IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0516

IN THE MATTER OF:

J.B.,

A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Seventeenth Judicial District Court,
Blaine County, The Honorable Yvonne Laird, Presiding

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3. Whether the district court abused its discretion when it terminated Mother's parental rights.

STATEMENT OF THE CASE

On November 6, 2015, the Department of Public Health and Human Services (Department) removed J.B. (aged 2 months) from the care of N.B. (Mother) based on concerns of Mother's drug use and dangerous behavior. (Doc. 1.) The initial petition was ultimately dismissed, as T.N. (Father) completed his treatment plan and was given custody of J.B. (Docs. 45, 46.)

J.B. was subsequently removed from Father's care in January 2021 due to allegations of ongoing sexual abuse in the home where J.B. resided with paternal grandmother (Indian Custodian). (Doc. 47.) Mother was appointed an attorney to represent her. (Doc. 55.) J.B. was adjudicated as a youth in need of care and temporary legal custody (TLC) was granted to the Department. (2/22/21 Tr. at 12; Docs. 71, 74.)

Treatment plans were developed for both parents and the Indian Custodian, and TLC was extended five times. (3/22/21 Tr. at 2-5; 4/26/21 Tr. at 3-4; Docs. 76, 77, 78, 83, 84, 91, 102, 116, 132, 153.)

In April 2024, the Department filed a petition to terminate parental rights based on the failure of the parents to complete their respective treatment plans. (Doc. 169.) Following the hearing, the court terminated Mother's and Father's respective parental rights. (7/22/24 Tr. at 32; Doc. 189.)

STATEMENT OF THE FACTS

I. The 2015 petition

Mother's involvement with the Department began at the time of J.B.'s birth on August 30, 2015, when the Department obtained information that Mother and J.B. tested positive for methamphetamine. (11/23/15 Tr. at 5; Doc. 1.) The Department attempted to contact Mother to set up a chemical dependency (CD) evaluation and drug testing. (11/23/15 Tr. at 5.) Ultimately, the Department was unable to contact Mother and she failed to complete a CD evaluation. (*Id.*)

On November 5, 2015, the Department received a report stating that Mother was currently high, presumably on methamphetamine, while caring for J.B. (Doc. 1, Aff.) The reporter believed that Mother was incapable of caring for J.B. (*Id.*) Mother admitted to a family member that she was high on methamphetamine

but denied recent use to Child Protection Specialist (CPS) Andrew Prevost. (*Id.*) Mother stated that Fort Belknap Social Services had custody of her other son, B.B., who had been removed from the home at eight days old. (*Id.*) That child was also removed due to Mother's methamphetamine use. (11/23/15 Tr. at 5.) Law enforcement was present for J.B.'s removal and believed, based on her behavior, Mother was under the influence of methamphetamine. (*Id.*) The Department removed J.B. from the home on November 6, 2015. (*Id.*)

The State filed a petition for emergency protective services, adjudication of the child as a youth in need of care, and TLC on November 12, 2015. (Doc. 1.) Mother failed to appear at the show cause hearing on November 23, 2015. (11/23/15 Tr. at 2-3.) At the time of the hearing, the identity of the birth father was unclear. (*Id.* at 11.) However, the named Father, who at the time was listed as putative, was present. (*Id*. at 2, 6-7.)

Mother's counsel did not oppose the State's petition. (*Id.* at 3.) The district court granted the Department's petition, finding that continued placement of J.B. with Mother would be contrary to J.B.'s best interests, as mother had placed J.B. in danger. (*Id.* at 11; Doc. 11.) The district court also found that J.B. was an "Indian child" as defined by the Indian Child Welfare Act (ICWA) and that the Department had thus far complied with ICWA's requirements. (*Id*. at 12-13; Doc. 11.)

Paternity testing confirmed T.N. was J.B.'s birth father.[1] (Doc. 13 at 1.) Mother met with the Department to discuss her treatment plan, sign releases, and visit J.B. (Doc. 13 at 2.) Mother made little progress on her treatment plan. (6/27/16 Tr. at 9; Doc. 15, Aff.) She missed numerous appointments for CD evaluations, treatment, and visits with J.B. (Doc. 15, Aff.) Based on those failures, the State filed to extend TLC. (*Id*.) Mother did not object to the extension. (6/27/16 Tr. at 4.)

Ultimately, Father completed his treatment plan. (Doc. 45, Aff.) Mother made little to no progress. (*Id*.) As a result, the State dismissed the case, with full custody of J.B. granted to Father. (*Id*.)

II. The 2021 petition

In January 2021, J.B. was removed from Father's care due to ongoing allegations of sexual abuse of J.B. by an uncle in the home. (Doc. 47, Aff.) J.B. disclosed the sexual abuse to Father and the Indian Custodian,[2] but neither adult reported the abuse. (*Id*.) J.B. started exhibiting sexualized behaviors. (*Id*.) At the time, the location of Mother was unknown. (*Id*.)

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[1] Father's rights were terminated by the district court on July 22, 2024. He has not appealed that order. Accordingly, this section focuses on Mother's conduct and claims.

[2] J.B.'s paternal grandmother became the Indian Custodian after Father left J.B. in her care prior to the 2021 Petition. (2/22/21 Tr. at 6.)

At the show cause hearing, Mother's appointed counsel Helge Naber (Counsel) appeared, but Mother did not. (2/22/21 Tr. at 3-5.) The Department represented that it had been unable to serve Mother, and moved to have her served by publication, which was granted. (*Id.* at 4-5.) The district court subsequently granted the Department's petition and adjudicated J.B. a youth in need of care. (*Id*. at 11-12; Doc. 74.)

At the treatment plan hearing, Counsel again appeared, but Mother did not. (3/22/21 Tr. at 3, 6; Doc. 79.) Counsel represented that he had not had direct contact with Mother and thus was unable to take a position on the proceedings. (3/22/21 Tr. at 6-8.) Mother also failed to contact the Department. (Doc. 75, Aff.)

Neither Mother nor Counsel appeared at the April 26, 2021 treatment plan hearing. (4/26/21 Tr. at 2; Doc. 83.) The Department represented that in its communications with Counsel prior to the hearing, Counsel had not had contact with Mother. (*Id.*) CPS Brian Holt testified that he had not had contact with Mother over the last month. (*Id*. at 6.) At the end of the hearing, the district court approved the Department's proposed treatment plan for Mother. (Doc. 84.)

As of the filing of the Department's petition for extension of TLC on August 11, 2021, Mother's whereabouts were still unknown. (Docs. 86, Aff.; 88.) During the August 23, 2021 hearing, Counsel indicated that he still had not had contact with Mother. (8/23/21 Tr. at 2.) And Mother did not appear at the hearing.

(*Id*.) During the hearing on the Department's petition, CPS Dana Kjersem testified that she had spoken with Mother over the phone and attempted to get visits set up. (*Id*. at 5.) However, by the time the visit was arranged, Mother's phone number was inactive again. (*Id*.)

On February 22, 2022, the TLC over J.B. expired. (3/15/22 Tr. at 10.) The Department did not file its second petition for extension of temporary custody until February 23, 2022. (Doc. 96.) By the March 15, 2022 hearing on the extension of TLC, Mother had begun to engage with the Department and with Counsel. (3/15/22 Tr. at 3-4, 8; Docs. 96, Aff, 99, 101.)

Although neither Counsel nor Mother appeared for the hearing on March 15, 2023, Counsel filed a Notice of Unavailability and Position with the court, documenting the reasons for his absence and Mother's position on the Department's extension of TLC. (3/15/22 Tr. at 2; Doc. 101.) The notice provided that Counsel was in a contested review hearing in the Eight Judicial District Court at the same time as this hearing, and that Counsel had discussed the instant petition with Mother. (Doc. 101.) In the notice, Counsel represented that, after consultation with his client, Mother did not object to the Department's requested extension of TLC. (*Id*.) Counsel then advocated on behalf of Mother, notifying the district court that a closer kinship placement existed that could facilitate easier visitation. (*Id*.) Counsel also informed the court that changes with the current visitation provider

had hampered Mother's visitation. (*Id*.) Counsel indicated that he had already discussed the issues with the assigned CPS Melody Wilkes (CPS Wilkes). (*Id*.)

During the March 15, 2022 hearing, counsel for the Indian Custodian objected to the late filing to extend TLC. (3/15/22 Tr. at 10.) The district court noted the strict compliance requirement for the Department under Mont. Code Ann. § 41-3-442(4), which necessitated the request for extension be filed prior to the expiration of the order. (*Id*. at 13.) Pursuant to Mont. Code Ann. § 41-3-442(7), the district court reviewed the reasons for the delay in filing and found that the reasons were legitimate and extending the order was in the best interest of J.B. (*Id*. at 13-15.)

On April 12, 2022, the district court held a placement hearing due to J.B. allegedly being abused in her foster placement. (4/12/22 Tr. at 1-13.) Counsel appeared at the hearing, but Mother did not. (*Id*. at 2; Docs. 105, 106.) Counsel indicated he had not heard from Mother in several weeks. (4/12/22 Tr. at 2.) The Court Appointed Special Advocate (CASA) report noted that Mother had missed a visit and was difficult to reach via phone. (Doc. 107.)

Issues with Mother continued. According to the CASA report, Mother's visits with J.B. had been suspended based on Mother's lack of consistency. (Doc. 112.) While CPS Wilkes was conducting a home visit at the foster placement, Mother had arrived and appeared to be under the influence of alcohol

and illegal substances. (*Id*.) Mother's statements upset J.B. (*Id*.) CPS Wilkes suggested a treatment option near J.B.'s new placement, but Mother "was not interested in any help." (*Id*.) The CASA report indicated that the Department had not had any contact with Mother since July 26, 2022. (*Id*.)

At the September 27, 2022 hearing to extend TLC, neither Mother nor Counsel appeared. (9/27/22 Tr. at 3; Docs. 114, 116.) CPS Wilkes testified as to her encounter with Mother at the home visit on July 25, 2022. (9/27/22 Tr. at 7.) According to CPS Wilkes, Mother had been actively high and admitted to using "dope" five minutes prior to seeing J.B. (*Id*.)

Testimony at the hearing established that J.B. needed a higher level of care. (*Id.* at 8-9.) The Department could not find a suitable kinship placement and placed J.B. in a therapeutic foster home. (*Id*.) A Qualified Expert Witness (QEW) was not available that day, so the district court set a hearing for the ICWA placement hearing on October 12, 2022. (*Id*. at 14-15.) Counsel did appear for that hearing, where the QEW testified that the non-ICWA placement was necessary due to J.B.'s needs and urged that the district court find good cause to deviate from ICWA placement preferences based on J.B.'s needs.[3] (Doc. 117.)

[3] No transcript was requested for the 10/12/22 placement hearing. *See* Doc. 194.

On February 14, 2023, Mother again failed to appear at a placement hearing for a new therapeutic foster home. (2/18/23 Tr. at 2-4; Docs. 123, 124.) Counsel was present but was unable to provide a position given Mother's lack of contact. (2/18/23 Tr. at 2, 7; Docs. 123, 124.)

In March 2023, the Department filed its fourth petition for an extension of TLC. (Doc. 125.) At the hearing on the petition, Mother and Counsel both appeared. (4/11/23 Tr. at 2; Docs. 131, 132.) Mother requested a few moments to speak with Counsel at the start of the hearing. (4/11/23 Tr. at 2.) After the call, Counsel advised that Mother did not object to an extension of TLC and provided the court with an update on Mother's progress. (*Id.* at 3-4.)

Although the Department was excited about the progress Mother had made on her treatment plan, there were still concerns for J.B. (*Id.* at 14, 19.) The CPS testified that Mother needed to rebuild her relationship with J.B. due to the length of time she had been out of Mother's care. (*Id.* at 14.) To do that, the Department had been facilitating video visits between Mother and J.B. (*Id.*) The CPS worker testified that J.B. exhibited behavior issues after those calls. (*Id.*)

In May 2023, J.B.'s needs required the Department to move her to Coastal Harbor Health System in Georgia. (Doc. 133.) During the placement hearing on June 13, 2023, both Counsel and Mother appeared via Zoom. (6/13/26 Tr. at 2; Docs. 136, 137.) The CPS worker testified that Mother had not been consistent in

her visits with J.B. prior to the move and those inconsistencies had impacted J.B.'s behaviors. (6/13/23 Tr. at 5.) Counsel questioned the CPS worker regarding the high number of placement changes that occurred over the span of the case. (*Id*. at 7.) When asked about Mother's position, Counsel stated that there was no objection to the placement at issue, but there was concern over the number of placements over the past 24 months. (*Id.* at 9.) Counsel asked that the Department identify a permanent placement. (*Id*.)

The district court temporarily approved the placement pending testimony from an ICWA expert on the placement's appropriateness. (Doc. 137.) Mother did not appear for the subsequent hearing, although her Counsel was present. (7/24/23 Tr. at 2; Docs. 140, 141.)

The Department filed a fifth petition to extend TLC on September 22, 2023. (Doc. 142.) The attached affidavit described Mother's compliance with her treatment plan and detailed Mother's inconsistent visitations with J.B. (Doc. 143.) The affidavit described J.B.'s lack of attachment to Mother, noting that J.B. called Mother a "stranger." (*Id.*) On October 17, 2023, the CASA filed an updated report. (Doc. 148.) The report documented concerns that Mother was again using alcohol or drugs and had slashed her boyfriend's tires in August 2023. (*Id*.) The CASA was concerned with Mother's lack of consistency in developing a relationship with J.B. (*Id*.)

Subsequent to the Department's fifth petition, the Fort Belknap Indian Community (FBIC) filed a Notice of Intervention and Appearance in the case. (Docs. 142, 150.) FBIC also filed a motion to transfer jurisdiction to FBIC's tribal court. (Doc. 146.) The district court addressed FBIC's requests at the hearing to extend TLC. (10/23/23 Tr. at 3.) Counsel represented that Mother supported the transfer to tribal court, and that he and Mother had been in contact several times to discuss how to begin the process for the transfer. (*Id.* at 5.) Mother stated that she was able to reach Counsel by email. (*Id.* at 5-6.) Mother was ordered to put her consent to the transfer in writing. (*Id.* at 5, 8.) Additionally, Mother did not object to the extension of TLC. (*Id.* at 5.) Mother did not appear for any subsequent hearings after this point. (*See generally* 11/14/23 Tr., 11/27/23 Tr., 1/22/24 Tr., 6/11/24 Tr., 7/22/24 Tr.; Docs. 157, 161, 165, 180, 188.)

Father objected to the transfer to FBIC tribal court, and his counsel filed a written notice of that objection on Father's behalf. (Doc. 154.) Father also appeared telephonically at the date set for the transfer hearing. (11/14/23 Tr. at 2-3; Doc. 157.) Mother did not appear. (*Id.*) However, the district court continued the hearing after Father's attorney stated he was not prepared to proceed to a contested hearing on transfer. (*Id*. at 4-5.)

The transfer hearing was reset for November 27, 2023. (*Id*. at 6.) Both Mother and Father were absent from the hearing. (11/27/23 Tr. at 2; Docs. 161,

162.) The district court noted Father's written objection to the transfer. (11/27/23 Tr. at 3.) The district court asked the parties if there was any guidance as to whether the case could be transferred when one parent objected. (*Id*. at 4-7.) Counsel for FBIC stated that she understood that "an objection from the parent sort of kills [FBIC's] motion" to transfer the case to tribal court. (*Id*. at 4.)

Neither the attorneys nor the district court were aware of any precedent that would allow J.B.'s case to be transferred to the tribal court after the formal objection by Father. (*Id*. at 4-7.) Although Counsel stated he didn't "have a legal solution" to the issue, he advocated for the transfer and referenced the high number of placements J.B. had been subjected to under the care of the Department. (*Id*. at 6.) Based on Father's objection to the transfer, the district court denied FBIC's motion for transfer. (*Id*. at 7; Doc. 162.)

The district court held a status hearing on January 22, 2024. (Doc. 165.) The Department called CPS Cindy Baillargeon (CPS Baillargeon) to provide an update on Mother, who was not present at the hearing. (1/22/24 Tr. at 2-6.) Mother's contact with the Department had been sporadic. (*Id*. at 5.) CPS Baillargeon testified that there had been several domestic violence incidents reported in Blaine County involving Mother over the last six months. (*Id*.) Additionally, Mother was arrested and sentenced to probation after she was involved in a stabbing in Fort Belknap. (*Id*.) CPS Baillargeon was able to visit Mother after she was arrested in

Blaine County and transported to the Valley County Jail. (*Id*.) At the time of that arrest, Mother appeared highly intoxicated and tested positive for methamphetamine. (*Id*.) At the end of the hearing, Counsel indicated he did not have current contact information for Mother and asked the Department to provide any contact information it had. (*Id*. at 9.)

On April 10, 2024, after more than three years of J.B. being in the Department's care, the Department petitioned to terminate Mother's and Father's parental rights. (Doc. 169.) Attached to the petition was a 34-page affidavit provided by CPS Baillargeon. (*Id*.) The petition detailed the extensive actions taken by the Department to assist Mother with her treatment plan, but due to Mother's inability to abstain from methamphetamine and alcohol, and build a relationship with J.B., and her ongoing unsafe and volatile relationships resulting in injuries and arrests, the Department believed it was no longer in J.B.'s best interest to be reunified with Mother. (*Id*.)

The termination hearing was originally scheduled for June 11, 2024. At that hearing, Mother failed to appear. (6/11/24 Tr. at 2; Doc. 180.) When asked if Counsel could take a position on the petition for termination, Counsel indicated he could not, but advised that Mother had completed some of the treatment plan. (6/11/24 Tr. at 3.) At the same hearing, counsel for the Indian Custodian, Mr. Olsen, objected to both the manner of service and the content of the notice

provided under both ICWA and state law. (*Id*. at 3-9.) As a result of Mr. Olsen's objections, the district court rescheduled the termination hearing for July 22, 2024, to ensure all parties were provided adequate notice. (*Id*. at 9-10.)

The hearing on the termination of Mother's parental rights took place on July 22, 2024. (Docs. 188, 189, 191.) Again, Mother failed to appear, but Counsel was present. (Docs. 188, 189, 191; 7/22/24 Tr. at 2.) Counsel indicated that he had not heard from Mother "in a rather long time," and was unable to take a position on the termination petition. (7/22/24 Tr. at 5.)

During the termination hearing, QEW Anna Marie White (White) testified that, based on the record, the Department had made active efforts and FBIC supported the termination. (*Id*. at 9-11.) QEW White testified that the age of the case showed that the Department attempted "to do anything and everything" it could to reunify the family. (*Id*. at 10.) QEW White further opined that continued custody of J.B. by Mother would likely result in serious emotional or physical damage to J.B. (*Id*. at 11.)

CPS Baillargeon also testified. (*Id*. at 13-26.) As to contact with Mother, CPS Baillargeon testified that she had been unable to reach her since before the June 11, 2024 hearing when CPS Baillargeon had offered to provide Mother a ride to the hearing, which Mother declined. (*Id*. at 15.) CPS Baillargeon indicated she had attempted contact at four different numbers—two were disconnected and

CPS Baillargeon was unable to connect with Mother on the other two. (*Id*.) CPS Baillargeon attempted to contact Mother again on the morning of the termination hearing, but to no avail. (*Id*.)

Testimony established that the Department sought to terminate Mother's parental rights due to her failure to complete the April 26, 2021 court ordered treatment plan. (*Id*. at 16.) CPS Baillargeon indicated that Mother had failed to complete any of the four areas outlined in the plan, the details of which were included in the affidavit attached to the petition for termination. (*Id*. at 16-18.) CPS Baillargeon also testified that J.B. had been in the Department's care for 41 or 42 months at the time of the hearing. (*Id*. at 18.)

Although Mother was not present for the termination hearing, Counsel questioned CPS Baillargeon as to the lack of a permanency plan for J.B. (*Id*. at 20.) He argued that the petition was filed prematurely, as there was no permanency plan in place. (*Id*. at 28.)

Counsel for the Indian Custodian objected to the sufficiency of the evidence provided at the hearing by the Department. (*Id*.) Specifically, he alleged that there was no testimony regarding whether the condition of the parents was likely to change within a reasonable time and insufficient evidence to prove beyond a reasonable doubt that the parents had failed to complete their treatment plans. (*Id*.)

The district court terminated both Mother's and Father's parental rights. (*Id*. at 32.) The district court relied on the entirety of the record by referencing the 2015 petition and Mother's failure to complete a treatment plan at that time, as well as the more than three years the instant proceeding had been pending. (*Id*. at 31.) The district court emphasized that testimony established Mother had again failed to complete any part of her treatment plan, despite the Department's active efforts, and that Mother had failed to remain in contact with either her attorney or the Department. (*Id*.) The court concluded that Mother was unlikely to reach a position where she could care for J.B. in a reasonable amount of time, and adopted the reasons set forth in the petition, the testimony of QEW White, and all the reasons the court then orally pronounced. (*Id*. at 32-33.)

The court's written order further explained the basis for the termination, finding that J.B. had been adjudicated a youth in need of care, and had been removed from Mother's care on November 6, 2015, when she was two months old, due to threatening and dangerous behavior, as well as Mother's methamphetamine use. (Doc. 189.) The court noted that J.B. had never returned to Mother's care. (*Id*.) Throughout the duration of the case, Mother was inconsistent with maintaining contact with J.B. to build a relationship and understand J.B.'s specific and heightened needs. (*Id*.) Additionally, the court discussed Mother's lengthy history and pattern of "using methamphetamines, consuming alcohol, being aggressive,

and being in volatile situations for many years," leading to her incarceration. (*Id*.) The court concluded that Mother had not demonstrated the capability to meet the physical, emotional, or safety needs of J.B., and termination of Mother's parental rights "would eliminate the possibility that [J.B.] be exposed to [an] unsafe and hazardous living environment that would cause her great detriment." (*Id*.)

SUMMARY OF THE ARGUMENT

The district court did not commit reversible error when it denied the transfer of J.B.'s case to FBIC Tribal Court based on Father's written objection to the transfer. The language of 25 U.S.C. § 1911(b) explicitly provides that when a parent objects, the district court may not transfer the case to tribal court. Nothing in the law or the record supports Mother's claim that Father waived his objection by his nonappearance.

Mother also cannot establish that she was prejudiced by Counsel's performance. The record establishes that Mother failed to remain in regular contact with J.B., CASA, the Department, and Counsel. Mother's failure to maintain contact with Counsel foreclosed his ability to make objections, present evidence, or advocate any progress or position. Mother has failed to establish that Counsel's actions were ineffective. Nor has Mother demonstrated how the outcome would have changed had Counsel acted differently.

Finally, the district court did not abuse its discretion when it terminated Mother's parental rights. The evidence presented at the termination hearing was uncontested. Sufficient evidence existed to prove that J.B. was a youth in need of care, Mother failed to complete any aspect of her treatment plan in the over 40 months that the case was pending, her conduct or condition were unlikely to change in the reasonable future, active efforts were made by the Department, and continued custody by Mother would likely result in serious emotional or physical damage to J.B. The district court did not abuse its discretion in terminating Mother's parental rights.

STANDARD OF REVIEW

This Court reviews for correctness a district court's conclusions of law. *In re C.B.*, 2019 MT 295, ¶ 13, 398 Mont. 176, 454 P.3d 1195. In a dependent neglect proceeding, whether a person has been denied her right to due process, including allegations of ineffective assistance of counsel (IAC), is a question of constitutional law, for which this Court's review is plenary. *In re J.E.L.*, 2018 MT 50, ¶ 13, 390 Mont. 379, 414 P.2d 279 (citation omitted); *In re A.L.D.*, 2018 MT 112, ¶ 4, 391 Mont. 273, 417 P.3d 342.

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. A 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.*

ARGUMENT

I. The district court correctly denied transfer of J.B.'s case to FBIC Tribal Court based on Father's objection, which he never rescinded.

In an ICWA case, a parent's objection acts as a veto to the transfer of a state court proceeding to tribal court, pursuant to 25 U.S.C. § 1911(b). Specifically, ICWA provides:

> Transfer of proceedings; declination by tribal court.
>
> 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) (emphasis added and original.)

Statutory construction requires a district court to simply "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. "The starting point for interpreting a statute is the language of the statute itself." *State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622. The plain meaning of the statute controls when the "intent of the Legislature can be determined from the plain meaning of the words used in the statute." *Id.*

The plain meaning of § 1911(b) is undisputed, as provided by the case cited by Mother. A district court must transfer a case involving the foster care placement of, or termination of parental rights to, an Indian child to the tribal court *unless* either parent objects. *See In re K.D.*, 630 N.W.2d 492, 494 (S.D. 2001) ("The plain language of 25 U.S.C. § 1911(b) makes it clear that a parent's objection to transfer prevents such transfer."). That meaning is reinforced by the related language at 25 C.F.R. § 23.117(a), which provides that upon receipt of a transfer petition, the district court must transfer the proceeding unless "[e]ither parent objects to such transfer." Further, as noted in *In re K.D.*, "The statute contains no limiting language, nor are there any latter enacted exceptions to a parent's right to object." *In re K.D.*, 630 N.W.2d at 494.

Father filed a written objection to FBIC's motion to transfer J.B.'s case to FBIC Tribal Court. (Doc. 154.) Father also appeared at the initial setting for the transfer hearing on November 11, 2023.[4] (11/14/23 Tr. at 2-3; Doc. 157.) The issue of transfer could have been decided by the district court at the November 14, 2023, hearing, as no contested hearing is necessary once a parent objects. However, the district court reset the hearing for November 27, 2023, based on Father's counsel not being prepared for a contested hearing. (11/14/23 Tr. at 6.) Father's counsel's statements support that Father was continuing in his objection to transfer the case to FBIC Tribal Court. Although Father did not appear at the November 27, 2023 hearing, nothing in the record suggests that Father rescinded, withdrew, or otherwise waived his objection to the transfer. (11/27/23 Tr. at 2; Docs. 161, 162.)

The responses by the various attorneys and the district court judge indicate the parties understood § 1911(b) to have the same plain meaning as above. In response to learning of Father's objection, the tribal attorney stated, "an objection from the parent sort of kills [FBIC's] motion" to transfer the case to tribal court. (11/27/23 Tr. at 4.) Neither the Department nor other attorney was aware of any guidance that would allow the district court to transfer J.B.'s case while a parent

[4] Mother failed to appear at either the November 14, 2023, or the November 27, 2023 transfer hearing. (11/14/23 Tr. at 2-3; 11/27/23 Tr. at 2.)

was objecting, because the language in § 1911(b) is so clear.[5] (*Id*. at 4-7.) The district court agreed. (*Id.* at 7.) This Court should uphold the district court's denial of transfer to the tribal court.

II. Mother was provided effective representation at all stages of the proceedings.

The right to effective counsel in dependent neglect cases is rooted in the Fourteenth Amendment's due process protections. *See In re A.S.*, 2004 MT 62, ¶¶ 23, 31, 320 Mont. 268, 87 P.3d 408. This Court has specifically held that fundamental fairness requires that parents are effectively represented by counsel at adjudicatory hearings and proceedings to terminate their parental rights. *A.S.*, ¶ 12

[5] Mother argues that Counsel's failure to argue the waiver by Father constitutes IAC. Counsel cannot be faulted for failing to raise an unsettled or debatable theory of law. *See, e.g., Murtishaw v. Woodford*, 255 F.3d 926, 949-50 (9th Cir. 2001) (no deficient performance in failing to raise an obscure, uncertain, and undeveloped self-defense theory); *United States v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990) (no deficient performance where, at time of trial, the case on which defendant relies had not been decided); *see also Fields v. United States*, 201 F.3d 1025, 1028 (8th Cir. 2000) (no deficient performance for failure to object where the law is unsettled on a subject). Nor can counsel be expected to forecast changes in the law. *See Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (a lawyer is not ineffective for failing to anticipate decisions in later cases).

(right to counsel at termination); *In re J.J.L.*, 2010 MT 4, ¶ 16, 355 Mont. 23, 223 P.3d 921 (right to effective counsel at adjudication).

This Court has adopted "benchmark, although nonexclusive, criteria" for evaluating effectiveness of counsel in dependent neglect proceedings. *A.S.*, ¶ 27. When evaluating a parent's IAC claim, the following two factors are considered: 1) counsel's experience and training in representing parents in dependent neglect proceedings; and (2) the quality of counsel's advocacy demonstrated during the proceedings. *In re C.M.C.*, 2009 MT 153, ¶ 30, 350 Mont. 391, 208 P.3d 809 (citing *A.S.*, ¶ 26). Under the advocacy prong, a court considers, among other things, whether counsel demonstrated that he possessed necessary trial skills (e.g., making appropriate objections, producing evidence, and calling and cross-examining witnesses). *J.J.L.*, ¶ 19; *A.S.*, ¶ 26. However, a parent may not sustain an IAC claim unless the parent demonstrates she suffered prejudice because of the alleged ineffective assistance. *A.S.*, ¶ 31; *C.M.C.*, ¶ 30; *In re A.J.W.*, 2010 MT 42, ¶ 24, 355 Mont. 264, 227 P.3d 1012 ("Even if there were ineffective representation, it is inconsequential unless the parent suffered prejudice as a result."); *C.M.C.*, ¶ 30 (citing *A.S.* ¶ 31).

Mother does not challenge Counsel's training and experience under the first IAC prong. *C.M.C.*, ¶ 31 (when appellant failed to provide any argument about counsel's experience/training, Court could not evaluate the IAC factors and

declined to speculate). Rather, Mother relies upon the second IAC prong, advocacy, to argue Counsel was ineffective by: (1) missing three court hearings and appearing by Zoom; (2) not objecting to the court adjudicating J.B. as a youth in need of care on February 22, 2021; (3) not objecting to Mother's treatment plan; (4) not objecting to the expired TLC issue; (5) failing to object to a non-ICWA placement; and (6) her allegedly having difficulties in contacting Counsel. (Br. at 20-21.)

Mother fails to establish that Counsel's performance was ineffective. *See C.M.C.*, ¶ 38 (when facially competent representation is shown in the trial record, parent fails to establish a threshold showing of IAC, and her claims were therefore without merit). Mother also fails to establish how any of Counsel's alleged "errors" prejudiced her.

Mother asserts IAC based on counsel's failure to appear at three hearings over the course of the three and a half years the case was active. Neither Counsel nor Mother appeared at the April 26, 2021 hearing on Mother's treatment plan. (4/26/21 Tr. at 2; Doc. 83.) However, at that hearing, Ms. Harwood, the attorney for the Department, represented that in correspondence prior to the hearing, Counsel indicated he had not heard from Mother. (*Id.*) The CPS also testified that he had not had contact with Mother over the last month. (4/26/21 Tr. at 6;

Doc. 83.) Prior to the hearing, Mother had to be served by publication, as no one could locate her. (2/22/21 Tr. at 4-5.)

After the treatment plan was ordered by the district court, both Counsel and the Department had, at best, sporadic contact with Mother. Indeed, Mother did not begin working on her treatment plan until some time prior to the April 11, 2023 hearing to extend TLC. During that hearing, both Counsel and Mother provided updates as to her progress and stipulated to the extension of TLC. (4/11/22 Tr. at 3-4, 20-21.) Neither Mother nor Counsel objected to any of the provisions of that treatment plan, and Mother does not raise that the treatment plan was inappropriate now. (Br. at 20-21.) This Court should find no prejudice exists as to Counsel's failure to object to Mother's treatment plan.

At the March 15, 2022 hearing, Mother again failed to appear; however, Counsel filed a Notice of Unavailability and Position with the district court. (Doc. 101.) Counsel had a conflicting court appearance in a contested review hearing in another district court at the same time. (*Id.*) In that filing, Counsel noted that he had discussed the petition to extend TLC with Mother, and there was no objection. (*Id.*) Counsel then advocated that J.B. should be moved to a closer kinship placement to facilitate visitation by Mother. (*Id.*) Counsel also relayed that he had already taken action on the visitation issues and discussed them with the active CPS. (*Id.*)

At that hearing, it was learned that the petition to extend TLC was filed a day late, in violation of Mont. Code Ann. § 41-3-442(4). Counsel for the Indian Custodian lodged an objection to the filing. (3/15/22 Tr. at 10.) The district court considered the objection but found that the reasons for the delay were legitimate and that extending the order was in the best interest of J.B. (*Id*. at 13-15.) Mother can show no prejudice, as the argument she purports Counsel was deficient in failing to raise, was in fact raised and considered by the court.

Finally, at the September 27, 2022 hearing regarding the non-ICWA placement of J.B., neither Mother nor Counsel appeared. (9/27/22 Tr. at 3; Docs. 114, 116.) Testimony at the hearing established that the Department had attempted to find another kinship placement, but was unable to, and that the current therapeutic placement was necessary to provide for J.B.'s needs. (9/27/22 Tr. at 8-9.) A QEW was not available that day, so the district court set a hearing for the ICWA placement hearing on October 12, 2022. (*Id*. at 14-15.) Counsel did appear for that hearing, where the QEW testified that the non-ICWA placement was necessary due to J.B.'s needs, and urged the district court to find good cause to deviate from ICWA given those needs. (Doc. 117.)

This Court has held, "It is not realistic to expect counsel to make objections or particularly advocate for a client when counsel is unable to locate or contact the client and the client fails to contact the attorney." *In re B.J.J.*, 2019 MT 129, ¶ 18,

396 Mont. 108, 443 P.3d 488. Although Mother asserts it was Counsel's lack of contact with her, the record demonstrates otherwise. Given Mother's lack of engagement with the Department and her lack of contact with Counsel throughout the course of this case, her IAC assertions are unavailing. Except for the short period of time when Mother was engaged and coming to court, she was basically out of contact and unreachable by Counsel, the Department, or the CASA. Mother had contact information for Counsel. (4/11/23 Tr. at 3; 10/23/23 Tr. at 5-6.) Mother did not answer the telephone at the phone numbers she provided the Department and did not keep Counsel apprised of her contact information when it changed. (1/22/24 Tr. at 9; 7/22/24 Tr. at 15.) And neither Counsel nor the Department had any substantive contact from Mother in the months leading up to the termination hearing. (7/22/24 Tr. at 5, 15.)

Without being able to reach Mother, Counsel could not make objections, present evidence, or advocate to the court any client progress or position. A parent cannot establish IAC through her own failure to contact and engage with counsel. *B.J.J.*, ¶ 18. In this case, Counsel rendered legal services that were as effective as possible given Mother's lack of contact and engagement with him.

Mother faults Counsel for not objecting during the adjudicatory hearing. However, since Father—the parent from whom J.B. was being removed—had been served, the court did not err in holding the hearing on February 22, 2021.

See In re K.B., 2016 MT 73, ¶ 19, 383 Mont. 85, 368 P.3d 722 (held, father's counsel's failure to object to adjudication was not IAC when sufficient evidence was presented to find child was a youth in need of care due to mother's actions; father could not establish how he was prejudiced).

It is true that Counsel could have opposed the court including his client in the adjudicatory order by arguing that service had not yet been perfected. However, as established above: Mother was in no position to assume care of J.B. since she was unable to be located, and Mother has never asserted there was insufficient evidence to adjudicate J.B. as a youth in need of care. Counsel's failure to object to adjudication was not from lack of advocacy.

In sum, Mother fails to establish that Counsel's performance was ineffective. *See C.M.C.*, ¶ 38. Mother has also failed to establish how any of Counsel's alleged "errors" prejudiced her.

III. The district court did not abuse its discretion when it terminated Mother's parental rights.

A. The district court correctly concluded that there was sufficient evidence to terminate Mother's parental rights.

Montana Code Annotated § 41-3-609 sets forth the criteria available to a district court to terminate a parent's right to maintain the care and custody of their child. To terminate a parent's right to an Indian child pursuant to Mont. Code Ann.

§ 41-3-609(1)(f), the district court must find beyond a reasonable doubt that: (1) the child was adjudicated as a youth in need of care; (2) the parent has not successfully completed an appropriate treatment plan approved by the district court; and (3) the parent's conduct or condition "rendering them unfit is unlikely to change within a reasonable time." Mont. Code Ann. § 41-3-1320(2); 25 U.S.C. § 1912(f). Before the district court can terminate a parent's rights to an Indian child, the district court must conclude that the Department has made active efforts "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Mont. Code Ann. § 41-3-1319(1); 25 U.S.C. § 1912(d). The district court also cannot terminate a parent's rights to an Indian child without testimony from a qualified expert witness "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Mont. Code Ann. § 41-3-1318(1), (3); 25 U.S.C. § 1912(f).

As this Court has consistently recognized, when a parent fails to act to correct the reason for Department intervention, it is her child who suffers. *See In re I.K.*, 2018 MT 270, ¶ 12, 393 Mont. 264, 430 P.3d 86; *In re L.S.*, 2003 MT 12, ¶ 15, 314 Mont. 42, 63 P.3d 497. "Although the State cannot simply wait for the parent to complete a treatment plan under the ICWA, a court may consider the parent's failure to participate when determining whether the State had made 'active

efforts.'" *In re D.S.B.*, 2013 MT 112, ¶ 15, 370 Mont. 37, 300 P.3d 702 (internal citation omitted). Further, in determining whether the Department engaged in active efforts, a court may also consider "a parent's demonstrated apathy and indifference to participating in treatment." *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556 (citing *E.A. v. Div. of Family & Youth Servs.*, 46 P.3d 986, 991 (Alaska 2002)).

District courts have broad discretion to determine the credibility, veracity, and probative value of evidence, including the relative credibility, veracity, and probative value of any conflicting evidence. *In re Marriage of Bliss*, 2016 MT 51, ¶¶ 15-21, 382 Mont. 370, 367 P.3d 395. 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. *In re A.N.W.*, 2006 MT 42, ¶ 29, 331 Mont. 208, 130 P.3d 619. Moreover, partial compliance with treatment plan requirements is insufficient to preclude termination under Mont. Code Ann. § 41-3-609(1)(f). *In re D.A.*, 2008 MT 247, ¶ 22, 344 Mont. 513, 189 P.3d 631.

On appeal, Mother does not challenge that sufficient evidence to terminate her parental rights existed. In fact, Mother concedes that the 34-page affidavit that accompanied the petition for termination "recited factual allegations satisfying [the] standards to the requisite burden of proof." (Br. at 24.) Instead, Mother

alleges that the testimony presented during the termination hearing was insufficient to meet the beyond a reasonable doubt standard. (*Id*.) The record proves otherwise.

During the termination hearing, the Department elicited uncontested testimony from QEW White that the Department made active efforts to prevent the breakup of the Indian family. (7/22/24 Tr. at 9-11.) In support of her opinion, QEW White testified to specific actions of the Department that constituted active efforts and explained that the age of the case showed that the Department did everything possible before moving to terminate. (*Id*.) QEW White also testified that based on her review of the entire record, continued custody of J.B. by Mother would likely result in serious emotional or physical damage to J.B. (*Id*. at 11.) Moreover, both QEW White and FBIC supported the termination. (*Id*. at 11-12.)

Furthermore, CPS Baillargeon testified to the lack of contact the Department had with Mother and to Mother's failed treatment plan. CPS Baillargeon's testimony established that Mother had not completed *any* of the required tasks in her court-ordered treatment plan. (*Id*. at 16-18.) The plan included tasks related to her parenting abilities, treatment for substance abuse, mental health treatment, and other general tasks. (*Id*.) CPS Baillargeon also testified that the Department made active efforts to prevent removal of J.B. and reunify her with her parents, but that those efforts were unsuccessful. (*Id*. at 19.) The evidence showed that Mother failed her treatment plan and failed to remain in contact with the Department and

Counsel, thus it was unlikely that Mother's conduct would change within a reasonable period of time. (*Id*. at 15-18.) It was further established that J.B. had been in the Department's care for over 40 months, and there had been no change to the child's circumstances. (*Id*. at 20.) All the evidence was uncontested. (*Id*. at 20-26.) Given a district court's broad discretion to assign a probative value to evidence it hears, this Court should find the district court did not abuse its discretion and uphold the district court's termination of Mother's parental rights.

Moreover, the district court, in terminating Mother's parental rights, appropriately considered uncontested facts asserted during the pendency of the instant case as well as J.B.'s case in 2015. A district court is permitted to take judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Mont. R. Evid. 201(b).

A court may take judicial notice sua sponte, without a formal request from a party. Mont. R. Evid. 201(c). In a civil proceeding, facts judicially noticed are accepted as conclusive. Mont. R. Evid. 201(g). Indeed, "[w]hen facts are not subject to reasonable dispute, . . . the District Court saves time and money for all parties by taking judicial notice of those facts." *State v. Hart*, 191 Mont. 375, 389-90, 625 P.2d 21, 29 (1981) (citing Comm'n Comment, Mont. R. Evid. 201).

"Thus, once a fact is properly judicially noticed, the party offering such evidence is relieved of the duty to also move for its admission. Taking judicial notice of such facts accomplishes that purpose." *In re S.T.*, 2008 MT 19, ¶ 17, 341 Mont. 176, 176 P.3d 1054.

A court may also take judicial notice of the records of any court in Montana pursuant to Mont. R. Evid. 202. This Court has previously held that a district court may take judicial notice of a prior termination proceeding before a court in Montana. *In re K.C.H.*, 2003 MT 125, ¶ 16, 316 Mont. 13, 68 P.3d 788.

Although the district court did not explicitly state that it was taking judicial notice, the district court's oral pronouncement and written findings of fact show the district court effectively did take judicial notice of the 2015 petition. The district court also appropriately relied on uncontested facts provided in previous petitions and hearings throughout the three and a half years J.B.'s case was pending before the district court. Thus, this Court should conclude that the district court did not abuse its discretion in terminating Mother's parental rights because the record supports that the Department established cause for termination of Mother's parental rights beyond a reasonable doubt.

B. The district court correctly concluded that termination of Mother's parental rights was in J.B.'s best interests.

Montana's children "have a right to a healthy and safe childhood in a permanent placement." Mont. Code Ann. § 41-3-101(1)(f). When implementing

the polices of Tit. 41, ch. 3, the children's "health and safety are of paramount concern." *See* Mont. Code Ann. §§ 41-3-101(7), -427(1)(a), -442(8). A child's need for a permanent, stable, and loving home supersedes a biological parent's right to parent the child. *In re D.A.*, 2008 MT 247, ¶ 21, 344 Mont. 513, 189 P.3d 631.

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

Here, by the time the Department petitioned for termination, J.B. had been out of the home for the past 39 months. (7/22/24 Tr. at 20; Docs. 47, 169.) When the district court conducted the termination hearing, J.B. had been in an out-of-

home placement for 42 months. (7/22/24 Tr. at 20; Docs. 47, 188, 189.) Indeed, the record supports that J.B. had not been in Mother's care since she was 2 months old. (Docs. 1, 189.) Mother has not, nor can she, present evidence to overcome that termination of Mother's parental rights was in J.B.'s best interests.

Even setting the presumption aside, the record supports that termination of Mother's parental rights was in J.B.'s best interests. Over the course of the almost 9 years J.B. was out of Mother's care, Mother inconsistently engaged with services offered by the Department to help her complete her treatment plan. (3/22/21 Tr. at 3; 3/15/22 Tr. at 3-4, 8; 9/27/22 Tr. at 7; 4/11/23 Tr. at 3-4, 14-19; 7/22/24 Tr. at 16-18; Docs. 75, 79, 84, 96, 99, 101, 112.) Mother also failed to maintain contact with the Department, and did not follow through on attending visits, which caused J.B. to exhibit increased behavioral issues. (2/22/21 Tr. at 4-5; 4/26/21 Tr. at 2, 6; 8/23/21 Tr. at 5; 9/27/22 Tr. at 7; 4/11/23 Tr. at 14; 6/13/23 Tr. at 5; 1/22/24 Tr. at 5; Docs. 75, 79, 86, 88, 107, 112, 143, 148.) During the pendency of the case, Mother continued to use illegal drugs. (9/27/22 Tr. at 7; 1/22/24 Tr. at 5; Docs. 112, 148.) Accordingly, the district court did not err when it concluded that termination of Mother's parental rights served J.B.'s best interests.

/ / /

CONCLUSION

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

Respectfully submitted this 23rd day of May, 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 8,525 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Selene Koepke
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CERTIFICATE OF SERVICE

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