

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0047

IN THE MATTERS OF:

S.W. and D.W.,

Youths in Need of Care.

BRIEF OF APPELLEE

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

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GUARDIAN AD LITEM

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STATEMENT OF THE ISSUES

1. Whether Father was denied due process when the Department did not provide reunification services after it petitioned for a determination that reunification services were not required and before the hearing on the petition.
2. Whether the court abused its discretion when it found that Father subjected a child to chronic, severe neglect.
3. Whether the court abused its discretion when it found that Father had his rights to a prior child terminated and the circumstances of that termination were relevant to his ability to adequately care for the children at issue.

STATEMENT OF THE CASE

The Department of Public Health and Human Services (Department) removed the oldest two kids belonging to Mother, M.W., and Father, A.W., three times. (Doc. 1 at 8-15.) Although the parents completed treatments plans and were reunified with the children the first two times, the parents' rights to those two children were terminated in the third case. (*Id.*)

While the third case was pending, Mother gave birth to twins in Washington, who are the children at issue in this case. Because the parents had gone to Washington, the Department did not have a case involving the twins pending at the time of their birth. (Doc. 1 at 16.) When the twins were eight months old, the

Department received reports that led to the discovery that the parents were living with the twins in the same home in Great Falls that the Department had previously told the parents was unsuitable for children. (*Id.* at 15-16.) The Department removed the twins and petitioned for emergency protective services, a determination that reasonable efforts were not required, and termination of parental rights and permanent legal custody. (Doc. 1.)

Following a hearing on the petition, the court terminated Mother's and Father's parental rights to the twins based on the parents' prior terminations and the parents subjecting the children to chronic, severe neglect. (Doc. 42 at 6-7, available at Appellant's App.) Father appeals.

STATEMENT OF THE FACTS

I. The petition for emergency protective services, a determination that reasonable efforts were not required, and termination of parental rights

The Department initiated this case, the fourth case involving the parents, on August 2, 2024, by filing a petition for emergency protective services, a determination that reasonable efforts were not required, termination of parental rights, and permanent legal custody (Petition). (Doc. 1.) The Department explained that the twins were placed into emergency protective custody under emergency circumstances on July 31, 2024. (*Id.* at 2.) The Department alleged

that it had probable cause to believe the twins were abused or neglected or in danger of being abused or neglected. The Department alleged that reunification services did not need to be provided under Mont. Code Ann. § 41-3-423(2)(a) because the parents subjected the children “to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child;” and under Mont. Code Ann. § 41-3-423(2)(e) because the parents “had parental rights to the child’s sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent’s ability to adequately care for the child at issue.” (Doc. 1 at 6.) The Department petitioned to terminate the parents’ parental rights based on the above facts and the allegation that the conduct or condition of the parents rendering them unfit was unlikely to change within a reasonable time, the continuation of the parent-child relationship would likely result in continued abuse and/or neglect, it was no longer in the best interest of the children to continue to work toward reunification, and clear and convincing evidence established that the best interest of the children would be served by terminating the birth parents’ rights. (*Id.* at 7-8.)

An attached affidavit written by Child Protection Specialist (CPS) Dawn Wood described the Department’s prior history with the parents and the circumstances that led to the twins’ removal. (Doc. 1, attached Affidavit.) The

affidavit stated that the twins were born on November 21, 2023, so they were less than one year old. (*Id.* at 1-2.)

The Affidavit alleged that a substantial number of reports had been filed on both parents, and the Department had three prior cases involving the parents' two older children, resulting in the termination of the parents' rights to those children in March 2024. (*Id.* at 3.) While the third case, initiated in 2023, was pending, the parents fled to Washington, where the twins were born. (*Id.* at 4.)

On July 29, 2024, the Department received a report alleging that the parents had been engaging in physical altercations with each other in the presence of the children. (*Id.* at 3.) The reporter stated that the children could be heard screaming from the home, and Mother screamed at the children. (*Id.*) The reporter also stated that the "home was very dirty and cluttered," and the reporter had "grave concerns for the children's safety." (*Id.*) The reporter indicated that the parents had returned to their home in Montana several months earlier. (*Id.* at 4.) Since then, the reporter stated that he had made multiple calls to law enforcement for welfare checks because the parents were screaming, fighting, and breaking windows in the house, which led to glass shards on the walkway outside. (*Id.*) Law enforcement records demonstrated that he had made one prior call for a family disturbance. (*Id.* at 7.) The family did not come to the door when law enforcement investigated. (*Id.*)

The Department attempted to make contact with the parents on July 30, 2024, at their residence. (*Id.*) Although people could be heard inside, no one answered the door. (*Id.*) Most of the windows to the home were boarded up, and glass shards were on the ground outside. (*Id.*) The parents had previously lived in the house before moving to Washington. The house had been deemed unsafe because extensive damage had been caused by pet urine and feces, there was water damage from a leaking pipe in the bathroom, and the parents had sealed vents, causing mold to grow on the floor due to lack of air circulation. (*Id.*)

On July 31, 2024, law enforcement went to the home, accompanied by CPS, to serve a search warrant on the residence. (*Id.*) The parents refused to open the door, so the officers had to force entry, which took considerable time and effort because the door had been blocked from the inside. (*Id.*) When they gained entry, officers located the parents and another adult, who was a Level 2 Registered Sexual Offender, inside the home. (*Id.*) Neighbors stated, and the parents verified, that the sexual offender cared for the children when the parents left the home. (*Id.* at 4-5.)

CPS located the children sleeping in separate playpens. (*Id.* at 5.) They noted that one of the playpens had a metal piece protruding into the pen, there were dirty blankets in the playpens, the children's diapers were overfilled, and one of the children had a diaper rash. (*Id.* at 5.) The CPS could not find clothes that fit the children, and there were minimal supplies for the children. (*Id.*) Additionally, the

home was filthy. (*Id.*) There were suboxone wrappers and a crushed pill on the floor, and doorways were blocked by items. (*Id.* at 6.) Windows were covered up with cardboard. (*Id.*)

Mother said she was gathering things up and moving back to Washington. (*Id.* at 6.) She appeared to be under the influence and had bruises on her legs and red marks on her chest and throat. (*Id.*) She claimed that she falls a lot. (*Id.*) She declined to submit a UA or hair sample for drug testing. (*Id.*)

Father claimed he was not under the influence, but he smelled strongly of alcohol. (*Id.*) He refused to submit to drug testing. (*Id.*) He said the children had not had any medical care since they were discharged from the hospital in Seattle after their birth. (*Id.* at 7.)

The children appeared to be delayed when they were removed from the home. (*Id.* at 7.) They seemed to be confused when a CPS attempted to feed them applesauce, leading the CPS to believe they had not been transitioned to solid foods. (*Id.* at 7-8.) They also struggled to sit up on their own. (*Id.* at 8.)

Wood explained that the twins needed immediate protection and removal was necessary because the twins had been or were in danger of being abused and/or neglected. (*Id.*)

Wood requested a determination from the court that the Department should not have to provide reunification services, including a treatment plan because the

parents completed two treatment plans previously, but the same safety concerns persisted, including unsafe living conditions, substance use, domestic violence, and unaddressed mental health problems. (*Id.*) The Department alleged that the parents were not engaged in any services and had actively evaded CPS, which included not providing the children with medical care. (*Id.*) The Department alleged that reunification services were not necessary under Mont. Code Ann. § 41-3-423(2)(e) because the parents had their rights to their two older children terminated based on the same concerns that were at issue in this case. (*Id.*) The Department alleged that the parents' rights to their older two children were terminated after the parents fled to Washington and repeatedly stated that they would not be coming back to avoid possible intervention with the twins. (*Id.* at 9.) The Department further alleged that the twins were hospitalized for ten days at birth because S.W. was suffering from withdrawals. (*Id.*) The parents later returned to the house in Great Falls that the Department had previously told them was unsafe for children. (*Id.*) The parents continued to demonstrate substance use and domestic violence, and they exposed the children to unsafe caregivers. (*Id.*)

The Department requested termination of the parents' parental rights without a treatment plan based on the aggravated circumstance of the parents' prior termination. (*Id.* at 11-12.) The CPS restated the facts that led to the removal in this case and explained that Father was provided with extensive services in the first

two cases, including chemical dependency counseling, mental health counseling, couple's counseling, anger management, parenting education, and family-based services. (*Id.* at 12.) The CPS stated that Father did not engage in any services during his third case and instead fled to Washington to avoid the Department's involvement with the twins, but he was offered services by the State of Washington. (*Id.*)

The court issued an Order to Show Cause, Granting Emergency Protective Services, Notice of Show Cause, and Termination Hearing. (Doc. 5.) The court found the Department had sufficient reason to believe the children were in immediate or apparent danger of harm, the Department made reasonable efforts to avoid removal, and removal was necessary and in the best interest of the children. (*Id.* at 1.) The court relied on facts alleged in the affidavit in support of the petition in this case and on facts alleged in the parents' prior cases. (Doc. 5.)

II. Hearings on the petition

A hearing for emergency protective services was held August 7, 2024. (8/7/24 Tr.) The parents did not contest probable cause for the removal. (8/7/24 Tr. at 11-12.) The Department informed the court that the parents had not been in contact with the Department since they were released from custody, and she

suggested that they should meet with the CPS who was present that morning to schedule a meeting and take steps to arrange visitations. (*Id.* at 13-14.)

The show cause, adjudication, and termination hearing was held December 13, 2024. (12/13/24 Tr.) The parents arrived at the hearing seven minutes after it began. (*Id.* at 13.)

The Department presented evidence that the parents had cases in 2017 and 2021 in which they successfully completed treatment plans. (*Id.* at 57, 59-60.) In those cases, they were provided referrals for chemical dependency services, mental health services, domestic violence services, and parenting training, and they were provided with caseworker coaching to help them maintain a clean and sanitary home. (*Id.*) A third case was initiated in 2023.

In October 2023, the parents left Montana. (*Id.* at 30.) At that time, their third case with the Department was pending. In November 2023, Wood learned that the parents had left behind five cats in their residence that a disabled neighbor was supposed to be caring for. (*Id.* at 36-37.) Wood obtained permission from Father to enter the home and retrieve the cats. (*Id.* at 37.)

During the prior cases, the parents struggled with substance use, domestic violence, and unsanitary living conditions. (*Id.* at 31-32.) The Department had grave concerns about the parents' housing during the 2023 case because there was water leaking, water damage, and mold coming from the bathroom. (*Id.* at 78.) In

addition, the bathtub was falling through the floor. (*Id.*) The windows were also broken from the inside out and were boarded up with cardboard. (*Id.*)

The parents' parental rights to their older two children were terminated in March 2024 without a treatment plan. (*Id.* at 57.)

When the parents moved to Washington, they had claimed that they needed to have the children delivered at a specialty hospital, but the twins were not born at a specialty hospital. (*Id.* at 44.) The twins had to stay in the neonatal unit at the hospital for about ten days after birth because they had to detox. (*Id.* at 64, 74.) The State of Washington removed the children for 15 days after they were released from the hospital, and then they were reunited with the parents. (*Id.* at 64.) Washington helped the parents obtain housing in a homeless shelter. (*Id.* at 75.)

On July 29, 2024, the Department received a report indicating that screams from an infant and from Mother could be heard outside the parents' home in Great Falls. (*Id.* at 33-34.) The reporter indicated that there were not any sounds from the home indicating that children were present after the screams, creating grave concerns about the safety of the children. (*Id.* at 34-35.) Wood went to the home on January 29 and 30, 2024, but she was unable to contact anyone. (*Id.* at 34-35.)

Wood requested the help of law enforcement, and they obtained a search warrant for the home. Law enforcement and CPS served the search warrant on the

home on July 31, 2024. (*Id.* at 7, 35.) The parents would not open the door, so law enforcement had to force their entry with a battering ram. (*Id.* at 7.)

After law enforcement broke down the door, they located Father, Mother, and a tier 2 sexual offender in the home. (*Id.* at 7-8.) The twins were sleeping in separate playpens, one of which was broken, causing a metal bar to protrude into the mattress. (*Id.* at 35, 38.) The twins' diapers were extremely full, and one of the children had a diaper rash. (*Id.* at 39.) There were multiple containers of formula in the home, but they were all different and were all nearly empty. (*Id.* at 39-40.) The twins were not able to sit up on their own, even though they should have been crawling at their age. (*Id.* at 41, 47.) The twins also choked a lot, which may have been from lying back while drinking a bottle. (*Id.* at 47-48.) They were also very dirty and had sharp pointy nails and cuts all over their legs and face from their fingernails. (*Id.* at 48.) The CPS could not find appropriately sized diapers or clothes in the house for the twins. (*Id.* at 40, 49.)

Mother was very battered and bruised, which she blamed on her falling a lot. (*Id.* at 42.) Mother would not make eye contact and did not talk much. (*Id.* at 42-43.) She initially agreed to provide a drug sample, but then declined to do so when Father told her not to. (*Id.* at 43.) Father smelled strongly of alcohol, which he attributed to drinking one beer. (*Id.*) He refused to provide a drug sample.

(*Id.* at 43.) He was very jittery and appeared to be under the influence of something. (*Id.* at 44.)

The parents told the CPS that the children had received medical care in Seattle, but they had not received any medical care since they had returned to Montana. (*Id.* at 45.)

Wood found the parents to be more withdrawn and uncooperative at the time of removal than they had been during their earlier cases. (*Id.*) She concluded that “they were very, very hard into their addiction.” (*Id.*) The parents indicated that they did not know that the other person in their home was a tier 2 sexual offender, but they said they allowed him to watch the children. (*Id.* at 46.)

The house was filthy and full of clutter, including piles of clothes that did not appear to be usable and trash throughout the house. (*Id.* at 14-15, 36, 41.) The kitchen was very dirty with many dirty dishes, and the stove was open and dirty. (*Id.* at 14.) There was not any light in the living room because windows had been covered up. (*Id.* at 9, 36.) There was an electrical cord strung right above the playpens. (*Id.* at 36.) There was a stench of mildew in the home and there was a smell of ammonia from the cats that had previously been left in the home. (*Id.* at 36-38.) There were also suboxone wrappers and a powdery substance. (*Id.* at 40-41.)

The same problems with the safety of the house that had previously existed still existed, but electrical cords draped across the living quarters created a new safety concern. (*Id.* at 32-33.) The behaviors the CPS observed were the behaviors previous treatment plans had addressed. (*Id.* at 40.)

The parents were arrested and cited for obstructing justice. (*Id.* at 16.)

Even though the Department requested not to have to provide the parents with a treatment plan, the Department tried to assist the parents. (*Id.* at 50, 84.) The parents were given supervised visits with the twins once a week at the Department. (*Id.* at 50.) The parents consistently attended, but some visitations were canceled before they started or were discontinued midway through because of the parents' intoxication. (*Id.* at 50-54, 117-19.) CPS Supervisor Dariya Mowry checked in on many of the visits "because there were so many concerns with the parents being under the influence pretty much every time that they were coming to visitation." (*Id.* at 113.) Mowry canceled one visit before it started because of the parents' condition. (*Id.* at 117-19.) "They were not unconscious, but they were not quite asleep, but they were just passed out in the chair, kind of oblivious to what was going on." (*Id.* at 119.) Mowry believed it would not be safe for them to have the visitation because they were not in full control of their body. (*Id.*) During another visit, Father was swaying back and forth and his eyes were getting extremely heavy. (*Id.* at 53.) Wood offered him water and asked if he needed anything. (*Id.*) He said

he did not, but they gave him water. (*Id.*) He continued to sway and bent down at a 90-degree angle while S.W. was crawling underneath him. (*Id.* at 53.) Wood ended the visit because of her concern about the children's safety. (*Id.* at 54.) Mowry terminated all visitations after that based on safety concerns. (*Id.* at 121.)

Wood communicated with the parents at the visits. Sometimes they were willing to engage with her, and sometimes they were not. (*Id.* at 50.) She provided them with multiple flyers listing resources to help with multiple issues, including substance abuse, housing, and family counseling. (*Id.* at 51, 67.) Wood also offered to go with the parents to try to help them obtain suitable housing and offered job assistance and rides to services. (*Id.* at 51, 68, 93-94.) The parents declined her assistance and said they were looking for housing on their own. (*Id.* at 52, 68.) They refused to provide drug samples. (*Id.* at 52.)

Wood opined that there were not any services that would enable the parents to address these issues because they were not successful with previous services. (*Id.* at 58.) She also explained that the parents were not willing to engage with her except for participating in visitations. (*Id.* at 58.)

Wood testified that she was informed that Mother wanted to go to inpatient treatment. (*Id.* at 63.) But, Wood testified that Mother was not willing to have any conversations with her because she had been advised not to talk to Wood. (*Id.* at 64, 66.) Wood agreed that Father had never been enrolled in inpatient treatment

either. (*Id.* at 81.) Wood said that the Department previously suggested that the parents attend inpatient treatment, but Father was not willing to go without Mother. (*Id.* at 82.) Mother was also not willing to go to inpatient treatment without Father. (*Id.* at 92.) There are not any inpatient treatment programs that will accept couples. (*Id.*) The parents' chemical dependency counselor discharged them after that. (*Id.* at 82.) The parents later told her they were going to participate in inpatient treatment, but they did not provide details. (*Id.* at 82, 94-96.)

Wood testified that the parents had rapidly declined over the course of the case. (*Id.* at 77.)

Mowry testified that she supervised the parents' first case in 2017, and she was the supervisor on the 2023 case. (*Id.* at 97-98.) She testified that the issues in the prior cases were substantially similar to the issues in the current case. (*Id.* at 108.) The persistent issues included substance abuse, mental health problems, domestic violence, and unsanitary, uninhabitable living conditions. (*Id.*) Mowry testified that the problems with the parents' housing was caused by their damage to the home, not their lack of financial resources. (*Id.* at 108-10.) Mowry testified that the parents were provided with services designed to address the issues in the treatment plans provided in the 2017 and 2021 cases. (*Id.* at 110.) Although the Department did not develop a treatment plan for the 2023 case, the Department offered services. (*Id.* at 111.) The Department discussed the parents' housing and

tried to engage the parents in a conversation about the twins Mother was pregnant with. (*Id.*) The parents were not willing to work with the Department. (*Id.*) The Department would have assisted the parents if they had requested assistance. (*Id.* at 112.)

Mowry testified that the parents' chemical dependency during this case was "by far the worst I've seen them." (*Id.* at 112.) The Department tried to get them to participate in chemical dependency treatment, but was unsuccessful. (*Id.* at 112.) Mowry testified that "[t]here were drastic difference[s] from both of them, [Father], specifically," from how they appeared in prior cases. (*Id.* at 114.) Both parents had lost a lot of weight. Father "was very unkept, very strong body odor. He—eyes glassed over, unsteady ga[z]e. . . . Always looking down . . . in the sense somebody who's struggling with some sort of headache or pain where they just have a hard time keeping their head up." (*Id.* at 114.) She said his communication was minimal and he was "kind of disorganized during the visitation, just kind of trying to maintain and stay awake." (*Id.*) Both of the parents wore heavy clothing to the visitations, even in the summer. (*Id.* at 115.) Father would sweat profusely and sometimes went to the bathroom and vomited. (*Id.*) During one visit, the receptionist called Mowry to the waiting room because Mother appeared to be nearly unconscious. (*Id.*) Mowry described the parents as being "in way worse shape [in December 2024] than they were in March of 2024." (*Id.* at 122.)

Mowry did not believe that there were any services that could provide lasting effects for the parents because they had been provided treatment plans in 2017 and 2021, and they were provided services in 2023, and yet they were doing worse than before. (*Id.* at 122-23.)

Mother testified that she planned to attend inpatient treatment the following week. (*Id.* at 125.) Father testified that the State of Washington helped the family obtain housing in a family shelter. (*Id.* at 128.) He said he takes Suboxone, so it is hard to stay awake when he sits down within the first few hours after taking it. (*Id.* at 132.) He said his solution is to not sit down when parenting so he can stay awake, but that was not an option during visitations. (*Id.*) He said he was also going to enter inpatient treatment the following week. (*Id.* at 133.)

The court terminated the parents' parental rights under Mont. Code Ann. § 41-3-609(1)(d), which allows for termination of a parent's rights if the parent has subjected a child to any circumstances in Mont. Code Ann. § 41-3-423(2)(a) through (2)(e). (12/13/24 Tr. at 173-87.) The court found that the parents subjected a child to chronic severe neglect under Mont. Code Ann. § 41-3-423(2)(a) and that they had their parental rights to a sibling of the twins involuntarily terminated and that the circumstances related to the termination were relevant to the parents' ability to adequately care for the twins under Mont. Code Ann. § 41-3-423(2)(e). (12/13/24 Tr. at 173-74.) The court noted that there was testimony about the prior

removals, demonstrating that domestic violence, substance abuse, and deplorable living conditions were issues. (*Id.* at 174-75.) That court found that the Department attempted to provide services in the 2023 case, even though the Department did not have to. (*Id.* at 175.) The parents abandoned that matter and went to Washington. (*Id.*) The court inferred from the evidence that the parents went to Washington to avoid having the twins removed. (*Id.* at 176.) The parents then returned to the same deplorable conditions they had been living in before they left Montana. (*Id.* at 177.) The court stated that it was “clear” that the parents made “no attempt at making that home safe for the kids[,]” which was one of the reasons the older children were removed. (*Id.* at 178.) The court also noted that the parents failed to cooperate with the Department, and law enforcement had to force their way in to check on the children. (*Id.* at 178-79.) When they did, they found the children in a dirty home with diapers that had not been changed, and there were no diapers in the home that fit the twins. (*Id.* at 179.) Also, one of the playpens had a piece of metal sticking up into it. (*Id.* at 180.) The court concluded that these circumstances, viewed as a whole, established chronic severe neglect. (*Id.*)

The court noted that “this is an ongoing problem that has repeatedly drawn the attention of the Department that has repeatedly resulted in the removal of your children. It’s chronic as to the children because it’s chronic as to you.” (*Id.* at 181.) The court noted that the same issues had repeated themselves since 2017,

resulting in the termination of the parents' rights to the older two children. Based on these facts, the court found that the parents subjected the "twins to chronic severe neglect by exposing them to unreasonable risk of physical or psychological risk, failing to provide basic necessities[.]" (*Id.*)

The court also found that the parents rights to their older two children were terminated and the "circumstances related to the termination of the parental rights are relevant to the parent's ability to adequately care for the child at issue." (*Id.* at 182.) The court noted the parents' ongoing substance abuse and their intoxication at visitations. (*Id.* at 183.)

The court agreed that the parents needed inpatient treatment, but the court noted that the problem had persisted since 2017 even though the Department offered to help the parents. (*Id.* at 184-85.) The court stated that it was "unfortunate" that the parents "only choose to schedule treatment inpatient when a hearing for your termination is at hand, and throughout the pendency of this case, otherwise showed up under the influence for all the visitations that occurred, essentially." (*Id.* at 185-86.) The court concluded that the circumstances in this case were "very relevant and related to the circumstances in the previous cases. And [the testimony demonstrated the circumstances] only changed for the worse." (*Id.* at 186.)

The court issued an Order Terminating Parental Rights. The court reiterated that the Department did not need to provide a treatment plan based on “aggravated circumstances, including but not limited to chronic, severe neglect and prior terminations.” (Appellant’s App. A at 7.) The court terminated the parents’ parental rights under Mont. Code Ann. § 41-3-609(1)(d) based on the aggravated circumstances that established that the parents subjected a child to circumstances listed in Mont. Code Ann. § 41-3-423(2)(a) through (2)(e). (Appellant’s App. A at 9-10.) Citing Mont. Code Ann. § 41-3-423(2)(a), the court found that clear and convincing evidence supported termination because the parents subjected the youths “to aggravated circumstances (including but not limited to chronic, severe neglect of a child), despite years of intensive, narrowly tailored services designed to address their substance abuse, mental health, and domestic violence concerns, and the resulting parenting deficiencies.” (Appellants App. A at 9-10.) The court further concluded that continuing the parent-child relationship would likely result in an ongoing risk of abuse and/or neglect to the youths and the best interest of the youths would be served by termination. (*Id.*)

SUMMARY OF THE ARGUMENT

Montana Code Annotated § 41-3-423(2) allows the Department to petition for a determination that the Department is not required to make reasonable efforts

to reunify a family if certain circumstances are met. The Department was not required to provide reunification efforts after it filed a petition requesting a determination that reunification efforts did not have to be made, before the court ruled on the petition. The Department's failure to provide reunification efforts during that time period did not violate due process because Father had notice that the Department was requesting a determination that reunification efforts were not required, and a hearing was held on the petition.

The district court terminated Father's parental rights based on two theories, so if either is correct, it is unnecessary to review the other. For that reason, it is unnecessary to determine whether the court abused its discretion when it found that Father subjected a child to chronic, severe neglect. If this Court considers that issue, this Court should conclude that clear and convincing evidence supports the court's finding that Father subjected a child to chronic, severe neglect. Father's lengthy and severe neglect of his oldest two children, which ultimately resulted in the termination of his parental rights to those children, should be considered. Further, the twins were removed at the time of their birth and continued to be neglected until they were removed at eight months old. The twins' developmental delays and the deplorable conditions they were living in demonstrate they were subjected to chronic, severe neglect. As a result, the court did not abuse its discretion when it terminated Father's parental rights on that ground.

Finally, the record overwhelmingly demonstrates that Father's parental rights to his oldest two children were involuntarily terminated, and the circumstances that led to the termination are relevant to his ability to parent the twins. Father's termination of his rights to his older children was caused by his substance abuse, mental health problems, domestic violence, and unsanitary, uninhabitable living conditions. Those same problems persisted in this case and are clearly relevant to his ability to parent the twins. The court did not abuse its discretion when it terminated on that ground.

ARGUMENT

I. Standard of review

This Court reviews a district court's decision to terminate parental rights to determine whether the court abused its discretion. *In re M.J.*, 2013 MT 60, ¶ 16, 369 Mont. 247, 296 P.3d 1197. A court abuses its discretion when it acts "arbitrarily, without employment of conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *In re M.J.*, ¶ 17.

The district court's specific findings are reviewed to determine whether they are clearly erroneous. *In re M.J.*, ¶ 16. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence or if, upon reviewing the record, this Court is left with a definite and firm

conviction that the district court made a mistake. *Id.* This Court reviews conclusions of law to determine if they are correct. *Id.* The appellant has the burden on appeal to establish that the district court’s factual findings are clearly erroneous. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825.

II. Father’s right to due process was not violated by the Department’s failure to provide reunification services after it filed a petition requesting the court find that reunification services were statutorily not required, and before the hearing on that petition, because reunification services were not required during that time.

At the hearing on emergency protective services, both parents stipulated that probable cause existed for the removal of the twins, and neither parent requested to receive reunification services while they were waiting for the court’s determination on whether reunification services were required. (8/7/24 Tr. at 11-12; *see generally* 8/7/24 Tr.) Father argues for the first time on appeal that the Department was required to provide reunification services while it was waiting for the court’s ruling on the Department’s Petition. Although this claim was not preserved, this Court has previously reviewed a similar claim under the plain error doctrine. *In re C.B.*, 2019 MT 294, ¶ 15, 398 Mont. 176, 454 P.3d 1195. As a result, the State addresses the merits of this claim.

“Due process requires that parents in abuse and neglect proceedings receive ‘notice and an opportunity to be heard.’” *In re R.K.*, 2023 MT 161, ¶ 23, 413 Mont.

184, 534 P.3d 659 (quoting *In re C.B.*, ¶ 18). To establish a due process violation, a parent “must demonstrate how the outcome would have been different had the alleged due process violation not occurred.” *In re C.B.*, ¶ 18. Father had notice and an opportunity to be heard so he was not denied due process. *In re C.B.*, ¶ 30.

Further, Father was not entitled to reunification services during the four months between the filing of the Petition, which requested a determination that reunification services were not required, and the hearing on the Petition, at which the court determined that reunification services were not required and terminated Father’s and Mother’s parental rights. The Department is generally required to “make reasonable efforts to prevent the necessity of removal of a child from the child’s home and to reunify families that have been separated by the state.” Mont. Code Ann. § 41-3-423(1)(a); *accord In re C.B.*, ¶ 29. “[T]he child’s health and safety are of paramount concern” when determining what reunification services to provide. Mont. Code Ann. § 41-3-423(1)(c). Although reunification services are generally required, the Department may request “a determination that preservation or reunification services need not be provided” if statutory criteria are satisfied. Mont. Code Ann. § 41-3-423(2). “A court may make a finding that the department need not make reasonable efforts to provide preservation or reunification services if the court finds that the parent has:”

(a) subjected a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child;

. . . or

(e) had parental rights to the child's sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue.

Mont. Code Ann. § 41-3-423(2). A finding that preservation or reunification services are not necessary must be supported by clear and convincing evidence.

Mont. Code Ann. § 41-3-423(4). Montana Code Annotated § 41-3-423(2) and (4) exempt the Department from the requirement to make reasonable efforts in

Mont. Code Ann. § 41-3-423(1). *In re C.B.*, ¶ 29.

Nothing in the statutory language of Mont. Code Ann. § 41-3-423 requires the Department to provide a treatment plan while the Department is waiting for a court to rule on its request for a determination that reunification services do not need to be provided when the circumstances in Mont. Code Ann. § 41-3-423(2) have been established.

This Court rejected the argument that reunification services are required under the same circumstances in *In re C.B.* Mother in *In re C.B.* had her rights to her older three children terminated based on severe drug use, inability to provide safe and stable housing, and an inability to provide adequate care, and she had the

rights to her fourth child terminated based on her prior terminations. *In re C.B.*, ¶ 3. Mother then gave birth to a fifth child, which was not immediately removed because Mother was sober and able to meet the child's needs. *In re C.B.*, ¶ 4. The next year, however, the child was removed due to Mother's drug use and unsafe living conditions. *In re C.B.*, ¶¶ 5-7. The Department petitioned to terminate without providing reunification services. *In re C.B.*, ¶ 7. Four months later, the court terminated Mother's parental rights based on her prior terminations and the similarity of the prior removals and the current circumstances. *In re C.B.*, ¶ 11.

Mother in *In re C.B.* argued that the Department deprived her of due process when it failed to make reasonable efforts to avoid removal and failed to provide efforts to reunify the family during the four months before the hearing. *In re C.B.*, ¶ 28. This Court rejected that claim, concluding that the district court did not err in determining that the Department did not need to provide reunification efforts. *In re C.B.*, ¶ 30. Further, the Court noted that Mother had notice of the Department's intent to seek termination and that reunification services need not be provided. *Id.* The Court reiterated that the Department was "exempt from providing 'reasonable efforts' at reunification because there was clear and convincing evidence that Mother continued to abuse drugs such that her past involuntary terminations were relevant to her ability to adequately care for C.B." *Id.*

In re C.B. is extremely similar to this case, and it demonstrates that the Department was not required to provide reunification services during the four months between the filing of the Petition and the hearing. Father was on notice that the Department was requesting a determination that reunification services were not required, and a hearing was held on the Department's request, at which Father was represented by counsel and able to testify. The Petition and hearing satisfied the due process requirements of notice and an opportunity to be heard. Further, clear and convincing evidence demonstrated that Father had his rights to two prior children terminated under circumstances that were similar to the pending case. Under these circumstances, reunification services are not required pursuant to Mont. Code Ann. § 41-3-423(2).

To impose a requirement that reunification services be temporarily provided, when a determination will subsequently be made that they are not required, would be a waste of resources and could be physically or psychologically damaging to children who have been removed, especially when it is clear that reunification services are not required based on prior terminations. That is demonstrated by this case, where the Department provided the parents with visitations, even though it was not required to do so, but it had to terminate the visitations due to safety concerns. This Court correctly concluded in *In re C.B.* that the statutes do not require reunification services during this time period.

Further, the record in this case demonstrates that reunification services would not have impacted the outcome. Although it was not required to do so, the Department provided information to the parents on how to obtain resources and offered to assist the parents. The parents declined to accept the Department's assistance. The parents arrived to the visitations intoxicated, requiring the Department to cancel visitations. Despite the completion of two treatment plans and the Department's offers of assistance, the parents were doing significantly worse by the time of the termination hearing than ever before. Because the parents were unwilling to engage with the Department, a treatment plan would not have been successful. Father cannot establish a due process violation because he cannot demonstrate that the outcome would have been different if reunification services had been provided.

III. The court did not err in terminating Father's parental rights without a treatment plan because he subjected the twins to chronic, severe neglect under Mont. Code Ann. § 41-3-423(2)(a), and he had the parental rights to two other children terminated under circumstances that are relevant under Mont. Code Ann. § 41-3-423(2)(e).

A court may terminate parental rights "upon a finding established by clear and convincing evidence" that "the parent has subjected a child to any of the circumstances listed in 41-3-423(2)(a) through (2)(e)." Mont. Code Ann. § 41-3-609(1), (1)(d). In the court's oral ruling, the court ordered the termination of

the parents' parental rights based on the court's conclusion that Father subjected the twins to two of the circumstances listed in Mont. Code Ann. § 41-3-423(2)(a) through (2)(e). The court found that the parents subjected a child to chronic severe neglect under Mont. Code Ann. § 41-3-423(2)(a), and the parents had their rights to other children involuntarily terminated and the circumstances related to the termination of parental rights were relevant to the parents' ability to adequately care for the children at issue, which satisfies the requirements of Mont. Code Ann. § 41-3-423(2)(e). (12/13/24 Tr. at 172-88.) Although the Court's written order cites Mont. Code Ann. § 41-3-423(2)(a), but not Mont. Code Ann. § 41-3-423(2)(e), the language of the order demonstrates that the parents' prior terminations were one of the bases on which the court terminated their rights. (*See generally* Appellant's App. A.) The court determined that reunification efforts were not required based on "aggravated circumstances, including but not limited to chronic, severe neglect and prior terminations." (*Id.* at 7.)

On appeal, Father argues that the court erred in finding that he subjected the children to chronic, severe neglect. But it is unnecessary to address that claim because the court also terminated the parents' parental rights based on their prior terminations. *See In re S.T.*, 2008 MT 19, ¶ 15, 341 Mont. 176, 176 P.3d 1054 (when a district court relies on more than one statutory basis in terminating a parent's rights, any one basis, if correctly relied upon, is sufficient to support

termination). Overwhelming evidence established that ground. It is undisputed that Father had the rights to his oldest two children involuntarily terminated. And, Mowry testified that the same problems that led the Department to remove the older two children three times, and to ultimately terminate the parents' parental rights, continued to prevent the parents from adequately caring for the twins. (12/13/24 Tr. at 108.) Clear and convincing evidence supports the court's termination of Father's parental rights on this ground.

Further, clear and convincing evidence supports the court's conclusion that the parents subjected a child to aggravated circumstances, including chronic, severe neglect. The language of Mont. Code Ann. § 41-3-423(2)(a) broadly states that reunification services are not required if a parent has "subjected a child to aggravating circumstances, including but not limited to . . . chronic, severe neglect of a child[.]" The statutory language references "a child" and is not limited to the child at issue in the termination proceeding.

This Court defines "chronic" as "marked by long duration, by frequent recurrence over a long time, and often by slowly progressing seriousness." *In re M.N.*, 2011 MT 245, ¶ 27, 362 Mont. 186, 261 P.3d 1047 (quoting *Webster's Third New International Dictionary* 402 (G & C Merriam Co. 1961)). "Discrete instances of neglect, when viewed within a consistent pattern of similar behavior, provide a clear basis by which a district court can find 'chronic, severe neglect.'"

In re M.N., ¶ 30. As this Court has reasoned, “[c]hildren need not be left to ‘twist in the wind’ before neglect may be found chronic and severe.” *In re M.N.*, ¶ 29.

In *In re E.Z.C.*, 2013 MT 123, ¶¶ 29-30, 370 Mont. 116, 300 P.3d 1174, this Court held the district court did not abuse its discretion in terminating the mother’s parental rights after finding she had subjected the children to chronic, severe neglect. *In re E.Z.C.*, ¶ 28. The Department was involved with the mother for ten years. *In re E.Z.C.*, ¶ 16. Over the course of that time, the Department provided the mother with a treatment plan, which she successfully completed. *In re E.Z.C.*, ¶ 14. Despite the services she received, the mother worsened over time. *In re E.Z.C.*, ¶¶ 16, 18. The final removal of the children occurred after the Department found them living in a dirty, cluttered home with a terrible smell and animal feces. *In re E.Z.C.*, ¶ 6. The children were not adequately fed, leading to dental problems, they were not adequately clothed, and one of them tested positive for methamphetamine. *In re E.Z.C.*, ¶¶ 6-7. This Court concluded that these actions amounted to chronic, severe neglect because they occurred over a long duration, were frequently recurring, and became increasingly serious. *In re E.Z.C.*, ¶ 29.

In this case, the district court’s finding that the parents subjected the twins to chronic, severe neglect is supported by clear and convincing evidence. The parents repeatedly subjected their four children to severe neglect during the Department’s eight years of involvement with the parents. The Department removed the older

children three times, ultimately terminating the parents' rights to those children. Those circumstances alone demonstrate that the parents subjected children to severe neglect that was long in duration, frequently reoccurred, and progressed in seriousness.

Further, the circumstances involving the twins constituted chronic, severe neglect. Although they were only eight months old, the twins were removed from the parents twice. The twins were born in Washington, while the 2023 petition involving the older children was pending in Montana. The court inferred that the parents went to Washington to avoid having the twins removed. The twins had to stay in the hospital for approximately 10 days because one of the twins was withdrawing from an illegal drug. (12/13/24 Tr. at 64, 74.) They were then removed from the parents by the State of Washington for 15 days. (*Id.* at 64.) The State of Washington found the parents suitable housing in a homeless shelter for families and reunited the parents with the children. (*Id.* at 75.) Despite being provided with suitable housing, the parents left Washington and returned to their uninhabitable home in Montana. (*Id.* at 33, 78.) They had left cats in the home while they were in Washington. (*Id.* at 36-37.) The home was filthy and cluttered, had windows boarded up, smelled of mildew and cat urine, had suboxone wrappers accessible, and had electrical cords draped throughout the living quarters. (*Id.* at 9, 14-15, 33, 36-41.) One of the children was in a broken playpen with a metal bar

protruding, and there were not appropriate diapers and clothes for the children.

(*Id.* at 35, 38, 40, 49.) Reports demonstrated that Mother could be heard screaming from outside the home. (*Id.* at 33-34.) Even more concerning was that the twins were unable to sit up or eat solid foods at eight months old, which they should have been able to do at that age, and they had sharp nails, which they had cut themselves with. (*Id.* at 41, 47-48.)

Despite their young age, the twins suffered chronic, severe neglect from the day they were born until they were removed eight months later. The neglect continued to persist from their original removal at birth until they were removed in Montana. This amounted to a long duration, with frequent recurrence and progressing seriousness. Further, the parents' previous cases with the Department involving the other two children should be considered. Those cases demonstrate that even when given substantial resources, the parents continue to subject their children to unsuitable, unsafe housing conditions and illegal substances.

Significantly, Mowry observed that the parents were suffering more from their addiction in this case than prior cases, and they had significantly declined during the course of this case, demonstrating their continued inability to parent. (12/13/24 Tr. at 112, 122.) The court was not required to allow these children to “twist in the wind” before finding that they were subjected to chronic, severe neglect. *See In re M.N.*, ¶ 29. Given the totality of the evidence, the district court did not abuse

its discretion when it terminated Father's parental rights based on its conclusion that Father subjected a child to chronic, severe neglect.

IV. The Father's claim that he would start inpatient treatment the next week did not render the court's termination based on prior terminations erroneous.

As set out above, a court may terminate a parent's parental rights if the parent has "had parental rights to the child's sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue." Mont. Code Ann. § 41-3-423(2)(e), -609(1)(d). Clear and convincing evidence demonstrated that the circumstances of the prior terminations were relevant to the parents' ability to care for the twins. Wood and Mowry testified that the parents had suffered from the same problems over the eight years of their involvement with the Department. (12/13/24 Tr. at 32-33, 40, 108-12.) The court pointed out that drug use had been an ongoing problem for the parents, and their intoxication at visitations demonstrated it was relevant to their ability to adequately care for the children. (*Id.* at 183.) The court found that "the circumstances in this case are very relevant and related to the circumstances in the previous cases. And . . . they've only changed for the worse." (*Id.* at 186.)

Contrary to Father's assertion, one changed circumstance does not matter when determining whether the requirements of Mont. Code Ann. § 41-3-423(2)(e) are satisfied. The statute requires that the prior circumstances be "relevant," not identical. Mont. Code Ann. § 41-3-423(2)(e). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mont. R. Evid. 401. Father's long history of substance use, domestic violence, inability to provide adequate shelter, and neglect of his oldest two children is clearly relevant to his ability to care for the twins when they were removed from the same unsuitable home he was in before and he continues to suffer from substance abuse.

Father's admission to inpatient treatment did not make the prior circumstances irrelevant. Father continued to suffer from substance addiction, and was doing far worse by the time of the termination hearing. (*Id.* at 112, 122.) It was unknown whether inpatient treatment would produce any long-lasting change, especially given the severity of Father's addiction. The CPS testified that the Department previously attempted to get Father to attend inpatient treatment, but he was unwilling to do it. (*Id.* at 82.) Father cannot wait until the termination hearing to schedule inpatient treatment and then expect his eight-year history to be disregarded.

This Court has consistently held that if a district court finds the statutory criteria supporting termination are met, “no limitation requires the district court to consider other options prior to terminating parental rights.” *In re A.B.*, 2020 MT 64, ¶ 38, 399 Mont. 219, 460 P.3d 405 (citation omitted). “[T]he statute’s permissive language gives district courts discretion in deciding whether to terminate parental rights.” *Id.* While there may be alternatives to termination, “[c]hildren cannot always afford to wait for their parents to be able to parent.” *Id.* Moreover, this Court has stated it is not in the position on appeal to evaluate the evidence to consider the possibility of a different outcome; rather, this Court’s role is to determine whether the district court abused its discretion. *In re A.B.*, ¶¶ 23, 40.

Because Father’s parental rights to two other children were involuntarily terminated and the circumstances of those terminations are relevant to his ability to care for the children at issue, the court did not abuse its discretion when it terminated Father’s parental rights.

CONCLUSION

Clear and convincing evidence supports the district court’s findings that Father subjected a child to chronic, severe neglect and that Father had his rights to other children involuntarily terminated and the circumstances of those terminations are relevant. The court did not abuse its discretion when it terminated Father’s

parental rights based on those findings, and the court's termination of Father's parental rights to the twins should be affirmed.

Respectfully submitted this 3rd day of June, 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 8,821 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

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