IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0633

IN THE MATTER OF:

I.R.S. and M.W.A.H.,

Youths 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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STATEMENT OF THE ISSUES

Whether Mother was denied effective assistance of counsel at the adjudicatory hearing when her counsel was not present but had conveyed to DPHHS that the matter was not contested, which Mother did not dispute.

Whether the district court erred at the adjudicatory hearing when it advised Mother to speak to her counsel about filing a motion to transfer to tribal court.

Whether the district court erred when it accepted Aunt's request to withdraw her motion to intervene and ordered she be deemed an interested person and receive notice of the proceedings.

Whether the district court correctly found good cause to deviate from ICWA's placement preferences.

STATEMENT OF THE CASE

At the conclusion of a multiple-day hearing, on July 24, 2024, the district court granted petitions for guardianship regarding I.R.S. (born in 2018) and his half-sibling, M.W.A.H. (born in 2022), both Indian children as defined by the Indian Child Welfare Act (ICWA) and Montana's ICWA (MICWA). *See* 25 U.S.C. § 1901, *et seq*.; Mont. Code Ann. § 41-3-1301, *et seq*. (Doc. 95;

DN-22-225, Doc. 67.)[1] The Department of Public Health and Human Services, Child and Family Services Division (DPHHS) had been making active efforts to assist their mother, H.R.A.H. (Mother), for over three years, but those efforts proved unsuccessful.[2] (*Id*.)

Mother's assigned counsel was not present at the adjudicatory hearing, but following representations from DPHHS's counsel that Mother's counsel had advised that Mother intended to stipulate to the relief, and there being no comment otherwise from Mother, the court adjudicated the children. (8/31/21 Tr.; Doc. 21.) At that hearing, Mother asked the court about the process for transferring a case to tribal court, and the court advised Mother to speak to her counsel and have him file a motion and begin the process of inquiring with the Tribal Court whether it would accept jurisdiction. (*Id*.)

The children were initially placed with Mother's sister (Aunt), but they had to be removed following reports of abuse in her home for which the Crow Tribe Social Services intervened. (Doc. 95.) The children were placed with a nonnative foster family (Foster Family), which the district court consistently approved after

[1]Unless otherwise noted, citations to the district court record will be to *In re I.R.S.*, Cause No. DN-21-146.

[2]I.R.S.'s father (Father) did not appeal the court's order and M.W.A.H.'s father is unknown.

determining there was good cause to depart from ICWA's placement preferences. (*Id*.)

Prior to the guardianship hearing, Aunt filed a motion to intervene. (Docs. 50-51, 65.) However, Aunt withdrew her motion after learning she qualified as an interested person and would receive notices of proceedings. (10/4/23 Tr.; Doc. 95.)

DPHHS petitioned for guardianship. (Docs. 45-46.) A contested guardianship hearing was held on February 20, March 4, and April 3, 2024. (2/20/24 Tr. (Tr-1); 3/4/24 Tr. (Tr-2.); 4/3/24 Tr. (Tr-3.); Doc. 95.) At the conclusion, the district court granted the petitions for guardianship. (Doc. 95; DN-22-225, Doc. 67.)

STATEMENT OF THE FACTS

On May 13, 2021, DPHHS investigated a report that Mother was subjecting I.R.S. to unreasonable risks because of her methamphetamine addiction, which had involved law enforcement intervention, and her inability to keep her home safe. (Doc. 2.) Mother tested positive for methamphetamine and admitted she had smoked the drug in the room she shared with I.R.S. (*Id*.) Child Protection Specialist (CPS) Tricia Hergett noted the room was unsanitary and observed items that were dangerous to I.R.S. (*Id*.) Hergett learned that I.R.S. had been born

premature and needed speech and physical therapy. (*Id*.) I.R.S. was supposed to be attending therapy at Children's Clinic, but he only attended when his grandmother took him. (*Id*.) Hergett contacted Aunt who agreed that she and her husband would be a placement for I.R.S. (*Id*.)

The court granted emergency protective services and set a prehearing conference and show cause hearing for June 8, 2021, and an adjudicatory hearing for August 31, 2021. (Doc. 5.) James Reintsma was assigned to represent Mother. (Doc. 10.)

Mother and Reintsma appeared for the June 8, 2021 hearing, and requested the hearing be continued to allow more time for Mother to consult with Reintsma. (6/8/21 Tr.; Doc. 11.)

Mother appeared at the continued hearing, but Reintsma was not present. (8/31/21 Tr.) Reintsma had corresponded with counsel for DPHHS, Heather Webster, that Mother did not contest adjudication or temporary legal custody (TLC). (*Id*.) As Webster explained, "My understanding is that the parties will be stipulating or otherwise not object to the relief requested today. Mr. Reintsma did indicate that [Mother] is okay with the current placement and that she does not oppose the relief today." (Tr. at 5.) Webster provided an offer of proof that Edith Adams, the Qualified Expert Witness (QEW), would testify that continuing I.R.S. in the care of Mother would create a risk of serious emotional or physical harm. (*Id*. at 6-7.)

Finally, Webster stated that proposed treatment plans would be prepared and asked the court to set a treatment plan hearing, but added that Mother had already been working on some of the tasks. (*Id*. at 5-6.)

Noting the parties' stipulations, the court adjudicated I.R.S. as a youth in need of care and granted TLC. (Tr. at 7-8; Doc. 21.) When asked, Mother stated she had no questions, but then inquired about transferring her case to the "Rez." (*Id*.) The court advised Mother to speak to Reintsma as he would file a motion and get the process started. (Tr. at 9-11.)[3]

On September 9, 2021, I.R.S. was removed from Aunt's care. (Docs. 55, 95; TR-3 at 21-44, 59-86.) Crow Tribe Social Services had removed her husband's 16-year-old daughter from their care based on her allegation that her father abused her. (*Id*.) The case remained open until the daughter turned 18 and aged out. (*Id*.) The CPS assigned to this case reviewed the documentation from the Crow Tribe and Bureau of Indian Affairs (BIA) and determined I.R.S could not remain in Aunt's care. (*Id*.)

Mother and Reintsma appeared and stipulated to Mother's treatment plan being approved by the court. (9/28/21 Tr.) DPHHS explained that I.R.S. had been moved from Aunt's care and was now staying in a nonpreferred placement, but the agency continued to diligently search for other family placement options through

[3]*See* Section II.A below for additional relevant facts.

Mother and her mother. (*Id*.) Father's counsel added that there may be some paternal family members available for placement. (*Id*.) Reintsma confirmed that Mother had signed her treatment plan, but explained he had not been able to talk to Mother about the placement. (*Id*.) The court approved the treatment plan and found DPHHS was making diligent efforts to locate placement options and there was good cause to deviate from the placement preferences. (*Id*.; Doc. 20.) The court then specially addressed Mother, asking if she had any questions and what her plans were regarding chemical dependency (CD) treatment. (*Id*.) During open discussion with the court, Mother made no mention of transferring the matter to tribal jurisdiction; nor did she raise that issue in any subsequent proceeding. (*Id*.)

The court extended TLC and approved DPHHS's permanency plan. (3/29/22 Tr.; Docs. 23-24, 27-28.) Mother needed additional time to work on her treatment plan as she had not been regularly attending visits and had yet to begin a CD treatment program. (*Id*.) Mother was not present at the hearing, but her attorney reported that Mother was complying with UA testing and was receiving good prenatal care for her pregnancy. (*Id*.) The district court found DPHHS had established good cause to depart from the preferred placement for I.R.S. (*Id*.)

The parties appeared for a status hearing on July 19, 2022, where DPHHS reported that I.R.S. was doing well in his placement and in addition to his physical/speech/occupational therapies, he was participating in additional mental

health services to help with some developmental delays and behavioral issues. (7/19/22 Tr.) Mother reportedly had clean UA tests, was attending visits, and had completed a psychological evaluation. (*Id*.) Mother was diagnosed with Amphetamine Use Disorder and Social Communication Disorder and had issues with anxiety and depression. (DN-22-225, Doc. 2.) Based on Mother's evaluation, additional services were offered to assist Mother with basic living skills (hygiene, nutrition), including the PACT program through Rimrock. (9/13/22 Tr.)

Mother gave birth to M.W.A.H. in September 2022. (DN-22-225, Docs. 1-2.) Mother was living with her father and brother, who abused alcohol. (*Id*.) Given the continued concerns with Mother's ability to parent I.R.S. (*e.g*., untreated mental health issues, CD history, lacking basic parenting skills) and the hospital reporting that Mother would not bond with the baby or feed him, DPHHS placed M.W.A.H. with his brother in foster care. (*Id*.)

Mother was offered visitation and family-based services through RE Services. (Tr-2 at 56-80.) Michelle Devlin was the Family Advocate (FA) for Mother and the children, and she worked with them twice a week from October to December 2023. (*Id*.) Devlin monitored Mother's progress when she switched to a new FA at the end of 2023 and began in-home parenting time. (*Id*.) Mother was working on her individual mental health needs through counseling at Rimrock's Psych Rehab Program, but she was unemployed, and her apartment was not

considered a safe environment because of the people living there who were using alcohol and drugs. (Doc. 33.)

On December 6, 2022, Mother stipulated to extending TLC and approving the permanency plan in I.R.S.'s case. (12/6/22 Tr.; Docs. 38-39.) Mother also stipulated to the court adjudicating M.W.A.H as a youth in need of care and granting TLC. (*Id*.; DN-22-225, Doc. 17.) The court found good cause to depart from the placement preferences for both children. (*Id*.) On January 31, 2023, without objection, the court approved Mother's treatment plan in M.W.A.H.'s case. (1/31/23 Tr.; DN-22-225, Doc. 21.)

After a couple months, in-home parenting services were suspended because while Mother was present for the visits, the home was not safe (*i.e*., unapproved people in the home; drug paraphernalia). (Tr-2 at 56-80.) Mother's visits were moved back to RE Services and when Mother failed to attend both visits, they were eventually reduced to once a week. (*Id*.)

At the April 25, 2023 status hearing, DPHHS reported that M.W.A.H. was very delayed and required feeding therapy. (4/25/23 Tr.) Mother had canceled recent visits with the children, stopped attending mental health therapy, and tampered with her drug patch. (*Id*.)

On July 12, 2023, DPHHS petitioned for guardianship for both children. (Docs. 45-46.) In the supporting affidavit, CPS Saygar Christianson requested the

court find good cause to depart from the ICWA placement preferences and set forth diligent efforts that had been made to locate a preferred placement option for the children, but those efforts had been unsuccessful. (*Id*.) The court set the hearing for September 12, 2023. (8/15/23 Tr.; Doc. 49.)

The day before the guardianship hearing, Aunt filed a motion to intervene "as a member for [sic] the extended family," and sought to "assert her rights as a preferred placement." (Docs. 50-51.) DPHHS opposed the request, and the matter was set for a hearing. (9/12/23 Tr.) DPHHS argued that Mont. Code Ann. § 41-3-422(9)(b) precluded Aunt from being granted intervenor status. (Doc. 55 (citing *In re U.A.C.*, 2022 MT 230, ¶ 16, 410 Mont. 493, 520 P.3d 295).) DPHHS further asserted that ICWA did not permit Aunt's intervention because she was not an Indian Custodian as defined under ICWA. (*Id*.) Aunt's supplemental brief in support of her motion asserted that *U.A.C.* did not control based on her argument that since the case was an ICWA case, it was irrelevant whether Montana's Rules of Civil Procedure or Mont. Code Ann. § 41-3-422(9)(b) applied. (DN-22-225, Doc. 36.)

In September 2023, Mother finally completed a CD evaluation with Verity Seeman, LAC, at Rimrock Foundation. (Tr-2 at 32-54; Ex. 2.) Mother reported she was living in Hardin but was homeless. (*Id*.) Mother told Seeman that she had last drank alcohol in August and last used methamphetamine in

May 2023, but was otherwise less than forthcoming in answering questions. (*Id*.) Mother claimed she had no substance abuse history, which was contrary to Rimrock's records showing Mother's history of IV drug use. (*Id*.) Seeman was unable to make a treatment recommendation for Mother because the evaluation was inconclusive. (*Id*.)

For unknown reasons, OPD assigned Joshua Kotter as Mother's new counsel in September 2023. (Doc. 54.)

The court conducted a hearing on Aunt's motion to intervene on October 4, 2023. (10/4/23 Tr.) The court and parties openly discussed the motion and interpretation of Mont. Code Ann. § 41-3-422(9)(b).[4] (Tr.) After confirming that she qualified as an interested person under the statute and would be entitled to notice of the proceedings and the right to be present, Aunt withdrew her motion to intervene, explaining that she "would be happy with her simple appearance . . . in the proceeding without formally being told she is a party." (Tr. at 7-10.)

The November 8, 2023 guardianship hearing was continued because new counsel had to be appointed for Mother. (11/8/23/ Tr.) Mark Epperson was ultimately appointed as Mother's counsel. (Docs. 63, 71-72, 74.)

Seeman saw Mother again in December 2023 for an updated CD evaluation. (Tr-2 at 44-55; Ex. 3.) Mother was more forthcoming in her interview and

[4]*See* Section IV below for additional relevant facts.

admitted she had used methamphetamine the past weekend and had also consumed alcohol. (*Id*.) Seeman recommended Mother complete Level 2.5, day treatment, but Mother began Level 2.1, intensive outpatient, through telehealth because she was living in Hardin, had no transportation, and Level 2.5 was unavailable through telehealth. (*Id*.) Mother was discharged from the outpatient program in early January 2024. (*Id*.) Rimrock attempted to get Mother back into treatment, but Mother failed to follow through with doing an updated CD evaluation in mid-January. (*Id*.)

In the November 2023 affidavit in support of the permanency plan, Christianson again set forth the diligent efforts made to locate a preferred placement for the children that continued to be unsuccessful. (Doc. 68; DN-22-225, Doc. 44.) Both children attended several different therapists (*e.g*., occupational, physical, speech, and feeding) and had improved developmentally. (*Id*.) Christianson noted three applicable reasons for good cause to depart from ICWA's preferred placements: keeping siblings together; both children had extraordinary physical, mental, or emotional needs; and no ICWA preferred placements had been located despite diligent efforts. (*Id*.)

Epperson and Mother appeared for the permanency plan hearing on January 2, 2024. (1/2/24 Tr.) DPHHS noted Mother's opposition to guardianship, but requested the court approve the permanency plan of guardianship, as

permanency plans are simply a procedural step to ensure funding and that DPHHS had a long-term plan for the children. (*Id*.; Doc. 85.) The court approved the plan and found good cause to depart from the ICWA placement preferences, noting that despite DPHHS's diligent efforts to secure a preferred placement, those efforts had been unsuccessful. (*Id*.)

The guardianship hearing began on February 20, 2024. (Tr-1.) Webster explained Mother intended to consent to guardianship if she could have ongoing contact with the children. (*Id*.) Foster Mother assured Mother that she and Foster Father intended to maintain the children's connection with their tribal heritage and culture and also would facilitate contact with Mother and other extended family members. (*Id*.) However, after hearing from Foster Mother, Mother advised she did not consent to guardianship after all. (*Id*.) The matter was continued because DPHHS had released its witnesses based on Mother's representation that she agreed with guardianship. (*Id*.)

At the continued hearing, in addition to the parents and their attorneys, the following people were also present: Aunt; GAL, Juli Pierce; counsel for the children, Kimberly Durham; and Alaina Buffalo Spirit, ICWA Agent for the Northern Cheyenne Tribe. (Tr-2.) Seeman testified about Mother's CD evaluations and her failure to follow through with intensive outpatient treatment. (*Id*. at 32-54; Exs. 2, 3.) Seeman explained several attempts were made to get

Mother re-enrolled in treatment and to complete an updated CD evaluation, but they were unsuccessful. (*Id*.)

Devlin from RE Services described her work with Mother and stated she recently began supervising Mother's visits again. (Tr-2 at 60-80.) Devlin explained Mother was not engaged with the children during visits and, because Mother often no-called/no-showed, they implemented an attendance requirement that meant the children would not be transported to the visit until Mother was present. (*Id*.) Mother did not provide meals for the children and had stopped participating in family-based services that assisted with getting food and offering one-on-one parenting education. (*Id*.) In Devlin's opinion, Mother's parenting skills had regressed. (*Id*.)

I.R.S.'s pediatrician, Dr. Matt McDonald, who had been seeing I.R.S. since November 2021, explained three main medical issues impacting I.R.S. (Tr-2 at 5-32; Ex. 1.) First, I.R.S. suffered from failure to thrive, which required an "encouraging" and "very healthy dietary environment," where he would have regular meals and feeding therapy. (*Id*. at 8-9.) Dr. McDonald explained that I.R.S.'s growth and development had improved greatly in the past year because he was receiving appropriate and consistent healthy meals/snacks. (*Id*.) Second, I.R.S. had gross motor delays and muscle weakness that required consistent physical therapy. (*Id*.) Lastly, I.R.S. had expressive language delay that required

high quality speech therapy and caregivers who could consistently reinforce his progress for at least the next few years. (*Id*.) Dr. McDonald added that along with a caregiver who understood his medical needs, I.R.S. must also be in a positive, sober home environment free of social chaos. (*Id*.)

Mother testified that DPHHS had treated her fairly and that she had understood what was expected of her. (Tr-2 at 80-111.) Mother candidly told the court that she would not be able to safely parent the children if she abused alcohol and drugs. (*Id*. at 89-111.) Mother explained she stopped doing the drug patch when DPHHS filed for guardianship and admitted she used alcohol weekly and had used methamphetamine off-and-on since she stopped the drug patch. (*Id*.) Mother agreed she would probably benefit from mental health treatment, but admitted that she only attended individual counseling through Rimrock for a couple weeks. (*Id*.)

When asked what she understood about I.R.S.'s needs regarding his weight, Mother said she had "no comment on that," and was not sure what foods would be important for I.R.S. to eat. (Tr-2 at 88, 103.) Mother candidly testified that she was "somewhat ready" to try and demonstrate she could parent if she was given more time and she "did not know" if she could engage in services. (*Id*. at 98-99.) When asked if she was alright with the court granting guardianship to the children's current foster family, Mother replied, "Yes," and that it was in the

children's best interests. (*Id*. at 97, 108-09.) Mother elaborated that she was afraid that once guardianship was granted that the foster family would push for adoption. (*Id*.)

Given Mother's apparent agreement to guardianship, at the conclusion of Mother's testimony the court recessed so the parties could determine if additional testimony was necessary. (Tr-2 at 110-15.) When the court reconvened, Epperson reported that Mother was not willing to sign the consent to guardianship, and the matter was continued to April 3, 2024. (*Id*.)

At the continued hearing, Christianson explained that despite reviewing Mother's treatment plan with her multiple times, Mother was unable to internalize what was expected of her and had not successfully completed the plan (*i.e.,* did not complete CD treatment, stopped drug testing, did not follow through with individual counseling, had not exhibited any improved parenting skills, did not maintain stable, sober housing). (Tr-3 at 5-33.) Christianson actively sought to help Mother overcome barriers such as low income, limited transportation, and lack of familial support. (*Id*.) However, Mother never exhibited a desire to change and her capacity to safely parent the children had sadly regressed. (*Id*.)

Christianson explained the efforts DPHHS had recently made to locate an ICWA preferred placement for the children. (Tr-3 at 20-44.) Christianson sent a Facebook message to A.W.B.O.C. (a person Mother had named as a placement

option) and spoke to the Northern Cheyenne Tribe about finding her, but had never heard back. (*Id*.) Christianson reached out to Mother's maternal aunt, J.S., in October 2023 about being a placement but she declined after learning what she would need to do for licensure given her prior substantiation. (*Id*.) The children's maternal grandmother and other maternal aunt both had prior history with DPHHS (*e.g*., concerns with conditions of the home, mental health issues, and domestic violence) making them not appropriate placements. (*Id*.) Christianson attempted to contact them, but neither had responded. (*Id*.) Christianson also reached out to a paternal family member about being a placement option, but she was not available. (*Id*.)

Christianson explained that Mother had not asked that Aunt be reconsidered for placement. (Tr-3 at 21-44; Doc. 95.) Christianson reviewed the reason the children were removed from Aunt's care, including review of BIA and Crow Tribal Social Services records. (*Id*.) The first time Aunt contacted Christianson was in the summer of 2023, two years after I.R.S. had been removed from her care, to obtain a copy of her licensing certificate, but did not contact the CPS again. (*Id*.) In March 2024, Christianson called Aunt to get an update on her living situation and learned she was still living with her husband. (*Id*.) Christianson decided not to continue assessing Aunt's home for placement based

on communications with BIA human services about the appropriateness of Aunt as a placement option. (*Id.*)

Christianson explained the children had been with Foster Parents for 19 months and they were committed to the long-term care of the children and had demonstrated the ability to meet the children's special needs. (TR-3 at 5-18, 33-44.) Foster Parents, who had other Northern Cheyenne Tribal children in their care, maintained contact with Mother and made efforts to keep I.R.S. and M.W.A.H. connected to their Native American culture and extended family. (*Id.*)

QEW Adams, an enrolled member of the Northern Cheyenne Tribe, testified that if the children were to be returned to a parent, they would be at risk for serious emotional or physical damage. (Tr-3 at 47-52.) When asked about Aunt as a possible placement, QEW Adams understood that Aunt was not licensed or able to be licensed. (*Id.*)

As the ICWA agent for the Northern Cheyenne Tribe, Ms. Buffalo Spirit supported guardianship with Foster Parents. (Tr-3 at 53-57.) Ms. Buffalo Spirit testified that she had read the reports related to Aunt's home and believed that the Tribe's licensing procedures would require a home study, fingerprints, and review of any history (presumably, criminal or child services). (*Id.*) When asked if Aunt's home would be preferred over Foster Parents, Ms. Buffalo Spirit explained that it would depend upon the investigation and added that the Tribe does not

believe in hitting children and she opposed exposing children to any physical abuse. (*Id*.)

The final witness called by Mother was Aunt. (Tr-3 at 59-86.) Aunt testified that the Crow Tribe Social Services removed her husband's 16-year-old daughter from their care in 2021 based on her allegation that her father abused her. (*Id*.) The case remained open until the daughter turned 18 and aged out and neither she nor her husband had contact with her. (*Id*.) Aunt was unable to describe what special needs I.R.S. had or his recommended diet. (*Id*.) Aunt testified that after I.R.S.'s removal, she never contacted DPHHS about getting the children placed in her care. (*Id*.) Aunt explained she and Mother had asked the Tribe about it, but the Tribe stated it would not intervene. (*Id*.) Aunt confirmed she had not pursued licensing through either the Northern Cheyenne Tribe or Crow Tribe. (*Id*.)

At the end of Aunt's testimony, the court confirmed with DPHHS that no party had filed a motion for a placement hearing and that the Tribe had not sought a different placement either. (Tr-3 at 86-87.)

During closing remarks, Mother disputed DPHHS's assertion that there was good cause to deviate from the placement preferences, arguing that I.R.S. was removed from Aunt based on an allegation by a teenage daughter against her father, adding that in such situations the allegations are often false. (Tr-3 at 89.) The children's attorney shared Mother's position about placement, asserting that

there was a lack of "visible evidence" that Aunt was not an appropriate placement. (*Id*. at 90.) Aunt's attorney asserted that without a substantiation against Aunt and her husband, there was not good cause to deviate from the placement preferences. (*Id*. at 94.)

The GAL supported guardianship being granted to Foster Family. (Tr-3 at 91-92.) The GAL pointed out that since I.R.S. had been removed from Aunt's care in September 2021, there had been no requests (including by Mother) to place the children with Aunt. (*Id*.) Moreover, Aunt was not a licensed foster parent through either tribe or DPHHS, and DPHHS was unable to consider Aunt as a placement based on information it had received from another social service agency. (*Id*.)

DPHHS asserted that it had met its ongoing obligation to find preferred placements under ICWA, but was not obligated to rehabilitate a placement that had been deemed inappropriate or mitigate the safety concerns, especially when there had been no request by Mother or Aunt to reconsider Aunt as placement. (Tr-3 at 95-96.)

Aunt submitted a post hearing brief in support of placing the children with her. (DN-22-225, Doc. 65.) Aunt attached a declaration from Aunt's husband claiming he never had the chance to defend against his daughter's allegations. (*Id*.)

Mother's proposed findings of fact and conclusions of law advanced no facts in opposition to guardianship. (Doc. 91.01.) Mother conceded that she was not

sure she could care for the children full-time, but preferred Aunt to be the children's guardian. (*Id*.) Although Mother's only legal argument was that DPHHS could not show good cause to deviate from the preferred placements under ICWA, her requested relief was to deny the guardianship petition and place the children with Aunt. (*Id*.)

On July 24, 2024, the district court entered orders granting decrees of guardianship for both children. (Doc. 95; DN-22-225, Doc. 67.) The court entered extremely thorough findings of fact detailing the elements required for granting a decree of guardianship. (*Id*.) The court addressed Mother's failure to complete her treatment plan and the children's special needs. (*Id*.) The court noted Foster Parents demonstrated capacity for, and commitment to, providing for the children's care and best interests, which include continued connection to their Native Culture. (*Id*.)

The court specifically addressed DPHHS's diligent efforts to locate preferred placements and the circumstances of I.R.S.'s removal from Aunt. (Doc. 95.) The court noted that at the dozen hearings over two years, no party opposed that removal or objected to the children's subsequent placement. (*Id*.) Nor had any party requested Aunt be reconsidered as a placement until Mother withdrew her consent to guardianship in February 2024. (*Id*.) The court further noted that no

party had ever objected or contested the court's numerous findings of good cause to depart from the placement preferences it made throughout the proceedings. (*Id*.)

The district court specifically addressed the arguments advanced by Mother in her proposed findings and conclusions and Aunt's post-hearing brief. (Doc. 95 at 24.)

STANDARD OF REVIEW

The right to counsel in Dependent Neglect (DN) proceedings is rooted in statutes and due process clauses under the federal and state constitutions. *In re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, 87 P.3d 408. "Whether a parent has been denied his or her right to due process is a question of constitutional law over which this Court's review is plenary." *In re R.K.*, 2023 MT 161, ¶ 21, 413 Mont. 184, 534 P.3d 659.

Questions that involve justiciability, such as standing, are questions of law that this Court reviews *de novo*. *In re C.B.D.*, 2017 MT 108, ¶ 5, 387 Mont. 347, 394 P.3d 202.

This Court generally reviews a district court's order granting or denying a motion to intervene for abuse of discretion. *U.A.C.*, ¶ 9. "However, the interpretation of a statute is a question of law that [this Court] review[s] *de novo*" and this Court reviews "a district court's interpretation of the law for correctness." *Id.*

This Court reviews a district court's findings of fact for clear error and its conclusions of law for correctness." *R.K.*, ¶ 21. 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. *R.K.*, ¶ 21.

SUMMARY OF THE ARGUMENT

Mother's claim that she was denied effective assistance of counsel at the adjudicatory hearing is not supported in fact or law. First, Mother fails to assert what act or omission by Reintsma constituted poor advocacy. At the hearing Mother did not dispute that, in anticipation of not being present at the hearing, Reintsma had correctly advised DPHHS that she did not oppose the relief sought. Additionally, Mother asserts it was irrelevant that Reintsma did not file a petition to transfer. Second, Mother has not established how she was prejudiced by Reintsma's absence. Mother has not demonstrated that her attorney did not properly advocate for her and how she was prejudiced as a result.

Mother has also not established she was denied the opportunity to petition to transfer the case to tribal court. The record does not support, as Mother suggests, that her question to the court at the adjudicatory hearing constituted an unambiguous motion to transfer. Even if Mother's vague inquiry was an oral

motion, because she was represented by counsel, the court was correct to direct Mother to Reintsma. The court also properly advised Mother on the process of transferring a case and DPHHS provided Mother with a contact person at the tribe. Mother was not denied an opportunity to seek transfer, and she has not demonstrated how she was prejudiced by the open-court discussion about initiating a transfer request.

Next, this Court may decline to address the issue of Aunt's motion to intervene for any of the following three reasons. First, Aunt withdrew her motion to intervene. Second, at the hearing on Aunt's motion, Mother agreed that while Aunt qualified as an interested party, she did not qualify to be an intervener under the statute. Third, Mother does not have standing to raise a claim on Aunt's behalf. Finally, even if this Court considers this issue, Aunt was not entitled to intervener status. Aunt could not meet the requirements to intervene under either the federal or state statutes. Aunt was not an Indian Custodian, so she was not entitled to intervene under 25 U.S.C. § 1911(c). Nor could Aunt meet the threshold criteria—that the children had been abandoned—under Mont. Code Ann. § 41-3-422(9)(b).

Mother's final claim is refuted in the record and by the court's thorough and consistent findings that good cause existed to depart from preferred placements under ICWA. Instead of focusing on whether DPHHS met one of the good cause

exceptions or failed to conduct a diligent search, Mother questions the sufficiency of the evidence behind DPHHS's decision to remove I.R.S. from Aunt's care.

However, the court's comprehensive and detailed findings support DPHHS's decision, which was based on an active tribal social services case concerning allegations that Aunt's husband physically abused his daughter. The district court did not err by relying on the CPS's recitation of what was learned from the Crow Tribe Social Services report. Had a party believed the reports and information DPHHS relied upon were inaccurate, they could have requested a placement hearing where such evidence would have been discussed. However, neither Aunt nor Mother ever requested that DPHHS reconsider Aunt as a placement. Mother has not met her burden to establish the district court's findings were clearly erroneously or that it improperly concluded DPHHS had established good cause to depart from ICWA's placement preferences.

ARGUMENT

I. Mother has not identified how she was denied effective assistance of counsel.

When evaluating a parent's IAC claim, the following two factors are considered: 1) counsel's experience and training representing parents in dependent neglect proceedings; and (2) the quality of counsel's advocacy demonstrated during the proceedings. *In re Z.N.-M.*, 2023 MT 202, ¶ 34, 413 Mont. 502, 538 P.3d 21.

Under the advocacy prong, a court considers, among other things, whether counsel demonstrated that he possesses necessary trial skills (*e.g.*, making appropriate objections, producing evidence, and calling and cross-examining witnesses). *A.S.*, ¶ 26. A parent may not sustain an IAC claim unless the parent demonstrates she suffered prejudice because of the alleged ineffective assistance. *A.S.*, ¶ 31.

Mother asserts that her right to effective assistance of counsel was denied when the court conducted the adjudication hearing without Reintsma being present. (Opening Brief (Br.) at 29-30.) Notably, however, Mother does not dispute the court's order adjudicating I.R.S. as a youth in need of care or granting TLC. Nor does Mother argue that the court should not have accepted DPHHS's advisement that Mother did not contest that relief. (*Id.*) Instead, Mother explicitly ties her IAC claim to whether the district court properly handled her alleged request to transfer the case.

Mother alleges that the court denied her "effective assistance of counsel [which] put her in a position where she was forced to represent herself," and "[t]hen, having put [Mother] in that position, the district court improperly failed to act on her request that the matter be transferred to tribal court." (Br. at 30.) Mother's argument on appeal—that her comments at the hearing constituted a formal motion to transfer—contradicts her IAC claim which requires her to establish that without Reitsma's presence, she was prejudiced.

Moreover, Mother's IAC claim is further undermined by her argument that it was irrelevant that Reintsma did not subsequently file a motion to transfer the case. (Br. at 30.) In fact, Mother has failed to identify any act or omission by Reintsma that constituted lacking advocacy resulting in prejudice. Accordingly, Mother has not met either prong of her IAC claim. Nor is this Court required to conduct legal research or make arguments on an appellant's behalf to develop such a claim. *In re I.T.*, 2015 MT 43, ¶ 22, 378 Mont. 239, 343 P.3d 1192.

This Court should deny Mother relief based on IAC.

II. Mother was not denied the opportunity to petition to transfer the case to tribal court.

Pursuant to ICWA,

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b). *See also* Mont. Code Ann. § 41-3-1310 (court shall transfer case to tribal court absent good cause upon "the motion of" an enumerated party).

The ICWA Regulations state that "[e]ither parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing,

that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe." 25 C.F.R. § 23.115(a). The ICWA Regulations further direct that the "receipt of a transfer petition" is the trigger for the state court to notify the tribal court about the request and "request a timely response regarding whether the Tribal court wishes to decline the transfer." 25 C.F.R. § 23.116.

The current ICWA Guidelines do not address oral requests to transfer, but Guideline F.3 explains that:

> [i]t is important for the State court to contact the Tribal court upon receipt of the transfer petition to alert the Tribal court (usually reachable by first contacting the Tribe's designated ICWA agent) and provide it with the opportunity to determine whether it wishes to decline jurisdiction. It is recommended that, in addition to the required written notification, State court personnel contact the Tribe by phone as well.

81 Fed. Reg. 96476-96477 (Dec. 30, 2016).

A. Mother did not formally request the case be transferred to the Northern Cheyenne Tribal Court.

Mother asserts she was prejudiced because the district court did not act on her "request that the matter be transferred to tribal court" and claims that her comment to the court "clearly and unambiguously told the district court she wanted her case moved to tribal court." (Br. at 30, 31.) Mother also claims the district court "precluded her from making a desired motion." (*Id.*) The record does not support Mother's rendition of the facts.

At the adjudicatory hearing, after noting both parries stipulated to the requested relief, the court specifically asked Mother if she had any questions, to which she replied, "No." (8/31/21 Tr. at 8.) After the court thanked Mother for appearing and encouraged her to stay in contact with the CPS, Mother expressed frustration with having two different CPSs. (*Id*.) The court clarified that Caitlyn Saunders was the CPS assigned to her case. (*Id*.) Then the following exchange took place:

> MOTHER: Or how would I transfer my case?
>
> COURT: To?
>
> MOTHER: The Rez.
>
> COURT: Your attorney can file a motion.
>
> WEBSTER: Yes. I'm sorry, Judge. That is the end of Jim's note that he said that you have considered a transfer request. And so, now the next hearing that we'll have will be on your Treatment Plan on September 28th. And I'll email Jim to let him know that we're having that. But then if before then you're able to meet with him, he can make that motion on your behalf.
>
> COURT: And is that Northern Cheyenne Tribe?
>
> WEBSTER: Yes.
>
> COURT: Okay. And the issue is that's not automatic, ma'am. What would happen is the ICWA Department, Indian Child Welfare Act Department at the Northern Cheyenne Tribe, would have to staff the case. And they would have to make a decision as to whether or not they would accept transfer.
>
> MOTHER: And do you know how they work?

> WEBSTER: Jim can -- yes. So, Jim can talk with you about that process once the motion is made.
>
> MOTHER: I'm just trying to go through the fastest -- whatever is fastest.
>
> WEBSTER: So, Jim making that motion. And then you can—I'll also write down the ICWA agent's contact information for you. And then you can be in touch with Althea, too, okay?
>
> COURT: Ms. Saunders, can you provide some contact info for [MOTHER] . . .
>
> . . . .
>
> COURT: So, on September 28th we'll have the Treatment Plan Hearing. The Department before then will submit proposed treatment plans for [Father] and for [Mother] and ask me to approve those plans. That'll be the purpose of the hearing.
>
> Also, in the interim, [Reitsma] can visit with her about filing a motion to transfer to the Tribe, okay?

(Tr. at 9-11.)

Mother's general question, "how would I transfer my case?" did not constitute an "unambiguous oral motion," to transfer the case to the tribal court. The district was correct not to treat it as such and instead directed Mother to consult with her attorney, who the record establishes, had already spoken to Mother about transfer.

B. The district court did not err when it advised Mother to speak to her counsel about petitioning the court to transfer.

The court did not err when it advised Mother to talk to Reintsma about transferring the case and explained the process is initiated by her attorney filing a motion. When a litigant is represented by counsel, a court may not entertain motions made by the represented person. *See State v. Samples*, 2005 MT 210, ¶ 15, 328 Mont. 242, 119 P.3d 1191 ("a district court may refuse to accept *pro se* motions from defendants who are adequately represented by counsel.").

The record establishes that Reintsma had already spoken to Mother about possibly transferring the case based on the comments by DPHHS's counsel. Webster also advised Mother that she would notify Reintsma that the issue came up and Mother could meet with him about filing a motion. Webster also provided Mother with the contact person at the tribe to further inquire about a possible transfer.

Additionally, the district court correctly explained the procedural steps that must be met when a petition for transfer is submitted. Namely, that the district court must first determine if the tribal court would even accept transfer. The district court was well-versed in how transfer requests are handled and at no time did the court preclude or prevent Mother from seeking transfer.

C. Mother was not prevented from requesting a transfer.

A parent or tribe may request to transfer a case to tribal court "at any stage" of the proceedings. 25 C.F.R. § 23.115(b). At no time did the district court advise Mother or her counsel that it would not entertain a petition to transfer. Nor did Mother ever argue to the district court that the open-court discussion during the adjudicatory hearing gave her the impression she could not seek transfer.

At no time did Mother assert she was denied due process to bring such a motion to the district court. Failure to raise constitutional issues to the district court precludes review of such claims on appeal. *In re M.B.*, 2009 MT 97, ¶ 10 n.1, 350 Mont. 76, 204 P.3d 1242. This Court has also declined to consider due process violations not presented to the trial court when it "would have no significant impact upon the result." *In re A.H.*, 2015 MT 75, ¶ 28, 378 Mont. 351, 344 P.3d 403. Mother's due process claims have, therefore, been waived.

While this Court has considered unpreserved claims under the plain error review doctrine, Mother has also waived such a review by not developing that argument in her Opening Brief. This Court is "not required to perform legal research or make arguments on a party's behalf." *I.T.*, ¶ 22. Mother may not raise application of plain error review in her reply brief. M. R. App. P. 12(3) ("The reply brief must be confined to new matter raised in the brief of the appellee.").

Nonetheless, even if this Court considers this issue, Mother has not demonstrated how she was placed at an unfair disadvantage when the court advised her to consult with her attorney about petitioning for transfer to tribal court. As established above, Mother has not asserted Reitsma was ineffective for not bringing a petition to transfer.

A parent's right to the care and custody of a child represents a fundamental liberty interest and, consequently, the State must provide fundamentally fair procedures at all stages in the proceedings. *Z.N.-M.*, ¶ 24. "Fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during the termination proceedings." *A.S.*, ¶ 12. "Due process is not a fixed concept but a flexible doctrine which must be tailored to each situation to meet the needs and protect the interests of the parties involved." *In re C.B.*, 2019 MT 294, ¶ 18, 398 Mont. 176, 454 P.3d 1195 (citation omitted). Mother has not established she was denied the opportunity to petition the court to transfer I.R.S.'s case to tribal court.

Mother has also failed to provide any explanation for how the outcome of her case would have been different had the court treated her question about how a case is transferred as a formal petition to transfer the matter. *C.B.*, ¶ 18 (no due process violation absent showing of prejudice). As the court explained to Mother, transfer was not automatic as the tribal court had to agree to accept the matter.

Also, as both the QEW and Ms. Buffalo Spirit explained, tribal courts typically award guardianships. Ms. Buffalo Spirit consistently concurred in the relief sought by DPHHS, including guardianship, and that good cause existed to deviate from the preferred placements under ICWA. Finally, Aunt testified that when she and Mother contacted the Tribe about placement, they were advised the Tribe was not interested in intervening.

Mother has not carried her burden to establish her rights to due process were denied by the district court advising her to speak to Reintsma about filing a petition to transfer the case to the Northern Cheyenne Tribal Court.

III. Aunt was not denied the opportunity to seek intervention in the case.

A. Additional relevant facts

The district court conducted a specific hearing on October 4, 2023, to consider Aunt's motion to intervene. (10/4/23 Tr.) Aunt was present and represented by counsel, as were the parents and children. (*Id*.)

During open-discussion with the court, the parties agreed that Aunt was a member of the Northern Cheyenne Tribe and that she had been a licensed foster care provider until her license expired in August 2023. (Tr. at 2-3.) However, before testimony was presented, DPHHS asserted an evidentiary hearing to determine if intervention was in the children's best interests was not necessary

because Aunt had not met the threshold criteria under Mont. Code Ann. § 41-3-422(9)(b) to permit intervention; that is, that the children had been abandoned. (Tr.)

Aunt argued she met the criteria because she had an interest in the children and had been a foster placement for I.R.S. (Tr. at 3-4.) Aunt further argued that apart from Mont. Code Ann. § 41-3-422(9)(b), MICWA gave extended family members "a private cause of action or private right to intervene," but did not cite to a specific provision to that effect. (*Id*.) The GAL agreed that Aunt would be a preferred placement option, if found to be safe/appropriate, but asserted Aunt did not have a right to intervene and that *U.A.C*. controlled. (*Id*. at 5.) While Kotter did not know Mother's personal position on the motion, he agreed with the GAL's legal argument, noting that if Aunt was the placement she would have a seat at the table, but still not intervenor status. (*Id*.)

During continued open-court discussion, the parties and court noted that while under Mont. Code Ann. § 41-3-422(9)(b), any interested party may appear, that does not rise to the level of intervenor. (Tr. at 5-7.) Aunt then advised the court that as long as she "can appear and be present at all proceedings" she "would be happy with her simple appearance . . . in the proceeding without formally being told she is a party." (*Id*. at 7-8.) Webster concurred that Aunt met the qualifications of an "interested party" and advised DPHHS had no objection to her

appearing at hearings (unless she was going to be called as a witness). (*Id*.) Once the other parties expressed their agreement with DPHHS's position, the following exchange took place:

> COURT: So just to be clear, you're withdrawing your motion to intervene and just seeking recognition of interested party?
>
> AUNT: Yes.

(*Id*. at 8-9.) After DPHHS confirmed it would provide Aunt with notice of the proceedings, the court again inquired with Aunt:

> COURT: So just for the record you have withdrawn your motion to intervene?
>
> AUNT: Yes.

(*Id*. at 10.)

B. This issue is not properly before this Court

This Court need not address Aunt's motion to intervene for three reasons.

First, Aunt withdrew the motion. The district court took great pains to confirm that Aunt no longer wanted to seek intervenor status by twice confirming with her attorney that he was withdrawing the motion. As this Court has repeatedly explained, it will not fault a district court for not addressing an issue that was "not brought to its attention during the proceedings because doing so would encourage litigants to withhold objections rather than raise the issues

appropriately in the district court." *In re H.T.*, 2015 MT 41, ¶ 19, 378 Mont. 206, 343 P.3d 159 (citations omitted).

Second, Kotter agreed that while Aunt qualified as an interested party, she did not meet the threshold requirements to intervene. "It is a long held principle that acquiescence in error takes away the right of objecting to it." *In re A.A.*, 2005 MT 119, ¶ 26, 327 Mont. 127, 112 P.3d 993 (citing Mont. Code Ann. § 1-3-207).

Finally, Mother does not have standing to assert that Aunt was denied due process. "Standing is a threshold requirement in every case, which [this Court] must address and decide *sua sponte* even if it is not raised by a litigant." *In re K.H.*, 2012 MT 175, ¶ 23, 366 Mont. 18, 285 P.3d 474. Since "[q]uestions of justiciability, such as standing, are questions of law," this Court reviews them *de novo* to determine if "a party has standing 'as of the time the action is brought.'" *C.B.D.*, ¶ 5 (citation omitted).

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 (citation omitted). "[A] litigant may assert only his own constitutional rights." *T.D.H.*, ¶ 24.

Mother's complaint about the denial of Aunt's motion to intervene is improper as she cannot assert alleged violations of another's constitutional rights. Even more compelling is the fact that Aunt had no fundamental interest or right in the care and custody of I.R.S. or M.W.A.H. for Mother to protect.

While I.R.S. had been initially placed with Aunt in foster care, she was not entitled to a parental interest. *See U.A.C.*, ¶ 21 (foster parents are temporary caregivers pursuant to contractual agreement with DPHHS). Nor did ICWA confer any legal interest or right to Aunt as she was not an Indian Custodian under ICWA. An Indian Custodian is "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." *See* 25 U.S.C. § 1903(6); Mont. Code Ann. § 41-3-1303(11). The district court determined that Aunt did not meet the definition of an Indian Custodian (Doc. 95 at 24), and significantly, Mother has not challenged that conclusion.

Since Aunt withdrew her motion to intervene, Mother agreed that Aunt did not meet the threshold criteria to intervene, and Mother does not have standing to assert a claim on Aunt's behalf, this claim should be denied as not properly before this Court. Nonetheless, even if this Court considers Aunt's motion to intervene, Mother's arguments that Aunt was entitled to intervene are not compelling.

C. Aunt was not entitled to intervenor status.

Mother asserts that Aunt's status as a preferred placement effectively gives her party-status under ICWA.

Mother's citation to Montana's constitution and MICWA's general legal principles (*see* Br. at 32-34) do not overcome the specific applicable language at Mont. Code Ann. § 41-3-422(9)(b) or 25 U.S.C. § 1911(c).[5] Nor has Mother argued or established that these specific statutes are unconstitutional. Thus, the two applicable intervention laws at issue here were Mont. Code Ann. § 41-3-422(9)(b) or § 1911(c).

Section 1911(c) states that the Indian child's tribe and Indian custodian have the right to intervene at any time during the proceedings.[6] However, as the district court concluded—and neither Mother nor Aunt contested—Aunt was not an Indian Custodian. ICWA did not confer a right for Aunt to intervene.

Nor was Aunt entitled to intervene pursuant to M. R. Civ. P. 24(b). The Rules of Civil Procedure apply in DN proceedings, "except as modified" by Title 41. Mont. Code Ann. § 41-3-422(4). Montana Code Annotated § 41-3-422(9) "clearly modifies the circumstances under which a party may intervene in a"

[5]There is no provision concerning intervenors in MICWA.

[6]To the extent that § 1911(c) conflicts with Mont. Code Ann. § 41-3-422(9), the ICWA provision would control. *See In the Interest of J.J.T.*, 544 S.W.3d 874, 878-80 (Tex. App. 2017) (if a state procedural rule governing the right to intervene conflicts with the purpose of ICWA, the ICWA provision controls).

DN proceeding. *See U.A.C.*, ¶ 12. Mother's arguments to the contrary, and her assertion that *In re M.E.M.*, 223 Mont. 234, 725 P.2d 212 (1986), nonetheless controls, is unavailing, because that case was abrogated by *U.A.C.*

This Court's holdings in *U.A.C.* and *In re R.N.*, 2024 MT 115, 416 Mont. 462, 549 P.3d 452, clearly establish that, even if she had not withdrawn it, Aunt's motion to intervene was not meritorious. As this Court has observed, the Legislature enacted Mont. Code Ann. § 41-3-422(9)(b) "to provide protection for abandoned children by allowing caretakers to participate in the proceedings as parties." *U.A.C.*, ¶ 14; *R.N.*, ¶ 11. When deciding whether to allow a party to intervene, a district court must "read and interpret §§ 41-3-422(9)(b) and 41-3-437(4), MCA, together as a whole." *U.A.C.*, ¶ 12. The plain meaning of the statutes controls the interpretation of the statutes. *U.A.C.*, ¶ 13.

In *U.A.C.*, and confirmed again in *R.N.*, this Court concluded that intervention is only allowed if "(1) the party seeking intervention [is] one of the enumerated groups—a foster parent, a preadoptive parent, or [a] relative of the child who has cared for [the] child; and (2) there must be an allegation of abandonment." *R.A.*, ¶ 13 (quoting *U.A.C.*, ¶ 14). When no allegation of abandonment had been alleged intervention by a foster parent was precluded. *U.A.C.*, ¶ 16; *R.A.*, ¶ 15.

Just as in *U.A.C.*, here there was no allegation of abandonment, so Aunt could not meet the threshold criteria to intervene under Mont. Code Ann. § 41-3-422(9)(b). Thus, even if Aunt had not withdrawn her motion to intervene, there was no basis to conduct a hearing to consider the other criteria under the statute.

Mother has not established that the district court committed reversible error when it accepted Aunt's request to withdraw her motion to intervene, that would have lacked merit regardless.

IV. The district court correctly concluded that good cause existed to depart from preferred placements under ICWA.

Mother's argument that good cause did not exist for DPHHS to deviate from ICWA's placement preferences, contorts what is required to establish good cause under ICWA and the ICWA regulations. (Br. at 35-40.) Mother asserts that Aunt was "presumptively a better, ICWA-compliant guardian and [DPHHS] did not show, by clear and convincing evidence that she was not a suitable guardian." (*Id*. at 39.)

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) (emphasis added).

DPHHS bore the burden of proving by clear and convincing evidence that there was good cause to deviate from the placement preferences. 25 C.F.R. § 23.132(b). DPHHS was also required to document the reasons establishing good cause through testimony or affidavits. 25 C.F.R. § 23.132(a). 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).

The district court did not err when it concluded good cause existed to deviate from ICWA's placement preferences. The court applied the correct statutory provisions and ICWA Regulations to substantial, credible evidence that supported

finding that good cause existed to depart from the ICWA placement preferences. As the district court concluded,

> clear and convincing evidence exists that the Department has shown good cause to deviate from ICWA's placement preferences because a suitable placement is unavailable after the [c]ourt has determined the Department has conducted a "diligent search. . . to find suitable placements [for [I.R.S.] that satisfy] the preference criteria." *See* 25 C.F.R. § 23.132(c)(5). [Aunt] is not a suitable placement. As recounted more fully *supra*, BIA conducted an investigation after another child in the home disclosed physical abuse of her and [I.R.S.]. The report was substantiated. The other child was removed from the home at the same time [I.R.S.] was moved. Unquestionably, a Crow Tribal proceeding was ongoing regarding that child until she aged out. Despite having an attorney, [Aunt's] husband never engaged in services to achieve return of the child. Again, [Mother] never named her [Aunt] to [Christianson] as a potential placement option. As recounted *supra*, the [c]ourt's review of earlier affidavits and hearings in this case and the companion case [DN 22-225] establishes [Mother] first raised the issue of [Aunt] as placement in the February 20, 2024 hearing, *i.e*. a means to oppose the Department's guardianship petition.

(Doc. 95 at 21-22.) The court's thorough and detailed findings of fact relative to the children's placement supported this conclusion. (*Id*. at 4-8.) The court correctly relied upon the CPS's testimony about what was learned from the BIA and Crow Tribe Social Services about safety concerns with Aunt and her husband as caregivers. (*Id*.)

This Court reviews the evidence in the light most favorable to the prevailing party and is "'not in a position to evaluate the evidence for a different outcome; [it] determine[s] only whether the court abused its discretion.'" *In re A.B.*,

2020 MT 64, ¶ 40, 399 Mont. 219, 460 P.3d 405. It is well-established that when reviewing a district court's findings this Court does not consider whether the evidence could support a different finding, nor does it substitute its judgment for that of the factfinder regarding the weight given to the evidence. *Id*.

The court correctly noted that after I.R.S. was removed from Aunt's care, despite several hearings being held, including a specific hearing on Aunt's motion to intervene that she withdrew, at no time before February 2024 did Mother oppose the children's placement or request the court conduct a placement hearing to consider Aunt as a potential caregiver. (Doc. at 5.) Nor did any party object to the court's conclusions prior to the guardianship hearing that DPHHS had met its burden to establish good cause to depart from the ICWA placement preferences. (*Id*.) The court's additional findings of fact concerning Aunt as a placement were also supported by clear and convincing evidence. (*Id*. at 6-8.)

Mother has not met her burden to establish that the court's determination that good cause supported departing from ICWA's placement preferences was incorrect. *R.K.*, ¶ 21.

CONCLUSION

The district court's orders entering a decree of guardianship should be affirmed.

Respectfully submitted this 28th 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 9,827 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Katie F. Schulz
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CERTIFICATE OF SERVICE

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