IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 09-0370

IN THE MATTER OF:

J.J.L., D.J.L., and R.D.L.L.

Youths in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Dirk M. Sandefur, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court properly exercise its discretion pursuant to the statutory criteria when it terminated the parental rights of the father, D.L.?

2. Was it ineffective assistance of counsel not to object to evidence of D.L.'s step children's statements testified to by their counselors and properly admitted at the adjudication hearing under the residual hearsay exception, Mont. R. Evid. 803(24), in accordance with the Montana Rules of Evidence, the discretion of the district court, and the best interests of the children?

3. Did the district court correctly conclude that the Indian Child Welfare Act (ICWA) did not apply to this case, because there was insufficient evidence that the Children were enrolled or eligible for enrollment in any federally recognized Indian tribe?

STATEMENT OF THE CASE

The Appellant father, D.L., Sr., appeals from the district court order and judgment terminating D.L.'s parental rights to his three children: 5-year-old daughter J.J.L., 2-year-old son D.L.L., Jr.,[1] and 1-year-old daughter D.J.L. (the

[1] Designated as "R.D.L.L." in the district court Case Register for Case No. DDJ-08-087-Y, in documents filed therein after June 19, 2009, and in the caption of this appeal.

Children). (D.C. Doc. 36,[2] 5/18/09 Tr. at 170-90, attached to Br. of Appellant as Exs. A & B; D.C. Doc. 42.) The Children's mother, A.P., also has three older children (the Step Children): a teenaged son, J.M. (living outside the home with another relative); a 13-year-old daughter, R.P.; and a 12-year-old son, J.P., also referred to as "J.B." (6/19/08 Tr. at 19-20.) The district court dismissed the petition as to A.P. and granted her full custody of the Children, based on the satisfactory completion of the terms of her treatment plan. (D.C. Doc. 36 at 1, 7; 5/18/09 Tr. at 188-90.)

This action commenced on April 7, 2008, when the State filed its Petition for Emergency Protective Services, Adjudication as Youth in Need of Care and Temporary Legal Custody based on the allegations that D.L. abused the Children and Step Children, in particular D.L.L., Jr., R.P, and J.P. (D.C. Doc. 1.) The district court granted emergency protective services based on the Petition, and ordered a show cause and adjudicatory hearing. (D.C. Doc. 5.) A citation was issued and served on D.L. requiring his appearance at the show cause hearing. (D.C. Doc. 4.)

The Office of the State Public Defender first appointed Lawrence A. LaFountain to represent the father (D.C. Doc. 7), and then

[2] Unless otherwise noted, references to the district court record will be to "D.C. Doc." numbers in Case No. DDJ-08-085-Y.

substituted Joseph Gilligan as counsel for D.L. in June 2008 (D.C. Doc. 11), who represented D.L. in these proceedings until Meghan Luft-Sutton took over in October 2008. (D.C. Doc. 19.) No evidence of these attorneys' qualifications, training, or experience appears in the record on appeal.

The district court held a show cause hearing at which testimony was given and at which the district court made factual findings that there was probable cause to believe the Children were youths in need of care. (6/19/08 Tr. at 1-75.) D.L. did not show up to that hearing, but his attorney, Mr. Gilligan, did--although he said he'd had "absolutely no contact" with his absent client. (6/19/08 Tr. at 3.) Despite finding probable cause, the district court determined that without considering the hearsay statements of R.P. and J.P., as testified to by their licensed professional counselors, there was insufficient evidence to determine the Children were youths in need of care by a preponderance of the evidence. (6/19/08 Tr. at 57-72; D.C. Doc. 13 at 3-4.) The district court allowed the parties to file briefs regarding the admissibility of such evidence. (6/19/08 Tr. at 63-64; D.C. Doc. 13 at 3-4.) The State filed a brief, but D.L. and A.P. did not. (D.C. Doc. 14; D.C. Doc. 17 at 1; 8/18/08 Tr. at 9-10.)

Based on the State's brief--and D.L.'s deemed admission under Unif. Dist. Ct. R. 2(b) by failure to file a response brief--the district court determined the State's offer of proof was well-taken and ruled in favor of admissibility of the

statements under the residual hearsay exception, Mont. R. Evid. 803(24) (availability of declarant immaterial). (D.C. Doc. 14; D.C. Doc. 17 at 1-2; 8/18/08 Tr. at 10-12.) Based on this admitted evidence of sexual and physical abuse by D.L., together with the previous findings of fact and conclusions, the district court adjudicated the Children as youths in need of care. (D.C. Doc. 17 at 2; 8/18/08 Tr. at 12.)

Following adjudication of the Children as youths in need of care, the district court approved treatment plans for D.L. and A.P. (9/15/08 Tr. at 26-39; D.C. Doc. 18.) Upon D.L.'s failure to cooperate with the State or comply with the terms of his treatment plan, the State filed a Petition for Termination of Parental Rights of Father and Dismiss With Custody to Mother. (D.C. Doc. 23.)

The district court held an evidentiary hearing and ordered the termination of parental rights based on satisfaction of the statutory criteria. (5/18/09 Tr. at 175-91; D.C. Doc. 36 at 6-7.) The district court also concluded that the best interests of the Children's physical, mental, and emotional condition would be served by termination of the parent-child legal relationship. (5/18/09 Tr. at 189; D.C. Doc. 36 at 7.)

The State alleged throughout the proceedings that the Indian Child Welfare Act did not apply to this case. (Aff. at 2, D.C. Doc. 1; D.C. Doc. 23 at 2.) Upon inquiry from the State, the Turtle Mountain Band of Chippewa Indians--with

which D.L. was enrolled as a member--expressly indicated that the Children were not "eligible or enrolled." (D.C. Doc. 35.5.) At the termination hearing, for the first time, D.L. testified that he was "affiliated" with--but not a member of--the Little Shell Band of the Chippewa, due to D.L.'s mother's alleged membership, and that he "believed" the estranged father of the Children's mother, A.P., may have been part Iroquois. (5/18/09 Tr. at 139, 149-50, 152-53, 154-55.) The district court concluded that "based on the proffered evidence this is not an ICWA case." (D.C. Doc. 36 at 6.)

STATEMENT OF THE FACTS

Before commencement of this action, A.P., D.L., and four of A.P.'s children--R.P., J.P., J.L.L., and D.L.L., Jr.--all lived together. (6/19/08 Tr. at 19-20.) Then, in September 2007, A.P. made allegations that she witnessed D.L. sexually abuse D.L.L., Jr., by fondling the child's testicles, and that D.L. may have also sexually abused the Step Children. (6/19/08 Tr. at 20-21; Aff. at 2-3, D.C. Doc. 1.) An investigation by law enforcement and Child Protective Services ensued which formed the basis of this action. (Aff. at 2-8, D.C. Doc. 1.)

Around that time, D.L. left the home and was incarcerated on a misdemeanor probation violation. (Aff. at 4, D.C. Doc. 1.) A.P. took the children to the Great Falls Mercy Home for a few days, then returned home, changed the

locks, and obtained a justice court restraining order preventing D.L. from being with or contacting A.P. and her children. (Id.; 6/19/08 Tr. at 22, 31-32.) That restraining order would later be extended and remain in effect throughout the pendency of this action. (6/19/08 Tr. at 31.)

A.P.'s and D.L.'s youngest child, D.J.L., was born in March 2008. (Aff. at 6, D.C. Doc. 1.) There have been no allegations in this action of abuse by A.P. (6/19/08 Tr. at 40.) The Children and Step Children were never removed from the home with their mother, and A.P. retained physical custody of the Children throughout. (6/19/08 Tr. at 32; 5/18/09 Tr. at 88, 106-07, 161-62.) During the same time period, D.L. has not lived with A.P. or any of the children, and his only contact with the Children was a single supervised visit. (5/18/09 Tr. at 100.)

Show Cause Hearing, June 19, 2008

The following facts were presented at the show cause hearing and were found by the district court to establish that probable cause existed to support the allegations of abuse and neglect. (D.C. Doc. 13 at 1-3.)

In September 2007, the Cascade County Sheriff s office received a referral that D.L. had sexually abused D.L.L., Jr., and one of the other children. (6/19/08 Tr. at 20-21, 43-44.) A.P. told the Sheriff's department that she had handed D.L.L., Jr., to his father in the bathtub and she saw D.L. fondle D.L.L., Jr.'s testicles. (Id. at 43.)

Sheriff's Detective Ivers also interviewed stepdaughter R.P., who said that D.L. had stuck his privates in her privates, that she had seen D.L. slap and hit the other kids, that the assaults happened on the couch and that he would lick his hand and touch his privates before sticking them in her. (6/19/08 Tr. at 44-47.) Detective Ivers asked the mother if D.L. lubricated himself during sex by licking his hand and she said yes, but she also stated that R.P. had never walked in on them having sex or seen them. (Id. at 47.)

Stepson J.B. disclosed to Detective Ivers that D.L. holds him by the neck, he saw D.L. swing the baby (D.L.L., Jr.) around in the high chair when the baby was crying, and that D.L. had touched him sexually. (6/19/08 Tr. at 48-52.) Detective Ivers also interviewed the oldest stepson, J.M., who disclosed that D.L. would ask him to sleep on the couch with him and that J.M. would wake up with his pants down and would have sexual intercourse with D.L. (Id. at 52-54.)

On or about September 24, 2007, in a follow up with social worker Kenn Englehardt, the mother again stated she saw D.L. fondle D.L.L., Jr., and one of the children had told her D.L. had sexually abused them. (6/19/08 Tr. at 21-23.) A.P. also previously alleged that her oldest son J.M. had sexually assaulted the younger children. (Id. at 23-24.)

D.L. told the social worker, he "could not prove anything, and that he had beaten every other DFS charge against him in his past and that he would beat this

charge." (6/19/08 Tr. at 28.) In regard to the allegations of sexual abuse, D.L. told the social worker and his supervisor that they "could take a picture of his private, referring to his penis, and take a picture of [J.M.'s] private, referring to his penis, and show them to the children and they would tell us who abused them." (Id. at 29.)

The Hearsay Evidence at Issue

At the close of the show cause hearing the district court entered findings of fact and conclusions of law that probable cause existed to support the allegations of abuse and neglect, and the State had shown that there was probable cause to believe that the Children were youths in need of care. (6/19/08 Tr. at 64-72.) However, due to hearsay issues raised sua sponte by the court, the district court did not then adjudicate the Children as youths in need of care. (6/19/08 Tr. at 57-64; D.C. Doc. 13.) Specifically, the district court found that without considering the hearsay statements of R.P. and J.P., as testified to by their licensed professional counselors, there was insufficient evidence to determine the Children were youths in need of care based upon a preponderance of competent evidence. (6/19/08 Tr. at 72; D.C. Doc. 13 at 3.) The district court stated:

> if that hearsay can't be--isn't properly admissible, then there's not enough evidence here for an adjudication and, at best, I can make a probable cause determination under 41-3-432, to set up an adjudicatory hearing where the State could potentially bring in at least [A.P.] to testify about what she saw, and could also potentially bring in [R.P.] or [J.P.]. But if that's not possible or not advisable,

> then what we're looking at here is . . . a TIA [temporary investigative authority], which is only going to get you 90 days.

(6/19/08 Tr. at 64.)

The district court concluded as a matter of law that the State made a "legitimate argument" that Mont. R. Evid. 803(4) (hearsay exception for medical diagnosis or treatment) applied broadly to the testimony of the counselors. (6/19/08 Tr. at 72-73.) The district court ordered that the State "shall brief the hearsay issue and any exceptions to hearsay it believes applies" and allowed that the attorneys for D.L. and A.P. may respond to the State's brief. (6/19/08 Tr. at 72-73 D.C. Doc. 13 at 3-4.) The district court stated, "I can see credible legal arguments either way." (6/19/08 Tr. at 63.) Counsel for A.P. submitted "the finding to the Court's discretion." (Id.) Counsel for D.L. said nothing.

The following summarized testimony of licensed professional counselors Larry Powell (Powell) and Roberta Cladouhos-Powell (Cladouhos-Powell) was presented at the show cause hearing and was the subject of the district court's sua sponte objection to the "substantial amount of hearsay evidence that was presented" and questioned as "a proper basis for adjudication." (8/18/08 Tr. at 9; D.C. Doc. 13 at 3.)

Powell testified without objection at the show cause hearing in regard to his counseling of one of the Step Children, J.P., otherwise known as J.B. (6/19/08 Tr. at 5-13.) J.P. had been in counseling with Powell for a year and a half. (Id. at 6.)

Powell testified that J.B. disclosed in October 2007 that D.L. had sexually abused him by repeatedly engaging in anal intercourse. (Id. at 8-9.) J.B. also disclosed during counseling that D.L. was physically abusive to him and kicked him and slapped him. (Id. at 8.) J.B. made no allegation of abuse by his mother, A.P. (Id. at 12.)

Cladouhos-Powell also testified without objection at the show cause hearing in regard to her counseling of another of the Step Children, R.P. (6/19/08 Tr. at 14-18.) R.P. had been in counseling with Cladouhos-Powell for the last year and a half. (Id. at 14.) In October 2007, R.P. disclosed to Cladouhos-Powell that over the course of about four years, D.L. had been sexually and physically abusive toward her. (Id. at 15-16.) R.P. disclosed that D.L. would have her remove her clothes and would place his penis near and in her vagina, and that he threatened her and she was afraid of him. (Id. at 16-17.) R.P. also made no allegation of abuse by her mother, A.P. (Id. at 18.)

The State filed a brief which "sets forth the law that allows hearsay statements of minors to be admitted at an adjudicatory hearing in a Youth in Need of Care action under the Montana Rules of Evidence." (D.C. Doc. 14 at 1.) The State argued the statements of R.P. and J.P. were admissible under dual grounds: "Pursuant to M. R. Evid.702 and M. R. Evid 803(24) the hearsay statements of the children presented to the Court through the testimony of the licensed counselors

and the sheriff's deputy be admitted." (D.C. Doc. 14 at 5.) The State also noted, "It is the policy in implementing of the child abuse and neglect statutes and actions under Title 41, chapter 3 of the Montana Code Annotated that the 'child's health and safety are of paramount concern' and best interest of the child is the focus and consideration of all involved. § 41-3-101(3) and (4)." Id.

Adjudication Hearing Continued, August 18, 2008

At the continued adjudication hearing, the district court informed the parties that it had read the State's brief as to the hearsay exceptions and noted that neither of the parents submitted a response to the State's brief. (8/18/08 Tr. at 9-10.) At the hearing, D.L.'s counsel said simply that he "did not" file a brief, without other explanation, or objection. (Id. at 10.) Based on consideration of all the evidence at the hearing held on June 19, 2008, the State's brief, and having provided an opportunity for the parents to provide testimony and briefing, the district court made the following conclusion of law:

> The court rejects the State's evidentiary offer pursuant to Mont. R. Evid. Rule 702 on the grounds that child hearsay evidence is not admissible under Mont. R. Evid. Rule 702 for the truth of the matter asserted, but rather, only as a basis of an expert's conclusions and opinion testimony. However, due to the parents' failure or choice not to respond and contest the State's brief and evidentiary offer therein, ***the Court deemed the State's argument under the residual hearsay exception to be well-taken and thus found the affected testimony from the prior hearing to be admissible under the State's uncontested offer.***

(D.C. Doc. 17 at 1-2 (emphasis added).) On the record at the hearing, the district court explained its ruling as follows:

> Now, the balance of the State's argument is, basically, that this is otherwise admissible under a catch-all exception to the hearsay rule, based upon the State's asserted circumstantial indicia of trustworthiness, as referenced in its brief.
>
> And in light of the fact that there's no response brief filed to the State's motion, pursuant to Rule 2 of the Uniform District Court Rules, the Court will deem the State's motion and brief well-taken; and despite the analytical questions and concerns that the Court still has in that regard.
>
> And so, with that objection resolved, then, on the basis of the findings of fact that the Court made previously at the June 19, 2008 hearing, I hereby adjudicate the subject children . . . as Youths in Need of Care.

(8/18/08 Tr. at 11-12; see also D.C. Doc. 17 at 1-2.)

The district court determined that the "cause, as far as possible to ascertain, is: the alleged sexual abuse of other children in the home and physical abuse by the Father" and the "nature of the abuse and neglect . . . are as follows: the Father has allegedly sexually abused and physically abused the children," as more fully described in the affidavit of the social worker. (D.C. Doc. 17 at 2; see Aff. at 2-8, D.C. Doc. 1.) In addition to adjudicating the Children as youths in need of care, the district court granted temporary legal custody to the State and determined that the current placement of the Children at home with the mother, A.P., with a safety

plan in place, and their removal from the father, remained in their best interest at the time. (D.C. Doc. 17 at 2.)

Termination of D.L.'s Parental Rights

At a three-month review and status hearing, it appeared and, the district court found, that D.L. had done nothing to comply with his treatment plan, had failed to appear at any scheduled meeting or appointments, and was in violation of certain other court orders, including a justice court restraining order. (12/8/08 Tr. at 48-50, 51; D.C. Doc. 20.) It appeared to the district court under those circumstances, that D.L. was "headed . . . towards termination; and I guess that's a matter of his choice." (12/8/08 Tr. at 51.)

Task A of D.L.'s treatment plan required him to complete a psycho-sexual evaluation with Dr. Donna Zook and follow all of the recommendations of the evaluation. (Treatment Plan at 2, D.C. Doc. 18.) The State had originally recommended the evaluation to be with Shawn Abbott, but D.L. objected and requested Dr. Zook. (9/15/08 Tr. at 29-32; D.C. Doc. 18.) The district court found that D.L. did not successfully complete this task. (D.C. Doc. 36 at 4-5.)

D.L. made his initial appointment with Dr. Zook on September 24, 2008, but did not complete the evaluation because of his refusal to sign the release so DFS could know the results of the evaluation. (5/18/09 Tr. at 90-91.) Dr. Zook never completed the required psycho-sexual evaluation. (Id. at 90-91, 93.) Dr. Zook

rescheduled to do the evaluation five times through November 2008, and D.L. did not appear for any of the appointments. (Id. at 91-92.)

On or about November 19, 2008, D.L. attempted to contact Shawn Abbott to do the evaluation. (5/18/09 Tr. at 93, 110-11.) Ms. Abbott did not do the evaluation as requested because, when she contacted the social worker, he told her the treatment plan and court order ordered Dr. Zook to do the evaluation, pursuant to D.L.'s objection and his own request. (Id. at 93, 111.)

About five months later, with the petition for termination pending, D.L. voluntarily appeared in Dr. Zook's office and requested to proceed with the evaluation, but again refused to sign the release because of his personality conflict with the social worker. (5/18/09 Tr. at 92, 134, 137-58, 160-61.) On May 12, 2009, D.L. again contacted Shawn Abbott to have the evaluation done. (Id. at 134-38.) She set up an appointment to do it on the day of the termination hearing, May 18, 2009, at 2 p.m. (Id. at 134-35.)

The district court found that, due to his apparent personality conflict with social worker, D.L. has refused and failed to complete a psycho-sexual evaluation, or sign any release for such an evaluation and follow any recommendations that may have come from such an evaluation. (5/18/09 Tr. at 156-57, 184; D.C. Doc. 36 at 4-5.)

Task B of the treatment plan prohibited D.L. from having any unsupervised contact with the Children (Treatment Plan at 2-3, D.C. Doc. 18), and there was no evidence on the record that he did. (5/18/09 Tr. at 94-99.) The district court concluded that on its face, Task B did not require D.L. to do anything affirmatively to complete the treatment plan, so the court found that he did not fail in this task. (D.C. Doc. 36 at 5; 5/18/09 Tr. at 95-97.) D.L. had one visit with the Children, which was supervised pursuant to this provision. (5/18/09 Tr. at 96, 99-100, 116.)

Task C of the treatment plan required D.L. to sign any necessary releases to allow the State and the social worker to follow his progress on the treatment plan and to assist him in completing the treatment plan. (Treatment Plan at 3-4, D.C. Doc. 18.) Task C also required D.L. to maintain contact with the social worker. (Id.) The district court found D.L. repeatedly refused to sign the release and failed this portion of his treatment plan. (5/18/09 Tr. at 186.)

On September 24, 2008, D.L. did sign a release for the Department to share all information with Dr. Zook but refused to sign the release for Dr. Zook to share information with the Department and the social worker. (5/18/09 Tr. at 101.) D.L. has refused to meet with the social worker throughout the length of the treatment plan. (Id. at 102.) Despite repeated attempts by the social worker to set up appointments and meet with D.L., D.L. met with the social worker on only one occasion since September 2008. (Id. at 102-06.) The social worker called and

attempted to make contact with D.L. on September 29 and 30, October 3, 20, and 31, November 18, and December 8 and 31, 2008, and January 6 and 13, and February 5, 2009. (Id.) The district court found that D.L. did not respond or stay in contact with the social worker due to a personality conflict with the social worker and, therefore, did not complete this task. (5/18/09 Tr. at 186; D.C. Doc. 36 at 5.)

The district court found and concluded that the conduct or condition rendering D.L. unfit or unable to care for the Children was unlikely to change within a reasonable amount of time in light of D.L.'s complete failure to cooperate with the Department in completing his psycho-sexual evaluation and sign the necessary releases, and to meet with the social worker. (5/18/09 Tr. at 89-90, 93-94, 187; D.C. Doc. 36 at 5-6.) In the absence of any reason for the refusal by D.L.--but for his personality conflict with the social worker--and for the reasons found for adjudication of the Children, the district court found that continuation of the parent-child relationship in D.L.'s untreated state would place the Children in danger of being abused and neglected and was not in their best interest. (5/18/09 Tr. at 108, 187; D.C. Doc. 36 at 5-6.)

The district court found that D.L. was unfit and unwilling to provide parental care for the Children in that he only requested, and only had, one visit with the Children during the pendency of this case. (5/18/09 Tr. at 187-88; D.C. Doc. 36

at 6.) D.L.'s refusal to cooperate and attempt to perform the treatment plan tasks, so as to get his Children back, also shows his unwillingness to parent and place the Children's best interest above his own feelings. (D.C. Doc. 36 at 6.)

The district court further found that since September 2008, the Children had been removed from their exposure to D.L. and had not been bonding with him, whereas their mother, A.P., had successfully completed her treatment plan and cared for the Children throughout the pendency of this case. (5/18/09 Tr. at 188; D.C. Doc. 36 at 6.)

The district court gave primary consideration to the physical, mental, and emotional conditions and needs of the Children and found that the Children needed permanency as quickly as possible. (D.C. Doc. 36 at 6.) The district court declared that its findings of fact were made by clear and convincing evidence. (Id.)

Facts Relating to Tribal Enrollment or Eligibility for Enrollment of the Children

The case was not initially presented to the court to be an ICWA case and was not asserted to be ICWA to the court. (D.C. Doc. 36 at 3.) As the social worker initially alleged, "To the best of my knowledge and belief the child is not an Indian Child subject to the Indian Child Welfare Act." (Aff. at 2, D.C. Doc. 1.) The mother had stated that the Children are not subject to ICWA and D.L. had "previously tried unsuccessfully to get them enrolled." (Aff. at 4, D.C. Doc. 1;

6/19/08 Tr. at 30.) In its termination petition the State alleged, again, "Petitioner believes the youth(s) is NOT a Native American child that are enrolled or eligible to be enrolled in a Native American Tribe." (D.C. Doc. 23 at 2.)

The mother never testified to any tribal membership. In testimony elicited by D.L., the social worker said A.P. "stated that she was not of sufficient Native American heritage for ICWA to apply." (5/18/09 Tr. at 114.) A.P. had also told the social worker that "she knows ICWA would not apply because [D.L.] had attempted to have ICWA apply in previous cases and was unsuccessful." (Id.)

The State gave D.L. ample opportunity throughout this case to provide complete and accurate information about the Children's ancestry and any claims of tribal enrollment or eligibility. (5/18/09 Tr. at 118-31.) When limited information was made known from D.L., the State made "every effort to contact the Bureau of Indian Affairs to find out if ICWA did apply, even given the partial information provided [by D.L.] and the Native information provided by [A.P.]" (5/18/09 Tr. at 123.) Those efforts included a "Request for Verification and Tribal Status" sent to the BIA in this case which included an ancestry chart listing the names of the children, the parents, and grandparents with dates of birth and possible tribal affiliation, "as best we know." (5/18/09 Tr. at 124.) The BIA responded to that inquiry, but said there was "insufficient information" and did not provide a positive enrollment status for D.L. or any of the Children. (5/18/09 Tr. at 125.) The social

worker made numerous attempts to gather pertinent tribal and family information from D.L., but was unsuccessful. (Id. at 125-26.) The few times the social worker was able to get through to D.L., D.L. cursed at him and hung up the phone. (Id. at 126.)

The State did discover that D.L. was an enrolled member in the Turtle Mountain Band of Chippewa, but the tribe, after receiving an ICWA notice from the State (D.C. Doc. 21), unequivocally determined that the Children--with less than 1/4 blood required for membership-- "would not be ***eligible or enrolled*** with the Turtle Mountain Band of Chippewa Tribe." (D.C. Doc. 35.5 (emphasis in the original).)

The district court found that no evidence was presented prior to the date of the termination hearing that the children were enrolled or enrollable in any recognized Native American tribe. (D.C. Doc. 36 at 3; 5/18/09 Tr. at 181.) The district court found, however, that D.L. raised a threshold issue at the termination hearing that ICWA may apply. (D.C. Doc. 36 at 3-4; 5/18/09 Tr. at 181.)

D.L. testified he was not an enrolled member of Little Shell Band of Chippewa, but was "affiliated" and potentially enrollable because of his mother's alleged membership in that band. (5/18/09 Tr. at 139, 152-53.) In addition, D.L. testified A.P. was "affiliated" with the Iroquois tribe through her father, although she had not seen her father "for some time" and did not even know where he lived.

(5/18/09 Tr. at 139, 154.) D.L. said A.P.'s mother "believed" A.P.'s father was "at least half blood from the Iroquois Tribe; I believe it was the Iroquois Tribe, that's what keeps sticking in my mind is the Iroquois." (5/18/09 Tr. at 155.) D.L. did not testify that A.P.--or her father--was an enrolled member of the Iroquois tribe.

The district court concluded, based upon a preponderance of the evidence in the termination hearing and prior proceedings, that "there was insufficient evidence upon which to conclude that the children in this matter are either enrolled or enrollable in a recognized Indian tribe." (5/18/09 Tr. at 182, 189; D.C. Doc. 36 at 4, 6.)

SUMMARY OF THE ARGUMENT

The district court properly and within its discretion terminated D.L.'s parental rights pursuant to the statutory criteria and findings based on clear and convincing evidence. On appeal, D.L. challenges none of these statutory findings of fact or conclusions of law. The record is absolutely clear and without dispute that the Children were adjudicated youths in need of care and, thereafter, D.L. was uncooperative, made no real effort to comply with an appropriate treatment plan, and was unwilling to make any changes or commitment necessary for him to be safely reunited with the Children. This Court should affirm the district court's

exercise of discretion in terminating D.L.'s parental rights, in the best interests of the Children.

D.L.'s request for reversal of the termination based on ineffective assistance of counsel should be denied, because an attorney's failure to object to properly admitted evidence is not ineffective assistance. D.L. tries to make this appeal about why the evidence in question should not have been admitted--but he has waived any such claim and the district court's discretionary ruling admitting the evidence must be presumed to be correct. The law provides that hearsay evidence of children at adjudication is permitted in accordance with the Rules of Evidence, in the discretion of the district court, and in the best interests of the children. It was, therefore, a proper exercise of the district court's discretion to admit the child witness statements through their counselors' testimony in this case under the residual hearsay exception of Mont. R. Evid. 803(24) (availability of declarant immaterial).

Even if the failure to brief or object to the evidence at adjudication could be seen as ineffective, D.L. has shown no resulting prejudice requiring reversal. The result of admitting the evidence was a finding that the Children were youths in need of care, necessitating a treatment plan to avoid termination. It was not the error, if any, of D.L.'s attorneys that ultimately and directly resulted in the termination of his parental rights. It was D.L.'s utter failure of cooperation, commitment, and progress on his treatment plan and his inability to change his

condition and conduct, in relation to the health, safety and best interests of his Children, which led directly to termination. D.L. cannot pin the responsibility for the termination of his parental rights on his attorneys' conduct at adjudication, where he did nothing to stand up for those rights himself.

Finally, the district court's findings that there was insufficient evidence to show that the Children were enrolled or eligible for enrollment in any recognized Indian tribe were not clearly erroneous. The Turtle Mountain Band of Chippewa, in which D.L. was enrolled as a member, determined that the Children were not "eligible or enrolled." The Little Shell Band of Chippewa is not a federally recognized tribe. Even if it was, D.L. admitted that he was not an enrolled member, therefore the Children were not biological children of a "member" of the tribe. Finally, there was no evidence or even allegation that either parent was a member of the Iroquois tribe, there was only D.L.'s belief that the Children's maternal grandfather may be part Iroquois. The district court correctly concluded, consistent with the evidence and the State's allegations throughout, that ICWA did not apply.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT TERMINATED THE FATHER'S PARENTAL RIGHTS.

A. Standard of Review and Applicable Law

This Court reviews a district court's decision to terminate parental rights for abuse of discretion, reviewing findings of fact to determine whether they are clearly erroneous and conclusions of law to determine whether they are correct. In re T.W.F., 2009 MT 207, ¶ 17, 351 Mont. 233, 210 P.3d 174.

Before terminating an individual's parental rights, a district court must adequately address each applicable statutory requirement. In re D.B., 2007 MT 246, ¶ 17, 339 Mont. 240, 168 P.3d 691. Section 41-3-609 of the Montana Code Annotated sets forth the circumstances under which a parent's rights may be terminated. Mont. Code Ann. § 41-3-609(1)(a) through (f). Under the circumstances pertinent to this case, a district court may terminate an individual's parental rights if it finds, as established by clear and convincing evidence, that (1) the child has been adjudicated a youth in need of care, (2) an appropriate court-approved treatment plan has not been complied with or has not been successful, and (3) the conduct or condition rendering the parents unfit is unlikely to change within a reasonable period of time. Mont. Code Ann. § 41-3-609(1)(f); see In re D.B., ¶¶ 20, 29.

The termination of parental rights statutes give priority to the best interests of the child as the primary and paramount statutory standard for termination. See, e.g., Mont. Code Ann. § 41-3-609(3) (district court shall give "primary consideration to the physical, mental, and emotional conditions and needs of the child."); Mont. Code Ann. § 41-3-101(4) (the child's health and safety are of paramount concern). The "best interests of the child" means the physical, mental, and psychological conditions and needs of the child and any other factor considered by the court to be relevant to the child. Mont. Code Ann. § 41-3-102(5). The best interests of the child take precedence over parental rights and the need for permanent placement in a loving and stable home supersedes the parent's interests. In re A.T., 2006 MT 35, ¶ 20, 331 Mont. 155, 130 P.3d 1249 (citing In re E.K., 2001 MT 279, ¶ 33, 301 Mont. 328, 37 P.3d 690).

B. Clear and Convincing Evidence Supports the Termination of D.L.'s Parental Rights Pursuant to the Statutory Criteria.

Although D.L. challenges the validity of the adjudication on the grounds of his counsels' ineffectiveness, see infra at 26-34, he does not challenge the district court's factual finding, pursuant to statute, that the Children were "adjudicated youth[s] in need of care." Mont. Code Ann. § 41-3-609(1)(f). The youth in need of care adjudication is a threshold requirement for termination, and absent such an adjudication, parental rights cannot be terminated pursuant to that statute. In re M.J.W., 1998 MT 142, ¶ 11, 289 Mont. 232, 961 P.2d 105. Without a

specific adjudication, the statutory requirement is not met and a court may not sever a parent's parental rights. In re T.C., 2001 MT 264, ¶¶ 16, 18, 307 Mont. 244, 37 P.3d 70.

In neither one of these cases did the district court actually adjudicate the children youths in need of care; there was no such finding. M.J.W., ¶ 18 ("The record before us is devoid of an order adjudicating M.J.W. a youth in need of care."); T.C., ¶¶ 16, 19 (district court made probable cause finding, but never adjudicated children as youths in need of care). Here, on the contrary, it is manifest on the record, without any objection or argument from D.L. to the contrary, that the district court specifically adjudicated the Children youths in need of care. (D.C. Docs. 17, 36 at 2, 6, 7; 8/18/08 Tr. at 12.)

D.L. likewise does not challenge on appeal any of the other findings and conclusions of the district court, supported by clear and convincing evidence at the termination hearing, regarding the statutory criteria required for termination under Mont. Code Ann. § 41-3-609(1)(f): D.L.'s failure to comply with or successfully complete an appropriate court-ordered treatment plan; and the unlikelihood that the conduct or conditions rendering D.L. unfit would change within a reasonable time. (5/18/9 Tr. at 184, 186-90; D.C. Doc. 36 at 4-7.) Nor does D.L. challenge the findings and conclusions that termination of his parental rights was in the best interests of the Children. (5/18/9 Tr. at 189; D.C. Doc. 36 at 6, 7.)

It is well settled that a district court's decision is presumed correct and that the appellant bears the burden of establishing error by the trial court. M.J.W., ¶18 (citations omitted) (appellant father did not challenge district court's specific findings and conclusions relating to abandonment leading to termination). There being clear and convincing evidence supporting the statutory findings, and hearing no challenge to those specific findings from D.L., this Court should affirm the district court's exercise of discretion in terminating D.L.'s parental rights.

II. D.L. HAS NOT SHOWN THAT HE SUFFERED FROM INEFFECTIVE ASSISTANCE OF COUNSEL AT THE ADJUDICATION OR TERMINATION HEARINGS.

A. Standard of Review

This Court exercises plenary review of whether a parent was denied effective assistance of counsel in termination proceedings. In re C.M.C., 2009 MT 153, ¶ 20, 350 Mont. 391, 208 P.3d 809.

B. D.L. Has Not Borne His Burden On Appeal to Establish Ineffective Assistance of Counsel or Demonstrate Prejudice From the Alleged Ineffectiveness.

Parents have a due process right to effective assistance of counsel in termination proceedings. In re A.S., 2004 MT 62, ¶ 20, 320 Mont. 268, 87 P.3d 408. The effectiveness of counsel in cases involving the termination of parental rights under title 41, chapter 3, part 6, Mont. Code Ann., should be

evaluated by the following nonexclusive factors: (1) training and experience--whether counsel has experience and training in representing parents in termination proceedings, and whether counsel have verifiably competent understanding of the statutory and case law involving such termination proceedings; and (2) advocacy--whether counsel has adequately investigated the case; timely and sufficiently met with the parent and researched the applicable law; prepared for the termination hearing by interviewing the State's witnesses and by discovering and reviewing documentary evidence that might be introduced; and demonstrated that he or she possesses trial skills, including making appropriate objections, producing evidence and calling and cross-examining witnesses and experts. A.S., ¶ 26 (citations omitted). If this Court determines, under the above factors, that a parent was ineffectively represented by counsel at his or her termination proceeding, the final analysis requires assessment of whether such parent suffered prejudice as a result of counsel's ineffectiveness. A.S., ¶ 32.

1. D.L. Must Concede That His Attorneys Had Adequate Training and Experience.

Regarding the first factor, D.L. has made no argument on appeal, and there is no evidence in the record, that his attorneys had inadequate training and experience in representing parents in termination proceedings, or suffered any inadequate understanding of the law in such proceeding. This Court has said, "We

cannot evaluate this factor without even an argument as to how it may apply in the case, and decline to speculate." C.M.C., ¶ 31. D.L. must, therefore, concede that his attorneys' training, experience, and grasp of the law in this case was adequate.

2. D.L. Has Not Shown That His Attorneys' Advocacy Was Inadequate.

a. The Hearsay Statements at Issue Were Properly Admitted at the Adjudication Hearing Pursuant to the Rules of Evidence, the Discretion of the District Court, and the Best Interests of the Children.

The district court has broad discretion in determining the admissibility of evidence. In re T.W., 2006 MT 153, ¶ 8, 332 Mont. 454, 139 P.3d 810. "Hearsay evidence is admissible at an adjudicatory hearing to determine whether the children are abused or neglected, according to the Montana Rules of Evidence." In re O.A.W., 2007 MT 13, ¶ 31, 335 Mont. 304, 153 P.3d 6 (citing Mont. Code Ann. § 41-3-437(3)). The Court has held that a district court did not abuse its discretion in properly admitting hearsay statements of children in adjudication hearings under the "excited utterance" exception, Mont. R. Evid. 803(2), T.W., ¶ 15, and under one of the "residual" hearsay exceptions, Mont. R. Evid. 804(b)(5)(declarant unavailable). O.A.W., ¶¶ 32, 45.

While such evidence is more strictly constrained in criminal cases, see, e.g., State v. J.C.E., 235 Mont. 264, 767 P.2d 309 (1989)(overruled in part by State v. S.T.M., 2003 MT 221, 317 Mont. 159, 75 P.3d 1257), due to the constitutional

right of confrontation and the finality, loss of liberty, and prejudice of a criminal conviction, the legislature has correctly determined that the Rules of Evidence are sufficient to protect parents' rights at an adjudicatory hearing. O.A.W., ¶ 40. In a criminal action, the right to confrontation may preclude a hearsay statement that the rules of evidence would otherwise permit in a civil, youth in need of care proceeding. T.W., ¶ 14. Unlike criminal cases, the health and safety of the children remain the paramount considerations in these civil matters. O.A.W., ¶ 40. The best interests of the child take precedence over parental rights and the child's need for permanent placement in a loving and stable home supersedes the parent's interests. A.T., ¶ 20.

Further, the result of a "youth in need of care" adjudication is intervention by the State in an attempt to assist the parents and to re-unite the family--it is only where treatment plans and reunification efforts are unsuccessful that the threat of termination arises. O.A.W., ¶ 40. Thus, an adjudicatory hearing does not result in the "prejudice" of termination of parental rights, but only the determination that the children are "abused and neglected" and that a treatment plan is necessary to assist the parents in remedying the situation.

Pursuant to these principles in this case, the hearsay statements of D.L.'s step children R.P. and J.P. were properly admitted under the residual hearsay exception, Mont. R. Evid. 803(24) (availability of declarant immaterial), in the

discretion of the district court and in the best interest of the health and safety of the Children. Due to D.L.'s failure to, or choice not to, respond and contest the State's brief and evidentiary offer, the district court deemed the State's argument under the residual hearsay exception to be well-taken and thus found the affected testimony to be admissible under the State's uncontested offer. (8/18/08 Tr. at 11-12; D.C. Doc. 17 at 1-2.)

Now, despite D.L.'s lengthy arguments on appeal why this evidence should not have been admitted (Appellant's Br. at 18-30), it is not the exercise of the district court's broad discretion in admitting this evidence at the adjudication hearing that is at issue on appeal--D.L. failed to preserve any such error and therefore waived it. It is well settled that a district court's decision is presumed correct and that the appellant bears the burden of establishing error by the trial court. M.J.W., ¶18. Furthermore, this Court will generally not address an issue raised for the first time on appeal. In re T.C., 2008 MT 335, ¶ 20, 346 Mont. 200, 194 P.3d 653 (no objection raised below at either adjudication or termination hearings that "improper adjudication invalidated the subsequent parental termination"); see also T.W., ¶¶ 18, 21 (Court should not address issue of admissibility of hearsay under "excited utterance" exception at adjudication hearing where appellant father failed to respond and set forth specific basis for hearsay exception) (Nelson, J., concurring).

For the purposes of this appeal, D.L. must concede that the evidence at issue was properly admitted pursuant to the Rules of Evidence and the discretion of the district court.

b. The Failure to Object, or Tactical Decision Not To Object, to Evidence Properly Admitted in the Discretion of the District Court at Adjudication, Was Not Ineffective Assistance.

In regard to the conduct of D.L.'s attorneys, this Court has held that the failure to object to properly admitted evidence does not constitute ineffective assistance of counsel. State v. Parker, 2007 MT 243, ¶ 21, 339 Mont. 211, 169 P.3d 380; see also Kills On Top v. State, 273 Mont. 32, 51, 901 P.2d 1368 (1995) (failure to object does not constitute ineffective assistance of counsel when the objection lacks merit and would have been properly overruled). Furthermore, this Court will not second guess the trial tactics of defense counsel. State v. Hurlbert, 232 Mont. 115, 120, 756 P.2d 1110 (1988) (citing State v. Tome, 227 Mont. 138, 742 P.2d 479, 482 (1987); State v. Brown, 228 Mont. 209, 741 P.2d 428, 430 (1987)) Counsel's use of objections lies within his or her discretion. Clausell v. State, 2005 MT 33, ¶ 20, 326 Mont. 63, 106 P.3d 1175. It is not unreasonable that counsel, as a trial tactic, would refrain from objecting at certain times in a proceeding, and any number of reasons not apparent on the record may explain why an attorney chooses not to lodge an objection. State v. Olsen, 2004 MT 158, ¶ 17, 322 Mont. 1, 92 P.3d 1204. Hence, the failure to object, or the conscious,

tactical decision not to, is within the "wide range" of permissible professional legal conduct. Dawson v. State, 2000 MT 219, ¶ 105, 301 Mont. 135, 10 P.3d 49.

In the single page of argument devoted to D.L.'s counsels' ineffectiveness, D.L., asserts without citation to the record or any authority, only that there is "no plausible reason for not filing a response detailing the applicable law," and that the only reason for admitting the evidence was the failure to file a response. (Br. of Appellant at 30.) D.L.'s bare assertions are contrary to the above-cited authority. Simply having a reason to object does not mean refraining from objecting is unreasonable.

In addition, although D.L.'s failure to file a response brief when given the opportunity was properly deemed an admission of the evidentiary offer, Unif. Dist. Ct. R. 2(b), it remained within the district court's discretion to admit such evidence with or without objection by D.L. This Court interprets that Rule as "allowing the trial court discretion to either grant or deny an unanswered motion." State v. Pizzola, 283 Mont. 522, 524, 942 P.2d 709 (1997) (citation omitted).

Evidence of the exercise of that discretion is apparent in the district court's recognition of the "legitimate argument" of the State and the "credible legal arguments either way." (6/19/08 Tr. at 63, 72-73.) In addition, counsel for A.P. was also given the opportunity to respond to the offer, but submitted "the finding to the Court's discretion." (6/19/08 Tr. at 63.) On this record, and based on the

principles set forth in O.A.W., D.L.'s "deemed admission" did not "convert a motion which is incorrect as a matter of law into a motion which is well-taken as a matter of law." Pizzola, 283 Mont. at 525. As a discretionary ruling of the district court, failure to object no more ensured admission of the evidence than filing a brief would have ensured its exclusion.

3. D.L. Has Not Shown Prejudice as a Result of His Attorneys' Failure to Object to the Evidence.

Ultimately, beyond being an error of professional judgment, a failure to object must also prejudice the party. Clausell, ¶ 20. Even if the failure to brief or object to the evidence at adjudication could be seen as ineffective, D.L. has shown no resulting prejudice requiring reversal. Again without citation to the record or any authority, D.L. claims simply, "there is no doubt that counsels' unreasonable conduct directly prejudiced D.L. and violated his right to effective assistance of counsel here." (Br. of Appellant at 31.)

The result of admitting the evidence at issue was a finding that the Children were youths in need of care, not an order of termination. At that point, D.L. had the power and the opportunity to comply with the appropriate terms of his treatment plan and make the necessary changes in his condition and conduct to be safely reunited with the Children. See O.A.W., ¶ 40.

Contrary to D.L.'s argument, it was not the error, if any, of D.L.'s attorneys that ultimately and directly resulted in the termination of his parental rights. While

adjudication of the Children as youths in need of care was a threshold determination, without which D.L.'s rights could not eventually have been terminated under the statute, M.J.W., ¶ 11, D.L. himself--not his attorneys--must bear the ultimate responsibility for termination of his parental rights in this case. As this Court recently noted in denying a claim of ineffective assistance in a termination proceeding, it was the appellant mother's "failure to comply that led to termination." C.M.C., ¶ 33. The district court similarly noted in this case that D.L. was "headed . . . towards termination; and I guess that's a matter of his choice." (12/8/08 Tr. at 51.) Here it was D.L.'s utter lack of cooperation, commitment, and progress on his treatment plan and his inability to change his condition and conduct, in relation to the health, safety and best interests of his Children, which led directly to termination.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ICWA DID NOT APPLY TO THE TERMINATION OF D.L.'S PARENTAL RIGHTS.

A. Standard of Review

In termination of parental rights cases, this Court reviews a 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 A.G., 2005 MT 81, ¶ 12, 326 Mont. 403, 109 P.3d 756. This case, as in A.G., presents the question whether

each of the Children was an "Indian child" within the meaning of ICWA. A.G., ¶ 13.

B. The District Court's Finding There Was Insufficient Evidence That The Children Were Enrolled Or Eligible For Enrollment In A Federally Recognized Indian Tribe Was Not Clearly Erroneous.

ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." A.G., ¶ 13 (citing 25 U.S.C. § 1903(4)); see Mont. Code Ann. § 41-3-102(11). For ICWA to apply, the Indian tribe in question must be recognized by the Secretary of the Interior as eligible for services provided to Indians by the Secretary. In re C.H., 2003 MT 308, ¶ 14, 318 Mont. 208, 79 P.3d 822 (citing 25 U.S.C. § 1903(8) and (11)). A child's eligibility for tribal membership presents a question of fact dependent on his or her actual ancestry. A.G., ¶ 13 (citing In re the Adoption of a Child of Indian Heritage, 111 N.J. 155, 543 A.2d 925, 933 (N.J. 1988)).

At the termination hearing, D.L. named three Indian tribes with which either he or A.P. might--he believed--be affiliated: the Turtle Mountain Band of Chippewa (D.L. enrolled member), the Little Shell Band of Chippewa (D.L. not enrolled member, but "affiliated" because of his mother's membership), and the Iroquois (A.P.'s father might be part Iroquois). (5/18/09 Tr. at 139-41, 149-53,

154-55.) There is no evidence in the record, and no witness or party ever testified or alleged, that the Children were "member[s] of an Indian tribe." 25 U.S.C. § 1903(4)(a); Mont. Code Ann. § 41-3-102(11)(a). D.L. understood that ICWA applies to the Children, "If they are enrollable." (5/18/09 Tr. at 155.) Therefore, the Children could be "Indian child[ren]" for the purposes of ICWA applicability in this case only if they were, first, "eligible for membership in an Indian tribe" and, second, "the biological child[ren] of a ***member of an Indian tribe***." 25 U.S.C. § 1903(4)(b); Mont. Code Ann. § 41-3-102(11)(b) (emphasis added).

In regard to the Turtle Mountain Band of Chippewa, D.L. was an enrolled member, but the tribe, after receiving an ICWA notice from the State (D.C. Doc. 21), unequivocally determined that the Children "would not be ***eligible or enrolled*** with the Turtle Mountain Band of Chippewa Tribe." (D.C. Doc. 35.5 (emphasis in the original).) Therefore, the district court's finding that "there is insufficient evidence upon which to conclude that the children in this matter are either enrolled or enrollable in a recognized Indian tribe" (5/18/09 Tr. at 189; D.C. Doc. 36 at 3-4) was not clearly erroneous in relation to any claim of ICWA applicability through the Turtle Mountain Band.

In regard to the Little Shell Band of Chippewa, D.L. testified he was not an enrolled member, only potentially enrollable because of his mother's alleged membership in that band. (5/18/09 Tr. at 152-53.) Therefore, the Children

could not be "Indian child[ren]" under ICWA through any Little Shell heritage, because they were not the biological children of a member of that Indian "tribe." See 25 U.S.C. § 1903(4)(b); Mont. Code Ann. § 41-3-102(11)(b). Furthermore, this Court and others have found that the Little Shell Band of Chippewa is not a federally recognized tribe. In re C.H., 2003 MT 308, ¶ 17, 318 Mont. 208, 79 P.3d 822 (citing 67 Fed. Reg. 46,328 (July 12, 2002)); State v. LaPier, 242 Mont. 335, 341, 342-43, 790 P.2d 983, 987 (1990); see also Richmond v. Wampanoag Tribal Court Cases, 431 F. Supp. 2d 1159, 1169 (D. Utah 2006) (citing Delorme v. United States, 354 F.3d 810, 814 n.6 (8th Cir. 2004)); State v. Alexander, 2006 ND 144, ¶ 13, 718 N.W.2d 2, 5 (N.D. 2006) (citing 70 Fed. Reg. 71,194 (Nov. 25, 2005)). The Little Shell Band of Chippewa remains unrecognized by the federal government. See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 (Aug. 11, 2009). Therefore, in relation to any claim of ICWA applicability through the Little Shell Band, the district court's finding that "there is insufficient evidence upon which to conclude that the children in this matter are either enrolled or enrollable in a recognized Indian tribe" (5/18/09 Tr. at 189; D.C. Doc. 36 at 3-4) was not clearly erroneous.

Finally, as to the Iroquois tribe, there was no evidence that A.P. was a "member" of the Iroquois tribe on which to base the Children's potential

eligibility. In fact, though there was testimony from D.L. that A.P.'s father may have been part Iroquois, there was no testimony that her father was a tribal "member," from which A.P.--let alone her Children--could determine tribal membership or eligibility. Therefore, the Children could not be "Indian child[ren]" under ICWA through any Iroquois heritage, because they were not the biological children of a member of the Iroquois Indian tribe. See 25 U.S.C. § 1903(4)(b); Mont. Code Ann. § 41-3-102(11)(b).

The mother never testified to any tribal membership. A.P. told the social worker that "she was not of sufficient Native American heritage for ICWA to apply." (5/18/09 Tr. at 114; 6/19/08 Tr. at 30; Aff. at 4, D.C. Doc. 1.) Furthermore, D.L.'s recollection of A.P.'s Iroquois heritage provided no detail as to A.P.'s tribal membership or the Children's eligibility. D.L. said A.P. was "affiliated" with the tribe through her father, but she had not seen her father "for some time" and did not even know where he lived. (5/18/09 Tr. at 139, 154.) D.L. said A.P.'s mother "believed" A.P.'s father was "at least half blood from the Iroquois Tribe; I believe it was the Iroquois Tribe, that's what keeps sticking in my mind is the Iroquois." (5/18/09 Tr. at 155.) Not only is it questionable that D.L. even remembered and identified the correct tribe of A.P.'s father with any certainty, D.L.'s testimony does not identify the father as a "member" of that, or any other, tribe. In relation to any claim of ICWA applicability through the Iroquois, the district court's finding that

"there is insufficient evidence upon which to conclude that the children in this matter are either enrolled or enrollable in a recognized Indian tribe" (5/18/09 Tr. at 189; D.C. Doc. 36 at 3-4) was not clearly erroneous.

This is not a case like A.G., where the terminated mother and the maternal grandmother each claimed actual enrollment in different Indian tribes and those tribes, upon notification of the termination, responded but needed additional information to establish the children's enrollment status. A.G., ¶¶ 3, 5. One tribe later wrote that ICWA applied and that it would intervene. A.G., ¶ 7. Under those circumstances--where both the mother and the grandmother knew they were enrolled tribal members--the district court should not have terminated the mother's rights without a conclusive determination of the children's status by the tribes. A.G., ¶ 27. Here, the only recognized tribe in which a parent of the Children knew, or even claimed, to be enrolled was the Turtle Mountain Band--and that tribe disclaimed the Children's enrollment or eligibility. Despite D.L.'s eleventh-hour assertions and beliefs about the Children's ancestry, he never provided any evidence--and neither party ever asserted a claim--that D.L. or A.P. were actually enrolled in the Little Shell Band or the Iroquois tribe--a prerequisite to the Children's possible eligibility for enrollment and recognition as "Indian child[ren]." See 25 U.S.C. § 1903(4)(b); Mont. Code Ann. § 41-3-102(11)(b). Where neither parent asserted they were enrolled in either the Little Shell Band or

the Iroquois tribe, it cannot be said the district court had reason to believe the Children qualified as Indian children under the ICWA definition. See A.G., ¶ 14.

Furthermore, in this case, any connection the Children have with the Iroquois tribe through their maternal grandfather was preserved by their mother's continuous custody and care, and the dismissal of the petition as to her parental rights. Even if the mother had some affiliation with the Iroquois tribe despite making no such claim, the termination of the parental rights of D.L.--who was clearly not an Iroquois tribal member--would not sever, or interfere with, whatever Iroquois heritage these Children might possess through their mother and their continued upbringing in her home.

Finally, D.L. had ample opportunity throughout this case to provide complete and accurate information to the State about the Children's ancestry and any claims of tribal enrollment or eligibility. (5/18/09 Tr. at 118-31.) When limited information was made known, the State made "every effort to contact the Bureau of Indian Affairs to find out if ICWA did apply, even given the partial information provided [by D.L.] and the Native information provided by [A.P.]" (5/18/09 Tr. at 123.) In this case, those efforts included a "Request for Verification and Tribal Status" sent to the BIA in this case which included an ancestry chart listing the names of the children, the parents, and grandparents with dates of birth and possible tribal affiliation, "as best we know." (5/18/09 Tr. at 124.) In this case

the BIA responded to that inquiry, but said there was "insufficient information" and did not provide a positive enrollment status for D.L. or any of the Children. (5/18/09 Tr. at 125.) The social worker made numerous attempts to gather pertinent tribal and family information from D.L., but was unsuccessful. (Id. at 125-26.) The few times the social worker was able to get through to D.L., D.L. cursed at him and hung up the phone. (Id. at 126.)

As the district court found, "all we have is [D.L.'s] belief . . . that he has some reason to believe that the mother, [A.P.], may have some Iroquois ancestry, but he hasn't presented any evidence beyond that belief." (5/18/09 Tr. at 169.) Further, there was no evidence beyond the alleged tribal membership of D.L.'s mother "establishing or showing any likelihood that the children are, in fact, of sufficient Little Shell heritage to be enrollable in that tribe either." (Id.) On this "evidence" and the record of complete stonewalling and lack of cooperation from D.L., the district court's findings and conclusions that there was insufficient evidence to determine the Children were Indian children under ICWA were not clearly erroneous or incorrect.

CONCLUSION

The district court's order terminating D.L.'s parental rights to the Children, J.J.L., D.L.L., Jr., and D.J.L., should be affirmed.

Respectfully submitted this 14th day of October, 2009.

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CERTIFICATE OF SERVICE

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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 not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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JONATHAN M. KRAUSS