (D.C. Doc. 219.) The District Court vacated the Termination Hearing and set a scheduling conference in its place on April 26, 2024. (D.C. Doc. 221.)

At the April 26, 2024, scheduling conference, the Department, Mother, and the children's attorney were present.. (4/26/24 Hearing Tr. at 4:16-22). The Department stated its intention to pursue termination and estimated it would need a single day for the hearing, intending to call seven witnesses. (4/26/24 Hearing Tr. at 5:21-25, 6:1-2, 9:17-25.) Mother, through counsel, estimated the need for a longer hearing, potentially three days. (4/26/24 Hearing Tr. 24:20-22). The Court set the termination hearing for two days, July 12th and 19th, and ordered all parties to provide witness and exhibit lists no later than June 14. (4/26/24 Hearing Tr. at 25:9-18).

The two-day termination hearing commenced on July 12, 2024. (7/12/24 Hearing Tr. at 17:17-18.) The Department called CPS McKay, who testified extensively about the case history and both parents' treatment plans. (7/12/24 Hearing Tr. at 79.) Ms. McKay alleged that she had made attempts to support and assist Mother in accessing treatment and services, including transportation assistance, accompanying her to appointments, and advocating for her housing needs, such as attending a hearing with the Great

Falls Housing Authority. (7/12/24 Hearing Tr. at 57:11-15, 57:22-25, 94:5-10, 123:1-3, 197:1-7.)

CPS McKay acknowledged that Mother had engaged in several services, including multiple parenting courses, such as SafeCare and Circle of Security, individual and family-based therapy, and visits with the children, but alleged that Mother did not follow through with all recommendations. (7/12/24 Hearing Tr. at 103:2-16, 106:9-22, 165:15- 25, 166:1-25, 167:1-22.) McKay admitted that the Department did not offer many cultural resources, such as exploring Powwow attendance with the children, until 2023, after the Department began discussing termination, stating there were safety concerns because the children may be exposed to unsafe individuals such as maternal uncle. (7/12/24 Hearing Tr. at 225:10-25, 226:1-19.)

CPS McKay also acknowledged that visits with the children largely went well prior to 2024 and that the children regularly expressed their desire to be with their parents. (7/12/24 Hearing Tr. at 168:2-11, 173:8-17, 187:18-20, 230:17-19). CPS McKay further testified that it had not been the Department's decision to cease visits in 2024, but alleged parents decided not to attend visits. She noted the children were upset by their parents' inconsistent visitation but failed to offer specifics on any efforts made to

address those concerns. (7/12/24 Hearing Tr. at 248:21-23, 250:3-23.) She also testified that the reason the Department did not pursue guardianship was because Mother and Father could dissolve the guardianship at "any time" and guardianship does not provide permanency for the boys. (7/12/24 Hearing Tr. at 187:19-20.)

Charmaine Nicholson, a licensed therapist, testified about her work with Mother, specifically related to addressing the trauma Mother had experienced. (7/12/24 Hearing Tr. at 261:20-24, 262:24-263:8) Ms. Nicholson confirmed that Mother had engaged in therapy with her, starting in August of 2022, and had made "very decent progress" until a relapse involving alcohol in early 2023. (7/12/24 Hearing Tr. at 262:24-263:8, 263:24-25).

The Department then called Iris Kill Eagle, the QEW on ICWA and tribal customs, to provide cultural context to the case. (7/12/24 Hearing Tr. at 284:14-17). Ms. Kill Eagle testified to the paramount importance of family in Little Shell culture, emphasizing that guardianship is generally preferred over termination of parental rights as it preserves the possibility of reunification. (7/12/24 Hearing Tr. at 286:8-25.) She stated that maintaining hope for reunification is a significant cultural value and was in the best interests of the children. (7/12/24 Hearing Tr. at 287:2-8.)

During closing arguments, the Department argued that despite efforts to support Mother and Father in completing their treatment plans, neither had achieved the necessary level of stability to safely parent the children. (7/12/24 Hearing Tr. at 293:1-11.)

Mother countered that termination was not mandatory even if the District Court found the Department met its burden, and advocated for guardianship as a more appropriate permanency plan. (7/12/24 Hearing Tr. at 296:3-18.) She highlighted Mother's periods of significant progress throughout the case, arguing that progress demonstrated her potential for change and her commitment to the children, and that guardianship would better serve the children's best interests. (7/12/24 Hearing Tr. at 297:4-12, 302:18-25, 303:1-17.) Mother's attorney emphasized that severing the parent-child bond should be a last resort, especially given the children's strong attachment to their mother, stating, "The kids have consistently, again, said throughout this case that they want to go home, they want to visit their parents every day, they're sad without their parents, and they're happy with them." (7/12/24 Hearing Tr. at 303:8-12.) Mother's attorney argued that the Department failed to make active efforts

> "…in a manner consistent with prevailing social, and cultural conditions and the way of life of the Indian Child's Tribe and parents

> when they failed to include the parents in the child's extracurricular activities consistently, and failed to include the parents in outside cultural activities, failed to invite the parents or listen to the parents in the decisions about the children's education when such decisions have such cultural significance."

(7/12/24 Hearing Tr. at 298:17-25, 299:1-2.) Particularly she pointed to the unilateral decision to enroll J.T.L. in a private Christian school against Mother's wishes. (7/12/24 Hearing Tr. at 297:18-25, 298:1-25, 299:8, 300:22-301:11.)

The children's attorney concurred with the parents' attorneys, arguing that termination was not in the children's best interest. (7/12/24 Hearing Tr. at 311:7-8.) While stating that five-year-old D.L.L.'s opinion could not be fully ascertained, counsel argued that J.T.L.,

> "…an extraordinarily mature, articulate, and intelligent eight-year-old… would want me to oppose [termination]… he told me very seriously that he wanted to get back with his parents eventually…I think that to the extent that guardianship would be an option here, it is probably something that I would support, whereas I do not support termination."

(7/12/24 Hearing Tr. at 311:16-25, 312:1-7.)

At the July 19, 2024 hearing, the District Court did not hear testimony and proceeded directly to issuing its findings and order from the bench. The Court terminated Mother's parental rights to both children citing §41-3-609(1)(f), MCA. (D.C. Doc. 257.) The Court found that although Mother had engaged in services at times and shown periods of progress, she had ultimately failed to complete or benefit from her treatment plan, referencing ongoing struggles with substance abuse, mental health, and housing instability, as well as Mother and Father's volatile relationship. (7/19/24 Hearing Tr. at 10:12-15:16, 28:22-30:3.) The Court ultimately determined that termination, rather than guardianship, was in the children's best interests. (7/19/24 Hearing Tr. at 36:11-15, 36:21-25.)

Also on July 19, 2024, the District Court issued its Order Terminating Parental Rights and Granting Permanent Legal Custody to the Department. (D.C. Doc. 259). The Court found that both Mother and Father had failed to complete their court-ordered treatment plans and that continuation of the parent-child relationship would likely result in further abuse or neglect. (Id.) Citing § 41-3-609(1)(f), MCA, the Court found that the conduct or condition rendering the parents unfit was unlikely to change within a reasonable time. The Court noted the children had been in foster care for over 15 of the most recent 22 months, establishing the statutory presumption in favor of

termination. (Id.) Acknowledging the children's status as Indian Children under ICWA, the court found "good cause" to deviate from ICWA placement preferences and determined that "active efforts" had been made to prevent the breakup of the Indian family, but these efforts were unsuccessful. (Id.) The Court terminated Mother and Father's parental rights, granted the Department permanent legal custody with the authority to consent to adoption. (Id.)

Mother filed timely notice of appeal on August 29, 2024. (D.C. Doc. 267.)

SUMMARY OF THE ARGUMENTS

The District Court violated Mother's fundamental right to parent her children and abused its discretion when it terminated her parental rights, failing to adhere to fundamentally fair procedures and the requirements of ICWA. The Department's unilateral decision to enroll J.T.L. in a private Christian school, despite Mother's objections and the availability of public schools with robust Native American cultural programs, prejudiced J.T.L.'s connection to his tribal heritage and constituted a violation of ICWA's active efforts requirement. Further, the Department's inadequate search for qualified ICWA placements and improper justification for deviating from ICWA placement preferences, coupled with deference to the foster parents'

preferences over Mother's wishes, effectively denied the children access to their Native culture. These actions directly undermined Mother's ability to maintain crucial cultural connections with her children and created an unfair procedural disadvantage.

The District Court also abused its discretion by prioritizing termination over compelling evidence supporting guardianship as a more appropriate permanency option. Despite the statutory presumption favoring termination, substantial evidence, including the children's positive interactions with Mother and J.T.L.'s express wish to return to his parents' care, demonstrated that termination was not in the children's best interests. The Department's failure to actively pursue guardianship and its inadequate cultural support and services further compounded the injustice. Therefore, the termination of Mother's parental rights, based on the Department's failure to comply with ICWA and the District Court's disregard for evidence favoring guardianship, constituted a violation of Mother's fundamental right to parent and an abuse of discretion.

STANDARD OF REVIEW

This Court reviews a district court's termination of an individual's fundamental constitutional right to parent his child for the abuse of discretion. In re D.B. and D.B., 2007 MT 246, ¶ 16, 339 Mont. 240, 168

P.3d 691. A district court has abused its discretion if its findings of fact are clearly erroneous, or its conclusions of law are incorrect. In re D.B. and D.B., ¶ 18. "Findings of fact are clearly erroneous if they are not supported by substantial evidence." In re D.H., S.H., K.H., N.S., J.B., Jr., 2001 MT 200, ¶ 14, 306 Mont. 278, 33 P.3d 616. If a court's findings of fact are supported by substantial evidence but the court misapprehended the effect of the evidence, the findings of fact are clearly erroneous. In re D.H., ¶ 14. The findings of fact are also clearly erroneous if the facts were supported and the district court did not misapprehend the effect of the evidence, but the reviewing Court is still left with the "definite and firm conviction that a mistake has been committed." In re D.H., ¶ 14. This Court reviews a district court's conclusions of law to determine whether its conclusions are correct. In re M.P.M., 1999 MT 78, ¶ 12, 294 Mont. 87, 976 P.2d 988.

A proceeding governed by the Indian Child Welfare Act is subject to heightened standards of proof. Under ICWA, if termination of a parent's rights is sought, then the court must be "satisfied by proof beyond a reasonable doubt" that 25 U.S.C. § 1912(d) has been met. 25 U.S.C. § 1912(f); In re G.S., 2002 MT 245, ¶ 33, 312 Mont. 108, 59 P.3d 1063. Beyond a reasonable doubt is the highest burden of proof and requires that proof be of "such a convincing character that a reasonable person would rely

and act upon it in the most important of his or her own affairs." State v. Flesch, 254 Mont. 529, 535, 839 P.2d 1270, 1273-74 (1992). A proceeding governed by ICWA may be invalidated upon proof that any provision of sections 1911, 1912, or 1913 of the Act has been violated. 25 U.S.C. § 1914.

ARGUMENTS

I. MOTHER'S RIGHTS UNDER ICWA WERE VIOLATED.

In 1978, Congress enacted ICWA in response to concerns that the continued existence and integrity of Indian tribes were threatened due to abusive child welfare practices. ICWA is meant to "protect the best interest of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. To accomplish this goal, ICWA requires additional and heightened procedures for involuntary child custody proceedings when an Indian child is the subject of the action. ICWA provides the "minimum Federal standards for the removal of Indian children from their families." 25 U.S.C. § 1902. "The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49-50 (1989) (See footnote 24 citing In re Appeal in Pima County Juvenile Action No. S-903, 130 Ariz. 202, 204, 635 P.2d 187 (App. 1981).

A. The District Court and the Department Violated ICWA's Active Efforts Requirements by Failing to Adhere to Cultural Practices.

The Department's unilateral decision to enroll J.T.L. in Foothills Community Christian School, despite Mother's express objections and the availability of public schools with robust Native American cultural programs, constituted a violation of ICWA's active efforts requirement, prejudiced J.T.L.'s connection to his tribal heritage, and was contrary to his best interests. 25 U.S.C. §§ 1901(3), 1902, 1912(d); 25 C.F.R. § 23.2.

ICWA requires states to protect the best interests of Indian children and promote the stability and security of Indian tribes and families, which includes the requirement for active efforts to prevent the breakup of the Indian family. 25 U.S.C. § 1902. Active efforts, to the maximum extent possible, must "be provided in a manner consistent with the prevailing social and cultural conditions and the way of life of the Indian child's Tribe" and be undertaken "in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodian, and Tribe." 25 C.F.R. § 23.2; Mont. HB 317 Section 12. Mother inside and outside of court repeatedly voiced her concerns about the lack of cultural resources at Foothills and requested J.T.L.'s enrollment in public school. By failing to engage with Mother and consider public school options, which would have

better supported J.T.L.'s connection to his Native American heritage, the Department violated ICWA's focus on the child's best interests and its mandate to work in partnership with the parents and Tribe." 25 U.S.C. §§ 1901(3), 1902, (9/8/23 Hearing Tr. at 7:22-25, 8:1-5); (3/28/24 Hearing Tr. at 74:1-7); (7/12/24 Hearing Tr. at 225:1-25.)

Mother argued before the District Court that this decision, coupled with placement in a non-Native foster home, was actively harming J.T.L.'s sense of cultural identity, resulting in his making concerning statements such as, "I don't like Native Americans." (D.C. Doc. 46.) This forced cultural assimilation, echoing the harmful practices of the boarding school era, runs directly counter to ICWA's purpose of preserving tribal connections. Assimilationist practices have caused irreparable harm and intergenerational trauma.

As Justice Gorsuch articulated in Haaland v. Brackeen, "Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life…It secures that promise by divesting States of authority over Indian affairs…In adopting ICWA, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture…" 143 S. Ct. 1609, 1661 (2023) (Gorsuch, J., concurring).

While the District Court acknowledged the cultural benefits of public school for J.T.L., it declined to order a change in his enrollment, prioritizing the avoidance of disruption over his cultural needs. (3/28/24 Hearing Tr. at 117:1-12, 118:15-19.) This decision disregards the profound importance of cultural identity for Indigenous children's well-being and psychosocial development, as acknowledged in the concurrence in In re A.B. and further supported by Ms. Kill Eagle's testimony. (In re A.B., 2020 MT 64, ¶¶ 49, 83, 399 Mont. 37, 457 P.3d 967 (Gustafson, J., concurring); 3/28/24 Hearing Tr. at 31:9-32:25; 83:22-25.) It also fails to consider the majority holding of In re A.B. that placement decisions involving Indian Children must reflect "the unique values of Indian culture." (Id. at ¶ 38.)

The District Court expressly violated ICWA, which prioritizes family preservation and maintaining parent-child relationships, by failing to protect Mother's right to direct J.T.L.'s cultural and educational upbringing. 25 U.S.C. §1902. By upholding J.T.L.'s enrollment in Foothills Community Christian School, despite compelling evidence demonstrating the detrimental impact on his connection to his Native American heritage and the availability of public-school alternatives with culturally appropriate programming, the Court prioritized administrative convenience over J.T.L.'s cultural needs. This decision, especially given the concurrent threat of

terminating Mother's parental rights, directly prejudiced Mother's ability to provide J.T.L. with necessary cultural connection and, as such, constitutes reversible error.

The Department's actions throughout this case demonstrated a failure to prioritize the children's cultural identity, as required by ICWA, instead deferring to the preferences of the non-Native American foster parents over active efforts towards cultural preservation. 25 U.S.C. § 1902.

ICWA explicitly mandates that placement decisions involving Indian children should "reflect the unique values of Indian culture." 25 U.S.C. § 1902. 25 U.S.C. § 1901(3) states that, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."

The Department's failure to secure a culturally appropriate placement was exacerbated by their ongoing deference to the foster parents' preferences. Mother consistently requested that the children be allowed to participate in culturally relevant activities, such as Powwows and other tribal events, and expressed concerns about the erosion of their cultural identity in their non-Native foster home. (7/6/24 Hearing Tr. at 38:8-12; 7/22/24

Hearing Tr. at 20:19-22, 21:1-14; 8/10/22 Hearing Tr. at 6:14-21, 8:1-3, 9:2-10, 12:15-25, 33:1-4; 11/16/22 Hearing Tr. at 8:5-23, 19:17-21.)

CPS McKay acknowledged these concerns at various hearings but testified that the Department had not allowed the children to attend community events due to concerns the children may be exposed to unsafe individuals. (7/12/24 Hearing Tr. at 225:10-25, 226:1-19.) Notably, however, the Department suddenly determined that Powwow attendance was appropriate in 2023, at the same time as filing their Petition for Termination. (7/6/22 Hearing Tr. at 39:1-8; 7/12/24 Hearing Tr. at 224:24-226:22.)

This suggests that cultural considerations were not a priority for the Department until they shifted their focus to termination, directly contradicting ICWA's requirement for diligent and ongoing cultural support. Furthermore, while Mother objected to J.T.L.'s enrollment in private school, the foster parents' preference for private school was ultimately what led to J.T.L. attending Foothills, and the Department's acquiescence to their wishes further restricted J.T.L.'s access to important cultural education and experiences.

This deference to foster parent's wishes even guided the Permanency Plan pursued by the Department. Despite J.T.L. expressing his desire to eventually be reunified with his parents, and Mother's stated willingness to

pursue guardianship, the Department declined to pursue this permanency option. The Department cited concerns about the potential for the guardianship to be undone and their prioritization of a “permanent” placement. (7/12/24 Hearing Tr. at 230:1-5, 230:20-25, 311:16-312:7.) This pattern of prioritizing the foster parents' preferences over Mother’s requests and tribal cultural preservation demonstrates the Department's failure to uphold ICWA's mandate.

By not actively seeking alternative placements that better reflected the children's cultural heritage and deferring to the foster parents' restrictions, the Department effectively limited the children's exposure to their Native culture. This disregard for cultural preservation undermines ICWA's fundamental goal of promoting the stability and security of Indian families and tribes. 25 U.S.C. § 1902.

B. Department Failed to Comply with ICWA Placement Preferences by Failing to Conduct a Thorough Search for Qualified ICWA Placements and by Improperly Justifying "Good Cause" to Deviate.

The Department failed to comply with ICWA placement preferences, both by failing to conduct a thorough search for qualified ICWA placements and by improperly justifying “good cause” to deviate from those preferences. 25 U.S.C. § 1915. ICWA establishes a clear preference for placing Indian children with (1) extended family members, (2) other

members of the child's tribe, or (3) other Indian families. 25 U.S.C. § 1915(a).

CPS McKay's testimony revealed that the Department's efforts to find a qualified placement were inadequate. While the Department allegedly contacted Tribes and conducted Seneca searches, these efforts did not demonstrate a diligent search for all available ICWA-compliant placements. (7/12/24 Hearing Tr. at 214:9-25, 219:24-25, 220:1-2.) For instance, despite being provided with the name of a potential kinship placement, a cousin of Mother's and a member of three affiliated Tribes, in December 2023, the Department failed to pursue placement with her, simply citing unspecified "history" as the reason. (7/12/24 Hearing Tr. at 215:20-26, 216, 217:1-6.)

The Department's justifications for "good cause" to deviate from ICWA placement preferences did not meet the stringent standards required by law. 25 U.S.C. § 1915. Simply asserting a lack of available ICWA-compliant foster homes is insufficient to establish good cause. The Department failed to show that placement with extended family members, or other tribal members, could not have occurred. (7/12/24 Hearing Tr. at 214:1-23.) As such, the District Court improperly determined that good cause existed and erred in finding they met their burden of proving, by clear

and convincing evidence, that the children could stay in their non-ICWA placement.

Additionally, the Department did not elaborate on the specifics of the potential placement's "history" or make any effort to explore whether an exception to the placement guidelines could be granted, even with supervisory assistance. (7/12/24 Hearing Tr. at 217:2-6.) CPS McKay admitted that neither she nor her supervisor spoke with the regional administrator, who had the authority to grant exceptions on a case-by-case basis. (7/12/24 Hearing Tr. 217:15-22.) This decision not to explore all available avenues to place the children in an ICWA-compliant home highlights the Department's insufficient efforts to comply with placement preferences.

Furthermore, the foster placement actively impeded the children's connection to their Native heritage. (7/12/24 Hearing Tr. at 222:7-10, 254:15-17). The foster placement insisted on enrolling J.T.L. in a private Christian school lacking Native American cultural curriculum, discouraged Mother's involvement in their cultural practices, and demonstrated a limited understanding of Native culture by considering activities like "playing basketball, spending time outdoors…and visiting Yellowstone to see bison"

as sufficient cultural immersion. (7/12/24 Hearing Tr. at 221:2-223:25; 3/28/24 Hearing Tr. 83:8-15.)

The Department's failure to provide meaningful placement alternatives, combined with the foster placement's actions and cultural misunderstandings, resulted in a failure to abide by ICWA.

II. THE DISTRICT COURT ERRED IN DETERMINING TERMINATION WAS IN THE CHILD'S BEST INTEREST.

A "natural parent's right to the care and custody of a child is a fundamental liberty interest which courts must protect with fundamentally fair procedures at all stages of the proceedings for the termination of parental rights." *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282 (citing *In re B.N.Y.*, 2003 MT 241, ¶ 21, 317 Mont. 291, 77 P.3d 189). Because the procedures to terminate an individual's right to parent her child implicate a fundamental liberty interest, the procedures are protected by the Due Process Clause of the United States and Montana Constitutions which guarantee that those procedures are fundamentally fair. *In re C.J.*, ¶ 26; *In re D.B.*, ¶ 17; U.S. Const. amend. XIV; Mont. Const. art. II, § 17.

If a child is in the Department's custody for 15 of 22 months, then it is presumed to be in the child's best interests to terminate parental rights. Mont. Code Ann. § 41-3-604. A district court may order the termination of

the parent-child legal relationship if there is clear and convincing evidence that the child was adjudicated a YINC, the parent failed to comply with an appropriate treatment plan, and the condition or conduct that rendered the parent unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), Mont. Code Ann. Further, in considering termination, a district court must give primary consideration the best interests of the child. Mont. Code Ann. § 41-3- 609(3). The clear and convincing standard requires that a preponderance of the evidence is definite, clear, and convincing. *In re L.M.A.T.*, 2002 MT 163, ¶ 33, 310 Mont. 422, 51 P.3d 504. Clear and convincing evidence does not have to be conclusive and falls between the criminal law rule of beyond a reasonable doubt and the civil law standard of a mere preponderance. *In re L.M.A.T.*, ¶ 33. It is the Department's burden to prove by clear and convincing evidence that every requirement of the termination statute has been satisfied. *In re L.M.A.T.*, ¶ 33.

Here, the Department failed to meet this burden, and the District Court erred in terminating E.C.-L.'s parental rights because the Department failed to provide evidence that termination was in D.L.L. and J.T.L.'s best interests, and the District Court did not primarily consider D.L.L. and J.T.L.'s best interests or wishes when terminating E.C.-L.'s rights. Further, the Department was not required to file a petition to terminate, and even if it

was, sufficient evidence rebutted any presumption that termination was in D.L.L. and J.T.L.'s best interests.

A. The Department Was Not Required to File for Termination and The Evidence in Support of Guardianship Overcame The Presumption That Termination Was In D.L.L. and J.T.L.'s Best Interests.

The District Court erred in terminating Mother's parental rights rather than pursuing guardianship. The evidence presented at the hearing, particularly children's strong bond, and expert testimony, demonstrated that guardianship was a more appropriate permanency option, and that termination was not in the children's best interests.

Section 41-3-604(1), MCA, establishes a presumption, not a mandate, for termination when a child has been in foster care for 15 of the most recent 22 months. This presumption is rebuttable if the evidence demonstrates that termination is not in the child's best interest. Here, substantial evidence countered this presumption. Multiple witnesses, including CPS McKay, acknowledged that the children's visits with Mother were largely positive and productive. Ms. McKay, despite recommending termination, acknowledged Mother's consistent visitation with the children in 2022 and 2023, and her completion of several treatment plan tasks, including parenting courses and therapy. (7/12/24 Hearing Tr. at 103:2-16, 168:13-16,

177:21-22). Crucially, the children's attorney, Ms. French, testified that eight-year-old J.T.L. clearly expressed his desire to eventually return to his parents' care, and opposed the termination but would support a guardianship instead. (7/12/24 Hearing Tr. at 311:17-312:7, 315:12-15.)

Moreover, guardianship is a safe and appropriate outcome for children in foster care. Research shows re-entry rates for children into the foster care system is lower amongst children placed in a guardianship as compared to an adoption. *In re A.B.* ¶ 50 *citing* Leslie Cohen & Mark Testa, Children & Family Research Ctr., Subsidized Guardianship and Permanence (2004), https://perma.cc/28FD-W626. Evidence from Montana specifically indicated that adoption did not offer safer or better well-being outcomes for children when compared to children who exited into guardianship. *In re A.B.* ¶ 50 *citing* James Bell Assocs., Children's Bureau, U.S. Dep't of Health & Human Servs., *Profiles of the Title IV-E Child Welfare Waiver Demonstration Projects: Volume 1: Demonstrations Active between Federal Fiscal Years 1996 and 2012* 113 (2013), https://perma.cc/5KEU-5BNF.

This evidence, along with Ms. Kill Eagle's testimony regarding the importance of family preservation and cultural continuity under ICWA, strongly supports the argument that guardianship, rather than termination, better served D.L.L and J.T.L.'s best interests. (7/12/24 Hearing Tr. at

286:8-25, 287:1). The Department's argument that guardianship does not necessarily guarantee permanency is untrue. The evidentiary record presented at the termination hearing, coupled with the Department's admitted initial presumption towards termination, as well as failure to provide cultural supports and services, demonstrates that they did not meet their burden to prove by clear and convincing evidence that termination was in the children's best interests. In re C.J., 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282 (citing In re B.N.Y., 2003 MT 241, ¶ 21, 317 Mont. 291, 77 P.3d 189); In re D.B., ¶ 17.

CONCLUSION

For these reasons, Mother respectfully requests this Court reverse the Order of the District Court terminating her parental rights and remand for further proceedings.

Respectfully submitted this day of January 17, 2025.

By: /s/ Abby Shea
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CERTIFICATE OF COMPLIANCE

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

/s/ Abby Shea
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APPENDIX

CERTIFICATE OF SERVICE

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