IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0703

IN THE MATTER OF:

P.E.W.,

Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Rod Souza, Presiding

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GUARDIAN AD LITEM

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Whether the district court erred in its conclusion that the Department engaged in "active efforts" to prevent the breakup of the family under the Indian Child Welfare Act (ICWA).

Whether the district court erred in its approval of a deviation of ICWA placement preferences for P.E.W. based on the child's extreme mental and emotional needs.

STATEMENT OF THE CASE

In November 2021, the Department of Public Health and Human Services, Child and Family Services Division (the Department) petitioned for Emergency Protective Services (EPS), Adjudication as a Youth in Need of Care (YINC), and Temporary Legal Custody (TLC) as to three-year-old P.E.W., and her five-year-old brother B.J.B.[1] (Doc. 1.) The Department removed the children from P.E.W.'s natural parents, K.M.B. (Mother) and S.I.W. (Father).[2] (*Id.*) P.E.W. was considered an Indian child under the ICWA through Father's

[1]In accordance with Mother's deconsolidation of the two cases on appeal, the State submits separate response briefs in *In re B.J.B.*, Case No. DA 24-0702, and *In re P.E.W.*, Case No. DA 24-0703.

[2]Father's parental rights were terminated but he did not appeal.

enrollment in the Northern Cheyenne Tribe. (Doc. 1 at 2; Docs. 4, 12; 11/23/21 Tr. at 2; Doc. 35.)

Without objection, the district court adjudicated P.E.W. as a YINC, granted TLC for six months, and set a treatment plan hearing. (1/4/22 Tr. at 3, 6; Docs. 14, 17.) Mother's treatment plan was approved on February 1, 2022. (2/1/22 Tr. at 3; Doc. 19.) The court extended TLC several times to give Mother additional time to work on her treatment plan. (10/11/22 Tr.; 5/23/23 Tr.; 8/15/23 Tr.; Docs. 37, 45, 50.)

On February 7, 2024, the Department petitioned for termination of Mother's and Father's parental rights under Mont. Code Ann. § 41-3-609(1)(f). (Doc. 58.) After termination hearings on April 22, 2024, June 18, 2024, and July 16, 2024, the district court terminated Mother's and Father's parental rights in November 2024. (Doc. 78 (attached as App. 1.)[3]

[3]Mother mistakenly attached the termination order as to B.J.B. rather than P.E.W. to her Opening brief. The proper order is attached to the State's responsive brief herein.

STATEMENT OF THE FACTS

I. The basis for removal and adjudication

In late 2021, the Department received a report that Mother was using drugs, along with reports of a domestic violence situation between Mother and her girlfriend Stephanie Rivera, witnessed by Mother's children, P.E.W. and B.J.B. (Doc. 2 at 5.) At that time, Paternal Grandmother (Grandmother), Mother, Stephanie, P.E.W., B.J.B, and Father were all living at Grandmother's house in Billings. (*Id*. at 4, 6-7.)

Grandmother reported Mother was struggling to parent, engaged in drug use, had bipolar disorder, and had interpersonal conflicts. (Doc. 2 at 5.) Father reported that Mother and Stephanie "fight a lot, both verbal and physical." (*Id*. at 6.) During the CPS visit, Father tested positive for methamphetamine. (*Id*.)

Mother admitted to the Child Protection Specialist (CPS) that she was using "a lot of meth" and had used for a "long time." (Doc. 2. at 6.) She also admitted she was in a "verbal and physically abusive relationship with both [Father] and Stephanie." (*Id*.) She reported she was bipolar. (*Id*.) She explained she was "struggling with mental health, drug abuse and being able to provide for the children's basic needs." (*Id*.)

At the Show Cause hearing, Mother explained that she didn't "really want to do the sober living." (11/23/21 Tr. at 5.) She explained that her kids were "very

unaware that I even do drugs" and they just thought she was sad and "sick in the brain." (*Id*. at 5.) The court responded that the proceedings were about providing "you with some safety and security, but also keep you sober." (*Id*. at 6.)

At the Adjudication Hearing, the Department explained that Mother did not want to go to Family Recovery Court. (1/4/22 Tr. at 3.) The court urged Mother to engage with "one of the family recovery courts," and to complete a chemical dependency evaluation and inpatient drug treatment. (*Id*. at 6-7.) Numerous resources were provided to ensure visitation and to help Mother's progress. (*Id*.) But while Family Recovery Court started in February 2022, within six months, the case was transferred back to district court after Mother failed to comply with treatment court rules. (Docs. 28, 29.)

Without objection, the district court adjudicated both children as youths in need of care based on physical neglect resulting from "issues of chemical dependency, exposure to domestic violence, housing instability, and lack of stability of [Mother and Father]." (Doc. 78 at 3.). The court approved Mother's treatment plan which required Mother to: "complete [a chemical dependency] Evaluation . . . and follow all recommendations"; undergo "[r]andom drug/alcohol testing;" "attend ongoing individual counseling;" "[a]ttend visits/parenting time with [P.E.W.] throughout pendency of case;" "complete a domestic violence risk assessment . . . and follow all recommendations;" meet with and immediately

provide current contact information to assigned CPS; and "[o]btain and maintain a legal source of income." (Doc. 19.)

II. Mother's engagement with the treatment plan

At an October 11, 2022 TLC extension hearing, CPS worker Caitlyn Saunders explained that Mother was participating in her treatment plan and was compliant with visitation. (10/11/22 Tr. at 5-6.)

But at the December 6, 2022 status hearing, the Department explained that Mother "is not engaged in CD treatment right now, she left without finishing." (12/6/22 Tr. at 2.)

At a May 23, 2023 hearing, the Department explained that Mother "got on the patch yesterday[,]" and was engaging in family sessions with Trauma Yoga, and was being screened for housing. (5/23/23 at 2-3.) The Department explained that they had investigated placement options for the children and "while our permanency plan does remain reunification, this next six months is really critical for their children." (*Id*. at 3.)

At an August 15, 2023 TLC/Permanency hearing, Mother's counsel explained that Mother was "three weeks sober," but housing was still an issue. Mother understood that the "Department at this time needs to stay involved in

order for her to remain sober for a longer period of time," and for housing and placement concerns. (8/15/23 Tr. at 5-6.)

At an October 10, 2023 status hearing, the Department explained that Mother "ha[d] a relapse recently" but resources were being provided at Hannah House, Mother was in "IOP" and was "testing through the patch" and saw her kids "once a week[.]" (10/10/23 Tr. at 2-3.)

At a January 2, 2024 status hearing, the Department explained that Mother "was at Hannah House, but then was asked to leave there[]" due to meth use, and that Mother was currently staying with friends. (1/2/24 Tr. at 3, 5.) At Hannah House, Mother had snuck Stephanie in to do drugs with her. (Doc. 59 at 18.) CPS Saunders explained the main problem was "just the consistency of sobriety[.]" (*Id*. at 4.) The Tribe was "in support of" Mother's termination as to P.E.W. (*Id*. at 6.)

On January 24, 2024, Mother was living in an apartment at Ponderosa Acres. (4/22/24 Tr. at 6; App. 1 at 8.) Stephanie visited Mother's apartment, resulting in Mother being beaten up by Stephanie. (4/22/24 Tr. at 15-16.) Mother nonetheless told the property manager that she loved Stephanie. (*Id*. at 16.) Mother was warned that Stephanie would not be allowed over, but the issue was not resolved, resulting in Mother vacating the apartment. (*Id*. at 16-19.)

After Mother was subsequently kicked out of Rimrock's inpatient treatment unit due to her threats of violence, Mother sporadically contacted CPS on the phone. (6/18/24 Tr. at 50.) When CPS Lindsey Brunner asked Mother about her treatment plan, Mother said she "can get all of the updates in court," and Mother would "only be contacting [CPS] for updates on the kids." (*Id*.)

On May 16, 2024, Mother tested positive for meth. (*Id*.) She had not completed her plan, nor was she meeting conditions for her children's return. (*Id*. at 51.) CPS Brunner explained that Mother did not significantly change or grow in the two years of working with the Department. (*Id*.) There was "no significant change in a positive direction" as to sobriety or mental health. (*Id*. at 52.) As to her domestic violence relationship with Stephanie, Mother said multiple times she was "done" with her, but "Stephanie always shows back up." (*Id*. at 56.)

III. Additional facts related to placement efforts

Mother has two children, P.E.W. and B.J.B, from two different fathers. Father of P.E.W. is from the Northern Cheyenne Tribe and P.E.W. is considered an Indian Child, so ICWA applied throughout her case. (Doc. 2 at 3.) The Tribe was always provided notification about the proceedings. (Docs. 12, 27, 62.) P.E.W. was three years old when she was initially placed in the Department's custody on October 28, 2021. (Doc. 2 at 2.)

The Department immediately began detailing its active efforts to prevent the breakup of the family and explained its search for placement options in compliance with ICWA. The Department complied with ICWA placement preferences by placing P.E.W. with Grandmother. At the show cause hearing, the court held that the "current placement complies with the placement preferences." (11/23/21 Tr. at 5; *see also* Doc. 17 at 4.) The parties stipulated to the Department's offer of proof in lieu of the testimony of the Qualified Expert Witness (QEW) "regarding the prevailing Native American tribal and social child rearing practices and cultural standards[.]" (Doc. 14 at 2.)

The district court ordered Mother and Father to "provide the department with the names and addresses of extended family members who may be considered as placement options for [P.E.W.][.]" (Doc. 14 at 3.) The Department immediately "initiated a diligent search for family members" for both Mother and Father. (11/23/21 Tr. at 8.)

On July 5, 2022, the Department detailed its efforts of interviewing Mother, Father, and Grandmother to ascertain other Indian relative contacts in compliance with 25 U.S.C. § 1915, ICWA. Out of these interviews, Mother identified P.E.W.'s current placement with Grandmother, and further identified a maternal aunt (Aunt) in Great Falls. (Doc. 25 at 2.) Father identified only Grandmother, the current placement. (*Id.*) Grandmother also identified only Aunt in Great Falls.

(*Id*.) However, "[n]o member of the child's extended family requested that custody be awarded to that family member or that a prior grant of temporary custody with that family member be made permanent." (*Id*. at 3.) The Department detailed that P.E.W. was doing "okay" with Grandmother, but was struggling with behaviors. (*Id*.) The Department provided "in-home support" for Grandmother and started P.E.W. in "Occupational Therapy at Advanced Therapy." (*Id*.) The Department "continued a diligent search for extended family members[.]" (*Id*. at 6.)[4] The Department "searched the child's family registry and there was no one listed." (Doc. 59 at 10.)

At a December 6, 2022 hearing, when the district court asked if Grandmother was a "potential plan B?" to reunification, CPS Saunders replied no because Grandmother felt she could not take care of the children long term. But CPS Saunders was looking into Aunt as a possible placement. (12/6/22 Tr. at 3.)

On April 26, 2023, the Department submitted a Permanency Plan affidavit, explaining that reunification was still the goal. (Doc. 40 at 6.) However, the Department also explained that Mother was not complying with her treatment plan. (*Id*. at 4-5.) The Department detailed its active efforts for reunification, including

[4] The Department also "conducted a Seneca search listing[]" and "checked social media to find other family members." (*See* Doc. 82, Aff. in Support of Permanency Plan at 3.)

numerous contacts with mother, identifying drug treatment services for Mother, and "identif[ying] and invit[ing] the child's Tribe[] and extended family to participate in providing support services." (*Id*. at 7-8.) Mother was referred to and placed at Willow Way, a placement to support reunification with children. (Doc. 59 at 14.) At that time, the Tribe's position was also reunification. (Doc. 40 at 6.)

The Department also updated the court on P.E.W.'s placement. P.E.W. had to be removed from the care of Grandmother because there were "reports of physical abuse by grandmother's boyfriend" and Father was improperly "residing at the residence[.]" (Doc. 40 at 3.) Additionally, B.J.B. reported sexual abuse from Father, and B.J.B. was displaying sexualized behavior towards P.E.W. (Doc. 59 at 17.)

The Department updated the court on its diligent search for an ICWA placement. Aunt in Great Falls was again identified as "may be willing to take the children if a permanency plan other than reunification is needed," but that placement would not support the reunification plan because of the distance from Billings. (Doc. 40 at 3-4.) A maternal uncle was 19 years old and unmarried with no children, so he was determined not to be a proper placement, particularly given P.E.W.'s and her brother's substantial needs. (*Id*. at 4.) The Department also explained "[P.E.W] is 4 years old and is not old enough to be asked about the child's desired permanency outcome or to consult with the Court personally[.]"

(Doc. 40 at 6.) The Department "[i]dentified and invited the child's Tribe and extended family to participate in providing support services." (*Id*. at 8.)

The Department asked the court to "find good cause to deviate from the ICWA placement" because "[n]o suitable placement that is compliant with ICWA's placement preferences was able to be identified despite the Department's diligent search efforts[.]" (Doc. 39 at 2.) The Department explained that it had made "active, but ultimately unsuccessful, efforts" to prevent the breakup of the Indian family and to reunite the family. (*Id*.) By April 2023, P.E.W. had been recently placed "in Shepherd, MT in state-licensed foster care with Chelsie and James May[,]" a non-ICWA placement. (Doc. 40 at 3.) P.E.W. was "doing well" at the foster home and was happy and enjoyed the other children at the home. (*Id*. at 4.) The foster placement was in conjunction with Mother's placement at Willow Way to support reunification. (Doc. 59 at 14.)

At the August 15, 2023 TLC/Permanency Hearing, Mother explained there was "no objection" to the "[d]eviation from the preferred placement" for P.E.W. (8/15/23 Tr. at 5.) The district court found "good cause to depart from the placement preferences based on unavailability despite the Department's diligent search." (*Id*. at 11.)

At the October 10, 2023 hearing, the Department reported that P.E.W. "was moved to Theresa and Frank Bollerjack's, and is doing well there[.]" However,

because it was a new placement, the Department was unsure the placement would be appropriate for permanency absent reunification. (10/10/23 Tr. at 2.) The Department also explained that Father "has been mostly MIA throughout this entire case." (*Id*.) According to later testimony from subsequent foster parents, this placement "had fallen apart" and the Department transferred care of P.E.W. to new foster parents, Christina and Robert Lane. (4/22/24 Tr. at 112-13.)

The Department filed a termination petition in February 2024, explaining that P.E.W. had been in custody of the Department and in foster care since October 28, 2021, which had been 24 months as of October 2023. (Doc. 59 at 2.) The Department again detailed: (1) its efforts to comply with ICWA during its original placement with Grandmother; which was unsuccessful; (2) the subsequent placement at Willow Way to support reunification with Mother, which failed; and (3) the fact that Aunt was now "not willing to take the children[]" and the 19-year-old maternal uncle was "unable to take the children at this time" due to "the children's very escalated behaviors[.]" (Doc. 59 at 3; *see also id*. at 13 (8/23/22 notation "CPS Saunders spoke with [aunt], and she is not willing to be placement.").)

By January 2024, P.E.W. was at her new placement with "Christina and Robert Lane." (2/27/24 Tr. at 4; *see* 4/22/24 Tr. at 114.) This was where B.J.B. was earlier placed in June 2023. (4/22/24 Tr. at 111.) And "[d]espite the

Department's diligent search and active efforts an appropriate ICWA compliant placement has not been located[,]" but the Department explained that P.E.W. currently had a stable home. (Doc. 59 at 2.)

At the first termination hearing, foster parent Christina Lane explained that P.E.W. was struggling. For example, she had bitten the daycare bus driver and threw shoes at him, and she was running around and screaming at other children. (4/22/24 Tr. at 116.) While B.J.B. and P.E.W. were placed together at the Lane's foster home, due to allegations of B.J.B.'s sexualized behavior toward P.E.W., safety measures and sleeping arrangements were made to appropriately supervise both children. (*Id*. at 113-14.) While Christina wanted to "keep [P.E.W.]" with them, it was "just getting difficult to get her the services she needed[.]" (*Id*. at 113.)

P.E.W. ultimately left foster care in March 2024 with the Lanes and was placed at Shodair Children's Hospital. (*Id*. at 125.) According to CPS Brunner, the Shodair placement was due to "big outbursts" at daycare and being kicked off the daycare bus, resulting in a referral "for a higher level of care." (6/18/24 Tr. at 37.) In her five years with the Department, CPS Brunner had never seen such a young child need such a high level of care. (*Id*.) P.E.W was prescribed medication for anger issues at Shodair, and the Department was working on getting her a psychiatric evaluation. (*Id*. at 38, 59.)

For her part, Mother acknowledged that P.E.W. "needs some therapy, she needs wraparound services." (4/22/24 Tr. at 96.) Mother explained, "I know she's really struggling mentally and emotionally." (*Id*.) Mother also acknowledged that P.E.W. needed to be treated at Shodair. (*Id*.)

CPS Brunner testified that, after the Shodair placement and as of March 29, 2024, P.E.W. was "in a regular foster home with Tami and Rick here in Billings[.]" (6/18/24 Tr. at 36-37, 58.) The foster parents were committed to providing long-term care for P.E.W. (*Id*. at 39.) Recognizing her heightened needs, the foster parents had daily counseling. (*Id*. at 38.)

P.E.W. had been through seven placements in a year. (6/18/24 Tr. at 41.) With the help of a psychologist and other services, CPS Brunner was optimistic that P.E.W. could remain at her current placement. (*Id*. at 39.) She believed that her behaviors had recently improved and P.E.W. felt safe and loved. (*Id*.) CPS Brunner testified that no other family members had been identified as potential placement for P.E.W. (*Id*. at 39-40.) The Department also applied for P.E.W.'s enrollment into the Northern Cheyenne Tribe. (*Id*. at 40.)

At the time of termination, neither P.E.W. nor her brother, B.J.B., had "asked about their mom in a while." (6/18/24 Tr. at 68.) Mother was living with a "couple friends in Laurel" but would bounce from house to house. (7/16/24 Tr. at

18.) P.E.W. had been in care of the Department for 992 days, or for "forty-six percent of her life." (Doc. 78, FOF, ¶ 8.)

At the point the Permanency Plan Affidavit was filed, "no member of the child's extended family requested that custody be awarded to that family member or that a prior grant of temporary custody with that family member be made permanent." (Doc. 82 at 4.)

Edith Adams, QEW, testified at termination that P.E.W. has "been through a horrific lifetime" in her "short years[]" and would be detrimentally injured if she was placed back into either parent's care. (7/16/24 Tr. at 37-38.) Adams is familiar with the childrearing practices of the Northern Cheyenne Tribe. (*Id*. at 37.) Adams explained that the Tribe normally "prefers a guardianship," but in special cases such as this one, "they will approve and acknowledge termination." (*Id*. at 38.) She explained, "The daughter has been through enough in my opinion." (*Id*. at 39.) Given the special needs of P.E.W., Adams testified that the permanency plan from the Department was appropriate. (*Id*. at 41.) Despite the tribe's preferred guardianships, the Tribe approved terminating Mother's rights. (App. 1, FOF, ¶ 32.)

IV. Additional facts related to the Department's active efforts

Mother sometimes cancelled or failed to show up for her visitation with her children, sometimes in between no-shows for urinalysis. (Doc. 59 at 10, 14.) While Mother was in sober living, visitations were difficult because Mother was "yelling at the kids and screaming and cursing at staff." (*Id*. at 15.) By April 4, 2023, after Mother had a brief period of sobriety, CPS was working to "slowly place the children back with mom one at a time so that [Mother] might not get overwhelmed." (*Id*. at 16.) Mother was still frequently reuniting with her paramour Stephanie, using drugs and testing positive for meth, getting kicked out of sober living, and missing urinalysis. (*Id*. at 10-18.) Mother continued the cycle of not showing up for parenting time in June 2023, but when she did show up for parenting on June 30, 2023, she had a black eye from Stephanie. (*Id*. at 17.) On August 17, 2023, Mother cancelled parenting time. (*Id*. at 18.) Mother's location was unknown to the Department in November to December 2023. (*Id*. at 19.)

But by January 2024, Mother explained, "I'm doing my visits, we start today at a new place." (1/02/24 Tr. at 4.) In April 2024, Mother testified it was "absolutely not[]" a safe environment for her kids when she was still dealing with her relationship with Stephanie. (4/22/24 Tr. at 89-90.) She explained that, while she was previously doing visitations with B.J.B. and P.E.W. together (*id*. at 96), after she had missed enough parenting visitations, they were cancelled "due to

some issues." (*id*. at 92). She admitted she was sending disrespectful text messages to the foster parents. (*Id*. at 93-94.) As CPS Brunner testified, there were also "some recent threats by [Mother] made to the foster parents," and communication was difficult. (6/18/24 Tr. at 69.) There was not much trust between the foster parents and Mother because Mother had recently brought Stephanie to B.J.B.'s wrestling tournament. (4/22/24 at 120.) However, Mother explained she was still making weekly phone calls with B.J.B. (*id*. at 93-94), although she had not had contact with P.E.W. (*id*. at 97).

V. Termination proceedings

The Department filed a motion and affidavit for termination, explaining that Mother needed "consistent chemical dependency treatment," and she had "failed to consistently drug test for CPS to access sobriety," and had "inconsistent" visitation with P.E.W. (Doc. 59 at 5.) The Department's affidavit detailed numerous no-shows for urinalysis, combative behavior with CPS, failure at all Mother's sobriety and treatment placements, several instances of physical violence from Stephanie followed by Mother consistently reuniting with her, and numerous drug relapses. (*Id*. at 7-20.)

Mother testified that she cycled between sober living housing and living on the streets over the last couple years. (4/22/24 Tr. at 80-81.) She explained that,

while she worked toward reunification with her children, she "ended up messing it up" each time. (*Id*. at 82.) She explained that she frequently relapsed and "snuck Stephanie in" to her living placements, resulting in her having to leave housing. (*Id*.) She explained that Stephanie was currently incarcerated due to her violence against her. (*Id*. at 84.) Mother explained that her relationship with Stephanie was problematic and was a significant source of her problems, but it was her fault too for letting Stephanie back into her life over and over. (*Id*. at 106-07.) At the April 2024 hearing, Mother testified she had recently relapsed around two or three weeks ago. (*Id*. at 86.)

CPS Saunders detailed Mother's difficulties with maintaining sobriety and housing and a domestic situation free from domestic violence. (6/18/24 Tr. at 12-14.) She explained that the children have "significant behaviors and some high therapeutic needs" that weren't being met because of Mother's lack of sobriety. (*Id*. at 14-15.)

CPS Brunner testified that Mother "has been very in and out of both [children's] lives." (6/18/24 Tr. at 69.) She continued that "[u]p until the end of May, [Mother] had been kicked out of a different visit agency for noncompliance and hadn't seen even [B.J.B.] for a couple months. This has been a pattern since I had the case, going in and out. And I don't feel that that's fair for these children to have her just pop in and out every few months." (*Id*.) She continued that "neither

one of [the children] have talked about [Mother] in a while to me[.]" (*Id*. at 69-70.)

P.E.W. had been in seven placements in a year. (6/18/24 Tr. at 40.) CPS Brunner testified that visitation was discontinued recently because "we're trying to get settled into her placement and in a routine, that hopefully we don't lose the placement again since she's been in so many foster homes this past year." (*Id*. at 41.) Nonetheless, Mother contacted CPS Brunner weekly to get updates and photos of P.E.W. (*Id*. at 41-42.)

VI. The district court's order

The district court opined in the termination order that "[the Department] made exemplary efforts (more than sufficient for active efforts)" to prevent the breakup of the family. (App. 1, FOF, ¶ 13.)

The court also held that the "Department has made appropriate and active, but ultimately unsuccessful, efforts to avoid the necessity of placing [P.E.W.] in a protective out-of-home placement and/or make it possible to safely return [P.E.W.] to her home, and pursuant to 25 U.S.C. § 1912(d), 'to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.'" (App. 1, ¶ 40.) Further specific conclusions are discussed herein.

SUMMARY OF THE ARGUMENT

Substantial credible facts support the district court's conclusion that the Department engaged in "exemplary efforts" over and above "active efforts" to prevent the breakup of the family. The Department gave Mother several resources and referrals to sobriety programs and reunification programs such as: Family Recovery Court, several inpatient treatments at Rimrock Foundation, six CD evaluations, Willow Way for reunification, Michelle House Sober Living, IOP, and Hannah House. While the goal was reunification and the Department engaged in extraordinary efforts for Mother to have the tools to successfully parent P.E.W., Mother failed every program, failed to show up for urinalysis 42 times, tested positive for meth several times, and attempted to re-expose her children to her abusive paramour Stephanie.

Mother nonetheless argues that active efforts were not established because Mother was denied visitation with P.E.W. during the final few months before termination. But Mother's lack of visitation was due to her own noncompliance with visitation, along with threatening and disrespectful communications to the foster parents. Mother acknowledged that her continued association with Stephanie was creating an unsafe environment for P.E.W, and that P.E.W. had substantial needs due to abuse and neglect. And, as the QEW aptly testified, P.E.W. "has been through enough[.]"

Next, the district court correctly concluded that "good cause" existed to divert from ICWA placement preferences because, in part, P.E.W. has extraordinary physical, mental, or emotional needs, such as specialized treatment services, that are unavailable in the community where a preferred placement is. Given five-year-old P.E.W.'s need for hospitalization and medication to control her violent outbursts, she qualifies as someone who has substantial mental and emotional needs justifying deviation from ICWA's placement preferences.

Nonetheless, the Department exhaustively explained its diligent search for an appropriate ICWA placement prior to its deviation of placement preferences. The Department initially provided an ICWA-compliant placement with Grandmother, but that placement failed due to allegations of physical violence and sexual abuse to the children. The Department diligently sought alternative family members through interviewing Mother and Father and scouring online resources to find potential family members. But even when family members were identified, some were not appropriate, and some were not viable because they conflicted with the goal of reunification. At any rate, given the substantial needs of P.E.W. and extraordinary circumstances, an alternative placement was appropriate and authorized under ICWA.

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.*

An appellant bears the burden of establishing error by the district court; therefore, it is the appellant's burden on appeal to establish that the district court's factual findings are clearly erroneous, or its conclusions of law are incorrect. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825. This Court reviews "the evidence in the light most favorable to the prevailing party when determining whether substantial credible evidence supports the district court's findings." *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715 (citation omitted).

This Court "will not reverse a district court's ruling by reason of an error that 'would have no significant impact upon the result.'" *In re H.T.*, 2015 MT 41, ¶ 10, 378 Mont. 206, 343 P.3d 159. Nor will this court "disturb a district court's

decision on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion." *Id.*, ¶ 10.

ARGUMENT

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

In termination proceedings where ICWA applies, the state and federal criteria must be established by evidence beyond a reasonable doubt. Mont. Code Ann. § 41-3-422(5)(b); 25 U.S.C. §§ 1912(d) and (f); *In re I.B.*, 2011 MT 82, ¶ 25, 360 Mont. 132, 255 P.3d 56 (citation omitted). In addition to Mont. Code Ann. § 41-3-609(1)(f), the following criteria must also be established: "active efforts" were made to prevent the breakup of the family and those efforts proved unsuccessful; and the Indian child would likely suffer serious emotional or physical damage if the parent were to maintain custody. 25 U.S.C. §§ 1912(d) and (f); *In re M.S.,* 2014 MT 265A, ¶ 24, 376 Mont. 394, 336 P.3d 930; *In re D.S.B.*, 2013 MT 112, ¶ 13, 370 Mont. 37, 300 P.3d 702. Here, Mother has only challenged "active efforts" and thus has waived review of the remaining TPR factors.

A. The district court did not err when it concluded that the Department made active efforts to reunify Mother with P.E.W., but those efforts were unsuccessful.

Under ICWA,

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d).

Active efforts refer 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).

In determining whether DPHHS made active efforts, a district court may consider "a parent's demonstrated apathy and indifference to participating in

treatment," as well as actions taken by the State to provide services for the other parent and the child. *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556; *D.S.B.,* ¶ 17. "The success of the remedial services and rehabilitative programs concomitantly depends on the parents' ability and willingness to develop the necessary skills to provide their child with a safe living environment." *I.B.,* ¶ 41 (citation omitted) (While the State cannot simply wait for a parent to complete his treatment plan, "a court may consider the parent's failure to participate."). A parent's inability or apathy to engage in the services offered by the Department does not diminish the fact the Department made active efforts. *D.S.B*., ¶ 15 (The Department will not be faulted if its 29 efforts are curtailed by a parent's own behavior); *accord In re A.L.D.*, 2018 MT 112, ¶ 7, 391 Mont. 273, 417 P.3d 342.

When a parent has refused to avail herself of a multitude of services offered by the Department (treatment plans, social worker support, supervised visitation, drug testing, CD treatment, counseling, referrals to treatment providers, in-home services, and parenting coaching) this Court agreed active efforts had been made. *D.S.B.*, ¶ *15; see also In re T.W.F.*, 2009 MT 207, ¶ 27, 351 Mont. 233, 210 P.3d 174 (court may consider parent's failure to participate in completing her treatment plan); *In re R.H.*, 250 Mont. 164, 171, 819 P.2d 152, 156 (1991) (while DPHHS's role may be to assist parents "in completing the treatment program, the parents retain the ultimate responsibility for complying with the plan.").

Active efforts must be tailored to the specific facts and circumstances of each individual case. 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. 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;
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> (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;
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> (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;
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> (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;
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> (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 CFR § 23.2; Mont. Code Ann. § 41-3-1319(4)(a).

Here, for over two years, the Department engaged in substantial active efforts through numerous programs and resources with a goal to reunite Mother and children. (*See* Docs. 25, 40, 59.) These efforts included detox at Rimrock Foundation, Family Recovery Court, Inpatient treatment at Rimrock Foundation, UA tests, visitations with the children when Mother would show up, another stay at Rimrock Foundation, the TRUST program at Rimrock Foundation, a stay at Ignatius House, face to face contacts with Mother, six CD evaluations, a subsequent day treatment at Rimrock Foundation, parent visits at YDI, multiple rehousing arrangements, a stay at Willow Way with the goal toward reunification, another stay at Rimrock Foundation, a referral and placement to Michelle House Willow Way Sober Living, IOP at Rimrock Foundation, and an admission to Hannah House Sober Living.

All these interventions and resources failed. The Department exhaustively detailed these efforts, along with Mother's noncompliance with all efforts. (Doc. 59 at 10-20; *see also Active Efforts Section at* Doc. 40 at 6-7.) Mother continued to use drugs, expose the children to Stephanie, and failed to complete her treatment plan. But Mother's failure to avail herself of the Department's services does not diminish the Department's active efforts. *D.S.B.*, ¶ 15. Indeed, as the district court concluded, "[d]espite the Department's active efforts, [P.E.W.] could not be returned safely to [Mother's] care. In addition to [Mother's] lack of stability, housing, and chemical dependency, [Mother's] ongoing relationship with Stephanie adversely impacts the children's safety." (App. 1 at 38.) The totality of the circumstances here shows that active efforts were pursued by the Department.

Notwithstanding the Department's exemplary active efforts, Mother nonetheless zeros in on just one possible aspect of "active efforts," and argues that the Department failed at active efforts because "Mother had gone five months without having any visitation from P.E.W." around the time of termination. (Appellant's Br. at 22.) Mother claims that the Department failed to explain the reason behind the suspension of contact, which violates the "detailed documentation" provision of ICWA, 25 C.F.R. § 23.120. (*Id*. at 22, 20.)

This argument fails. As the district court explained in the termination order, "even before the suspension of visitation with [P.E.W.], [Mother] exhibited a

pattern of coming into and going out of [P.E.W.'s] and her brother's lives. Compounding this point, '[n]either [P.E.W. nor her brother] ha[d] asked [or talked] about [Mother] in a while." (App. 1 at 34.) This behavior is well-documented. (Doc. 59 at 14, 17, 18, (missed parenting time); Doc. 59 at 19 (Mother unreachable from November 15, 2023 to December 7, 2023). As CPS Brunner testified, this was a persistent cycle throughout the proceedings. (6/18/24 Tr. at 69.)

Further, and as Mother herself testified, she understood that she was creating an unsafe environment by attempting to expose her children to her abusive paramour Stephanie. Mother acknowledged P.E.W. had special needs. Compounding the problem, Mother had engaged in threatening and disrespectful communication with the foster parents, resulting in a breakdown in trust. By May 2024, Mother had ceased all cooperation and most communication with the Department. (6/18/24 Tr. at 50.) Under these circumstances, suspension of visitation was appropriate while Mother abandoned any effort in her treatment plan and continued to struggle with substance abuse, her mental health, housing needs, and her relationship with Stephanie prior to termination. (*See* 6/18/24 Tr. at 50-56; Doc. 59 at 18-19.)

Mother's complete failure to address her own problems, CD, mental health, domestic violence, etc., supported termination regardless of whether she had additional visits with P.E.W. Thus, this discrete prong of "active efforts" did not

alter the outcome. *H.T.*, ¶ 10. By the time Mother's visits were suspended, Mother had already failed to accomplish any task/goal of her treatment plan, despite the undisputed active efforts the CPSs made to provide rehabilitative services to Mother. P.E.W. was clearly experiencing severe emotional and mental health issues concomitant with Mother using meth, refusing to talk to the CPS, and reuniting with her abusive girlfriend. Active efforts were established by the Department.

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

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—
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> (i) a member of the Indian child's extended family;
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> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
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> (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).

Under ICWA, good cause to depart from placement preferences may be established under several circumstances, including the unavailability of a suitable placement after a diligent search, 25 C.F.R. § 23.132(c)(5), and the "extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live." 25 C.F.R. § 23.132(c)(4).

The district court did not err in concluding good cause existed to deviate from an ICWA placement. The initial placement at Grandmother's house was ICWA compliant, but that placement failed because Grandmother did not want to be a long-term placement and there were allegations of physical and sexual abuse in the home. While the Department diligently searched for extended family members placements through several avenues of inquiry, no suitable family member could be found for placement. While Aunt was identified as a possibility, she lived in Great Falls, which would not support reunification at that time from Billings and, in any event, would not qualify as a location "within reasonable proximity to his or her home" under 25 U.S.C. § 1915. She also was ultimately unwilling to be a placement. (Doc. 59 at 13.) And once P.E.W.'s high needs were identified, a non-therapeutic placement was not appropriate.

Importantly, as the district court observed, "[P.E.W.'s] extreme mental health needs [] have required hospitalization and ongoing treatment with a variety

of medical providers at five years old." (App. 1 at 13-14.) Mother also acknowledged that P.E.W. had special needs, and needed a higher level of care, and required hospitalization and "wraparound" therapy. (4/22/24 Tr. at 96.) The Department detailed P.E.W.'s significant special needs, as evidenced by her placement at Shodair and subsequent medication due to her violent outbursts. The district court explained that "[w]hile [P.E.W.'s] violent outbursts have decreased since her hospitalization; she is still verbally and physically aggressive in her placement." (App. 1 at 22.) The court noted that "[n]o family or other potential preferred placements have been found for [P.E.W.]" (*Id*.)

The district court correctly concluded that "good cause" existed to divert from the ICWA placement preferences because P.E.W. "has extraordinary physical, mental, or emotional needs, such as specialized treatment services, that are unavailable in the community where a preferred placement is." (App. 1 at 22.) As the district court reasoned, this is a permissible reason to deviate from placement preferences under ICWA. (App. 1 at 31 (citing 25 C.F.R. § 23.132(c)(4)).) And the court correctly concluded that "[n]o ICWA-preferred placement was located for [P.E.W.] despite the fact that the Department conducted a diligent search to find suitable placements for her that meet the ICWA preference criteria." (*Id*. at 23.) Notably, Mother failed to "challenge termination" based on "the presence of good cause to deviate." (*Id*. (citing Docs. 76-77).) And "this is one of the special cases

where the Northern Cheyenne Tribe approves of terminating parental rights and no appropriate family has been found." (*Id*.)

CONCLUSION

The district court's order terminating Mother's parental rights as to P.E.W. should be affirmed.

Respectfully submitted this 19th day of March, 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 7,241 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0703

IN THE MATTER OF:

P.E.W.,

Youth in Need of Care.

APPENDIX

CERTIFICATE OF SERVICE

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