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.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it terminated Mother's parental rights to J.T.L. and D.L.L.

STATEMENT OF THE CASE

On September 20, 2021, the Department of Public Health and Human Services (Department) removed J.T.L. (aged 5) and D.L.L. (aged 2) from the care of E.C.-L. (Mother) and B.L. (Father) based on concerns of drug use by Mother and Father (collectively Parents) and the condition of the home. (Doc. 1 at 25-26.)[1] Because this was J.T.L.'s fourth removal and D.L.L.'s third removal, the Department initially petitioned the district court to grant the Department emergency protective services of the children, make a determination that the Department need not provide reasonable efforts to reunify the children with Parents, and, ultimately, terminate Parents' rights. (Doc. 1.)

In February 2022, J.T.L.'s and D.L.L.'s enrollment applications were approved by the Little Shell Tribe of Chippewa Indians of Montana (Little Shell Tribe), which resulted in both J.T.L. and D.L.L. constituting an "Indian child" as defined by the Indian Child Welfare Act (ICWA). (ADN-21-199, Doc. 31;

[1] Unless otherwise stated, citations to the record are from Cause No. ADN-21-198.

ADN-21-198, Doc. 41.) As a result, the Department rescinded its no reasonable efforts petition and instead petitioned to have the district court adjudicate the children as youths in need of care and grant the Department temporary legal custody, which the district court granted following a contested hearing on July 22, 2022. (Docs. 40, 42, 77, 81, 84.)

Despite its diligent efforts, the Department was unable to secure appropriate placement for the children in an ICWA preferred placement, resulting in the district court finding good cause existed for the children to remain in non-kinship foster care throughout the proceedings. (Docs. 29, 84, 112, 135, 207, 259.) The district court also approved J.T.L. remaining enrolled at Foothills Community Christian School (Foothills) over Parents' objection. (3/28/24 Tr. at 104-18.)

Parents ultimately were unable to successfully complete their court-approved treatment plans, resulting in the Department petitioning for termination of their parental rights on October 2, 2023. (Doc. 147.) Following a termination hearing on July 12, 2024, the district court terminated Parents' respective rights to both children. (Docs. 255, 257, 259.) Mother timely appeals.[2]

[2] Father's appellate counsel filed an *Anders* brief on January 27, 2025.

STATEMENT OF THE FACTS

Parents' involvement with the Department began in September 2016, when the Department removed C.[3] and J.T.L. based on concerns of Father using methamphetamine and Mother using methamphetamine and prescription opiates. (Doc. 1 at 23; 1/14/22 Tr. at 18.) The Department dismissed these cases after Mother completed her treatment plan. (*Id*.)

C. and J.T.L. were removed again in 2018, based on concerns about Parents' drug use and possible drug distribution by Father. (Doc. 1 at 24; 1/14/22 Tr. at 19-20.) D.L.L. was born during the pendency of those cases, which were ultimately dismissed in February 2020. (*Id.*) Approximately three months later, the Department received a report of the children being around unsecured prescription drugs and knives, and Father having methamphetamine on his person. (Doc. 1 at 24.) Law enforcement's investigation resulted in both Parents being charged with criminal child endangerment. (1/14/22 Tr. at 21.) After the Department successfully implemented an in-home safety plan, the cases were dismissed in August 2021. (*Id*. at 33.)

[3] The Department did not remove C. from Mother's care in the instant case. The record does not support that C. was residing with the family at that time. Also, C. was 17, making him less vulnerable than J.T.L. and D.L.L. (*See* 7/12/24 Tr. (TPR Tr.) at 213.)

In September 2021, J.T.L. and D.L.L. were removed from Parents. (Doc. 1.) At the time, Father was being investigated for an alleged sexual assault of one of the children. (1/14/22 Tr. at 6.) There were also concerns of drug use by Parents in the home and about Mother's mental health. (*Id*. 6-7.) The children were sleeping in the same bed as their parents due to their room being so cluttered with items that no one could enter the room. (*Id*. at 7.) There was also dog feces present throughout the home. (*Id*.) At the conclusion of the sexual assault investigation, Mother was charged with falsifying information concerning the child's sexual abuse allegation against Father. (*Id*. at 8.)

At that time, Father had reportedly been sober for well over a year. (*See id*. at 53.) Father described Mother as "nuts" and said that she "struggle[s] with chemical dependency," but Father "d[id] not feel that it [was] a problem that she was in the home." (*Id*. at 27.)

Following the removal, Parents attended weekly meetings with Child Protection Specialist Christa McKay. (TPR Tr. at 84, 193.) And Father began to address the reasons the Department became involved. Father cleaned out the clutter in the home, placed training pads in the bathroom for the dogs to use which he reportedly cleaned at least once a day, and weatherproofed the house. (1/14/22 Tr. at 42-44, 47.) Father submitted to drug testing, testing negative for all substances in October, November, and December. (*Id*. at 12-14.) Father, a graduate of

Veteran's Court, continued to utilize the program to maintain his sobriety, as well as attending individual chemical dependency sessions and relapse prevention group sessions with Ted Szudera, LAC, at Benefis. (*Id*. at 17, 54.)

Based on Father's progress, he moved to dismiss the case before the adjudication hearing. (Doc. 65.) Mother supported Father's motion. (*Id*.) By that time, Mother had completed a chemical dependency evaluation, which referred her to inpatient treatment. (1/14/22 Tr. at 25.) Mother went to the Montana Chemical Dependency Center (MCDC) for a short time, but ultimately left without completing treatment, stating "she does not need to be at inpatient treatment, that she could complete her sobriety with intensive outpatient." (*Id*.) After leaving MCDC, Mother resided at the Women's Shelter. (*Id*. at 15.) Several of Mother's urine analysis samples were marked dilute. (*Id*. at 25.) Father assured the Department he would not allow Mother access to the home if she was using drugs. (*Id*. at 15-16.)

However, the Department remained concerned about Father's ability to protect the children, specifically from family members, including Mother. (7/6/22 Tr. at 17-18, 23.) Father had stated "that he will allow family to be within the home because family is family." (*Id*. at 17.) Specifically, Father did not understand why the Department did not want the children's maternal uncle, R.C., to be around the children, even though R.C. had reportedly sexually assaulted a child family

member. (7/6/22 Tr. at 73; 7/22/22 Tr. at 45.) To Father, R.C. was still the children's uncle, and "[w]hat he did in the past or didn't do in the past is in the past." (7/22/22 Tr. at 55.) Father stated that he wanted to maintain contact with family and would just make sure the children were safe. (*Id*. at 46.) J.T.L. had already been sexually abused by a cousin while in Parents' care. (7/6/22 Tr. at 53.)

Even after Mother was no longer residing at the family's home, Father still allowed her unfettered access to the house, along with other inappropriate individuals, resulting in law enforcement being called. (7/6/22 Tr. at 17.) Father informed the Department that the children would have Mother in their life and Mother would have the children in hers, admitting that he was incapable of keeping Mother out of the home. (*Id*. at 17-18, 23.)

Father's statement confirmed the Department's belief that Father could not keep the children safe, especially from Mother. Parents are codependent and have a volatile relationship, with a history of verbal and physical altercations. (1/14/22 Tr. at 22; *see also* TPR Tr. at 266.) Parents have a history of not communicating with each other, reporting they are separated, and then getting back together within a matter of days. (1/14/22 Tr. at 22.) Parents struggle to independently parent the children, and in the previous cases reported feeling "overwhelmed" by the children, so much so that they "need[ed] the other parent there as support." (*Id*. at 23, 33.)

In May 2022, Mother asked that the children be placed with family. (7/6/22 Tr. at 23.) The Department began ongoing communication with representatives of the Little Shell Tribe regarding the children's placement. (7/6/22 Tr. at 15; 7/22/22 Tr. at 20.) The Little Shell Tribe did not object to the children's current placement, which was not an ICWA preferred placement. (7/6/22 Tr. at 15.) The Little Shell Tribe did not have any other placement alternatives available and did not know of any kinship placements. (7/6/22 Tr. at 15; 7/22/22 Tr. at 20-21.) Because the children were not in an ICWA preferred placement, the Department discussed with the Little Shell Tribe additional ways the Department could support the children in their placement. (7/6/22 Tr. at 70-71.)

On July 3, 2022, law enforcement found Mother passed out in her van in the middle of the street, with the van running and Mother's foot on the brake. (Doc. 107 at 20.) When law enforcement approached Mother, she attempted to start her van. (*Id*.) Mother's PBT indicated that her BAC was 0.171. (*Id*.) Mother was released from jail on July 6, 2022. (7/6/22 Tr. at 27-28.) Mother did not believe her relapse "ha[d] anything to do with sobriety," but rather was her being depressed that she had not been able to see her children more. (7/6/22 Tr. at 28, 49.) Mother had been suspended from the Women's Shelter for 30 days and was residing in a van that McKay had recently seen at Father's residence. (*Id*. at 42.)

By the July 6, 2022 adjudication hearing, Parents had obtained a divorce, and Father had removed Mother from the lease. (7/6/22 Tr. at 7.) Around the same time, Father reportedly wanted to have his children attend a powwow with him. (*See id*. at 71.) The Department had concerns about approving that because of Father's lack of follow-through with plans and that he might allow Mother to attend with them. (7/6/22 Tr. at 71-72.) However, to maintain the children's connection to their Tribe, the Department referred J.T.L. to a Native American club through his public school. (*Id*. at 70.) The Department also reached out to Parents for recommendations of activities that Parents would like the children to be involved in. (*Id*. at 70-71.) On July 22, 2022, the district court denied Father's motion to dismiss and adjudicated the children as youths in need of care. (7/22/22 Tr.; Docs. 81 at 2-3, 84.)

On September 9, 2022, Mother graduated from the partial hospitalization program at Benefis. (TPR Tr. at 200-01.) And, by November 2022, Mother had made significant progress on her treatment plan. (11/2/22 Tr. at 13.) Mother had been engaged with her providers and had been following the visitation coach's guidance during her visits that were held twice a week. (*Id*. at 12-13.) Mother, however, did relapse, which caused her to be sanctioned to prerelease until November 17, 2022. (*Id*. at 12.)

By March 2023, Mother had "gone above and beyond in advocating for herself and looking into housing," overcoming a denial letter that CPS helped Mother appeal, and was on a waiting list for housing. (3/22/23 Tr. at 5; TPR Tr. at 196-97.) Mother had been engaging in mental health treatment, chemical dependency treatment, and visits. (3/22/23 Tr. at 5.) Mother had also completed chaperone training and a coparenting class. (*Id*. at 5-6.) Given Mother's progress, the Department began planning on transitioning from supervised visits to in-home visits. (*Id*. at 7.)

By May 2023, supervised visits were occurring in the home. (5/10/23 Tr. at 5-6.) At that time, Mother and C. were residing with Father, where Mother planned to stay until C. was able to transition to the Job Corps. (*Id*. at 6.) Mother then would relocate to the Cameron Center where she could be reunified with the children. (*Id*.) Mother continued to see her chemical dependency provider once a month, had maintained sobriety, and was engaged with individual therapy. (*Id*. at 7.) Mother had also successfully completed the chaperone program with Charmaine Nicholson, LCPC. (*Id*.)

At that time, Mother, as a backup plan and to get out of Father's home sooner, was working on obtaining housing for herself and C. (Doc. 130 at 10.) However, Opportunities and the Office of Public Assistance (OPA) did not accept her order from tribal court saying that she was the legal guardian of C. because it

had been issued in 2009. (*Id*. at 10.) McKay planned to look at the dismissal order from C.'s case to see if Opportunities or OPA would accept that order. (*Id*.)

At a hearing on May 10, 2023, Mother brought to the district court's attention that she feared her children were "losing and not learning enough about their Native American culture and heritage," which Mother wanted them to know. (5/10/23 Tr. at 9.) J.T.L. reportedly said to Mother that "[he] do[es]n't like Native Americans." (*Id*. at 9.) Mother explained to J.T.L. that he is Native American and "how special and how important" it is to be Native American. (*Id*.) Mother wanted to take her children to powwows and other cultural events, but the Department did not approved those requests because the Department could not control for safety at the events, at which the Department expected R.C. to also be in attendance. (5/10/23 Tr. at 9-10; TPR Tr. at 224-25.)

During McKay's meeting with Mother on May 26, 2023, Mother expressed concern about caring for C. impacting her ability to reunify with J.T.L. and D.L.L. (Doc. 107 at 9.) McKay reminded Mother of their plan to support C. going to the Job Corps, with the backup plan of working with providers on repairing C.'s relationship with J.T.L. and D.L.L. so that the children could reside together with Mother. (*Id*.) If the therapy sessions with the children continued to go well, the Department planned on having Mother and the three children work with Nicholson

on establishing safety plans and working on boundaries. (*Id*.) The Department held a Family Engagement Meeting (FEM) at the end of May. (*Id*.)

McKay met with Mother in person at Father's home on June 6 and 16. (*Id*. at 8.) Mother requested permission to take the children to the Fourth of July parade, for which McKay reached out to a provider to arrange transportation. (*Id*.) On June 20, 2023, McKay tried to meet with Mother at Father's home, but she was not there. (*Id*. at 7.) McKay contacted Mother the next day by phone. (*Id*.) Mother, again, expressed concerns that the children would not be reunified with her if C. was in her care. (*Id*.) McKay explained that she had a meeting with the children's therapist to discuss next steps and to ensure that the Department was being mindful of all the children's needs, including C.'s. (*Id*.)

McKay met with Mother in person at Father's house on June 27, 2023. (*Id*. at 6.) Based on their conversation, McKay set another meeting for August 8 to assess how C. was doing and follow up on Mother's progress. (*Id*.)

During the first week of July 2023, McKay talked with Mother three times over the phone due to Mother being in Helena. (Doc. 130 at 5.) By that time, McKay, based on Mother wanting herself and C. out of Father's house, had placed C. on the waitlist for Missouri River Group Home and had talked to the directors of the Women's Shelter and the Cameron Center about available options for Mother and C. (*Id*. at 5-6.) McKay had also reached out to Opportunities to see if

there were available options for C. and set a meeting with the WIOA Youth Program. (*Id*. at 6.)

In July 2023, J.T.L. reported to McKay that he wanted to go to Foothills because his friends who he played soccer with went to school there and he felt bullied at Longfellow Elementary School. (Doc. 205 at 17.) McKay discussed J.T.L.'s wishes at the July 14 FEM, which had to end early due to Father's escalating behaviors. (*Id*.)

By August 2023, Parents were having individual unsupervised visits with the children. (8/2/23 Tr. at 7.) The visits had been transitioned to individual from family sessions because the tension between Parents was causing the children to have behavioral changes. (*Id*.) Also, during this time, Mother was caring for C., which the Department was trying to navigate because not only is C. a victim of sexual abuse, he also sexually abused one of the children. (*Id*. at 8.) To help ease this transition, the Department referred Mother to Nicholson for family therapy, which would include C. (*Id*.)

That August, McKay reached out to the Indigenous Education Department of Great Falls Public Schools, which informed her that J.T.L. was not attending the cultural groups offered during school. (Doc. 205 at 17.) J.T.L. reported that he did not attend the groups because "he felt singled out" and did not want to leave his classes. (*Id*. at 18.) McKay learned that the Indigenous Education Program offers

drum and dance and other activities during the school year that are not available to students outside of the public school system because those events occur during school hours. (*Id*.) McKay confirmed, however, that J.T.L. would be able to attend events after school that were offered through the Indigenous Education Program. (*Id*.)

At the August 24, 2023 FEM, Parents were informed that the Department would be enrolling J.T.L. in Foothills. (*See* 8/2/23 Tr. at 10; Doc. 205 at 18.) J.T.L. had been awarded a scholarship. (8/2/23 Tr. at 10.) The Department discussed "what could be done to add cultural activities for the boys," including inquiring whether the children could attend the same groups that they were able to attend in public school. (9/8/23 Tr. at 22.) McKay informed Mother that Foothills does offer a Native American curriculum. (Doc. 205 at 18-19.)

At the FEM, it was also reported that Mother had completed a chemical dependency evaluation. (Doc. 204 at 6.) McKay met with Mother again on September 1, 2023, and provided her with a monthly visit bus pass. (*Id*. at 7.) McKay made sure that all of Mother's appointments were listed in her phone so she would not miss any. (*Id*.)

At a hearing on September 8, 2023, it was reported that Mother had been charged with DUI. (9/8/23 Tr. at 31.) Mother's counsel informed the district court that Parents objected to the Department's unilateral decision to enroll J.T.L. at

Foothills against Parents' wishes. (*Id*. at 7.) Parents wished for J.T.L. to remain in public school because the public school system has a "fairly robust Native American program." (*Id*. at 8.) Mother orally moved for the district court to order the Department to enroll J.T.L. in public school. (*Id*.)

At that time, J.T.L. had only been at Foothills since the Tuesday after Labor Day. (*Id*.) As Mother explained, their concern with J.T.L. remaining enrolled in private school "brings us back to the days of the boarding school," and this is especially a concern with this case because the "children [are] in [a] non-kinship, non-Native American foster placement . . . and are losing their cultural identity that this family cares about immensely." (*Id*. at 9.) The district court asked Mother to brief the issue. (*Id*. at 27.)

Parents provided McKay with the name B.K. as a potential placement for the children. (*Id*. at 35.) McKay, however, conducted a diligent search and was "unable to find anyone listed with that name," and requested more information from Parents, who had not provided any further information. (*Id*.)

On September 22, 2023, the Women's Shelter suspended Mother indefinitely based on her unapproved absences from the Women's Shelter. (TPR Tr. at 53.) Before she was suspended, the Women's Shelter had been holding beds for Mother "for weeks at a time" but Mother had never showed up. (*Id*. at 52.) The

Women's Shelter holding beds for Mother meant that another person who needed a bed was denied one. (*Id*. at 53.)

On September 27, 2023, Mother moved the district court to compel the Department to disenroll J.T.L. from Foothills and enroll him in public school. (Doc. 146.) McKay talked with the Little Shell Tribe, which reported that it did not have a position on J.T.L.'s enrollment in Foothills because the Little Shell Tribe does not yet have a policy to refer to. (Doc. 205 at 20.) The Little Shell Tribe did inform McKay that it was developing groups that J.T.L. would be able to attend. (*Id*.)

During her meeting with McKay on September 29, 2023, Mother asked for the individual visits to return to joint visits. (Doc. 204 at 8.) McKay reminded Mother that the visits were not joint because of the tension between Parents impacting the children, but also said that they could implement periodic joint visits. (*Id*.)

The Department petitioned to terminate Parents' rights on October 2, 2023. (Doc. 147.) On October 5, 2023, McKay discussed this case with the Little Shell Tribe, providing an update on Parents and discussing J.T.L. being enrolled at Foothills (Doc. 204 at 8-9.) McKay then helped get C. into the Margaret Stuart Youth Home. (*Id*. at 9.) After McKay was informed that Youth Dynamics Inc. (YDI) could no longer support visits, McKay arranged for visits to continue

through Family Reunifications. (*Id*. at 10.) The Department authorized Parents to take the children to a powwow in early October. (TPR Tr. at 224.)

In November, McKay spoke with the Foothills principal, who confirmed, again, that Foothills offers a Native American curriculum and supports Native American culture. (Doc. 205 at 20.) The Foothills principal also shared that J.T.L.'s "teacher has taught school on 3 reservations and is very knowledgeable on how to support J.T.L." (*Id*.) McKay also spoke with the Longfellow principal regarding J.T.L.'s release of school records, and that principal "felt Foothills was a better school for [J.T.L.] to be at, he is able to have a smaller class size and more individualize[d] supports." (*Id*.) J.T.L.'s therapist confirmed that J.T.L. had been bullied at Longfellow and supported J.T.L. being at a school with smaller classroom sizes. (*Id*.)

McKay set a team meeting for Mother on November 8, at which they discussed sober living facilities for Mother. (Doc. 204 at 10-11.) Sober living facilities were discussed again at the November 17 team meeting. (*Id*. at 11.)

Parents reportedly resumed their relationship by December 2023. (TPR Tr. at 88.) Mother admitted that she was struggling with methamphetamine, fentanyl, and alcohol. (*Id*. at 90). She was recommended to complete inpatient treatment. (*Id*. at 91.)

On December 6, 2023, McKay had a phone call with Victoria Davenport at the GYST House, which would be accepting new clients the following week. (Doc. 204 at 11.) McKay scheduled a tour of GYST House with Mother and her providers for December 12, 2023. (*Id*.) McKay referred Mother to MCDC per Mother's request and learned that a bed would be available on December 27. (*Id*. at 12.) McKay arranged for Mother to have transport to MCDC. (*Id*.) After several more attempts in December 2023 and January 2024, McKay was able to get Mother into MCDC. (*Id*. at 94.) Mother left against medical advice after seven days. (*Id*.)

Parents were inconsistently engaging with visits with the children in November and December 2023, with Mother's last attended visits occurring at the end of December. (TPR Tr. at 107.) The Department informed Parents that visits would only be implemented again if Parents engaged with drug testing and their treatment providers consistently for 30 days. (*Id*. at 131.)

McKay arranged for transportation for Mother to go to MCDC on January 11, 2024. (Doc. 204 at 13.) Mother then said that she could not go to MCDC because she was having allergies, which prompted McKay to call her. (*Id*.) While on the phone with McKay, Mother said she would fall asleep and miss her ride because she had taken a Benadryl. (*Id*.) McKay stayed on the phone with her to try to keep her awake, but Mother hung up. (*Id*. at 13-14.) McKay rescheduled

for Mother to go to MCDC on January 18, which Mother could not attend because of a criminal matter. (*Id*. at 14-15.) Mother was then set to go to MCDC on January 23, which the Department transported her to. (*Id*. at 15-17.) McKay arranged for another chemical dependency evaluation so that Mother could return to MCDC. (*Id*. at 18.) McKay arranged transportation to that evaluation. (*Id*.) On January 24, 2024, Mother was charged with felony Criminal Possession of Dangerous Drugs. (Doc. 213.)

When she returned to Great Falls, Mother asked to go back to MCDC. (TPR Tr. at 94.) To return to MCDC, Mother needed to obtain a new chemical dependency evaluation, which she obtained from Julie Messerly in March 2024. (*Id*. at 95.) Because of Mother's missed bed dates, MCDC required her to write a letter in order to keep her bed date. (*Id*.) Mother refused. (*Id*.)

The district court conducted a hearing on Mother's school motion on March 28, 2024. (Doc. 210.1.) Mother wanted J.T.L. "to have as much Indigenous education and programming as possible." (3/28/24 Tr. at 70.) Great Falls Public Schools has an Indigenous Education Program, which is directed by Dugan Coburn and provides the public school system "the opportunity to help close the academic achievement gap for Native American students." (*Id*. at 8.) The Indigenous Education Program "provide[s] cultural classes, opportunities for kids to learn more about where they're from and who they are," as well as "ceremonies for

getting better connection with their culture-type ceremony, Indian ceremony, eagle feather ceremony kind of things." (*Id*. at 8-9.) Participation in the program is voluntary, and the culture class is 30-45 minutes once a month. (*Id*. at 13.)

While at Longfellow, J.T.L. had not participated in the cultural programs through the public schools. (*Id*. at 50-51.) Importantly, J.T.L. continually expressed that he was happier at Foothills and wished to stay there. (*Id*. at 103.) Ultimately, the district court ruled that J.T.L. should remain enrolled at Foothills until the end of the 2023-24 school year given that, at the time of the hearing, it was the end of March 2024. (*Id*. at 116-17.) The district court, however, was "going to keep this matter open for discussion" and encouraged the Department to make more efforts to "make up for . . . the difference that there is between that exposure [to Native American culture] at Foothills as opposed to public school." (*Id*. at 117.) The district court invited the parties to make another motion regarding school placement before the start of the 2024-25 school year. (*Id*.)

Parents were evicted from their home in early June 2024. (TPR Tr. at 89.) Near the end of June, Mother requested to go to Crystal Creek Lodge Treatment Center. (*Id*. at 96.) To go there, Mother had to complete a chemical dependency evaluation, which she requested be done through Indian Family Health. (*Id*. at 96.) Mother did not follow through on obtaining the evaluation. (*Id*.) By the July 12,

2024 termination hearing, Parents were "living on the streets with no camper, no car, no residence." (*Id*. at 89.)

At the time of the termination hearing, Qualified Expert Witness (QEW) Iris Kill Eagle, agreed that, based on the evidence, continued custody of the children by Parents would likely result in serious emotional or physical damage to the children. (*Id*. at 285.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it terminated Mother's parental rights. On appeal, Mother does not contend the district court erred when it concluded that the Department established beyond a reasonable doubt that she had not successfully completed her court-approved, appropriate treatment plan. Nor does Mother challenge the district court's conclusion that the Department had proved beyond a reasonable doubt that her conduct or condition rendering her unfit to parent was unlikely to change in a reasonable period of time.

Mother, however, does challenge that the Department did not make active efforts to reunify the family because the Department enrolled J.T.L. in Foothills over Mother's objection. The totality of the record, however, supports that the Department made ongoing, affirmative efforts aimed at assisting Mother with the completion of her treatment plan tasks so that she could be reunified with her

children. The district court, therefore, did not err when it concluded that the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family, but that those efforts were unsuccessful.

The district court also did not err when it concluded that good cause existed to deviate from ICWA's preferred placement preferences. After a diligent search and consultation with the Little Shell Tribe and Parents, the Department was unable to locate safe family members to serve as the children's placement. The Department, despite these efforts, was also unable to locate a foster home that was licensed or otherwise approved of by the Little Shell Tribe or any other tribe.

Finally, the district court correctly concluded that termination of Mother's rights served J.T.L.'s and D.L.L.'s best interests. At the time the Department petitioned for termination, J.T.L. and D.L.L. had been in an out-of-home placement for 24 consecutive months. And, by the time of the termination hearing, the children had been placed out of the home for 33 months. The instant Department involvement was the fourth time the Department had intervened in J.T.L.'s life and the third time in D.L.L.'s life. Mother asserting that guardianship, rather than termination, was in the children's best interests does not overcome the presumption that termination was in the children's best interests.

STANDARD OF REVIEW

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

This Court reviews a district court's factual findings to determine if they are clearly erroneous. *Id.* A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces the Court a mistake was made. *Id.* This Court reviews for correctness a district court's conclusions of law. *In re C.B.*, 2019 MT 295, ¶ 13, 398 Mont. 176, 454 P.3d 1195.

ARGUMENT

I. The district court and the Department complied with ICWA.

Mother contends that her "rights" under ICWA were violated when (1) the Department did not make active efforts that adhered to the Little Shell Tribe's cultural practices and (2) the district court found that there was good cause to deviate from ICWA's placement preferences. (Appellant's Br. at 32-33, 38.)

A. The district court did not err when it concluded that the Department made active efforts to reunify Mother with J.T.L. and D.L.L., but those efforts were unsuccessful.

Mother asserts that moving J.T.L. from Great Falls Public Schools, which offered Native American cultural programs, to Foothills "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." (Appellant's Br. at 33.)

1. Mother does not have standing to assert that the Department enrolling J.T.L. in Foothills prejudiced his cultural connection and was not in his best interests.

Mother does not have standing to assert that J.T.L.'s best interests have been violated or that he has been prejudiced by the Department's alleged violation of ICWA. The Montana Constitution precludes a court from resolving "a case brought by a plaintiff who does not show 'that he has personally been injured or threatened with immediate injury by [an] alleged constitutional or statutory violation.'" *In re T.D.H.*, 2015 MT 244, ¶ 24, 380 Mont. 401, 356 P.3d 457 (quoting *Olson v. Dep't of Revenue,* 223 Mont. 464, 470, 726 P.2d 1162, 1166 (1986)). And "a litigant may assert only his own constitutional rights." *T.D.H.*, ¶ 24.

Because Mother cannot assert J.T.L.'s rights, this Court should decline to review Mother's appellate claim that the Department's alleged violation of ICWA's active efforts requirement when they enrolled J.T.L. in Foothills prejudiced his connection to his culture and was not in his best interests. However,

even if Mother could assert a claim on behalf of J.T.L., Mother cannot establish that J.T.L.'s connection to his culture was prejudiced or that enrollment at Foothills was not in J.T.L.'s best interests.

Despite Mother's unsupported assertion that the foster parents were the reason that the Department enrolled J.T.L. in Foothills, J.T.L., himself, asked to attend Foothills because he wanted to be with his friends from his soccer team and other extracurricular activities. Even if J.T.L. met these friends who attended Foothills because of his foster parents, that does not equate to the foster parents demanding that J.T.L. attend Foothills. Moreover, the purpose of enrolling J.T.L. in Foothills was not to deprive him of his Native American culture but, rather, to support J.T.L.'s needs. The Longfellow principal believed that J.T.L. would do better in smaller classroom sizes, which, to the principal, made Foothills a great fit for J.T.L. J.T.L. also reportedly was being bullied at Longfellow. J.T.L. several times expressed that he liked attending Foothills and had made noticeably positive behavioral changes since his enrollment. Finally, by the time of the school hearing in March 2024, J.T.L. had told his counsel and guardian ad litem that he wanted to stay at Foothills.

Moreover, McKay had contacted multiple resources, including the Little Shell Tribe, to identify other programs that J.T.L. could participate in to continue to support his connection with the Little Shell Tribe. McKay also confirmed that

Foothills has a Native American curriculum. In other words, McKay ensured J.T.L.'s needs were being met while providing additional support to ensure that J.T.L. would not lose his connection to the Little Shell Tribe's culture.

2. The Department's decision to enroll J.T.L. in Foothills does not constitute a violation of ICWA's active efforts requirement.

Mother asserts that the Department violated ICWA's active efforts requirement when it enrolled J.T.L. in Foothills over Mother's objection. (Appellant's Br. at 33.) When seeking foster care placement of, or the termination of parental rights to, an Indian child, ICWA requires the State to prove to the district court that the Department has made active efforts "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d).

Active efforts refers to "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with" the child's family. 25 CFR § 23.2. The Department must make active efforts that assist the parent(s) or Indian custodian "through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan." 25 CFR § 23.2; Mont. Code Ann. § 41-3-1319(3). "To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in

partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe." 25 CFR § 23.2; Mont. Code Ann. § 41-3-1319(4)(a). Active efforts must be tailored to the specific facts and circumstances of each individual case. *Id*. Examples of active efforts may include, but are not limited to, the following:

> (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
>
> (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
>
> (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
>
> (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
>
> (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
>
> (6) Taking steps to keep siblings together whenever possible;
>
> (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

> (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
>
> (9) Monitoring progress and participation in services;
>
> (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
>
> (11) Providing post-reunification services and monitoring.

25 CFS § 23.2; Mont. Code Ann. § 41-3-1319(4)(a).

Mother's contention that McKay did not make active efforts consistent with the Little Shell Tribe's prevailing social and cultural conditions and way of life is not supported by the record. At a minimum, McKay communicated with the Little Shell Tribe once a month. In those conversations, McKay routinely inquired into how the children's cultural connection could best be supported and whether the Little Shell Tribe had any programs available for the children to participate in. McKay always encouraged Mother to discuss the Little Shell Tribe's culture or share items of cultural significance with the children, such as the dreamcatchers that hung above their beds at the foster placement. (3/28/24 Tr. at 53, 55; TPR Tr. at 221.) In early October 2024, McKay also approved Mother's attending a powwow with the children after it was confirmed that safety resources would be in place. (TPR Tr. at 224.)

When concerns arose that J.T.L. was being bullied in school and wished to go to Foothills to be with his friends who attended school there, McKay approached Mother about this opportunity at least twice. McKay also discussed J.T.L. transitioning to private school with the Little Shell Tribe, which, at that time, reported it could not take a position because it had yet to create a policy on that subject. McKay then reached out to the State's ICWA specialist, who stated that if the transitioning school would best support J.T.L.'s needs, then that was the most important factor to consider.

McKay reached out to Foothills, which confirmed that they offered a Native American curriculum. Although the district court correctly observed that Foothills' Native American curriculum was not nearly as robust as the Indigenous Education Program offered through Great Falls Public Schools, that did not negate that Foothills did have a curriculum that would support J.T.L.'s connection to his culture. (*See* 3/28/24 Tr. at 115.) Finally, McKay confirmed with the Indigenous Education Program that J.T.L. would be able to participate in other events that were held after school.

Notably, Mother offers no correlation between J.T.L. attending Foothills and her failure to complete her treatment plan. Nor does Mother argue that J.T.L.'s schooling prevented her from demonstrating her conduct or condition rendering her unfit to parent would change in a reasonable period of time. Moreover, Mother

has not challenged on appeal the district court's conclusions that the Department established beyond a reasonable doubt that she did not successfully complete her treatment plan, her conduct or condition rendering her unfit to parent was unlikely to change in a reasonable period of time, and that continuation of the parent-child relationship would likely result in ongoing abuse and neglect. Indeed, Mother, before the district court and on appeal, does not argue that J.T.L. and D.L.L. should be reunified with her, but instead argues that guardianship, rather than termination, are in J.T.L.'s best interests.

However, even if this Court finds that the Department's decision to enroll J.T.L. at Foothills was contrary to mandated active efforts, that conclusion, by itself, does not nullify the other significant active efforts made throughout this case. Active efforts must be tailored to the factual circumstances of each case. 25 CFR § 23.2. As such, just like reasonable efforts, active efforts must be based on the totality of the circumstances and are "not static or determined in a vacuum." *In re C.M.G.*, 2020 MT 15, ¶ 17, 398 Mont. 369, 456 P.3d 1017.

At the beginning of the case, McKay referred Mother for a chemical dependency evaluation. Because the evaluation referred Mother for inpatient treatment, McKay arranged for Mother to go to MCDC. Mother returned after a few days. McKay referred Mother for mental health treatment, chaperone training, and parenting classes. McKay also arranged for visits to occur between Mother and

the children. McKay arranged for weekly meetings between her and Mother and also monthly FEMs. McKay provided bus passes and arranged for transportation to visits, activities, and treatment.

McKay helped Mother with her housing appeal so that she could be on a waitlist for housing after she had been denied. McKay worked diligently to have C. accepted into a program or home so that he would not be a barrier to J.T.L. and D.L.L. returning home. McKay also devised a backup plan in the event C. was not accepted into a program or other group home, and arranged for gradual therapy sessions with C., D.L.L. and J.T.L. so that C. could be in the home once D.L.L. and J.T.L. were reunited with Mother. For example, McKay referred J.T.L. to therapy. (*See* Doc. 220 at 2.) McKay referred D.L.L. to occupational therapy and therapy. (*See id*. at 4.) McKay continually was in contact with the children's and Mother's providers so that they were aware of the progress made by Mother and the needs of Mother and the children.

Notably, when Mother relapsed in August 2023, McKay referred Mother for a chemical dependency evaluation so that she could attend treatment. McKay regularly arranged for Mother to go to MCDC, including reaching out to MCDC to determine when they had a bed available, which often required last minute changes due to Mother deciding not to go, and arranging for transportation.

When the record is reviewed in total, the district court did not err when it concluded that the Department had made active efforts aimed at reunifying Mother with J.T.L. and D.L.L., but that those efforts were ultimately unsuccessful. Mother's contention that the Department violated ICWA's active efforts requirement by enrolling J.T.L. at Foothills over Mother's wishes, even if true, does not undermine the plentiful other active efforts that the Department made. Nor does it negate the substantial evidence that, despite all of McKay's efforts, Mother's conduct or condition rendering her unfit was unlikely to change in a reasonable time, in part, because Mother was unable to successfully complete her treatment plan.

B. The district court did not err when it concluded that good cause existed to depart from ICWA's placement preferences.

Mother argues that good cause did not exist for the Department to deviate from ICWA's placement preferences because the Department failed to conduct a diligent search of available ICWA preferred placements. (Appellant's Br. at 38.) In relevant part, ICWA created placement preferences for foster care or preadoptive placements:

> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or

> preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—
> (i) a member of the Indian child's extended family;
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 U.S.C. § 1915(b).

The district court did not err when it concluded good cause existed to deviate from ICWA's placement preferences. Parents had previously requested that the children be placed with R.C. (*See generally* Doc. 204 at 4.) The Department, however, was unable to place the children with R.C. in light of the allegations that he had sexually assaulted a child family member and had provided white pills to Mother. (1/14/22 Tr. at 69; 7/6/22 Tr. at 72; 7/22/22 Tr. at 44.) Nicholson's recollection was that R.C. had sexually abused both C. and Mother. (TPR Tr. at 266-67.) Ultimately, Mother had obtained an order of protection against R.C. by July 2024. (*Id*. at 226.)

McKay contacted the Little Shell Tribe, which did not know of any available placement options. McKay, in working on various other cases, also spoke "with a variety of tribes," all of which appeared to be "really struggling with finding placements for children in general." (11/16/22 Tr. at 10.)

During the proceeding, Parents provided McKay with the name of Mother's cousin, L.M.B.G., along with her contact information. (TPR Tr. at 215-16.) McKay corresponded with L.M.B.G. (*Id*. at 215.) The Department, however, was unable to place with L.M.B.G. because she had a history that made her an inappropriate placement for the children. (*Id*. at 216-17.)

Mother also provided the name B.K., but McKay was unable to find B.K. On September 1, 2023, McKay asked Mother for B.K.'s information, but Mother asked McKay for time to talk with B.K. first. (Doc. 204 at 7.) On September 15, Mother had a phone call with McKay, who asked about B.K. again, and Mother said that she had not talked with B.K. yet and that B.K.'s phone was no longer in service. (Doc. 204 at 7.) Mother also mentioned she might have a niece who could be a placement, but wanted to talk to her attorney first. (*Id*.) McKay contacted Kathy Calf Boss Ribs, of the Blackfeet Tribe, to determine if she knew who B.K. was since B.K. reportedly resided in Browning, Montana. (Doc. 259 at 3.) McKay, ultimately, was never able to get in touch with B.K.

Father did not provide any other family members who were willing to be placements. (Doc. 204 at 4.) McKay also conducted a Seneca search without a response, and checked social media, newspapers, obituaries, search engines, and school records in the search for available family members. (*Id*.)

Good cause accordingly existed to deviate from the placement preferences. There were no appropriate family members available to serve as the children's placement. The Little Shell Tribe had no available or known foster placements for the children. And the current placement allowed the children to be in the same home.

II. The district court did not abuse its discretion when it terminated Mother's parental rights to J.T.L. and D.L.L.

Montana Code Annotated § 41-3-609 sets forth the criteria available to a district court to terminate a parent's right to maintain the care and custody of their child. To terminate a parent's right to an Indian child pursuant to Mont. Code Ann. § 41-3-609(1)(f), the district court must find beyond a reasonable doubt that: (1) the child was adjudicated as a youth in need of care; (2) the parent had not successfully completed an appropriate treatment plan approved by the district court; and (3) the parent's conduct or condition "rendering them unfit is unlikely to change within a reasonable time." Mont. Code Ann. § 41-3-1320(2); 25 U.S.C. 1912(f). Before the district court can terminate a parent's rights to an Indian child, the district court must conclude that the Department has made active efforts "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d); Mont. Code Ann. § 41-3-1319(1). The district court also

cannot terminate a parent's rights to an Indian child without testimony from a qualified expert witness "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f); Mont. Code Ann. § 41-3-1318(1), (3).

On appeal, Mother does not challenge that the children were not adjudicated as youth in need of care. Nor does Mother challenge that she did not successfully complete her court-approved, appropriate treatment plan. Mother, likewise, does not challenge that her conduct or condition that rendered her unfit to parent was unlikely to change within a reasonable time. Nor has Mother challenged that there was insufficient evidence for the qualified expert witness to testify that continued custody of the children by Mother was likely to result in serious emotional or physical damage to the children. Instead, on appeal, Mother, other than her active efforts challenge addressed above, only challenges that termination of her rights was not in J.T.L.'s best interests.

Montana's children "have a right to a healthy and safe childhood in a permanent placement." Mont. Code Ann. § 41-3-101(1)(f). When implementing the polices of Tit. 41, ch. 3, the children's "health and safety are of paramount concern." *See* Mont. Code Ann. §§ 41-3-101(7), -427(1)(a), -442(8). A child's need for a permanent, stable, and loving home supersedes a biological parent's right to parent the child. *In re D.A.*, 2008 MT 247, ¶ 21, 344 Mont. 513, 189 P.3d

631. As this Court has consistently recognized, when a parent fails to act to correct the reason for Department intervention, it is her child who suffers. *See In re I.K.*, 2018 MT 270, ¶ 12, 393 Mont. 264, 430 P.3d 86; *In re L.S.*, 2003 MT 12, ¶ 15, 314 Mont. 42, 63 P.3d 497.

The guiding principle in determining whether to terminate parental rights is always and foremost the best interests of the child: "the district court is bound to give primary consideration to the physical, mental, and emotional conditions and needs of the [child]; thus, the best interests of the [child] are of paramount concern in a parental rights termination proceeding and take precedence over the parental rights." *In re A.T.*, 2006 MT 35, ¶ 20, 331 Mont. 155, 130 P.3d 1249 (citation omitted). To that end, Montana's Legislature implemented the following statutory presumption for children in dependent neglect proceedings: "[i]f a child has been in foster care under the physical custody of the state for 15 months of the most recent 22 months, the best interests of the child must be presumed to be served by termination of parental rights." Mont. Code Ann. § 41-3-604(1). This presumption is rebuttable. *In re A.B.*, 2020 MT 64, ¶ 33, 399 Mont. 219, 460 P.3d 405.

Here, by the time the Department petitioned for termination, J.T.L. and D.L.L. had been out of the home for 24 months. When the district court conducted the termination hearing, J.T.L. and D.L.L. had been in an out-of-home placement for 33 months. However, as the CASA noted in her April 2024 report, J.T.L. had

been in an out-of-home placement for "approximately seventy (70) non-consecutive months . . . which accounts for more than 70% of his life," and D.T.L. had been in an out-of-home placement for "approximately fifty-eight (58) non-consecutive months . . . which accounts for more than 90% of his life." (Doc. 220 at 2.)

Nonetheless, Mother argues that the district court erred when it found termination of her parental rights was in the children's best interests because the evidence "demonstrated that guardianship was a more appropriate permanency option." (Appellant's Br. at 43.) Because the district court cannot *sua sponte* consider whether guardianship, instead of the Department's request for termination of Mother's parental rights, was in the child's best interests, Mother's argument is without merit.

As this Court has reiterated, "[w]hen the circumstances set forth in § 41-3-609(1)(f), MCA, exist, the statute's permissive language gives district courts discretion in deciding whether to terminate parental rights." *In re C.M.*, 2015 MT 292, ¶ 35, 381 Mont. 230, 359 P.3d 1081. In rendering its decision, "[n]o limitation is placed upon a court which requires consideration of other options, such as guardianship [over termination and permanent legal custody], prior to terminating parental rights." *In re E.A.T.*, 1999 MT 281, ¶ 33, 296 Mont. 535, 989 P.2d 860 (citing Mont. Code Ann. § 1-2-101).

The district court could not have considered guardianship, in lieu of termination of Mother's parental rights, here because neither of the two statutorily required parties—the Department or the GAL—petitioned for such relief. *See* Mont. Code Ann. § 41-3-444(1). And Mother's contention that the record supports guardianship, even if correct, does not undermine the discretion Mont. Code Ann. § 41-3-444(1) affords only to the Department or the GAL. Furthermore, the district court, even if the record supported guardianship, had no authority to order the Department or the GAL to file a petition for guardianship. *See State v. Mont. Eighth Jud. Dist.*, OP 22-0099, 2022 Mont. LEXIS 353 (Apr. 19, 2022).

Mother contends that her largely positive visits with the children and her completion of parenting classes and therapy support that termination was not in the children's best interests. Mother's assertion, however, ignores that J.T.L. asked for visits to stop by early 2024 until Mother was able to "make better choices." (TPR Tr. at 188-89.) And, although Mother completed parenting courses and chaperone training, she did not complete therapy, nor did she successfully complete her chemical dependency related tasks. Indeed, the record supports that Mother never rebounded from her August 2023 relapse despite McKay's continual efforts to help her go to inpatient treatment. Ultimately, Mother was charged with possession of methamphetamine and, by the termination hearing, she was living on the streets.

The instant Department involvement was the fourth time it had been involved in J.T.L.'s life, and the third time in D.L.L.'s life. J.T.L. was eight and D.L.L. was five when the district court terminated their Mother's parental rights. As the guardian ad litem, the person representing the children's best interests, previously remarked, the children require sustained stability, especially in light of the "history and cyclical nature of the case." (3/22/23 Tr. at 8.) The record supports that Mother was unable to provide that to the children.

As such, Mother has not, nor does the record support that Mother could, overcome the presumption that termination was in the children's best interests. Mother has not challenged that substantial, credible evidence supported that she did not successfully complete her treatment plan or that the condition rendering her unfit to parent was unlikely to change in a reasonable time. Accordingly, the district court did not err when it concluded that termination of Mother's parental rights served J.T.L's and D.L.L.'s best interests.

CONCLUSION

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

Respectfully submitted this 20th day of February, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,159 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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