

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF ISSUES - 1 -

STATEMENT OF CASE - 2 -

FACTS - 3 -

STANDARD OF REVIEW - 15 -

SUMMARY OF ARGUMENT - 16 -

ARGUMENT - 17 -

CONCLUSION..... **Error! Bookmark not defined.**

CERTIFICATE OF COMPLIANCE..... - 33 -

CERTIFICATE OF SERVICE - 34 -

TABLE OF AUTHORITIES

Cases

<i>In re A.B.</i> , 2020 MT 64, 399 Mont. 219, 460 P.3d 405.....	19, 21
<i>In re A.M.G.</i> , 2022 MT 175, 410 Mont. 25, 517 P.3d 149.....	22, 23
<i>In re A.J.C.</i> , 2018 MT 234, 393 Mont. 9, 427 P.3d 59.....	17
<i>In re A.L.P.</i> , 2020 MT 87, 399 Mont. 504, 461 P.3d 136.....	15
<i>In re C.M.C.</i> , 2009 MT 153, 350 Mont. 391, 208 P.3d 809.....	17
<i>In re D.B.</i> , 2007 MT 246, 339 Mont. 240, 168 P.3d 691.....	23
<i>In re D.H.</i> , 2001 MT 200, 306 Mont. 278, 33 P.3d 616.....	15
<i>In re D.L.L.</i> , 2025 MT 98, 421 Mont. 522, 568 P.3d 552.....	15, 19
<i>In re L.H.</i> , 2021 MT 199, 405 Mont. 173, 492 P.3d 1218.....	15
<i>In re S.W.</i> , 2025 MT 178, ¶ 31, 573 P.3d 781, 790.....	31
<i>In re T.S.</i> , 2013 MT 274, 372 Mont. 79, 310 P.3d 538.....	18
<i>In re U.A.C.</i> , 2022 MT 230, 410 Mont. 493, 520 P.3d 295.....	20

Statutes

41-3-101, M.C.A.....	17
41-3-306, M.C.A.....	18
41-3-307, M.C.A.....	18
41-3-422, M.C.A.....	2
41-3-423, M.C.A.....	16, 18, 26, 27, 28, 29, 30
41-3-444, M.C.A.....	17
41-3-602, M.C.A.....	17
41-3-604, M.C.A.....	20
41-3-609, M.C.A.....	1, 30
41-3-1301, M.C.A.....	18
28 C.F.R. 35.130(b)(1), -(7)(2024).....	26, 27

STATEMENT OF ISSUES

1. Whether the District Court abused its discretion by terminating Mother's parental rights, rather than finding that Guardianship without terminating Mother's rights was in the child's best interests.

2. Whether the District Court erred in determining pursuant to 41-3-609(1)(f)(ii) and -(2), M.C.A., that the conduct or condition of Mother rendering her unfit, unable, or unwilling to give the Youth adequate parental care was unlikely to change within a reasonable time, by

a. Misapprehending or being mistaken about the nature of the evidence;
or

b. Incorrectly concluding that the Department undertook reasonable efforts to reunify the family.

3. Whether the District Court erred in finding chronic abuse sufficient to support termination of Mother's parental rights.

STATEMENT OF CASE

The Montana Department of Public Health and Human Services, Child and Family Services, Division, brought this action for physical neglect of minor child W.B.A., then seven years of age, pursuant to 41-3-422(1), M.C.A., seeking emergency protective services, adjudication, and temporary legal custody, on June 12, 2023. The Youth was removed from his mother, E.A. In July, 2023, the Department filed paternity tests that showed that M.M., one of two putative fathers, was the biological child of W.B.A. Father's whereabouts remained unknown and he did not participate in the case. This is not an ICWA case.

W.B.A. was adjudicated a Youth in Need of Care by stipulation of Mother and the Department on August 15, 2023. On October 3, 2023, the District Court ordered a treatment plan for mother E.A.

On July 8, 2024, the Department petitioned for termination of both parent's parental rights. The Court termination Father's parental rights at the beginning of the three-day contested termination hearing on January 2, 2025, and terminated Mother's rights at the conclusion of the hearing on January 9, 2025. Mother appeals. During the case, Mother had five different attorneys and one stand-in attorney and the Department assigned five different social workers.

FACTS

A. Facts Relating to Guardianship as the Preferred Permanency Option.

1. In the previous case in 2022, under which was granted Temporary Investigative Authority, both of E.A.'s children were temporarily placed with her oldest son's paternal grandmother. Transcript, Termination Hearing, 1-2-25, p. 193, l.8 to p. 194, l. 12.

2. During the TIA period, the District Court returned W.B.A. to Mother's care before the beginning of the school year. Transcript, Termination Hearing, 1-2-25, p. 196, l. 3-5.

3. At the conclusion of Temporary Investigative Authority, W.B.A.'s older son A.A. wanted to live with his grandmother and her younger son W.B.A. wanted to stay with Mother. A private guardianship was created, leaving A.A. with his grandmother. W.B.A. remained Mother, and the case was dismissed. Transcript, Termination Hearing, 1-2-25, p. 196, l. 22-24, p. 197, l. 6-14; Transcript, Termination Hearing, 1-3-25, p. 83, l. 13-15.

4. When W.B.A. was removed at the beginning of this case, he was again placed with his brother's paternal grandmother, where his brother still resides. Affidavit in Support of Petition for EPS, Adjudication, and TLC, Document 1, 6-12-23, p. 1. W.B.A. has remained in this family placement during the entirety of this

proceeding. Order Terminating Parental Rights, Document 77, 4-16-25, p. 3, par. 7.

5. E.A. has maintained throughout this case that if she could not parent her younger son W.B.A., she desired a guardianship for him with his placement, where his brother resides under a guardianship.

6. At the Status Hearing of November 8, 2023, Mother's third attorney advised the Court that Mother wanted a guardianship, the District Court spoke favorably of the option, and the Department agreed to do a subsidized guardianship and to start the process, although the child's required six months at the placement would not be complete until December 6, 2023. Transcript, Status Hearing, 11-8-23, p. 7, l. 12-15, p. 9, l. 9-13, l. 22-25, p. 10, l. 10-11. The Court did not issue an order on the status hearing and the minute entry omits the Department's agreement to the guardianship. Minute Entry, Document 34, 11-8-23.

7. There is no evidence in the record that the Department moved forward with the Guardianship at any time. The Guardianship plan was not mentioned in the Petition and Affidavit for extension of Temporary Legal Custody filed January 29, 2024. Petition and Affidavit for TLC Extension, Document 37. The Petition and Affidavit for Termination do not mention the Department's promised guardianship. Petition and Affidavit for Termination, Document 51, 8-2-24. The Permanency Plan filed the same date does not even indicate that guardianship was considered as a permanency option, let alone explain why the Department had abandoned

guardianship after agreeing to one. Notice of Filing and Permanency Plan Report, Document 52, 8-2-24.

8. At the status hearing on August 7, 2024, at which Mother was unrepresented by counsel, Mother stated that she had advised her counsel that she was still interested in guardianship in July, 2024, before the Petition for Termination was filed. Transcript, Status Hearing, 8-7-24, p. 14, l. 6-9.

9. After Nick Petrini assumed handling the case for the Department in August, 2024, he never discussed guardianship with Mother or considered it as an option because the Department was already moving forward with termination. CPS Petrini was not aware that the Department had discussed guardianship as an option, let alone previously agreed to it. Transcript, Termination Hearing, 1-3-25, p. 83, l. 5-12.

10. At the termination hearing, the placement (the paternal grandmother of the child's brother), did say that she was not willing to consider a guardianship, but refused to give her reasons for that position. Transcript, Termination Hearing 1-2-25, p. 280, l. 2-8.

11. Mother had five different assigned attorneys during the pendency of the case. Taryn Gray was appointed on June 22, 2023; Haleigh Thrall was appointed on September 27, 2023; Melanie D'Isadoro was appointed on November 3, 2023; Lindsay Jubain was appointed on September 6, 2024; and Teal Mittelstadt was

appointed on September 25, 2024. Notices of Assignment of Counsel, Documents 8, 27, 32, 57, and 59. Mother spoke on her own behalf at the status hearing of August 7, 2024, and OPD attorney Kelly Driscoll appeared on her behalf as interim counsel for the 9-18-24 status hearing. Transcript, Status Hearing, 8-7-24, p. 7. l. 4 to p.19, l. 10; Minute Entry on Status Hearing, Document 58, 9-18-24.

12. The Department had five different case workers serially assigned to the case: Anastasia Datsopoulos, Nadine Hoffman, Christine Sanders, Kristin Brammer, and Nicolas Petrini, who had approximately eight months experience as a CPS worker at the time of assignment. Transcript, Termination Hearing 1-3-25, p. 10, l. 4-10.

B. Facts Relating to Mother’s Treatment Plan Progress and Ability to Parent Within a Reasonable Time.

13. In the five months before the termination hearing, Mother was actively engaged and making progress on her treatment plan:

a. Mother maintained consistent contact with CPS Petrini, including participating in twice-monthly treatment team meetings. Transcript, Termination Hearing, 1-3-25, p. 49, l. 9-14 p. 67, l. 5-7, l. 15-22.

b. Mother signed releases and CPS Petrini was able to speak with her providers. Transcript, Termination Hearing, 1-3-25, p. 68, l. 14-16, p. 69, l. 1-6.

c. Mother obtained a chemical dependency evaluation on August 29,

2024, which recommended Intensive Outpatient (IOP) chemical dependency treatment, joined and consistently attended a waiting list group on September 19th, and began the program on October 14, 2024, which included three three-hour group counseling sessions and one one-hour individual session per week, for a total of 10 hours per week, as well as completing three UAs a week. Her attendance was consistent, and she was actively involved in the treatment and making progress, and had the potential to apply the lessons she learned in treatment. She was due to complete that treatment within a month at the time of the termination hearing. Transcript, Termination Hearing, 1-2-25, p. 69, l. 12-17, p. 70, l.3 to p. 71, l. 18. p. 73, l. 8 l. 17, p. 74, l. 25 to p. 75, l.3, p. 83, l. 14-20, p. 85, l. 11 to p. 86, l. 9, p. 101, l.5-7; Transcript, Termination Hearing, 1-3-25, p. 25, l. 6-11, l. 69 to p. 70, l. 13.

d. Mother missed some, but not a lot of UAs since August. Transcript, Termination Hearing, 1-2-25, p. 28, l. 11. She has had some alcohol relapses and some positive test results for THC and Kratom, and some results negative for all substances, but had no recent positive UAs for alcohol before the termination hearing. Transcript, Termination Hearing, p. 30, 16-21.

e. Mother completed a parenting class in October, 2024. Transcript, Termination Hearing, 1-3-25, p. 15, l. 10-15.

f. Mother had consistent weekly visits with her son, and four bedtime phone calls weekly. Transcript, Termination Hearing, 1-3-25, p. 16, l. 13-18.

g. Mother had obtained and was being treated by a new mental health provider, Emily Mittelstadt, since her two previous providers, Josh Sink and Kao Moua, had moved, but CPS Petrini had not obtained the treatment records yet. Transcript, Termination Hearing, 1-3-25, p. 35, l. 1-1-6, p. 84, l. 20, p. 139, l. 7 to 141, l. 16.

h. Mother had obtained an appropriate home under a yearly lease, sharing it with her sister, and was prepared to have her sister move out before her son moved back in. Transcript, Termination Hearing, 1-3-25, p. 59, l. 9-14; Transcript, Termination Hearing, 1-3-25, p. 130, l. 20 to p. 132, l. 9.

i. Mother was steadily employed. Transcript, Termination Hearing, 1-3-25, p. 128, l. 8-19.

j. Mother's fiancé Cameron was incarcerated, she recognized that he had been an unsafe person for her son to be around and resolved that he would never be around him and determined that if he was unable to maintain his sobriety even once after completion of treatment and incarceration, she would completely sever that relationship. Transcript, Termination Hearing, 1-3-25, p. 132, l. 10-20, p. 159, l. 12 to p. 160, l. 3.

14. Mother had completed a psychological evaluation with Susan Day on September 23, 2023. Notice of Filing Confidential Psychological Evaluation, Document 35, 12-6-23, She had completed a mental health evaluation with Kao

Moua on January 2, 2024. Transcript, Termination Hearing, 1-3-25, p. 33, l. 14 to p. 24, l. 3.

15. Before the petition for termination was filed, Mother had engaged with providers, maintained contact and visits with her son, and worked on multiple tasks of her treatment plan, although her engagement was not as consistent as it became later.

16. To summarize, at the time of the Termination hearing, the state of Mother's treatment plan compliance and progress was as follows:

**TREATMENT PLAN COMPLETION PROGRESS
At Time of Termination Hearing**

Treatment Plan Condition A: Mother's parenting skills.
Issue: Mother exposes her child to unsafe individuals.

Task A1: Complete CFS-approved parenting course.
Type of Task: Completable.
Status: *Completed as of October, 2024.*

Task A2: Regularly attend visits and maintain contact with child.
Type of Task: Ongoing.
Status: *Ongoing, successfully.*
Consistent since August, 2024, with 1 weekly supervised visit and four bedtime phone calls per week.

Task A3: Follow provider recommendations, meet child's physical and emotional needs, cooperate with in-home services providers.
Type of Task: Ongoing.
Status: *Ongoing, successfully.*
Mother recognized unsafe individuals and was able to vocalize her plan for and commitment to keep W.B.A. away from unsafe individuals when reunified.

Task A4: Keep child safe in her care during visitation and trial home visits.
Type of Task: Ongoing.
Status: *Ongoing, successfully.*
Mother has consistently exercised proper protective capacities while visiting child.

Task A5: Once trial home visit begins, maintain child's medical, dental, and service visits.
Type of Task: Conditional, ongoing.
Status: *Condition not met so task not begun.*
The child had not yet been placed back with Mother under a trial home visit, so this task had not begun. Mother did attend one medical appointment with placement.

Treatment Plan Condition B: Mother's chemical dependency.
Issue: Excessive alcohol use.

Task B1: Complete a chemical dependency evaluation.
Type of Task: Completable.
Status: *Completed August 28, 2025.* (second eval.)

Task B2: Follow CD evaluation and provider recommendations.
Type of Task: Ongoing.
Status: *Ongoing, successfully.*
Mother more than halfway through IOP.

Task B3: Not use alcohol or drugs.
Type of Task: Ongoing.
Status: *Ongoing, improving.*
No recent positive UAs for alcohol

Task B4: Drug and alcohol testing
Type of Task: Ongoing.
Status: *Ongoing, improving*
Increased testing compliance recently

Task B5: Relapse Prevention Plan
Type of Task: Conditional, Completable.
Status: *Condition not met, not at point of treatment where relapse prevention plan is drafted.*

Treatment Plan Condition C: Mother's mental health.

Issue: Serious mental health issues not consistently treated.

Task C1: Obtain a psychological evaluation and follow recommendations.

Type of task: *Obtain evaluation: completable; follow recommendations: ongoing.*

Status: *Obtain Evaluation: Completed.*
Follow Recommendations: Ongoing.

Mother was working on maintaining sobriety as recommended and on removing dangerous people from her life.

Task B2: Enroll in, attend, and participate in counseling.

Type of task: Ongoing.

Status: *Ongoing successfully.*

Mother was engaged with a therapist.

Task B3: Complete anger management class.

Type of task: Completable.

Status: *Not begun; CPS has not discussed anger management with Mother or referred her to a provider.*

Treatment Plan Condition D: Housing.

Issue: Safe appropriate housing.

Task D1: Maintain safe and stable housing.

Type of Task: Ongoing.

Status: *Ongoing, successfully.*

Mother has own apartment.

Task D2: No unapproved, unsafe housemates.

Type of Task: Ongoing.

Status: *Ongoing.*

Sister will move out, Cameron incarcerated, safety plan.

Task D3: Keeping Department informed when child in her care.

Type of task: Conditional, ongoing.

Status: *Condition not yet met; task not yet begun.*

Treatment Plan Condition G: Case administration tasks.

Task G1: Maintain consistent contact with Department.

Type of Task: Ongoing.

Status: *Ongoing, successfully.*

Regular attendance at twice-monthly meetings

Task G2: Sign necessary releases.

Type of task: Ongoing.

Status: *Ongoing, successfully.*

Releases signed as necessary.

SUMMARY OF MOTHER'S TREATMENT PLAN PROGRESS:

Completable tasks: 4

Completed: 3 parenting course, CD eval, psych. eval.

Not begun: 1 anger management (no dept. referral).

Ongoing Tasks: 12

Ongoing, successfully: 8 Attend visits, meet child's needs in visits, keep child safe in visits, follow CD recommendations, counseling, safe housing, meetings with Department, releases.

Ongoing, improving: 4 sobriety, drug and alcohol testing, unsafe housemates, follow psych eval recommendations.

Conditional Ongoing Tasks: 3

Conditions not met to begin tasks: 3 Trial home visit tasks: make appointments, relapse prevention plan, inform Department.

C. Facts Relating to Whether the Department Made reasonable Efforts:

17. Mother requested accommodations on account of her mental illness and co-occurring conditions, including more time to complete her treatment plan, on

August 7, 2024. Transcript, Status Hearing, 8-7-24, p.13, l. 5-8, l. 24 to p. 14, l.2. The Department never offered accommodations.

18. CPS Hoffman identified Mother's relationship with Cameron, her open-door policy, her inability to change, and the logistics of communication as barriers to Mother's progress under the treatment plan. Transcript, Termination Hearing, 1-2-25, p. 216, l. 9-25.

19. CPS Petrini identified Mother's delay in filling out releases as a barrier to monitoring Mother's progress. Transcript, Termination Hearing, 1-3-25, p. 29, l. 9-15.

20. Dr. Susan Day noted that people with Mother's psychological diagnoses have difficulty with people in positions of authority, experience conflictual relationships, are distrustful and suspicious of others, and blame others for their difficulties. Notice of Filing Mother's Confidential Psychological Evaluation, Document 35, 12-26-23. People with personality disorders have difficulty in sticking with treatment due to the symptoms of the disorder itself, although treatment is possible and can be beneficial and significantly reduce a range of psychiatric symptoms through a variety of specialized psychotherapeutic interventions. *"Effectiveness of outpatient and community treatments for people with a diagnosis of 'personality disorder': systemic review and meta-analysis"*. Katakis et al., BMC Psychiatry, 2023 Jan. 21;12:57 (*"Challenging therapeutic pessimism associated*

with this patient group is equally important, considering the effectiveness of the interventions and patients' engagement with those treatments").

21. Mother's adoptive father Bob and his wife Maryann provided some family support to Mother and her children before the case started. Edward is a former foster parent of multiple foster children, including Mother, and an actuary and economist. He has deep personal experience with mental illness with his ex-wife, Mother's adoptive mother. He was aware of Mother's past substance use and of her unhealthy relationship choices. He has a perceptive, balanced view of Mother's issues and challenges. Transcript, Termination Hearing 1-2-25, p. 219, l. 17 to p. 220, l. 19. p. 144-189.

22. When Mother recommended that her father serve as a visitation supervisor, the Department arbitrarily denied the request on the grounds that the child allegedly did not want Bob as a supervisor. Transcript, Termination Hearing, 1-3-25, p. 17, l. 9-21. The record reflects no other time that the Child was consulted about visitation supervisors.

STANDARD OF REVIEW

This Court reviews a district court's decision to terminate parental rights for and abuse of discretion. *In re A.L.P.*, 2020 MT 87, par. 12, 399 Mont. 504, 510, 461 P.3d 136, 140.

A court errs and abuses its discretion if it terminates parental rights based on clearly erroneous findings of fact, erroneous conclusions of law, or otherwise acts arbitrarily, without sound employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *In re D.L.L.*, 2025 MT 98, 421 Mont. 522, 568 P.3d 552.

Findings of fact are clearly erroneous if not supported by substantial evidence, the court misapprehended the effect of the evidence, or this Court is firmly convinced a mistake was made. *Id.*, citing *In re D.H.*, 2001 MT 200, 306 Mont. 278, 33 P.3d 616. This Court reviews lower court conclusions of law for correctness. *Id.*, citing *In re L.H.*, 2021 MT 199, 405 Mont. 173, 492 P.3d 1218.

SUMMARY OF ARGUMENT

1. The District Court abused its discretion by terminating Mother's parental rights, when the less restrictive permanency option of guardianship was more appropriate. The child was placed with and being cared by a relative. Guardianship would have guaranteed the youth's safety, provided permanency, placed him on an equal legal status with his older brother, and better suited the child's need to maintain connection with his mother.

2. The District Court erred in determining that the conduct or condition of Mother rendering her unfit, unable, or unwilling to give the Youth adequate parental care was unlikely to change within a reasonable time. The District Court's description of Mother's engagement and progress under her treatment plan as "last-ditch efforts", "minimal compliance", and bearing "little impact" was clearly wrong. Further, the Department did not make reasonable efforts to reunify Mother and Child under the current requirements of 41-3-423(b), M.C.A. in effect at the time the treatment plan was approved.

3. The Court erred in concluding that the child suffered chronic severe neglect under 41-3-423(2)(a), M.C.A.

ARGUMENT

1. The District Court Erred in Not Finding That Guardianship was the Preferred Permanency Option.

The primary permanency options in a civil child abuse and neglect case brought under Title 41, Chapter 3, 41-3-101 et seq., M.C.A. in order of preference, are reunification, guardianship, and termination. 41-3-101(1)(b); 41-3-444; 41-3-602 et seq., M.C.A. A natural parent's right to the care and custody of her child is a constitutionally protected fundamental liberty interest that must be protected by fundamentally fair proceedings. *In re C.M.C.*, 2009 MT 153, 350 Mont. 391, 208 P.3d 809; *In re A.J.C.*, 2018 MT 234, 393 Mont. 9, 427 P.3d 59. A child has a concomitant constitutionally protected fundamental liberty interest to be in the care and custody of their natural parent, and a right to a safe and healthy childhood in a permanent placement. 41-3-101(e), -(f), M.C.A.

The primary purpose of the child abuse and neglect statutes is to ensure children who are abused or neglected are protected and made safe. 41-3-101(1)(a), M.C.A. The Department's primary directive is to achieve this purpose in a family environment and preserve the unity and the welfare of the family whenever possible. 41-3-101(1)(b), M.C.A.

Successful and safe reunification with the parent(s) satisfies every right and goal of the child abuse and neglect statutes. If reunification can't be achieved,

guardianship without termination of parental rights best balances the conflicting goals and rights of the parties, particularly where, as here, the child is in a family placement. Where a guardianship cannot keep the child safe, then a termination of parental rights may be the only alternative.

In 2013, this Court held that a district court was not required to consider other options before terminating parental rights if the statutory criteria are met. *In re T.S.*, 2013 MT 274, 372 Mont. 79, 310 P.3d 538. However, practical, precedential, and legislative actions in the past half-decade have made clear that the *T.S.* ruling cannot and should not continue to apply.

The Montana legislature's recent enactments in this field have demonstrated a policy change toward disfavoring termination and increasing procedures and statutory guidelines designed to protect parents, including adopting early procedures for mediation and removal review (41-3-307 and 41-3-306, M.C.A.), concretely and clearly defining reasonable efforts (41-3-423(b), M.C.A.), adoption of a state ICWA (41-3-1301 et seq., M.C.A.), and adopting a mechanism for reinstatement of parental rights (41-3-615, M.C.A.). The department and the district courts cannot proceed with business as it was done in the past, considering this fundamental and clear policy and statutory shift. *In re T.S.* no longer reflects the legislative policy mandate. Guardianship should be compared to Termination when determining the child's best interests.

As noted by Justice Gustafson, the Department has demonstrated a persistent hostility toward or diminishment of guardianship as a permanency option in these cases, including taking the positions that guardianships do not provide permanency; that they are easy to dissolve, that they keep the child less safe than termination and adoption, and that they lead to higher reentry rates by the child into the child welfare system. Justice Gustafson has correctly labeled these positions as myths and misconceptions, citing significant research. *See, e.g., In re D.L.L.*, 2025 MT 98, 421 Mont. 522, 568 P.3d 552 (*Gustafson, J., concurring.*); *In re A.B.*, 2020 MT 64, 399 Mont. 219, 460 P.3d 405 (*Gustafson, J., concurring, joined by Justices Sandefur and McKinnon*).

[I]t is counterproductive to terminate a parent's rights when such does not increase the overall safety or stability of the child and is not in the best interests of the child's family.

In re D.L.L., 2025 MT 98, 421 Mont. 522, 568 P.3d 552 (*Gustafson, J., concurring*).

In the present case, the evidence conclusively establishes that terminating Mother's parental rights would not increase the overall safety or stability of W.B.A. Specifically, it is undisputed that the child's brother, A.A., has been in a guardianship with the same placement since late 2022, and has been entirely safe and stable within that guardianship. Because of his guardianship, A.A. was not named as a youth in need of care in this case. Nor has the Department attempted to

terminate Mother's parental rights to A.A., because the Department believes that he is safe and stable in that guardianship.

There was no evidence, let alone clear and convincing evidence, presented at the termination hearing comparing guardianship to termination or suggesting that W.B.A.'s safety or stability would be better if his mother's parental rights were terminated. The family placement testified that she wouldn't consider a guardianship, while refusing to provide any reasons therefore, but her testimony only revealed her preference and is not evidence that termination is in the child's best interests. The child's best interests outweigh the placement's permanency preference. It is the Department initially and ultimately the court which determines the appropriate permanency for the child; placements, whether family or foster, are not permitted by ultimatum to force a permanency result against the child's best interests. They have no parental liberty interest in raising the child. *Cf. In re U.A.C.*, 2022 MT 230, 410 Mont. 493, 520 P.3d 295.

The District Court relied on the presumption set forth in 41-3-604(1), M.C.A. in determining that the child's best interests would be served by termination. Termination Order, Document 77, 4-16-25, p. 25, par. 48. Given that the child was placed with his brother in the care of his brother's paternal grandmother, it is undisputed that the Department was not required to file a petition for termination regardless of the presumption. 41-3-604(1)(a), M.C.A.

Unlike the District Court in *In re A.B.*, 2020 MT 64, 460 P.3d 405, 399 P.3d 219, the District Court did not “thoughtfully consider” guardianship as well as termination in deciding that termination and adoption were in W.B.A.’s best interests.

Notably, a guardianship would have also placed W.B.A. on the same legal footing as his brother, promoting equality under the law and unity within the family.

Also significant is the Department’s agreement to guardianship, while completely failing to follow through with its promise to prepare a petition and obtain the guardianship. This represents a fundamentally unfair position and procedural failing, especially given that there are no identified safety or stability risks in guardianship, as demonstrated by the guardianship of W.B.A.’s brother.

On this record, the most likely reason for this failure seems to be a lack of communication between the Department’s multiple assigned caseworkers upon reassignment, perhaps exacerbated by the simultaneous turnover of counsel representing Mother and the fact that the agreement for guardianship never appeared on the record and was presented as ambiguous in the Court minutes. But regardless, if the Department had acted with diligence when the agreement was made, or had begun the process in July 2024, when they believed Mother to be struggling and making insufficient progress, the child would be as safe and stable as his brother and Mother’s parental rights would be intact.

Given that the District Court failed to identify any practical or legal safety or stability difference between the permanencies of guardianship or termination, the Court’s factual and legal determination in Paragraph 56 of its termination order that termination was in the child’s best interest is legally unsound, insufficient, and not supported by necessary evidence. The best interest finding was arbitrary and unreasonable, resulting in substantial injustice to Mother.

Accordingly, the District Court’s grant of termination under both theories – failure of treatment plan, and chronic abuse – should be reversed.

2. The District Court Erred holding Mother’s condition rendering her unfit, was unlikely to change within a reasonable time.

This Court has set forth in its legal framework in detail:

A court may order the termination of a parent-child legal relationship upon a finding of clear and convincing evidence that the child is an adjudicated youth in need of care and both of the following exist: (i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and (ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA. K.H. appeals the District Court's finding on the second of these requirements—that the conduct or condition rendering her unfit to parent was unlikely to change within a reasonable time.

“[C]onduct or condition of the parent” refers to the condition or reason causing the treatment plan to be unsuccessful. *In re M.T.*, 2020 MT 262, ¶ 32 n.6, 401 Mont. 518, 474 P.3d 820; *J.B.*, ¶ 22 (citation omitted). In determining what constitutes a reasonable time, courts must consider that the best interest of the child, though balanced with the right to parent, is “paramount.” *In re D.F.*, 2007 MT 147, ¶ 43, 337 Mont. 461, 161 P.3d 825. *See* § 41-3-609(3), MCA; *In re K.L.*, 2014 MT 28, ¶ 15,

373 Mont. 421, 318 P.2d 691. The best interest of the child is presumed to be served by termination of parental rights *33 if the child has been in foster care under physical custody of the state for fifteen of the most recent twenty-two months. Section 41-3-604(1), MCA.

Section 41-3-423(1), MCA, requires the Department to make “reasonable efforts” to “reunify families that have been separated by the state.”⁵ We have held that the presence of reasonable efforts by the Department may be a relevant consideration in determining whether the conduct or condition rendering a parent unfit, unwilling, or unable to parent is unlikely to change within a reasonable time under § 41-3-609(1)(f), MCA. See *In re R.J.F.*, ¶¶ 25-28 (citing § 41-3-609(1)(f)(ii), MCA; *In re D.B.*, ¶ 25). While, in some cases, a “conclusion that a parent is unlikely to change could be called into question if the Department failed to make reasonable efforts to assist the parent ..., in other cases, a parent's unlikelihood of change may well be unaffected by the Department's efforts.” *In re C.M.*, 2019 MT 227, ¶ 22, 397 Mont. 275, 449 P.3d 806 (citing *In re R.J.F.*, ¶ 26). See also *In re C.M.G.*, 2020 MT 15, ¶ 14, 398 Mont. 369, 456 P.3d 1017 (“[A] parent may challenge the State's contention that the conduct or condition rendering the parent unfit is unlikely to change within a reasonable time, by arguing that the department failed to make reasonable efforts.” (citing *In re C.M.*, ¶ 22; *In re R.J.F.*, ¶ 26)).

In re A.M.G., 2022 MT 175, par. 20-22, 410 Mont. 25, 32–33, 517 P.3d 149, 154–55.

This Court has not adopted a specific timeline to determine what is a “reasonable time” for completion of a treatment plan. The Court does refer to the fifteen/twenty-two month presumption but that presumption alone cannot provide the basis for a finding that a parent’s condition won’t change within a reasonable time on which termination of parental rights is based. *In re D.B.*, 2007 MT 246, 339 Mont. 240, 168 P.3d 691.

a. The evidence showed that Mother was substantially and successfully engaged at the time of her termination hearing.

In its termination order, the District Court found that Mother's condition rendering her unable to parent was unlikely to change in a reasonable time, describing her efforts to complete her treatment plan as "last-ditch", "minimal", and bearing "little impact". Termination Order, Document 77, 4-16-25, p. 24, par. 52, p. 31, par. 7, p. 32, par. 8.

Mother did not dispute that her treatment plan was incomplete at the time of the termination hearing. Rather, she contended that she was substantially engaged, making substantial progress, and moving toward reunification at a reasonable pace. At the time of termination, fourteen months after the treatment plan was approved, Mother had ten months of partial engagement and five months of full engagement with almost all her treatment plan tasks and was making steady progress.

As between the District Court's and the Department's characterization of Mother's treatment plan progress as minimal and Mother's characterization of it as substantial, Mother's assessment is clearly more accurate. The District Court misapprehended this evidence to Mother's prejudice.

Similarly, Mother testified very clearly about her protective capacities and her resolve to keep dangerous individuals, including her sister and Cameron, away from her child, and also adopted a significant one and done boundary for her own protection.

The Court leaned heavily on the existence of Mother's mental health conditions in finding that she would not complete her treatment plan in a reasonable time. But the record reflects that Mother had successfully completed a treatment plan leading to dismissal of her 2016 case in 2018 after successful completion of a treatment plan and that she parented for four years thereafter without significant Department involvement. She then successfully navigated a brief period of temporary investigative authority in summer/fall of 2022. Thus, she has twice demonstrated the ability to work with the Department and return to functional parenting.

Mental illness, including bipolar disorder and personality disorders, do not in and of themselves exclude a parent from parenting their child. The Department clearly agrees with this, since it drafted a treatment plan and worked with Mother to complete it. If the Department didn't believe it was possible for her to safely parent, it could have filed for guardianship immediately or requested a finding that a treatment plan was not necessary. Unfortunately, as outlined below, the Department wasn't up to the tasks of meaningfully assisting a mentally ill parent through successful treatment plan completion or complying with the new reasonable efforts statute.

b. The Department failed to make reasonable, statutorily mandated efforts necessary for Mother's successful completion of her treatment plan.

The Department must make reasonable efforts to reunify families that have

been separated by the state. 41-3-423(1)(a), M.C.A. In 2023, shortly before the filing of this case, the Montana Legislature revised the reasonable efforts statute to specifically describe the good faith efforts that the Department must take. 41-3-423(1)(b), M.C.A. These include, in pertinent part, 1. Identifying appropriate services and *helping the parent overcome barriers*, including *actively assisting* the parent in obtaining appropriate services; 2. With parental consent, identify and invite the extended family to participate in providing support and services to the family and to participate in family team meetings, permanency planning, and resolution of placement issues; 3. Consulting with family members to provide family structure and support for the child and parents; 4. Facilitating the use of remedial and rehabilitative services; 5. Considering alternative ways to address the needs of the parent and the family when optimum services do not exist or are not available. 41-3-423(1)(b)(ii), -(iii), -(iv), -(v), -(x), M.C.A.

The federal Americans with Disabilities Act provides separate but similar obligations in child neglect cases involving parents with mental or cognitive disabilities, requiring both the state child welfare agency and the district court to provide reasonable accommodations to ensure equal access to services and processes. These accommodations can include modifications to communication, services, and policies to address the needs of the parent. 28 C.F.R. 35.130(b)(1), -(7)(2024). The child welfare agency must conduct an individualized assessment of

the needs of the parent, without reliance on generalizations or stereotypes about the parent's disability. 28 C.F.R. 35.130(2024).

In this case, the Department failed to understand that the nature of Mother's mental illness and her status as a domestic abuse victim created barriers to engagement in the treatment plan, even though Dr. Day identified some of them in her report. Thus, they failed to identify the inherent barriers to Mother's successful engagement and progress in her treatment plan. CPS Petrini seems to have accidentally adopted an approach with worked, when combined with Mother's internal motivations, given that her engagement and progress increased significantly after he assumed handling the case. But the Department lacked the insight to change lanes and help Mother on her productive path. The Department's failure and lack of expertise in handling a parent with complex emotional needs cannot and should not be held against her. It is not a moral failing by Mother, it is a professional expertise failing by the Department.

Unfortunately, the District Court demonstrated the same lack of conceptual understanding of Mother's specialized needs and necessary accommodations, remedial and rehabilitative services, and alternative ways to address her needs, as required under 41-3-423(1)(b)(ii), -(v), and (x), M.C.A.

The Department further failed to meaningful involve and develop Mother's extended family and friends in providing her support and services, aside from

placement, the Child's fictive grandmother. 41-3-423(1)(b)(iii) and -(iv), M.C.A. require the Department to help the parent develop a broader social network by involving family members and helping them become provide extended family structure and support. Mother advised the Department that she would like her adoptive father Bob involved in the process. He and his wife were already offering some support. The Department quickly concluded that he did not understand the full nature of her emotional and substance abuse issues and discounted his involvement.

The District Court seems to have been mistaken or to have misapprehended the effect of Bob's extensive testimony about his daughter's substance use, unhealthy relationships, and the dangerousness of her daughter's paramours, given his extensive examination and disclosures about those exact comments. Termination Order, Document 77, 4-16-25, paragraph 38. The District Court's finding in this paragraph sounds more like the argument of counsel for the Department, with its misleading factual recitations, rather than the careful, balanced findings of an objective court. This finding was error by the Court.

Ultimately, the District Court should have determined that the Department failed to meet its statutory burden to involve and develop extended family members to provide structure and safety.

The District Court didn't conduct a subsection-by-subsection review of the 41-3-423(1)(b), M.C.A with the facts on the record. Rather, the Court just provided

a list of Department efforts and summarily declared they constituted reasonable efforts. Termination Order, Document 77, 4-16-25, p 28-30, par. 64, p. 31, par. 6. Parsed down to their essence, the Efforts taken by the Department after removal to reunify the family consisted of arranging and supporting visits with the child, developing a treatment plan, referring Mother to various providers, held treatment team meetings, and communicated with Mother and occasionally her providers.

That level of Department effort may arguably have been acceptable under pre-2023 reasonable efforts standards, but it is not now. That level of judicial analysis of reasonable efforts may arguably have been acceptable under pre-2023 reasonable efforts standards, but it is not now.

The Montana Legislature revised 41-3-423(1)(b), M.C.A. to specifically adopt concrete, detailed standards to define the Department's duty to make reasonable efforts and to provide the overriding requirement that such efforts must be made in good faith. The duties imposed on the Department to act in good faith, to identify appropriate services, to overcome barriers, and to consider alternative ways to address the parent's needs, establish an imperative professional duty that the Department understand the limitations and needs of the parents and the mandates of the ADA in crafting and implementing appropriate treatment plan methods. *See "Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under*

Title II of the Americans with Disabilities Act and Section 5-4 of the Rehabilitative Act”, issued by United States HHS and DOJ, <https://www.ada.gov/resources/protecting-parent-rights/>.

The Montana legislature has adopted a series of parental right-focused statutes, including 41-3-423(1)(b), M.C.A., in recent legislative sessions. There is a clear legislative policy priority to require the Department to do more and better for the benefit of parents in assisting them with successfully navigating the adjudication, treatment, and reunification process. This Court should apply this policy focus in reviewing and applying these new statutes.

The Department failed to provide reasonable efforts as defined since 2023. Therefore, the District Court’s termination of parental rights for failure of treatment plan should be dismissed.

3. The Court erred in concluding that the child suffered chronic severe neglect.

The Court may order a termination of parental rights where the parent has subjected a child to chronic, severe neglect, by clear and convincing evidence. 41-3-609(1)(d), and 41-3-423(2)(a), M.C.A. The statute does not define “chronic, severe neglect” but this Court has found that the Legislature intended the meaning to be comparable in severity to the other bases for termination in that statutory subsection, including torture, sexual abuse, chronic abuse, and abandonment.

Section 41-3-423(2)(a), MCA, lists “chronic, severe neglect” alongside abandonment, torture, chronic abuse, and sexual abuse as “aggravated circumstances.” Courts must measure the severity of neglect in relation to those other grave conditions.

In re S.W., 2025 MT 178, ¶ 31, 573 P.3d 781, 790.

This Court has previously defined “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 Int'l Dictionary*, 402 (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. The record provides substantial evidence that both S.W. and D.W. were subjected to chronic, severe abuse. From birth, the twins suffered from exposure to drugs. They did not receive customary pediatric care after being discharged from the hospital and, instead, were moved from a homeless shelter into a residence in another state that was “found in deplorable conditions.” S.W. and D.W. cried as their parents screamed at one another—enough to prompt others to alert law enforcement. Adults in the home, including a Level 2 sex offender, allowed the twins to sleep under electrical wires, in a broken playpen, with dirty diapers, burns from diaper rash, and in clothes that did not fit. Over the eight months of their lives, S.W. and D.W. had not been properly cared for, and they exhibited signs of developmental delay as a result. As the District Court noted, severe neglect had become a chronic issue in Father's home that had “repeatedly drawn the attention of the Department” and had “repeatedly resulted in the removal of [his] children.”

In ref S.W., 2025 MT 178, ¶ 18, 573 P.3d 781, 788.

The words “chronic” and “severe” have to have meaning, or they would not be included in the statute.

There was no clear and convincing evidence presented at the termination hearing that the three discrete instances of Department and Court involvement in this case over 9 years reflect “frequent recurrence [of abuse] over a long time”. Frequent means on many occasions, in many cases, or in quick succession, often. Three is not many. Three is a few. Nor is there clear and convincing evidence of slowly progressing seriousness. Any neglect here was not chronic.

Severe here means as bad as torture or sexual abuse. Exposure to domestic abuse accompanied by alcohol overuse is neglect. But it is not logically or thematically analogous to torture or sexual assault. Any neglect here is not severe.

Courts must resist the urge to erode the very high bar that must be met in cases which support termination without a treatment plan, which would frustrate the objectives of the Legislature and the rights of parents. This case does not qualify.

CONCLUSION

For all of the reasons and in light of all of the errors set forth above, Mother respectfully requests that this Court reverse the District Court’s Termination Order and remand for completion of Mother’s treatment plan or the filing of a petition for guardianship.

Dated this 17th day of September, 2025.

Allen P. Lanning
Allen P. Lanning
Attorney for E.A.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief is proportionately spaced, has a 14-point typeface, and consists of 7,018 words.

Allen P. Lanning
Allen P. Lanning

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and correct copy of the foregoing **Appellant's Opening Brief** with the Clerk of the Montana Supreme Court and that I served true and correct copies upon each attorney of record and unrepresented party by email.

Allen P. Lanning
Allen P. Lanning

APPENDIX

TABLE OF CONTENTS

Order of Termination

1

CERTIFICATE OF SERVICE

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