IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 14-0084

IN THE MATTER OF:

S.B.C., Jr.,

Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Edward P. McLean, Presiding

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BLACKFEET TRIBE

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STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that good cause existed not to transfer jurisdiction to the Tribe.

2. Whether the district court abused its discretion when it terminated the birth mother's parental rights.

STATEMENT OF THE CASE

This case involves S.B.C., Jr. (S.B.C.), whose birth parents are N.B. (Mother) and S.B.C., Sr. (Father). (Doc. 76, attached as App. 1; Doc. 91, attached as App. 3.) Throughout this case, S.B.C. has been considered an "Indian child" within the meaning of the Indian Child Welfare Act (ICWA) (specifically, 25 U.S.C. § 1903(4)). (Apps. 1, 3.)

In July 2011, S.B.C. was placed into protective care when he was a month old. (Doc. 1.) S.B.C. was adjudicated a youth in need of care as to Mother in January 2012 and as to Father in June 2012; appropriate treatment plans were approved and ordered for each parent. (Docs. 34, 49, 50.) The Blackfeet Tribe (Tribe) received the required notices and the Tribe's January 2012 motion to intervene was granted by the district court. (Docs. 23, 32.)

Thirty-five days after the petition to terminate the parents' rights was filed, the Tribe filed a motion to transfer the case to the Tribal Court. (Docs. 48, 52.)

Following a hearing, the district court denied the motion to transfer. (App. 1; 05/14/13 Tr.) Father's petition for a writ of supervisory control over the district court's order denying the transfer was denied by this Court on August 20, 2013. (*See* Supreme Court Case No. OP 13-0465; Order attached as App. 2.)

The district court held a hearing on the petition to terminate the parents' parental rights on September 10, 2013. (App. 3; 09/10/13 Tr.) On January 15, 2014, the court entered its findings, conclusions and order wherein both parents' rights were terminated. (App. 3.)

Mother appeals the district court's order denying transfer and also challenges the district court's order terminating her parental rights. (Mother's Br. (M. Br.))[1]

STATEMENT OF THE FACTS

The Department of Public Health and Human Services (DPHHS) filed its initial petition seeking emergency protective services (EPS) and temporary investigative authority (TIA) after removing S.B.C. from Mother in Missoula. (Doc. 1.) Father's name did not appear on S.B.C.'s birth certificate and paternity was eventually established with DPHHS assistance in March 2012. (Doc. 35.)

[1]Father also filed a notice of appeal; however, his opening brief is not due until June 20, 2014. The State intends to file a separate Response Brief to Father's Opening Brief.

DPHHS sought EPS and TIA based on a report that S.B.C., his two-year old sister, and his cousin were left with inappropriate caregivers (failed to properly supervise children; arrested on warrants; possible substance abuse). (Doc. 1, Aff.) Law enforcement had been to the family home four times in the previous two weeks for similar concerns. (*Id*.) Mother was contacted by DPHHS and advised to return home or her children would be placed in protective care. (*Id*. at 3, 7-8.) Mother did not return home and DPHHS later learned there was a warrant out for her arrest. (*Id*.) Mother's relative explained that Mother had been out drinking with Father (allegedly an alcoholic). (*Id*. at 7.) DPHHS asked Father about taking custody of S.B.C., but he declined. (09/10/12 Tr. at 386-89, 574-76.) The worker also learned S.B.C. had not been given his antibiotics for over a week and the medication had not been properly stored. (Doc. 1.)

At the time of removal, the Tribe notified DPHHS that it intended to assume jurisdiction over the case when the child's IV-E eligibility was confirmed. (Doc. 1 at 3.) The Tribe's ICWA Coordinator, Raquel Vaile (Vaile), advised DPHHS that the paternal grandparents planned to become licensed foster care providers but until that time and the IV-E approval, the Tribe requested DPHHS maintain S.B.C.'s placement. (*Id*.)

At the August 17, 2011 show cause hearing, Mother was in custody on a Municipal Court bond and Father stipulated to the requested relief, and the district

court granted EPS and TIA. (Docs. 10, 22.1; 08/17/11 Tr.) On September 15, 2011, an Affidavit in support of DPHHS's intervention and S.B.C.'s placement was filed by the Tribe's ICWA Coordinator and ICWA Expert, Vaile. (Doc. 15.)

In September 2011, Mother and S.B.C. moved into the Mountain Home (a shelter for homeless mothers and babies); however, Mother claimed she did not get enough help with her children so she left after only two weeks. (Doc. 17; 10/19/11 Tr. at 11-12; Doc. 18, Aff. at 4; 01/24/12 Tr. at 40-45.) The case manager at Mountain Home described concerns regarding Mother's parenting skills and the fact she left because she did not want to follow the rules. (01/24/12 Tr. at 93-102.)

Within days of leaving Mountain Home, Mother, who was 21 years old, was charged with felony DUI (fourth or subsequent offense) and habitual traffic offender and was incarcerated. (*Id*.) Since Mother was in jail and Father declined to take S.B.C. (and also contested paternity), DPHHS located an ICWA compliant foster home (Native American foster parents and siblings) for S.B.C. in early October 2011. (10/19/11 Tr. at 13; 05/14/13 Tr. at 215-15.) Sheila Finley (Finley) consulted with Vaile, who approved the placement; Vaile explained to Finley that she was assessing placement of S.B.C. with the paternal grandmother in Browning but also was aware paternity may be in question. (*Id*.) Father made it clear to everyone that he did not want to visit S.B.C. or have his family involved with S.B.C. until paternity was confirmed. (10/19/11 Tr. at 16; Doc. 18, Aff. at 2;

01/24/12 Tr. at 54; 05/14/13 Tr. at 216; 09/10/13 Tr. at 398-99, 423-25, 593.) Father also expressed to Finley that he did not wish to parent S.B.C. because he did not know how to care for an infant. (05/14/13 Tr. at 217.)

A petition for adjudication and temporary legal custody (TLC) was filed on November 7, 2011, and a hearing was set for January 24, 2012. (Docs. 18, 20.) On December 23, 2011, the Tribe filed a notice of intervention, preserving its right to file a motion to transfer to the Blackfeet Tribal Court. (Doc. 23.) The district court granted the Tribe's motion to intervene. (Docs. 27, 32.)

At the January 24, 2012 hearing for adjudication, Vaile testified that DPHHS was complying with ICWA and she agreed with DPHHS intervention and continued to approve S.B.C.'s placement with the Native American foster family. (01/24/12 Tr. at 23-29.) When asked if the Tribe would accept jurisdiction should either parent petition the district court, Vaile stated she was meeting with the Tribe's attorney about that issue. (01/24/12 Tr. at 33-36.)

Father was not present at the hearing and Mother was in custody. (Doc. 50; 01/24/12 Tr.) Mother had been released following her arrest for felony DUI but had since been jailed again for tampering with her SCRAM bracelet. (Doc. 30; 01/24/12 Tr. at 64.) Mother admitted she did not return home to care for her children on July 23, 2011, because she had a warrant out for her arrest. (01/24/12 Tr. at 105.) She explained that the person she had left S.B.C. with was 15 years

old and had alcohol problems. (*Id*. at 116-18.) Mother also explained that she left Mountain Home because no one was helping her care for the children. (*Id*. at 109-10.) Mother admitted she got drunk after leaving Mountain Home and was arrested for felony DUI; although Mother made arrangements for her daughter's care, she did not make any arrangements for S.B.C. (*Id*. at 110-12.)

At the conclusion of testimony, the district court granted the petition for adjudication and set a dispositional hearing. (01/24/12 Tr. at 136-37; Doc. 50.)[2] As of the February 29, 2012 dispositional hearing, Mother had signed her treatment plan and was awaiting sentencing on her felony DUI, having pled guilty. (02/29/12 Tr.) The district court entered an order approving Mother's treatment plan on March 8, 2012. (Doc. 34.) The court granted TLC; Father was not present at the dispositional hearing either. (Docs. 33, 50.)

A hearing as to Father for adjudication and TLC was held on June 27, 2012; Father's counsel stipulated to the relief sought. (Docs. 43, 50.) Prior to the hearing, DPHHS submitted a proposed treatment plan for Father which, following adjudication and TLC, the district court approved. (Doc. 49.) Mother's counsel advised that her client was currently at the WATCh treatment program with a

[2]Mother mistakenly asserts that the district court did not adjudicate S.B.C. as a youth in need of care until March 29, 2013. (M. Br. at 15.) However, as the record shows, the court adjudicated S.B.C. as to Mother on January 24, 2012, and granted TLC as to Mother on February 29, 2012; the court merely did not issue its written order until March 29, 2013. (Doc. 50.)

discharge date of early November. (*Id*.) In September 2012, the court was advised that upon completion of WATCh, Mother hoped to reside at the Carol Graham Home (CGH) where she could have S.B.C. with her. (Doc. 44.) DPHHS advised that Father was arranging visitation with S.B.C. and DPHHS was assessing placement options for S.B.C. with a paternal aunt who needed to complete the application process. (*Id*.)

A motion to approve the permanency plan was filed on September 28, 2012, wherein DPHHS explained the primary plan for S.B.C. was reunification with Mother and the concurrent plan was for adoption. (Doc. 45.) In early December 2012, without objection, the permanency plan was approved and TLC was extended. (Docs. 46, 50; 12/05/12 Tr.) Father was not present at the hearing and Finley told the court that when she spoke with Father the day before, he told her that he was too busy to do his treatment plan. (12/05/12 Tr. at 160.) Despite the fact paternity had been established as of March 2012, Father did not visit S.B.C. until December 2012. (09/10/13 Tr. at 392-93, 602-603.)

Finley secured a spot for Mother and her two children (S.B.C. and his older sister) at CGH for December 2012. (09/10/13 Tr. at 427.) However, before S.B.C. could be placed with her there, Mother was asked to leave CGH because she could not follow the rules. (*Id*. 09/10/13 Tr. at 396-97, 429, 471-72.) Finley explained Mother had made it clear she did not want to be at CGH. (*Id*. at 476-77.)

On February 27, 2013, the court set a hearing on DPHHS's forthcoming petition to terminate parental rights for March 6, 2013, and later reset it for May 2, 2013. (D.C. Docs. 47, 47.1.)[3] On March 6, 2013, DPHHS filed a petition to terminate the parents' parental rights based on failed treatment plans. (Doc. 48.)

On April 10, 2013, the Tribe filed a Motion to Transfer Jurisdiction and Dismiss Case.[4] (D.C. Doc. 52.) In its motion to the district court, the Tribe erroneously stated that the district court was "required" to transfer the matter to the Tribal Court. (*Id.*) Relying on this inaccurate statement, and its belief the matter was uncontested, the district court signed the Tribe's proposed order on April 18, 2013. (D.C. Doc. 53; *see also*, 05/14/13 Tr. at 278, and App. 1 at 17.)

DPHHS did not learn of either the motion to transfer or the district court's order granting the motion until April 23, 2013. (D.C. Doc. 54 at 3.) The Tribe sent DPHHS a copy of its transfer motion by facsimile on April 23, 2013. (D.C. Doc. 55 at 1-2.) DPHHS did not receive the district court's order granting transfer until April 25, 2013. (D.C. Doc. 55 at 1-2.) On April 24, 2013, DPHHS filed an objection to the motion to transfer and on April 25, filed a motion to reconsider the court's transfer order. (Docs. 54-55.) Counsel for S.B.C. filed notice of agreement

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[3]The Tribe received the Minute Entry from the February 27, 2013 hearing, and was, therefore, on notice DPHHS intended to seek termination of the parents' rights. (Doc. 47.)

[4] The Tribe did not initiate its petition to the Tribal Court requesting it accept jurisdiction until April 8, 2013. (*See* 05/14/13 Tr. at 313-14.)

with DPHHS' position in regards to the transfer motion and premature order. (Doc. 57.)

On April 25, 2013, the district court issued an order rescinding the April 18, 2013 transfer order, and set a hearing on the motion to transfer for May 2. (Doc. 56.) On April 29, 2013, the Tribe, joined by Mother, moved to continue the May 2 transfer hearing, and on May 1, 2013, sought continuation of the termination hearing. (Docs. 58-59, 62, 64.) Over objection from DPHHS and the child's attorney, the court granted the continuance to May 14, 2013. (Docs. 60, 65.)

At the transfer hearing, both Finley and S.B.C.'s foster mother (Foster Mother) described S.B.C.'s placement history. From the beginning of DPHHS involvement (July 2011) to October 11, 2011, S.B.C. was placed and moved from several placements through no fault of DPHHS. (App. 1 at 5-6, 12; 05/14/13 Tr. at 230-31, 237.) After Mother was arrested for felony DUI in early October 2011, S.B.C. was placed with a concurrent, ICWA-qualified Native American foster home, where he still resided. (*Id*. and 05/14/13 Tr. at 173-74.) Vaile, an ICWA Expert and the Tribe's ICWA Coordinator in 2011, made active efforts to place the child in a kinship home prior to October 2011 (including consideration of the paternal family for placement), but could not secure a kinship placement that was ICWA compliant. (App. 1 at 11; 05/14/13 Tr. at 212-13, 218, 221-22.) Vaile continued to support the placement until she was replaced by Anna Fisher (Fisher),

(the Tribe's ICWA Coordinator from September to November 2012). (App. 1 at 9-10; 05/14/13 Tr. at 218, 221-22, 282.)

Foster Mother is an enrolled member of the Salish and Kootenai Tribe in Lake County, Montana, is familiar with Indian culture, has adopted three Native American children, and recognizes the importance of S.B.C. learning about his own culture, heritage, and customs. (App. 1 at 10-11; 05/14/13 Tr. at 169-70, 173-74, 185, 189, 193-96.) Foster Mother explained that Vaile met with her in June 2012, and since that time, no one from the Tribe or any family members had contacted her to discuss S.B.C. (05/14/13 Tr. at 190, 197, 306-07.) Foster Mother explained she was under the impression that if the case were transferred, S.B.C. would be removed from their care and she described the negative impact several moves had had on her three adopted kids. (App. 1 at 11-12; 05/14/13 Tr. at 190-197.)

DPHHS actively pursued all kinship placements. (App. 1 at 9-11.) Finley explained that she consulted Vaile about placement options after Mother was arrested in October 2011. (05/14/13 Tr. at 212-13.) Finley explained that the maternal grandmother was not an appropriate placement option given her history with DPHHS. (*Id.*) Finley contacted Father's sister (Dorothy) in August 2012. Dorothy asked Finley not to contact the paternal grandmother because she was too old to care for an infant and Finley accepted her representations; Dorothy expressed to Finley she wanted to be considered for placement. (App. 1 at 9;

05/14/13 Tr. at 218-21, 228-29.) Finley invited Dorothy to visit the foster family and S.B.C. and offered gas cards and a hotel room to Dorothy; however, Dorothy did not follow through. (*Id*., 09/10/13 Tr. at 512.) Finley sent an e-mail to confirm Dorothy's interest and two weeks later sent another message with instructions on how to pursue licensing with the Tribe, but Finley did not hear back from Dorothy. (*Id*., 09/10/13 Tr. at 522.) Finley explained there was no other paternal family identified for possible placement and there was no reason to move S.B.C. from an ICWA compliant foster home. (05/14/13 Tr.) The Tribe concurred that it had been assessing other placement options, but had found none. (09/10/13 Tr. at 500.)

Finley described her contact with the Tribe following its motion to transfer and the court's initial order granting the motion. The Tribe notified Finley two hours before a placement hearing in Tribal Court on April 18, 2013 (same day the district court issued the order transferring the case). (05/14/13 Tr. at 227-28.) Finley was given no explanation for why she had not been given notice of the hearing. (*Id*. at 252-53, 256-57.)

On April 29, 2013, three days before the initial termination of parental rights hearing, the Tribe's new ICWA Coordinator sent Finley a letter advising her that S.B.C.'s placement was no longer acceptable. (05/14/13 Tr. at 224-26.)[5] The

[5]This letter was written and sent four days after the district court's April 25, 2013 order rescinding its April 18, 2013 order transferring the case. (Doc. 56.)

letter informed Finley that S.B.C. was being placed with his paternal grandmother who became licensed on April 29, 2013; the Tribe had made no contact with DPHHS about this new placement. (*Id*., App. 1 at 13.) Finley explained that the new ICWA coordinator later indicated that if she had known about the paternal family's apathy, she would not have pushed so hard to transfer the case. (*Id*. at 231.) Fisher agreed that it was unusual for a Tribe to wait until a petition for PLC and TPR was filed to move to transfer. (*Id*. at 297.) Fisher admitted the Tribe chose not to seek jurisdiction until the petition for termination was filed and acknowledged the Tribe's delay in seeking transfer was driven by financial reasons. (App. 1 at 15-16.)

Following testimony and oral argument, the district court took the matter under advisement. (Doc. 73; Tr. 05/14/13 at 334-35.) On June 3, 2013, the district court issued an order denying the joint request to transfer jurisdiction. (App. 1.) ("[T]he State has shown good cause to deny the Tribe's untimely motion seeking transfer of jurisdiction to the Blackfeet Tribal Court at this advanced stage of these proceedings.")

On July 17, 2013, Father filed a Petition for Supervisory Control to vacate the June 3, 2013 order denying the request to transfer jurisdiction. (*See* Supreme Court Case No. OP-13-0465). On August 20, 2013, this Court denied Father's Petition for Writ of Supervisory Control. (App. 2.)

Once Finley learned the paternal grandmother was interested in being a placement option, Finley worked to establish contact with her by phone, e-mail, and certified mail. (09/10/13 Tr. at 400-02.) Finley extended gas cards and hotel vouchers for the paternal grandmother to visit S.B.C. twice in June 2013. (*Id*. at 400-02, 519.) However, after those visits, Finley heard nothing from the paternal grandmother and later learned she had health problems and had passed away in August. (*Id*. at 482, 520.) Finley was unable to accommodate Father's request for a visit over the Fourth of July, but told him he could have a visit the following week; however, Finley did not hear from Father. (*Id*. at 482.)

The district court conducted the termination of parental rights (TPR) and PLC hearing on September 10, 2013. (Doc. 87, 09/10/13 Tr.) Mother was not present for the hearing as her whereabouts were unknown. Mother had a warrant out for her arrest based on a pending petition for revocation of her suspended sentence from her felony DUI. (09/10/13 Tr. at 350, 397-98, 416.) The report of violation alleged that Mother had consumed alcohol and absconded from probation. (*Id*.) Without objection, DPHHS requested the district court take judicial notice of Mother's criminal case which was assigned to the same judge as the dependent neglect matter. (*Id*.)

Foster Mother described what S.B.C. was like when he first came into their care in October 2011, at age two and a half months: displayed symptoms of

reactive attachment (though not diagnosed); was extremely fussy; did not like being held like most infants (could not hold him facing themselves and had to hold away from their bodies; did not like skin-to-skin contact; had to be constantly bounced or would scream; screamed whenever he was put down. (09/10/13 Tr. at 353-55.) The foster family worked with S.B.C. for two months with constant physical and face-to-face contact to address those basic issues. (*Id*.) When S.B.C. had visits with Mother, he was extremely fussy, very agitated (kicking and hitting with fists), so the decision was made that Foster Mother should stay in the room during visits as a "safety net." (*Id*. at 357-58.) Once S.B.C. became verbal, when Foster Mother brought him to visits, the closer they got to the visit location, S.B.C. cried and said, "No, no, mommy, no;" and then clung to her. (*Id*.)

Finley explained that neither parent successfully completed a treatment plan nor demonstrated a vested interest in developing a relationship with S.B.C. (09/10/13 Tr. at 419.) With regards to Mother, Finley described the failed reunification attempts with Mother including her brief stay at Mountain Home in September 2011, and in December 2012, when she was kicked out of CGH before S.B.C. could be placed with her. (09/10/13 Tr. at 394-97, 429, 471-72.)

Susan Stevens (Stevens) testified in her capacity as an ICWA expert. (09/10/13 Tr. at 526-68.) Stevens stated continued custody of S.B.C. with Mother would likely result in serious emotional or physical damage to S.B.C. because of the

lack of child-parent relationship, Mother's lack of parenting ability, and the special needs of S.B.C. (possible reactive attachment issues). (*Id*. at 539-40.) Stevens explained that Mother's pending incarceration and the fact she has absconded from supervision confirmed it was not appropriate to pursue another reunification and she concurred with termination of her parental rights. (*Id*. at 541-42, 549.)

At the conclusion of testimony, the district court orally granted the petition as to Mother and instructed the parties to submit proposed findings, conclusions and orders as to Father. (09/10/13 Tr. at 627-29.) On January 15, 2014, the district court entered its order terminating both the parents' rights and granting PLC to the Department. (App. 3.)

STANDARDS OF REVIEW

This Court reviews a district court's findings of fact to determine if they are clearly erroneous. *In re J.S.*, 2014 MT 79, ¶ 14, 374 Mont. 329, 321 P.3d 103 (citing *In re J.W.C.*, 2011 MT 312, ¶ 15, 363 Mont. 85, 265 P.3d 1265). Findings of fact are clearly erroneous if they are not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if this Court is left with the definite and firm conviction that a mistake has been committed. *J.S.,* ¶ 14 (citing *In re G.S.*, 2002 MT 245, ¶ 24, 312 Mont. 108, 59 P.3d 1063). A district court's conclusions of law are reviewed for correctness. *J.S.*, ¶ 14 (citing *In re*

M.P.M., 1999 MT 78, ¶ 12, 294 Mont. 87, 976 P.2d 988). "A district court's application of the law to the facts of a case is a legal conclusion which we review to determine whether the interpretation of the law is correct." *J.S.*, ¶ 14 (citing *In re J.W.C.*, ¶ 15). An appellant bears the burden of establishing error by the district court; therefore, it is the appellant's burden on appeal to establish that the district court's factual findings are clearly erroneous. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825 (citing *In re M.J.W.*, 1998 MT 142, ¶ 18, 289 Mont. 232, 961 P.2d 105).

A district court's order terminating parental rights is reviewed for abuse of discretion. *In re R.M.T.*, 2011 MT 164, ¶ 26, 361 Mont. 159, 256 P.3d 935 (citing *In re J.M.*, 2009 MT 332, ¶ 12, 353 Mont. 64, 218 P.3d 1213). This Court reviews a district court's decision to take judicial notice of facts and law for an abuse of discretion. *In re Marriage of Steab*, 2013 MT 124, ¶ 11, 370 Mont. 125, 300 P.3d 1168 (citation omitted).

A district court abuses its discretion when it "acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *R.M.T.*, ¶ 26. A district court's decision is presumed correct and will not be disturbed on appeal "unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear

abuse of discretion." *In re M.N.*, 2011 MT 245, ¶ 14, 362 Mont. 186, 261 P.3d 1047 (citing *In re E.K.*, 2001 MT 279, ¶ 33, 307 Mont. 328, 37 P.3d 690).

SUMMARY OF THE ARGUMENT

The district court's findings concerning good cause to deny the motion to transfer were supported by substantial evidence and the court did not act arbitrarily or abuse its discretion in denying the motion. The record established by clear and convincing evidence that the Tribe's motion to transfer was filed at an advanced stage of the proceedings and that it would not be in S.B.C.'s best interests to transfer the case at such a late juncture.

The district court properly took judicial notice of its prior rulings (facts and law) as well as Mother's criminal proceeding. Substantial evidence supported beyond a reasonable doubt that Mother failed to complete her treatment plan, that the plan was unsuccessful, and that Mother had left S.B.C. under circumstances that made it reasonable to believe she did not plan to assume care of the child in the future. The district court did not misapprehend or misconstrue the effect of the undisputed evidence that Mother failed to follow through on appropriate aftercare programs and stable living options, absconded from felony supervision, failed to maintain contact with DPHHS, and failed to demonstrate interest in becoming a

suitable parent to S.B.C. The district court did not abuse its discretion in terminating Mother's parental rights.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED THE MOTION TO TRANSFER.

A. Applicable Law

In relevant part, § 1911(b) of ICWA provides,

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe. . . .

The burden of establishing good cause by clear and convincing evidence is on the party opposing the transfer. *In re T.S.*, 245 Mont. 242, 245, 801 P.2d 77, 79 (1990) *writ of certiorari denied, King Island Native Community v. Montana Dep't of Family Servs.*, 500 U.S. 917 (1991) (citing *In re M.E.M.*, 195 Mont. 329, 333, 635 P.2d 1313, 1317 (1981)). This Court has stated that the district court must find clear and convincing evidence "that the best interests of the child would be injured" if the matter was transferred. *T.S.*, 245 Mont. at 245, 801 P.2d at 79 (held, district court "properly applied the jurisdictional 'best interests of the child' test and considered the BIA Guidelines").

The Bureau of Indian Affairs (BIA) promulgated guidelines to help state courts interpret and apply ICWA. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584-95 (Nov. 26, 1979) [hereinafter, Guidelines]. This Court has previously considered the Guidelines as persuasive and will apply them when interpreting ICWA. *In re C.H.*, 2000 MT 64, ¶ 12, 299 Mont. 62, 997 P.2d 776.

B. Good Cause Existed to Deny the Tribe's Untimely Motion to Transfer Jurisdiction.

The procedural Guidelines for § 1911(b) state:

> Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer *unless* either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that *good cause to the contrary exists for denying the transfer*.

Guidelines, C.2., 44 Fed. Reg. at 67590-91 (emphasis added). Section 1911(b) "specifies that requests [to transfer] are to be made promptly after receiving notice of the proceeding." Guidelines, C.1 Commentary, 44 Fed. Reg. at 67590.

Under the Guidelines, "good cause" to deny a request to transfer the proceedings is present under any of these circumstances:

> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing;
> (ii) The Indian Child is over twelve years of age and objects to the transfer; or

> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

Guidelines, C.3 Determination of Good Cause to the Contrary, 44 Fed. Reg. at 67591.

The BIA recognized that:

> [t]imeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

See Guidelines, C.3 Commentary, 44 Fed. Reg. at 67591. The Guidelines further recognize the impact of a delinquent transfer as evidenced by the distinction between the limited disruptions of granting intervener-status versus the more significant disruption from a motion to transfer. *Id*. *See* also *In re A.P.*, 1998 MT 176, ¶ 26, 289 Mont. 521, 962 P.2d 1186.

In *A.P.*, this Court quoted the following BIA guideline when discussing timeliness of a transfer motion:

> This section specifies that requests are to be made promptly after receiving notice of the proceeding. . . . While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when

> intervention is permitted. . . . Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

A.P., ¶ 26 (citing Guidelines at 44 Fed. Reg. 67590) (emphasis added).[6] See also, *People in Interest of J.J. and S.J.*, 454 N.W.2d 317 (S.D. 1990) (tribal motion to intervene granted; but untimely § 1911(b) motion to transfer was denied because, under the BIA guidelines, intervention is far different than transfer and would subject children to potentially dangerous situations and not be in their best interest).

There is no question that the Tribe and parents waited "until the case is almost complete" to seek transfer. The Tribe's motion to transfer was filed: 610 days after receiving notice (08/09/11 to 04/10/13); 455 days after the Tribe intervened (01/10/12 to 04/10/13); 42 days after the district court set a hearing date for a forthcoming petition to terminate (02/27/13 to 04/10/13); and 35 days after DPHHS filed its petition for termination (03/06/13 to 04/10/13).

The Tribe apparently advised DPHHS at the inception of the case that it was interested in seeking transfer of jurisdiction once the child was declared IV-E eligible. (Doc. 1 at 3.) However, it did not seek such a transfer until termination proceedings were initiated 18 months later. Nor did it seek transfer when it moved

[6]See also this Court's Order denying Father's application for writ of supervisory control. (App. 2 at 2 (citing *J.W.C.*, ¶ 22).)

to intervene in January 2012, when the problems identified with the parents' inability to parent were readily apparent to all parties.

The Tribe was consistently apprised of the status of the case, which included the parents' lack of progress or success with their treatment plans. The record reflects that the Tribe's reason for seeking transfer was to effect a change in the child's placement; however, it chose to wait until DPHHS filed for termination of parental rights to seek transfer. This is notable given the Tribe's own ICWA Coordinator and Expert consistently approved S.B.C.'s placement and the Tribe's motion to transfer came six months after Vaile was replaced.

The legislative history of ICWA "states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." Guidelines, 44 Fed. Reg. 67584 (citing S. Rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977)); and *T.S.*, 245 Mont. at 246, 801 P.2d at 80. The court's findings with respect to the dates the Tribe received notice and when the motions to transfer were filed are undisputed. The district court did not abuse its discretion in applying the evidence to § 1911(b) and the Guidelines when it concluded the transfer request(s) were at an advanced stage of the proceeding.[7]

[7]In fact, this Court has already recognized that "the proceedings in the District Court [were] well along" and this case was "on the eve of a termination hearing." (App. 2 at 2.)

Mother's reliance on the district court's April 18, 2013 order granting transfer as proof the court did not believe the matter was at an advanced stage is not supported in the record. (*See* M. Br. at 15.) Rather, the district court made clear--during the transfer hearing and in its order denying transfer--that it was misled by the Tribe's inaccurate statement in its motion and the erroneous belief that there was no objection. (App. 1 at 17; 05/14/13 Tr. at 278.) Moreover, Mother's misunderstanding of the record and erroneous belief that adjudication was not ordered until March 29, 2013 (*see* n. 2, *supra*) cannot support her argument that the State delayed these proceedings in any way.

Mother's assertion the district court improperly placed a burden on the Tribe is misleading. (M. Br. at 14, 16.) This district court properly considered the timeliness of the Tribe's motion to seek transfer as clearly contemplated by § 1911(b) and the Guidelines, *supra*. The district court's inquiry on the Tribe's interest and action in the proceeding was focused on determining if there was a good reason for the Tribe's delay in seeking transfer until after a petition to terminate was filed. The State disagrees with Mother's characterization of the transfer hearing as an "indictment" of the Tribal system (*see* M. Br. at 16). Rather, when the entire record is read and all the comments are considered in context, the State asserts the district court properly weighed the timeliness of the motion, which included the purposeful delay in filing the motion, and the child's best interests.

The district court's findings with regard to the Tribe's failure to seek transfer based on financial reasons merely restated what the Tribe's ICWA Coordinator testified to at the hearing *in response to Father's counsel's inquiry*. The court's comments were not an indictment of the Tribal system. Notably, the district court was cognizant of the Guidelines' mandate that a tribe's socio-economic status cannot be considered; the court specifically cited to the provision and explained it was the tardiness of the Tribe's request to transfer that was at the core of the court's ruling, not its socio-economic position. (*See* App. 1 at 27.)

In *T.S.*, this Court affirmed the trial court's order denying a motion to transfer the matter to a tribal court; this Court explained:

> The uncontroverted evidence at the hearing in this case strongly indicates that any transfer of T.S. from her present environment would "devastate" the child and would have long-term harmful effects upon her. This is the longest, most stable and protected environment she has ever known. *The District Court properly considered the only loving environment T.S. has ever known in its application of the best interests test*. She resides in a home where the mother is Native American and fully capable and willing to teach T.S. about her Indian heritage. T.S. has adapted to her home and the family desires to adopt her as soon as possible.

T.S., 245 Mont. at 247-48, 801 P.2d at 80 (emphasis added). *See also In re M.E.M.*, 195 Mont. at 336, 635 P.2d at 1317 ("The burden of showing 'good cause to the contrary' must be carried by the State with clear and convincing evidence that the *best interests of the child would be injured* by such a transfer.").

The facts of this case are comparable to those presented in *T.S.* The only stable, loving home S.B.C. had known was with his foster family and he had no relationship with any paternal family member or the Tribe. S.B.C. has never been in Father's care and was only in Mother's care intermittently during his first month of life. S.B.C.'s Native American foster mother is not only well informed on Indian Culture, but also dedicated to ensuring S.B.C. is taught his Blackfeet Culture.

This Court recognized that transfer at a late stage in the proceedings would create a "manifest disruptive effect" by exposing the child to "an entirely new court system for more litigation and possible retrial" and would "hardly be in the best interest of the parents or child." *See A.P.*, ¶ 27. Here, the district court properly considered the best interest of S.B.C. when evaluating "good cause" to deny the motion to transfer. The district court properly noted that transferring the case at such an advanced stage ("just before termination and adoptive proceedings were eminent") would not be in the child's best interest (move him from only stable family he has known; delay proceedings and his need for permanency). (App. 1 at 25.) The best interest of the child is properly considered when considering an untimely transfer motion that clearly would disrupt a child's life and permanency. *See* Guidelines, 44 Fed. Reg. at 67591 (Guidelines grant state courts discretion to deny motion for transfer when they are untimely *despite* the

underlying purpose of the ICWA that provides a tribe should determine the best interests of its own members).

Mother also takes the district court findings out of context when she claims the court's findings exhibited "extreme bias" against the Tribe. (M. Br. at 17.) In doing so, Mother blatantly ignores the numerous facts set forth that clearly establish the motion to transfer was not filed "promptly" and that the "proceeding was at an advanced stage" when the motion was eventually filed.

The district court's order did not rest on comments concerning the Tribe's motivation to wait being tied to financial resources. The district court's Conclusion No. 13 describes what is in the child's best interests, explaining that taking a child from the only caregiver he has known would disrupt his well-being. (App. 1.) The court's comments set forth potential explanation for why the Tribe waited; the court's findings as to the Tribe's motives cannot change the undisputed findings that the motion to transfer was at an advanced stage of the proceedings and would disrupt S.B.C. and adversely impact his best interests.

Based on the record, specifically the significant period of time the Tribe refrained from requesting transfer to the Tribal Court, the district court's determination of good cause is supported by clear and convincing evidence. The Tribe's overt, non-action precisely fits the Guidelines' definition of "good cause" as well as the purpose for § 1911(b) (prevent a party from waiting to see how a

case is going and seek a transfer if the outcome does not look to be in their favor in State Court).

The district court did not misapprehend the substantial evidence establishing good cause to deny the motion to transfer; Mother has failed to establish that the district court's findings were clearly erroneous. *See J.S.*, ¶ 14. Nor does the record create a "definite and firm conviction that a mistake has been committed." *J.S.*, ¶ 14. The district court's application of the law to the facts presented in this matter was correct and should be affirmed. *J.S.*, ¶ 14.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY TERMINATING MOTHER'S PARENTAL RIGHTS.[8]

A. Applicable Law for Termination of Parental Rights

Relevant to this matter and pursuant to Mont. Code Ann. § 41-3-609(1)(f), a court may terminate parental rights if the following exist:

> the child is an adjudicated youth in need of care and both of the following exist:

[8]Regarding termination of her rights, Mother limited her appeal issues to: (1) whether the court erred in finding she abandoned her child; and (2) whether sufficient facts supported the court's finding that she failed her treatment plan or that the plan was unsuccessful. Mother does not challenge any of the following factors: S.B.C. was adjudicated a youth in need of care; the treatment plan was appropriate; the conduct/condition rendering her unfit to parent was unlikely to change in a reasonable period of time; active efforts were made; or that continued custody by her would likely result in serious emotional or physical damage to the child.

(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.

A court may also terminate a parent's rights under Mont. Code Ann. § 41-3-609(1)(a), if that parent has abandoned her child as defined at Mont. Code Ann. § 41-3-102(1). Each ground represents a separate and independent basis for termination. *In re M.J.C.*, 2014 MT 122,¶ 11, ___ Mont. ____, ___ P.3d ____ (citing *In re T.H.*, 2005 MT 237, ¶ 32, 328 Mont. 428, 121 P.3d 541).

The Court will uphold a district court's order terminating a parent's rights in an ICWA case "if a reasonable fact finder could conclude beyond a reasonable doubt" that active efforts were made and that continued custody by the parent is likely to result in serious emotional or physical damage to the child. *In re G.S., Jr.*, 2002 MT 245, ¶ 33, 312 Mont. 108, 59 P.3d 1063. *See also In re T.W.F.*, 2009 MT 207, ¶ 18, 351 Mont. 233, 210 P.3d 174.

"The best interests of the children are of paramount concern in a termination of parental rights termination proceeding and take precedence over the parental rights." *E.K.*, ¶ 33 (citation omitted).

B. Mother Failed Her Treatment Plan and/or Her Plan Was Unsuccessful.

Given Mother's conviction for felony DUI, the main task of her treatment plan was to address her chemical dependency by attending inpatient treatment, entering an aftercare program and a sober living environment, and abstaining from alcohol consumption. (Doc. 34.) Mother was also required to maintain contact with Finley so visits could be set up and improve her relationship with S.B.C. (*Id*.) Once Mother established and maintained her sobriety, a phase II treatment plan would be developed. (*Id*.)

While Mother completed the WATCh inpatient treatment program and entered the CGH, she failed to abide by the facility's rules and, in fact, advised Finley she had no intention of staying there. Finley explained Mother did not maintain a structured setting for more than a few weeks. (09/10/13 Tr. at 145-46.) Finley described Mother's lifelong struggle with alcohol and explained how during DPHHS intervention Mother failed to maintain her sobriety, did not participate or complete aftercare treatment, and did not maintain contact with her social worker. (*Id*.) The record supports the district court's finding that "Mother has not been present in [S.B.C.'s] life and has an active warrant for her arrest for failing to follow her conditional release following completion of the WATCh program for a Felony DUI conviction at age 21." (App. 3 at 13.)

Finley described two failed reunifications with Mother. The basis for the second failed reunification was due to Mother failing to following through with the CGH aftercare program or learning how to care for her children. In fact, Mother was asked to leave the program before S.B.C. could be placed with her. Within a month of Mother being asked to leave CGH, DPHHS decided to pursue termination of her rights and filed its petition in early March 2013.

While complying with the terms of probation was not a specific task on her treatment plan, the basic probation conditions were similar to those in her treatment plan and Mother's failure to follow those conditions illuminates her lack of interest or capacity to abide by her treatment plan. Mother absconded from felony supervision, had a warrant out for her arrest, and her whereabouts were unknown at the time of the termination hearing. These factors indicate Mother failed to demonstrate the ability to put her children's needs ahead of her own addictions and she was not able to show a desire to strengthen (or even establish) a relationship with S.B.C. as contemplated by her treatment plan tasks.

Mother's argument that the testimony in support of the "failed reunification" is insufficient to establish a failed treatment plan ignores the fact that the failed reunification was a result of her not meeting the tasks of her plan. It was not unreasonable for the court to consider Finley's specific description about Mother's failure to maintain her aftercare program as not complying with her treatment plan.

When Finley described Mother's current status as an absconder, and the fact she left CGH, she was implicitly explaining how Mother failed to abide by the tasks of her treatment plan.

Moreover, and also supported by the record, Mother's treatment plan was not successful. Montana Code Annotated § 41-3-609(1)(f)(i) is written in the disjunctive ("a treatment plan has not been complied with or has not been successful"); thus, "completing all tasks in a treatment plan does not necessarily mean the plan is 'successful.'" *In re A.F.*, 2003 MT 254, ¶ 25, 317 Mont. 367, 77 P.3d 266 (citations omitted). This Court has consistently held that "complete compliance with a treatment plan is required, as opposed to partial compliance or even substantial compliance." *In re A.A.*, 2005 MT 119, ¶ 31, 327 Mont. 127, 112 P.3d 993 (citation omitted).

Mother offers no argument that the court erred in finding her treatment plan was unsuccessful; in fact, the evidence established beyond a reasonable doubt that Mother did not meet the long-term goals of her treatment plan and failed to address the reasons S.B.C. came into protective care. This Court has explained that when a parent was incarcerated during most of the proceedings,

> it would have been irresponsible for the court to overlook [the parent's] serious chemical dependency history and to simply accept [the parent's] assertion that these problems were forever solved. The District Court's findings on the evidence, supported by judicial notice it took of the abuse and neglect proceedings for [the children], and the

> criminal proceedings against [the parent], were supported by substantial evidence . . . .

In re L.H., 2007 MT 70, ¶ 27, 336 Mont. 405, 154 P.3d 622.

Indeed, the ICWA Expert agreed that Mother's rights should be terminated based on her failure to complete her treatment and given her pending criminal case that may involve incarceration. (09/10/13 Tr. at 542, 549, 564-65.) This Court has also noted that while a parent's incarcerated status does not alleviate the State's burden to establish one of the criteria found at Mont. Code Ann. § 41-3-609(1), the statutes specifically direct a court to consider long-term confinement when determining if the conduct or condition is unlikely to change. *See* Mont. Code Ann. § 41-3-609(2)(d). Given Mother's status as an absconder and alleged continued use of alcohol, it is not unreasonable to consider her pending legal issues to most likely involve incarceration.

Mother's argument that the district court erred in taking judicial notice of prior facts or law, ignores this Court's longstanding position that judicial notice is appropriate in youth in need of care cases. *See In re K.C.H.*, 2003 MT 125, ¶¶ 14-15, 316 Mont. 13, 68 P.3d 788 (pursuant to Mont. R. Evid. 202(b)(6), district court did not err in taking judicial notice of prior termination proceedings which were a "record of a court of this state.").

This Court has previously concluded that it is not error for a district court to take notice of earlier testimony in a youth in need of care case when the complaining

parent has had an opportunity to cross-examine the witness. *In re S.C.*, 2005 MT 241, 328 Mont. 476, 121 P.3d 552 (citing *In re A.M.*, 2001 MT 60, ¶ 51, 304 Mont. 379, 22 P.3d 185 (not error for a district court to take notice of earlier testimony in a youth in need of care case when the complaining parent has had an opportunity to cross-examine the witness (citing Mont. R. Evid. 202(b)(6), a court may take notice of the records of any court in the state)). *See also T.W.F.*, ¶ 21 (district court properly relied on the record of its proceedings when granting petition for TPR and PLC); and *In re M.F.*, 201 Mont. 277, 286-87, 653 P.2d 1205, 1210 (1982).

A "court shall take judicial notice [of a fact] when requested by a party and supplied with the necessary information." Mont. R. Evid. 201(d). A court has the discretion to take judicial notice whether requested or not. Mont. R. Evid. 201(c). "A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Mont. R. Evid. 201(b).

A court may also take judicial notice of law, which includes "[r]ecords of any court of this state or of any court of record of the United States or any court of record of any state of the United States." Mont. R. Evid. 202(b)(6), 202(c). "A court shall take judicial notice of any law when requested by a party and supplied with the necessary information." Mont. R. Evid. 202(d).

This Court has held that during bench-trials, it is presumed that the district court disregarded inadmissible evidence from affidavits or reports in reaching his decision. *In re M.L.H.*, 220 Mont. 288, 715 P.2d 32 (1986) (citations omitted). The key factor to be considered when a district court may consider prehearing filings, is whether the author of such reports testifies and is cross-examined. *M.L.H.*, 220 Mont. at 294, 715 P.2d at 35 (no error when district court based its findings on witness testimony and reports of only those who testified).

Mother's argument that it was "unlawful" for the court to take notice of prior facts presented in this case is unsupported. Finley testified at all the contested hearings and she was subject to cross-examination by all parties. Under this Court's jurisprudence as cited above, it was not improper for the court to consider such evidence or its prior rulings. This included the fact that Mother was incarcerated during most of the case and she abused alcohol and failed to follow either her treatment plan or the conditions of probation. She was arrested for felony DUI while DPHHS had TIA; her release on bail for the DUI was revoked because she tampered with the SCRAM bracelet and consumed alcohol; she was sentenced to a term of incarceration and attended the WATCh inpatient treatment as a result of her DUI; and she currently had a warrant out for revocation of her suspended sentence.

Moreover, in its adjudication and temporary legal custody order, the district court explained its reliance on "facts in the file and record of this case;" no party

voiced objection to the court taking judicial notice of the record. (Doc. 50 at 4.) Nor did any party oppose DPHHS's oral motion at the beginning of the termination proceeding to take judicial notice of Mother's criminal file which the same judge was presiding over. (09/10/13 Tr. at 350.)

Not only did Mother fail to oppose the court considering her criminal file, she cannot point to any specific factual error the district court made by taking judicial notice of the prior proceedings. This Court is reluctant to fault a district court for failing to address alleged deficiencies that were not brought to its attention at a time when any deficiencies could have been cured. *In re A.N.W.*, 2006 MT 42, ¶ 41, 331 Mont. 208, 130 P.3d 619. When a father did not object to a district court taking judicial notice of his prior conviction in a termination of parental rights case, the fact of his conviction was "not a reasonably disputed fact." *In re S.T.*, 2008 MT 19, ¶ 18, 341 Mont. 176, 176 P.3d 1054 (district court entitled to rely on the evidence that the father had sexually abused a child as one basis for terminating parental rights).

Mother has failed to establish how the district court abused its discretion in taking judicial notice of prior orders or Mother's criminal file. *Marriage of Steab*, ¶ 11. Significantly, Mother cannot point to a single "fact" that she alleges the district court relied on in error; in fact, she conceded that she cannot discern any such information from the court's order. (M. Br. at 23.)

The district court's findings and conclusions as to termination of Mother's parental rights under Mont. Code Ann. § 41-3-609(1)(f) are fully supported in the record. The witness testimony and record establish beyond a reasonable doubt that Mother failed to complete the tasks on her treatment plan and her plan was also unsuccessful. The district court also properly considered the best interests of S.B.C. in terminating Mother's parental rights. *See In re D.S.B.*, 2013 MT 112, ¶ 12, 370 Mont. 37, 300 P.3d 702.

This Court may affirm the district court's order based on one or more theories. *See In re C.P.*, 2001 MT 187, ¶ 13, 306 Mont. 238, 32 P.3d 754 (Court did not have to address mother's challenge to termination of her rights under Mont. Code Ann. § 41-3-609(1)(f), when district court provided an alternative basis for termination under Mont. Code Ann. §§ 41-3-609(1)(d) and [423](2)(e)). The statute provides "multiple circumstances under which a court is authorized to terminate a parent's right to a child." *In re K.J.B.*, 2007 MT 216, ¶ 31, 339 Mont. 28, 168 P.3d 629. Where a district court relies on more than one statutory basis in terminating parental rights, any one basis, if correctly relied upon, is sufficient to support termination under Mont Code Ann. § 41-3-609(1). *S.T.*, ¶ 15; *T.H.*, ¶ 30 (abandonment is a "separate and independent basis for termination" under -609(1)(b)).

Thus, this Court may affirm the district court's order terminating Mother's parental rights based on her failed and unsuccessful treatment plan. Likewise, this Court may also affirm the order based on the court's conclusion that Mother abandoned S.B.C.

C. Mother Left S.B.C. Under Circumstances That Made it Reasonable to Believe She Did Not Intend to Care for S.B.C. in the Future.

Mother argues that no testimony was presented at the termination hearing to establish she had abandoned her child. (M. Br. at 19.) However, the undisputed facts before the district court at the time of the termination hearing established that a warrant was issued for Mother based on her failing to report to her felony probation officer. Mother also failed to appear at the termination hearing. The record also shows that Mother had a history of consciously choosing to avoid arrest over caring for her children. (01/24/12 Tr. at 105.) Thus, it was not unreasonable for the district court to conclude that Mother's actions of absconding from supervision and not maintaining contact with DPHHS indicated her unwillingness to care for S.B.C. *See In re P.E.*, 282 Mont. 52, 934 P.2d 206 (1997) ("factual determinations [of what constitutes abandonment] are properly left to the District Court and . . . will be upheld unless clearly erroneous.").

The statutory definition of "abandon," "abandoned," and "abandonment" includes "leaving a child under circumstances that make reasonable the belief that

the parent does not intend to resume care of the child in the future." Mont. Code Ann. § 41-3-102(1)(a)(i). In *M.J.C.*, this Court affirmed termination of a parent's rights based on abandonment when the parent had not tried to establish a relationship with the child through visits or support and also failed to comply with the treatment plan. *M.J.C.*, ¶ 12. Significantly, this Court explained that the parent's "noncompliance with his treatment plan also indicates that he had no intention of caring for M.J.C. in the future." *M.J.C.*, ¶ 12.

This Court has held that when a parent failed to comply with her treatment plans and then ceased all contact with DPHHS, her whereabouts were unknown, and she failed to appear at the termination hearing, the trial court properly concluded that the parent abandoned her children by leaving them under circumstances that made reasonable the belief she did not intend to resume care of them. *In re A.E.*, 255 Mont. 56, 840 P.2d 572 (1992). *See also In re K.P.M.*, 2009 MT 31, ¶¶ 25-27, 349 Mont. 170, 201 P.3d 833 (the district court terminated mother's parental rights on the basis of abandonment when she "failed to manifest any intention she would someday resume physical custody or make permanent legal arrangements for [her child]"); *T.H.*, ¶¶ 29-33 (termination of parental rights based on abandonment upheld when parent stipulated to TLC, left town, had minimal contact with her children, and no contact with her social worker); *M.J.W.*, ¶¶ 16-17 (father's failure to parent, with minimal intermittent contact and

visitation, made reasonable the belief that father did not intend to resume care of the child in the future).

Mother argues that the court's findings were not sufficient to establish that she left S.B.C. under circumstances that made it reasonable to believe she did not intend to resume care of the child in the future. While the State does not agree the court's findings were infirm, when its orders are examined under the doctrine of implied findings, there is additional support for its conclusion.

This Court has adopted the doctrine of implied findings for the purpose of reviewing findings of fact. The doctrine provides that where findings of fact "are general in terms, any findings not specifically made, but necessary to the [determination], are deemed to have been implied, if supported by the evidence." *Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶ 41, 368 Mont. 101, 293 P.3d 817 (quoting *In re Transfer of Location for Mont. All-Alcoholic Bevs. Resort*, 2008 MT 165, ¶ 29, 343 Mont. 331, 184 P.3d 324).

This Court has relied upon the doctrine of implied findings in youth in need of care cases. *See In re D.A.*, 2003 MT 109, ¶¶ 21, 26, 315 Mont. 340, 68 P.3d 735 (while some facts appeared conclusory, Court's "concern on review is whether the evidence supports them"); *M.J.W.*, ¶ 20 (district court "implicitly" determined the child was "abused and neglected" upon a determination that the child was abandoned); *T.H.*, 2005 MT 237, 328 Mont. 428, 121 P.3d 541. *See also In re*

S.C., 2000 MT 370, ¶ 14, 303 Mont. 444, 15 P.3d 861 (Court applied doctrine of implied findings in involuntary commitment case.).

Based on review of the testimony presented and the record before the district court, the court's conclusion that Mother's actions indicated she did not intend to care for S.B.C. were certainly supported beyond a reasonable doubt.

CONCLUSION

This Court should affirm the district court's order denying the motion to transfer and the district court's findings of fact, conclusions of law, and order terminating Mother's parental rights.

Respectfully submitted this 2nd day of June, 2014.

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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 9,925 words, excluding certificate of service and certificate of compliance.

_____
KATIE F. SCHULZ

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 14-0084

IN THE MATTER OF:

S.B.C., Jr.,

Youth in Need of Care.

APPENDIX