

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0282

IN THE MATTER OF:

D.E.R. Jr.,

Youth in Need of Care.

ANDERS BRIEF

On Appeal from the Montana Eight Judicial District Court, Cascade County,
the Honorable Elizabeth Best, Presiding.

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STATEMENT OF THE ISSUE

Whether counsel for the Appellant should be permitted to withdraw from this cause in accordance with the criteria established in *Anders v. California*, 386 U.S. 738 (1967) and § 46-8-103, MCA.

STATEMENT OF THE CASE AND FACTS

Appellant Mother, N.H. (“Mother”), appeals the *Order Terminating Parental Rights* issued by the Cascade County District Court (“District Court”) on March 24, 2025. (D.C. Doc. 227). The Department of Child and Family Services (“Department”) first became involved with Mother’s family in 2015. The case involving D.E.R. Jr. was Mother’s third consecutive case with the Department. Mother had her rights terminated to two older children and at the outset of this case was in the process of having her rights terminated to a third child. (D.C. Docs 1; 8/15/22 Hearing Transcr. at 27:2-9, 39:6-13, 47:19-25). The Department was notified that Mother gave birth in March 2022 to D.E.R. Jr., Mother admitted that she had abused substances during her pregnancy and had received very little prenatal care, attending only three prenatal appointments. (D.C. Doc 1.)

The Department filed a *Petition for Emergency Protective Services and Adjudication as a Youth in Need of Care* (“YINC”) and for *Temporary Legal Custody* (“TLC”) on March 25, 2022. (D.C. Doc 1.) In the supporting

affidavit, Child Protection Specialist (“CPS”) Frison stated the removal of the child from Mother’s care was due to concerns of substance abuse, Mother’s lack of engagement with the Department during prior and concurrent Dependency-Neglect cases, and unresolved substance abuse issues. (D.C. Doc 1, 8/15/22 Hearing Transcr. at 27:2-9, 37.) However, Mother did test negative for all substances at the time of Youth’s birth. (D.C. Doc 1; 8/15/22 Hearing Transcr. at 29:5-9, 48:12-19.) Several days after birth, once Youth was discharged from the NICU he was placed in kinship care in Box Elder, approximately two hours away from Mother. (D.C. Doc, 8/15/22 Hearing Transcr. at 27:14-21.) This placement had previously adopted one of D.E.R. Jr.’s older half siblings and is also placement for another of his half siblings. (D.C. Doc 1.) The *Petition* also identified that the Indian Child Welfare Act (“ICWA”) may apply to the proceedings, with the Chippewa Cree Tribe identified as the Youth’s possible tribal affiliation. (D.C. Doc. 1.)

Mother was present at the Show Cause hearing on July 7, 2022 and contested the *Petition*. Mother also presented information that the Youth also had possible tribal affiliation with Little Shell, Blackfeet and Turtle Mountain tribes. The District Court ordered birth parents provide information to the Department to ascertain tribal affiliation within seven

days and granted the Department an additional four weeks to research all possible tribal affiliations. (D.C. Doc. 31.) On August 19, 2022, the Department filed a *Notice of Filing – Response from Tribe*, noting that the Youth was not enrolled or eligible for enrollment in the Little Shell Tribe. (D.C. Doc. 39.)

After multiple continuance the contested Show Cause hearing was finally held on August 25, 2022. Mother and her counsel were present and argued that the Department has still not sufficiently investigated all possible tribal affiliations. (8/25/22 Hearing Transcr. at 16:21-25.) Mother had sent the Department an updated family history list which it had neglected to include in its inquiries about the child's enrollment status in the Turtle Mountain Band and Little Shell Tribes. (8/25/22 Hearing Transcr. at 19:5-10, 20:16-24, 22.) Based on this information, the District Court determined the child may be an Indian child and ordered all tribes receive all additional information. (8/25/22 Hearing Transcr. at 25:17-21.)

The Court heard testimony from Department employees, including Shawna Inama, Michaela Stroop and Dariya Mowry. CPS Inama testified that since removal, Mother had not been engaged in any services and had not communicated with the Department at all for the last two months. (8/25/22 Hearing Transcr. at 27:14-21.) She also noted that Mother had tested

negative for all substances at birth and admitted that Mother's newborn child had been placed two hours away with the Department only offering Mother one visit a week. (8/25/22 Hearing Transcr. at 29:5-9, 29:14-20, 30:17-23.) Child Welfare Manager Stroop testified as to Mother's other ongoing Dependency-Neglect proceeding, noting Mother had not been engaged in that case and, despite Mother's negative drug test at the time of D.E.R. Jr.'s birth, there are continued concerns about substance abuse. The concerns in Mother's prior case, where her parental rights were terminated, and current other case had not been resolved. (8/25/22 Hearing Transcr. at 37.) CPS Supervisor Mowry testified to the Department's continuing substance abuse concerns, concerns about the where Mother was living and Mother's lack of contact with the Department in both her other child's case and the present case. (8/25/22 Hearing Transcr. at 42:8-19.) She did note, however, that Mother was attending her once weekly visits with D.E.R. Jr. (8/25/22 Hearing Transcr. at 43:1-8.)

Anna Fisher testified as the Qualified Expert Witness under ICWA. She expressed her opinion that continued custody of the child by Mother would likely result in serious emotional or physical damage to the child. Ms. Fisher also noted the child's young age, only four months, as being a critical factor in the concern about continued possible abuse or neglect. (8/25/22

Hearing Transcr. 46:14-22.) Following this testimony, the Court adjudicated the child a YINC and continued Emergency Protective Services. The Court also found that the Department was making active efforts as required under ICWA, despite a clear determination as to whether the Youth was eligible for enrollment in a tribe. (D.C. Doc 45.)

The Department filed multiple *Notice of Filings – Response from Tribe* showing that D.E.R. was not enrolled or eligible for enrollment in the Blackfeet, Crow, Turtle Mountain Band or Fort Peck Tribes. (D.C. Docs. 50, 51, 52.) At the Dispositional Hearing on October 13, 2022, Mother was present and objected to areas of her treatment plan which the Court ordered changes and approved the treatment plan. The District Court also granted the Department TLC for a period of six months. In its *Order* the District Court included the changes to Mother’s treatment plan, however the treatment plan does not appear in the record as an attachment to this *Order*. Additionally, the *Order* stated ICWA was still considered to apply even though Tribal affiliation had still not been determined. (D.C. Doc 58.)

On January 4, 2023, the Department filed a *Motion for Permanency Plan* and a *Notice of Permanency Plan Report* (“Report”) which listed the permanency plan for D.E.R. Jr. to be adoption and determined ICWA did not apply. (D.C. Doc 59.) In the *Report* Mother’s location was listed as unknown

and the Department reported that Mother had not been engaging with her treatment plan. (D.C. Doc 59.)

A hearing on the *Report* was set for January 12, 2023. (D.C. Doc 60.) Mother was not present, and the CPS reported she had not had much contact with Mother since the last hearing. Mother was set up with visits at RE Services and had attended three but missed one. There was concern that Mother was mostly on her phone and not engaged with child during visits. (D.C. Doc 65, 1/12/23 Hearing Transcr. at 6-7.) Mother's counsel objected to the permanency plan as she believed it was premature for the Department to not continue to work reunification efforts between Mother and the child. (1/12/23 Hearing Transcr. at 8:8-18.) The District Court agreed and found the permanency plan of adoption to be inappropriate at that stage of the case. The Department was directed to amend the permanency to reunification and extension of TLC. (1/12/23 Hearing Transcr. at 10:17-11:3.)

On April 5, 2023 the Department filed a *Motion to Extend TLC*. The basis for the extension was to provide parents additional time to work on their treatment plans. No supporting affidavit accompanied this *Motion*. (D.C. Doc 63.) A hearing was held on April 13, 2025. Mother did not appear at the hearing and Mother's counsel could not take a position. The Department had not had any recent contact with Mother. (D.C. Doc 65.)

Based on the lack of any objection the District Court granted the extension of TLC for an additional six months. Despite the lack of clarity regarding the Youth's eligibility for enrollment in a Tribe, the District Court continued to recognize that ICWA may apply and continued to use heightened ICWA evidentiary standards. (D.C. Doc 66.) On May 9, 2023, the Department filed a *Notice of Filing – Response from Tribe* which finally determined that Youth was eligible for enrollment in Chippewa Cree Tribe. (D.C. Doc 69.) Mother attempted to transfer the case to Tribal Court, however, this was ultimately unsuccessful when the Tribe declined to accept the case. (D.C. Docs. 70, 80, 83.)

On July 26, 2023 a *Petition for Termination of Parental Rights* was filed based on the failure of Mother to comply with her court ordered treatment plan and on the basis of abandonment. (D.C. Doc 81). The Youth had been in care for all 16 months of his life and Mother had only seen the child 12 times since his birth. (D.C. Doc 81.) In the supporting affidavit prepared by CPS Saylers, she noted that Mother had not completed multiple tasks on her treatment plan including parenting classes, a chemical dependency evaluation or drug testing. Mother had not met with CPS, nor had she been willing to provide CPS with her address. (D.C. Doc. 81, affidavit.)

The Termination Hearing was initially to be held on November 30, 2023. Mother was not present, but her counsel objected to termination of parental rights arguing that guardianship was the more appropriate disposition in this case. Based on father's request for a continuance the Termination Hearing was reset to January 18, 2024. (D.C. Doc 141; 11/30/23 Transcr. Hearing at 13:9-16, D.C. Doc. 144.)

A Status Hearing was held on January 4, 2024. Mother was not present, and the Department moved to continue the termination hearing to which there was no objection. Mother's Counsel once again advocated for guardianship over termination. The Court also expressed concern about the absence of the Tribe from the proceedings. (D.C. Doc 171.) The Termination Hearing was reset to February 15, 2024. (D.C. Doc 182.)

On February 7, 2024, Mother's treatment plan was finally filed into the District Court record by Mother's counsel. Mother's Treatment Plan required her to complete the following tasks: parenting classes, attend visitation, a chemical dependency evaluation and follow recommendations, maintain sobriety, engage in drug testing, develop a relapse prevention plan, obtain safe and stable housing, maintain contact with CPS and sign requested releases of information. (D.C. Doc 198.)

The Department filed its *Permanency Plan Report* on February 8, 2024. Mother's whereabouts were once again unknown. The Department reported it was exploring guardianship but if it could not be subsidized, adoption would be permanency plan. (D.C. Doc 200.) At the February 8, 2024, the District Court expressed its confusion about why guardianship was not the primary permanency goal. (2/8/24 Hearing Transcr. at 21:7-12.) The Department responded by stating that Tribe did not favor guardianship in this and there were "other considerations regarding permanency and the age of the child that have to be considered" including whether the guardianship could be subsidized. (2/8/24 Hearing Transcr. at 21:7-12, 30:11-24.) This statement regarding the Tribe's position was made without any actual written or verbal evidence to support it.

Another hearing was held on May 16, 2024. Jaynah Gopher appeared at this hearing on behalf of the Chippewa Cree Tribe. (D.C. Doc. 204.) On behalf of the Tribe, Ms. Gopher stated the preference for guardianship over termination of Mother's parental rights and adoption of the Youth. (5/16/24 Hearing Transcr. at 11:19-22.) However, despite this the Department reported it had staffed the option of guardianship, and the belief was that Mother had ample opportunity to engage and work toward reunification but had not made any progress. Given that, the Department still planned to move

forward with termination of parental rights. (5/16/24 Hearing Transcr. at 9-10.) The District Court then issued its *Order* regarding permanency of D.E.R. Jr. noting a strong preference for guardianship in this case, followed by the permanency option of adoption. (D.C. Doc. 205.)

On August 7, 2024 the Department filed a *Motion for Extension of Legal Custody* in order to give parents more time to complete their treatment plans. Mother had reengaged with the Department in April 2024, and had been attending supervised visitations with the child, however visitation services were recently suspended due to missed visitation and lack of communication with the Department. Mother was also not engaging with the Department for drug testing and did not enroll in the drug patch Compliance Monitoring System to which she was referred. (D.C. Doc 206.) At the hearing on the extension, Mother was not present, and Mother's counsel had no position on the extension. Representatives of the Tribe were present and supported the extension of TLC. (D.C. Doc. 209.) The District Court granted the extension of TLC for six months. (D.C. Doc. 210.)

On November 19, 2024, the second *Petition for Termination of Parental Rights* ("TPR") was filed. (D.C. Doc 216.) The TPR outlined that Mother would have brief stints of engagement with the Department but ultimately would disappear and fail to complete the tasks on her treatment

plan. (D.C. Doc 216.) Specifically, the TPR alleged Mother had failed to successfully complete her court-ordered treatment plan. As evidence of this, the TPR reported Mother did not complete a parenting class or parenting assessment. Mother was also very inconsistent in her visitation due to frequent incarceration. Mother did complete a chemical dependency evaluation but failed to provide drug tests to the Department to otherwise demonstrate sobriety. Mother was not able to show the Department she had safe and stable housing due to not having consistent communication with CPS. Additionally, Mother refused, on several occasions, to give the Department her address or contact information. CPS Salyers was only able to contact Birth Mother through Facebook Messenger with sporadic replies. (D.C. Doc. 216.)

The TPR also alleged that Mother had abandoned the Youth. Mother's last visit with the Youth was May 8, 2024, and she was attending visitation inconsistently prior to that. Mother has seen the Youth only 13 times since birth; 12 times between March 2022 and January 9, 2023, and once on May 8, 2024. CPS Cobb attempted to re-engage Birth Mother with visits in May 2024, but after attending only one visit, Birth Mother stopped showing up. (D.C. Doc. 216.)

In this support affidavit CPS Cobb stated that the conduct and/or conditions rendering Mother unfit, unable, or unwilling to give the child adequate parental care included Mother's excessive use of a narcotic or dangerous drugs that affect Mother's ability to care and provide for the child. Additionally, this was the third consecutive case with the Department and Mother continued to struggle with engagement, demonstrated through lack of contact with multiple CPS workers. The Department believed termination of Mother's rights to be in the Youth's best interests. (D.C. Doc. 216, affidavit.)

The Department filed another *Motion to Extend TLC* on February 5, 2025. (D.C. Doc 246.) In the supporting affidavit, CPS Cobb stated that the Tribe's position had changed to be in support of the TPR. CPS Cobb also updated she had provided Mother with a ride to Box Elder for an in-person visit with child on December 17, 2024. However, Mother had then been incarcerated since January 6, 2025. (D.C. Doc. 246, affidavit.) The Department was unable to serve Mother with the TPR after she was released from Cascade County Detention Center on February 6, 2025, as she was unable to be located and had not checked in with probation since her release. (D.C. Doc 255.) Following a hearing on February 13, 2025 the District

Court extended TLC until the hearing on the TPR. Mother was not present for the hearing. (D.C. Doc 260.)

The TPR hearing was held on March 20, 2025, Mother was present via Zoom, however sporadically disconnected and then reappeared. CPS Cobb testified as the CPS on the case since February 15, 2024. (3/20/25 Hearing Transcr. at 8:9-12.) In terms of her treatment plan, the only task Mother had successfully completed was getting a chemical dependency evaluation in October of 2024. (3/20/25 Hearing Transcr. at 42:1-4.) Mother had not maintained contact with the Department throughout the life of the case and had last seen the Youth in December of 2024. (3/20/25 Hearing Transcr. at 42:11, 42:17-25, 43:1-3.)

Roberta Cross Guns testified as the QEW required by ICWA. She noted that the Youth's current placement fell within the ICWA preferred placements as she was a licensed kinship placement. (3/20/25 Hearing Transcr. at 108:4-6.) When asked if the placement was consistent with Chippewa Cree cultural values Ms. Cross Guns agreed it was and then explained it would be inconsistent with the tribal values to have the child be placed back with the Mother given how little contact there had been she and the Youth during the case. (3/20/25 Hearing Transcr. 111:8-9,111:11-22.)

During closing arguments, the Department did state that, even though Mother had a visit with the child in the last six months, it was still alleging abandonment and asking the Court to terminate Mother's parental rights on that basis. (3/20/25 Hearing Transcr. at 113:6-14.) The Department believed that, despite this one visit, Mother had left the Youth for almost the entire three years of his life without much contact. (3/20/25 Hearing Transcr. at 114:3-12.)

The District Court issued its *Order* terminating Mother's parental rights on March 24, 2025. The District Court found that Mother had failed to successfully complete her treatment and had also abandoned the Youth. (D.C. Doc. 272 at 3.) Additionally, the District Court found the Youth has special needs and Mother had not demonstrated an understanding of these needs and shown she could safely and adequately parent the Youth. (D.C. Doc. 272 at 10.) The District Court also found Mother had left the Youth under circumstances that make it reasonable to believe that she does not intend to resume care of the Youth in the future, and the conduct or condition rendering her unfit was unlikely to change within a reasonable time. (D.C. Doc. 272 at 11.) The parent-child legal relationship between Mother and the Youth was terminated. (D.C. Doc. 272 at 16.)

Mother filed a timely *Notice of Appeal*. (D.C. Doc. 277.)

ARGUMENT

I. COUNSEL FOR MOTHER SHOULD BE PERMITTED TO WITHDRAW FROM THIS CAUSE IN ACCORDANCE WITH *ANDERS V. CALIFORNIA* AND MONTANA CODE ANNOTATED § 46-8-103.

An appellant is guaranteed the right to fair representation by the Sixth Amendment of the United States Constitution. *Anders v. California*, 386 U.S. 738, 744 (1967); *see also* Mont. Const. Art. II, § 17. When appellant's counsel "finds [her] case to be wholly frivolous, after a conscientious examination of it, [s]he should so advise the court and request permission to withdraw." *Anders*, 386 U.S. at 744. To ensure protection of this right, counsel seeking to withdraw must accompany her motion to withdraw with a brief that references anything in the record that might arguably support an appeal. *Id.* A copy of the brief should be provided to the appellant and the appellant must be afforded the time to respond to counsel's motion and brief. *Id.*

The State of Montana has codified the requirements of *Anders* in Mont. Code Ann. § 46-8-103(2) (2023). If counsel concludes that an appeal would be frivolous or wholly without merit after reviewing the entire record and researching the applicable law, counsel must file a motion with the Montana Supreme Court requesting permission to withdraw. Mont. Code Ann. § 46-8-103(2). A memorandum discussing any issues that arguably

support an appeal must accompany counsel's motion. *Id.* The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, along with appropriate citations to the record and the law bearing on each issue. *Id.* An *Anders* brief is intended to assist the appellate court in determining that counsel has conducted the required detailed review of the case and that the appeal is so frivolous that counsel's motion to withdraw should be granted. *Penson v. Ohio*, 488 U.S. 75, 81–82 (1988). The requirements of an *Anders* brief are not meant to force counsel to argue against her client. *Anders*, 386 U.S. at 745.

After conducting diligent research of the record and applicable law in this matter, counsel has not found any non-frivolous issues appropriate for appeal. Without arguing against her client, counsel for the Appellant is compelled by her ethical duty of candor before this Court to provide the Court with this brief in accordance with the requirements of *Anders*.

II. THE RECORD MAY ARGUABLY SUPPORT MOTHER'S ASSERTION THAT THE DISTRICT COURT ERRED WHEN IT TERMINATED HER PARENTAL RIGHTS.

A. Standard of Review

This Court reviews a district court's order terminating an individual's parental rights for abuse of discretion. *In re J.J.L.*, 2010 MT 4, ¶ 4, 355 Mont. 23, 223 P.3d 921. To do so, this Court first reviews the district court's

findings of fact to determine whether they are clearly erroneous and conclusions of law to determine whether they are correct. *In re D.B.*, 2007 MT 246, ¶ 18, 339 Mont. 240, 168 P.3d 691. Findings of fact are clearly erroneous if they are not supported by substantial evidence, the court misapprehends the effect of the evidence, or a review of the record convinces the Court that a mistake has been made. *In re M.J.W.*, 1998 MT 142, ¶ 7, 289 Mont. 232, 961 P.2d 105. The test for an abuse of discretion is whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. *In re K.J.B.*, 2007 MT 216, ¶ 22, 339 Mont. 28, 168 P.3d 629.

B. N.H. may assert that termination of her parental rights was an abuse of discretion because there was evidence that guardianship may have been a more appropriate disposition.

The court may order appointment of a guardian for a child that has been placed in the temporary custody of the Department if it is in the best interests of the child to be placed with the potential guardian or if termination of parental rights is not in the child's best interests. Mont. Code Ann. § 41-3-444 (2023).

N.H. may assert the court abused its discretion by terminating her parental rights rather than instructing the Department to pursue

guardianship. There are many instances within the record of the District Court's concern that the Department did not fully explore guardianship and requests made by both the Court and Mother's counsel that the Department do so. Additionally, the Chippewa Cree Tribe representative is on the record as stating that guardianship was preferred by the Tribe over termination of Mother's parental rights and adoption of the child. While the Department presented in its February 2, 2025 *Motion to Extend TLC* that the Tribe's position had changed and it now supported termination of parental rights, the Tribe is never on the record as stating this. Thus, Mother could argue that the disposition of guardianship was more representative of what was in D.E.R. Jr.'s best interests.

CONCLUSION

A thorough examination of the record and research of the applicable law seems to compel a conclusion that Appellant Mother's appeal has no merit. This Court should grant the undersigned's motion to withdraw as counsel on direct appeal.

Respectfully submitted this 21 day of July 2025.

By: /s/ Shannon Hathaway

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's *Anders 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 not more than 10,000 words, excluding certificate of service and certificate of compliance.

/s/ Shannon Hathaway

Shannon Hathaway

APPENDIX

Order on Termination of Mother's Parental Rights to D.E.R. Jr..A

CERTIFICATE OF SERVICE

I, Shannon Colleen Hathaway, hereby certify that I have served true and accurate copies of the foregoing Brief - Anders to the following on 07-21-2025:

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