IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0642

IN THE MATTER OF:

D.E./A.E.,

Youths in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Second Judicial District Court,
Butte-Silver Bow County, The Honorable Brad Newman, Presiding

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STATEMENT OF THE ISSUES

Whether sufficient evidence supports that district court's determination that ICWA did not apply to this matter.

Whether the district court abused its discretion in terminating Mother's parental rights.

STATEMENT OF THE CASE

In August 2015, the Department of Public Health and Human Services, Child and Family Services Division (DPHHS) filed petitions for emergency protective services, adjudication as a youth in need of care, and temporary legal custody (TLC) for D.E. (born in 2003) and A.E. (born in 2006). (Doc. 1.)[1] The children's birth mother is T.E. (Mother) and their birth father passed away in June 2015.

Initial pleadings indicated the children may be Indian children and subject to the Indian Child Welfare Act (ICWA). (Doc. 2; 25 U.S.C. § 1901, *et seq*. (citations to ICWA will be to the applicable section).) However, later pleadings and statements on the record verified that the children were not in fact Indian

[1] This appeal concerns two siblings, D.E. and A.E. Since much of their respective cases contain the same information, references to the district court record will be to *In re D.E.*, Cause No. DN 15-075, unless otherwise noted.

children. (10/28/15 Tr. at 7-8, 11; 05/18/16 Tr. at 8; 01/11/17 Tr. at 7-8; Docs. 4, 34, 40.)

The children were adjudicated as youths in need of care and DPHHS was granted TLC of the children while Mother worked on court-approved treatment plans. (10/28/15 Tr; 12/07/15 Tr.; Docs. 15, 18.) Despite the various services offered to Mother and TLC being extended multiple times, Mother was unable to successfully complete her second treatment plan and a termination of parental rights (TPR) hearing was held in June 2017. (06/07/17 Hr'g (Hr'g); Doc. 56, attached to Mother's Opening Brief (Br.) as App. 1.) The district court concluded that clear and convincing evidence established the criteria of Mont. Code Ann. § 41-3-609(1)(f) and entered orders terminating Mother's parental rights. (*Id*.) Mother appeals from those orders.

STATEMENT OF THE FACTS

Between 2008 and 2015, DPHHS received three referrals concerning Mother and her care of the children; however, none of the reports were substantiated. (Doc. 2; 10/28/15 Tr.) Shortly after the children's birth father passed away in June 2015, multiple reports were made to law enforcement with concerns that Mother was unable to provide for the children's basic needs. (*Id*.) Welfare checks on the family did not result in DPHHS intervention. (*Id*.)

On August 20, 2015, law enforcement and DPHHS were alerted to allegations that Mother was chasing the children out of the home while threatening to kill A.E. and that Mother hit D.E. with a bungee cord. (Doc. 2; 10/28/15 Tr.) Mother was arrested for misdemeanor partner/family member assault and the children were placed with a non-relative kinship provider. (*Id*.)

When Mother was released from jail, she did not go see the Child Protection Specialist (CPS) at DPHHS as directed. (Doc. 2; 10/28/15 Tr.) Instead, and in violation of the court order prohibiting her from seeing the children, she went to where they were staying. (*Id*.) As a result, Mother was again arrested. (*Id*.) Given concerns with Mother's mental health and possible suicidal thoughts, she was placed into protective custody until she could see a mental health provider. (*Id*.)

CPS Matt LeBrun tried to meet with Mother at the jail but was advised that Mother refused to get dressed or cooperate with detention staff and thus could not have visitors. (Doc. 2; 10/28/15 Tr.) In addition to investigating collateral resources, LeBrun spoke to the children who confirmed a history of abuse and neglect by Mother, including being struck, threatened, left without water, and exposed to adults using dangerous drugs, including mushrooms and methamphetamine. (*Id*.)

DPHHS filed petitions for emergency protective services, adjudication as a youth in need of care, and TLC. (Docs. 1-2.) The affidavits in support of the petitions were identical and stated that the children may be Indian children as defined in ICWA based on the fact a parent may be an enrolled member of the Blackfeet Tribe. (Doc. 2.) LeBrun stated requests for verification of Indian child status would be sent to the Tribe and that he had contacted Blackfeet Tribal Social Services for assistance in finding placement options for the children. (*Id*.) On September 4, 2015, DPHHS filed a Notice of No ICWA Involvement with no supporting documentation or affidavit. (Doc. 4.) The notice "advise[d] the [c]ourt and all interested parties that the Department has learned that the Indian Child Welfare Act is not involved in this case." (*Id*.)

Prior to the show cause hearing, Mother was involuntarily committed to the Montana State Hospital (MSH) based on her mental health status. (Doc. 6; 10/28/15 Tr.; Hr'g at 34-35.) The show cause hearing was continued to October 28, 2015, upon Mother's motion. (Docs. 6-8.) The children's initial placement broke down because Mother tried to get into the house and the children were eventually placed in Poplar with a paternal aunt who is a licensed foster parent through the Fort Peck Tribe. (10/28/15 Tr.)

At the continued show cause hearing, Mother did not appear, but she was represented by counsel. (10/28/15 Tr.) Mother's counsel had not spoken to

Mother for several weeks and did not know Mother's position on the pending petition. (*Id*.) LeBrun testified about the basis for DPHHS intervention and the needs of the Mother and children, including that Mother had no housing and was in no condition to care for the children based on her mental health and substance abuse issues. (*Id*.)

LeBrun explained that the children's deceased father was affiliated with the Blackfeet Tribe so he inquired directly with that Tribe about the children's status as Indian children. (10/28/15 Tr. at 7-8.)[2] The Tribe verbally confirmed the children were not eligible for membership and thus are not Indian children under ICWA. (*Id*. at 7-8, 11.) LeBrun explained that he had not obtained anything in writing yet from the Tribe. (*Id*. at 11.) LeBrun also explained that Mother mentioned being affiliated with a tribe, but he had not yet confirmed Indian child status because Mother stated she was not enrollable and thus the children were not enrollable. (*Id*.)

The children's guardian ad litem (GAL) agreed with the requested relief and the court adjudicated the children as youths in need of care and granted TLC to DPHHS for a period of six months. (10/28/15 Tr.; Doc. 15.) The court noted it was making its findings and conclusions pursuant to only Montana's Dependent

[2] LeBrun's initial affidavit mistakenly indicated Mother was a member of the Blackfeet Tribe when it was actually the birth father who was affiliated with that Tribe.

Neglect provisions and not ICWA. (*Id*. at 19.) The court found that the children were not Indian children based on their father's tribal affiliation but ordered DPHHS to obtain confirmation that ICWA did not apply based on Mother's Indian heritage. (*Id*. at 19-20.) The court further ordered DPHHS to develop an appropriate treatment plan and set a hearing for December 7, 2015, to consider the plan. (*Id*.)

Mother was not present at the treatment plan hearing, but her appointed counsel was there on her behalf. (12/07/15 Tr.; Doc. 18.) CPS Supervisor Kara Richardson explained that contact with Mother had been inconsistent and incomplete. (*Id*.) Richardson explained that until Butte DPHHS obtained an address for Mother, a courtesy CPS in Great Falls could not be set up. (*Id*.) Richardson described the goals and tasks included in Mother's treatment plan and explained how they addressed the reason for DPHHS's involvement. (*Id*.) The court reviewed each task and goal on the treatment plan, approved the plan as appropriate, and ordered that Mother comply with the tasks and goals set forth therein. (*Id*.)

Mother did not make contact with DPHHS for several months, but in early February 2016, she finally contacted LeBrun and began working with a courtesy CPS in Great Falls. (05/18/16 Tr.) Because Mother just began working her

treatment plan in February, DPHHS filed a petition to extend TLC and a motion to approve a second treatment plan in early May 2016. (Docs. 23-24, 30, 26-27.)

The second treatment plan again focused on Mother's mental health and chemical dependency (CD) issues as well as her need to obtain and maintain stable housing and demonstrate the ability to parent her children. (05/18/16 Tr.) Mother moved into her own home in Great Falls in April 2016 and she was participating in individual counseling. (*Id*.) The court extended TLC and approved the proposed second treatment plan for Mother since the first plan had expired. (*Id*.; Docs. 30, 32.)

As of May 2016, the children were doing well in their kinship foster placement in Poplar and they also had a courtesy CPS worker assigned to them there. (05/18/16 Tr.) Based on Mother's progress with her plan, DPHHS planned to locate a foster home in Great Falls when school ended so Mother and the children could see each other more often. (*Id*.) The children were returned to Mother's care for a trial home visit at the end of July 2016. (Doc. 40.)

On August 9, 2016, DPHHS filed a letter from the Turtle Mountain Band of Chippewa Indians, which stated that neither Mother nor the birth father were enrolled with the Turtle Mountain Band and neither D.E. nor A.E. were enrolled or eligible for enrollment in the Turtle Mountain Band of Chippewa Indians. (Doc. 34.)

In early October 2016, the children were removed from Mother's care because Mother tested positive for methamphetamine. (Doc. 40.) Mother tested positive for methamphetamine again in October and twice in November 2016. (*Id.*; Hr'g at 18-23, 29-43.) After she tested positive, Mother stopped contacting DPHHS and also stopped going to therapy or complying with UA testing. (*Id.*; Doc. 45.)

On December 20, 2016, DPHHS filed a petition to extend TLC based on Mother needing more time to complete her treatment plan. (Docs. 39-40.) In addition to participating in CD treatment and maintaining sobriety, Mother still needed to set up and complete a parenting evaluation and then demonstrate improved parenting skills based on those recommendations. (*Id.*) In LeBrun's affidavits in support of extending TLC, he stated that he did not believe D.E. or A.E. were Indian children pursuant to ICWA. (Doc. 40.)

Mother stipulated to extending TLC based on Lebrun's affidavit and agreed with the proposed permanency plan. (01/11/17 Tr.; Docs. 40, 42, 47-48.) At that hearing, when the court found that DPHHS had made "active efforts" in this case, counsel for DPHHS reminded the court that it had been determined that ICWA did not apply and the court concurred without objection. (01/11/17 Tr. at 7-8.) The court approved the permanency plan and granted DPHHS's petition to extend TLC. (Docs. 47-48.)

However, as of May 2017, Mother was not maintaining contact with DPHHS, participating in regular UA testing, or attending mental health counseling. (Doc. 51; Hr'g.) DPHHS filed a TPR petition based on Mother's failure to successfully complete her second treatment plan and a hearing was set for June 7, 2017. (Docs. 50-51.) The children's GAL supported the petition. (Doc. 54.)

At the TPR hearing, the court heard testimony from several witnesses and the recommendation of the GAL, who agreed that termination of Mother's parental rights was in the children's best interests. (Hr'g.) The GAL explained how D.E. loved his mother, but recognized he needs stability in his life that his Mother cannot provide. (*Id*. at 26-29.) D.E. wanted to be with her, but was afraid that things would fall apart again and he would return to foster care. (*Id*.) A.E. expressed sadness about her mother, but like D.E., recognized her need for a safe, stable home and told the GAL it was "OK" to terminate her mother's rights. (*Id*.)

Christa Waliezer, was the CPS courtesy worker in Great Falls who worked with Mother since March 2016. (Hr'g at 7-18.) Waliezer assisted and monitored Mother's efforts with the tasks and goals on her treatment plan and also supervised the trial home visit and in-home safety plan. (*Id*.) Waliezer communicated on a regular basis with Cassandra Olson, the CPS in Butte, about Mother's failed treatment plan tasks and unwillingness to participate in offered treatments and services for several months. (Hr'g at 18-23.)

Mother had weekly contact with Waliezer for the first three to four months, but then her contact became inconsistent and finally nonexistent. (Hr'g at 7-18.) Waliezer explained that in October 2016, Mother was struggling with her substance abuse issues and stopped taking UA tests in late November 2016 except for one UA test in February and one in March 2016. (*Id*.) In addition, Mother missed several mental health appointments and, as a result, was discharged from that service. (*Id*.) While apparently Mother believed she no longer needed therapy, the treating therapists did not agree. (*Id*. at 15-16.)

After a confrontation with Mother, D.E. (age 14) refused to attend visits with Mother. (Hr'g at 7-18.) Waliezer described how Mother was "verbally rough" towards D.E. during visits and that she tried to manipulate him by making him feel guilty about not wanting to come home. (*Id*.) Mother attempted to also manipulate A.E. by telling her DPHHS workers were lying and by making impossible promises to A.E. (*Id*.) At first, Mother "blamed" A.E. for DPHHS's intervention and then later blamed D.E. (*Id*.) Waliezer believed Mother had "mixed emotions" about having her parental rights terminated. (*Id*. at 17.)

Mother testified on her own behalf and refuted that she had been evicted from her apartment. (Hr'g at 29-43.) Mother agreed she tested positive for methamphetamine in October 2016, but claimed she did not know how that happened. (*Id*.) Mother admitted that but for one UA test in February and one in

March, she had not complied with the requirement that she submit to UA testing. (*Id*.) Mother admitted she had not had any CD treatment and explained that was because she did not believe she needed any, despite the fact it had been recommended. (*Id*.) When asked if she recalled telling the GAL and Waliezer in December 2016 that she had a serious addiction problem, Mother denied having made that statement. (*Id*.)

During direct examination, Mother stated that she did not believe she needed any mental health treatment either. (*Id*.) However, during cross-examination, Mother stated she had called her former therapist because she wanted to keep going to her, but learned she had been discharged for failing to attend appointments. (*Id*.) When asked if she had been diagnosed with bipolar disorder at MSH, Mother replied that she thought it was "more of depression that I was dealing with." (*Id*. at 41.)

Following argument by all the parties, the court orally terminated Mother's parental rights. (Hr'g at 47-57.) The court made thorough and specific findings that Mother had not successfully completed several components of her treatment plan, including the CD and mental health issues. (*Id*.) The court also carefully reviewed its rationale for concluding that the conduct or conditions rendering Mother unfit or unable/unwilling to parent was unlikely to change in a reasonable period of time. (*Id*.)

STANDARD OF REVIEW

Since the appellant bears the burden of establishing error by the district court, 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 (citation omitted). This Court reviews the district court's decision to terminate parental rights for an abuse of discretion. *In re M.S.*, 2014 MT 265A, ¶ 12, 376 Mont. 394, 336 P.3d 930 (citation omitted). This Court "will not reverse a district court's ruling by reason of an error that 'would have no significant impact upon the result." *In re H.T.*, 2015 MT 41, ¶ 10, 378 Mont. 206, 343 P.3d 159 (citation omitted).

This Court "will not disturb a district court's decision 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." *H.T.*, ¶ 10 (citation omitted); *In re K.B.*, 2013 MT 133, ¶ 18, 370 Mont. 254, 301 P.3d 836 (citation omitted). A district court abuses its discretion when it "acts arbitrarily, without employment of conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *In re L.D.*, 2018 MT 60, ¶ 10, 390 Mont. 33, ___ P.3d ___ (citing *In re D.B.*, 2007 MT 246, ¶ 18, 339 Mont. 240, 168 P.3d 691); *In re M.J.*, 2013 MT 60, ¶ 17, 369 Mont. 247, 296 P.3d 1197 (citation omitted).

This court reviews a district court's conclusions of law for correctness. *K.B.*, ¶ 18; *H.T.*, ¶ 10 ("Compliance with state statutory requirements presents a question of law that we review for correctness."). This Court reviews a district court's factual findings for clear error. *In re A.K.*, 2015 MT 116, ¶ 20, 379 Mont. 41, 347 P.3d 711 (citation omitted). "Findings of fact are clearly erroneous if not supported by substantial evidence, the court misapprehended the effect of the evidence, or this Court has a definite and firm conviction that the lower court was mistaken." *L.D.*, ¶ 10 (citation omitted).

Finally, questions of whether a person has been denied his or her right to due process are questions of constitutional law, for which this Court's review is plenary. *In re M.V.R.*, 2016 MT 309, ¶ 24, 385 Mont. 448, 384 P.3d 1058 (citation omitted).

SUMMARY OF THE ARGUMENT

The record established, and the district court confirmed, that D.E. and A.E. are not Indian children as determined by two separate tribes. Based on the notice that ICWA did not apply and the supporting uncontested testimony from the CPS that the Blackfeet Tribe verified neither child was enrolled or enrollable with that Tribe, the district court correctly made a judicial determination that the children were not Indian children at the show cause hearing. DPHHS also made diligent efforts to confirm that the children were not Indian children through Mother's

heritage by contacting the Turtle Mountain Band of Chippewa Indians. Mother was afforded fundamentally fair procedures throughout these cases and the district court did not "act[] arbitrarily, without employment of conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice" when it proceeded to the TPR hearing based on its judicial determinations that ICWA did not apply.

Nor did the district court abuse its discretion when it concluded that the conduct or condition rendering Mother unfit to parent was unlikely to change in a reasonable period of time. The record, including Mother's own statements at the TPR hearing, contains substantial, credible evidence that Mother was unable to make and sustain the necessary life changes to safely parent her children. Mother's argument on appeal essentially requests this Court to reevaluate the evidence for a different outcome, which is not this Court's role. Mother has not established that district court's findings of fact were clearly erroneous because the court did not "misapprehend the effect of the evidence," the findings were "supported by substantial evidence" and they did not create a "definite and firm conviction that the lower court was mistaken."

ARGUMENT

I. The district court did not abuse its discretion or violate Mother's due process rights by proceeding to termination of her parental rights under only Mont. Code Ann. § 41-3-609(1)(f).

A. There is substantial, credible evidence in the record demonstrating that the children were not Indian children pursuant to ICWA.

To determine if ICWA applies, the court must verify the youth in need of care meets the definition of an "Indian child" under § 1903(4). Pursuant to ICWA, a child who is under 18 years old and not married, is an "Indian child" if she 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." § 1903(4).

In interpreting and applying ICWA provisions, this Court has historically turned to the Guidelines set out by the Bureau of Indian Affairs in 1979. *See* 44 Fed. Reg. 67,584-67,795 (November 26, 1979) (hereinafter, 1979 Guidelines); *In re C.H.*, 2000 MT 64, ¶ 12, 299 Mont. 62, 997 P.2d 776 (referring to the 1979 Guidelines as persuasive authority in interpreting ICWA); *In re A.G.*, 2005 MT 81, ¶ 12, 326 Mont. 403, 109 P.3d 756; *L.D.*, ¶ 14

In February 2015, the BIA issued new guidelines. *See* 80 Fed. Reg. 10,146-10,159 (February 25, 2015) (hereinafter, 2015 Guidelines). The 2015 Guidelines were effective as of February 25, 2015, and they "supersede[d] and replace[d]" the 1979 Guidelines. (2015 Guidelines at 10,147.) After the 2015 Guidelines were issued, the

BIA engaged in a notice-and-comment process to promulgate ICWA Regulations and in June of 2016, when the BIA issued the Regulations, it explained a revised set of guidelines would be issued in December 2016. (*See* 81 Fed. Reg. 38,778-38,876 (June 14, 2016); codified at 25 C.F.R. Part 23) (hereinafter, Regulations).).

Although the Regulations were not in effect at the time these cases were initiated, the petitions for TPR were filed in May 2017, after the Regulations became effective on December 12, 2017. 25 C.F.R. § 23.143 (Regulations did not apply to proceedings initiated prior to the effective date, but they do apply to "any subsequent proceeding in the same matter."). Therefore, the Regulations applied to the TPR proceeding.

The Regulations make it clear that *only* an Indian Tribe may determine "whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe." 25 C.F.R. §§ 23.108(a), (b) (emphasis added). This Court has long-held this same principle. *See L.D.*, ¶ 14 (district court "may not substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes"); *A.G.*, ¶ 14 ("for ICWA determination purposes . . . tribes have ultimate authority to decide who qualifies as an "Indian child").

Using only the Tribe's determination of a child's and parents' membership/enrollment status, a district court must make a judicial determination

of whether the child is an Indian child. 25 C.F.R. §§ 23.107, 23.108(c). When making such a judicial determination, the district court "may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership. 25 C.F.R. § 23.108(c). *See In re T.J.H.*, 2003 MT 352, 318 Mont. 528, 81 P.3d 504 (although hearsay, letter from tribe indicating child is not member or eligible for membership is sufficient to establish child not Indian child when supported by other uncontested evidence).

Here, the only time a party expressed a belief that ICWA may apply was in LaBrun's initial affidavit where he stated the children may be Indian children based on possible affiliation with the Blackfeet Tribe. However, even before the show cause hearing, DPHHS filed a notice to the court explaining that the CPS has learned ICWA did not apply to the children. LeBrun confirmed this notice at the show cause hearing when he testified that he verified with the Blackfeet Tribe that neither A.E. or D.E. were eligible for membership with the Tribe. LeBrun also described Mother's vague comment that, while she had Indian heritage, she was neither a member or eligible for membership with a tribe. Although this would mean neither child could be considered an Indian child, LeBrun testified he would verify this information.

When the court issued its ruling adjudicating the children as youths in need of care, the court correctly made the judicial determination that based on the birth

father's lineage, there was "confirmation in the file that ICWA does not apply because the children are not enrollable through father's heritage." (10/28/15 Tr. at 19.) The court instructed DPHHS to confirm which tribe Mother was affiliated with and verify Mother's belief that the children were neither eligible for enrollment or enrolled in the tribe as he did with the Blackfeet Tribe. (Tr. at 19-20.)

At the May 18, 2016 TLC extension hearing, LaBrun testified that ICWA did not apply, which was later confirmed by a letter from the Turtle Mountain Band of Chippewa Indians, which stated that neither Mother nor the birth father were enrolled with the Tribe and neither of the children was enrolled or eligible for enrollment in the Tribe. (05/18/16 Tr. at 8; Doc. 34.) In his December 2016 affidavit in support of the petition to extend TLC, LeBrun again verified that neither D.E. or A.E. were Indian children pursuant to ICWA and further confirmed that information at the January 11, 2017 hearing, when he reiterated that ICWA did not apply in these cases. (Doc. 40; 01/11/17 Tr. at 7-8; 40.)

The record supports the court's determination that the children were not Indian children and their cases were not subject to ICWA. The record also establishes that DPHHS made diligent efforts to investigate and verify the children's Indian heritage and whether they were enrolled or eligible for enrollment with ta tribe. The district court correctly concluded ICWA did not

apply to these cases and did not abuse its discretion in proceeding to the TPR hearing.

Mother relies upon this Court's recent decision in *L.D.* to support her argument. However, the facts and circumstances in *L.D.* are distinguishable. First of all, in *L.D.*, in its initial petition, DPHHS asserted that L.D. *was* an Indian child, and while it did not receive confirmation of that fact and the parents stated the child was not eligible for enrollment, DPHHS continued to treat the case as though ICWA applied. In *L.D.*, DPHHS served the named tribe and presented Qualified Expert Witness (QEW) testimony as required by ICWA at the show cause, extension of TLC, and first TPR hearings (L.D.'s father's rights were terminated under ICWA).

Here, DPHHS never asserted that the children were Indian children. Rather, DPHHS stated they "may" be Indian children. Also, unlike *L.D.*, DPHHS verified early in the proceedings that ICWA did not apply, did not serve a tribe with notice of the proceedings, and never presented QEW testimony. In fact, the only period of time DPHHS believed ICWA may apply was from the initial petition to the September 4, 2015 notice to the court that ICWA did not apply.

At the October 28, 2015 show cause hearing, the district court conducted a thorough open-court discussion about the applicability of ICWA and properly concluded the children were not Indian children based on information from the

Blackfeet tribe. The court also addressed the issue of ICWA at subsequent proceedings to ensure that DPHHS had done its investigation into Mother's alleged Indian heritage. Unlike the situation in *L.D.*, the court did not rely upon Mother's stipulation that ICWA did not apply. Nor was DPHHS passive in its efforts to verify the children's Indian child status as was the case in *L.D.*

Moreover, in *L.D.* it was not until right before the second TPR hearing that DPHHS declared ICWA did not apply and offered only comment from DPHHS's counsel as evidence to that fact. Unlike the facts in *L.D.*, here there was evidence of DPHHS's diligent efforts to identify and verify the children's Indian child status.

The factual circumstances presented here do not mandate reversal. Unlike *L.D.*, there was sufficient, credible evidence for the district court to make a threshold determination that the children were not Indian children and proceed to TPR knowing ICWA did not apply.

B. Mother was afforded fundamentally fair procedures throughout these proceedings.

On appeal, Mother makes only three passing references to due process and, but for listing the standard of review for constitutional claims, fails to set out any supporting legal authority or argument concerning the fundamental fairness of the proceedings. (Br. at 15, 17, 24.) This Court will not address arguments unsupported by authorities. *See, e.g., In re A.R.*, 2004 MT 22, ¶ 10, 319 Mont. 340, 83 P.3d 1287; Mont. R. App. P. 12(g).

In addition to absence of legal argument, Mother failed to properly preserve this constitutional issue by not raising it with the district court. *See In re M.B.*, 2009 MT 97, ¶ 10 n.1, 350 Mont. 76, 204 P.3d 1242 (failure to raise constitutional issues below precludes review of such claims on appeal). As this Court has consistently explained, "[g]enerally, a constitutional issue is waived if not raised at the earliest opportunity." *State v. Roundstone*, 2011 MT 227, ¶ 31, 362 Mont. 74, 261 P.3d 1009 (citation omitted). Nonetheless, should this Court consider Mother's constitutional claim, based upon the record presented, Mother cannot establish that her due process rights were violated.

A parent's right to the care and custody of a child is a fundamental liberty interest, which must be protected by fundamentally fair procedures. *In re A.H.*, 2015 MT 75, ¶ 25, 378 Mont. 351, 344 P.3d 403 (citing *D.B.*, ¶ 17). As this Court has explained, a "natural parent's right to the care and custody of his or her child is a fundamental liberty interest which must be protected by fundamentally fair procedures." *See In re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, 87 P.3d 408; *M.V.R.*, ¶ 44. Due process protects a parent from being placed at an "unfair disadvantage" during State proceedings to terminate the parent's custody of a child. *M.V.R.*, ¶ 44 (citation omitted). The "[k]ey components of a fair proceeding are notice and an opportunity to be heard." *In re C.J.*, 2010 MT 179, ¶ 27, 357 Mont. 219, 237 P.3d 1282 (citation omitted).

This Court has consistently stated that although a parent must be afforded fundamentally fair procedures at all stages of termination proceedings, a child's physical, mental, and emotional needs are paramount in any determination. *In re F.M.*, 2002 MT 180, ¶ 22, 311 Mont. 35, 53 P.3d 368. This Court has also noted that "due process is flexible, and 'the process that is due in any given case varies according to the factual circumstances of the case and the nature of the interests involved.'" *In re D.B.J.*, 2012 MT 220, ¶ 27, 366 Mont. 320, 286 P.3d 1201 (citation omitted) ("analysis of the procedures at issue will necessarily depend on the interests at stake"); *In re B.P.*, 2001 MT 219, ¶ 31, 306 Mont. 430, 35 P.3d 291 (citation omitted) (mother must be given opportunity to be heard but not at the expense of children whose best interests are of paramount focus in abuse and neglect proceedings).

Mother's due process rights were not infringed during these proceedings. She was given notice of all proceedings, had appointed counsel at all times, and was afforded multiple opportunities to be heard. Mother's counsel appeared at every hearing on her behalf and Mother was present at the TPR hearing. However, at no time did Mother challenge the court's judicial determination that ICWA did not apply or assert it was somehow infirm or unsupported.

The district court's judicial determination that the children were not Indian children was correct. Mother's parental rights were correctly terminated pursuant

to Mont. Code Ann. § 41-3-609(1)(f) following the district court's detailed, thorough, and extremely thoughtful findings, conclusion and order.

II. The district court did not abuse its discretion when it terminated Mother's parental rights

A. Termination of parental rights under Mont. Code Ann. § 41-3-609(1)(f)

While parents possess fundamental liberty interests in their right to maintain custody of their child, those rights are constrained by the child's constitutional rights to be free from abuse and neglect. The balance is struck in the laws governing termination of parental rights, which include a statutory mandate that primary consideration must be given to the needs of the child. Mont. Code Ann. § 41-3-609(3); *In re T.S.B.*, 2008 MT 23, ¶ 18, 341 Mont. 204, 177 P.3d 429. "[T]he best interests of the children are of paramount concern in a parental rights termination proceeding and take precedence over the parental rights." *In re K.L.*, 2014 MT 28, ¶ 15, 373 Mont. 421, 318 P.2d 691 (citation omitted). A child's need for a permanent, stable, and loving home supersedes a biological parent's right to parent the child. *In re D.A.*, 2008 MT 247, ¶ 21, 344 Mont. 513, 189 P.3d 631. This Court has repeatedly held that when considering termination of a parent's rights, "[t]he paramount concern is the health and safety of the child, and the district court must give 'primary consideration to the physical, mental and

emotional conditions and needs of the child.'" *In re E.Z.C.*, 2013 MT 123, ¶ 22, 370 Mont. 116, 300 P.3d 1174 (citation omitted).

Here, the district court terminated Mother's parental rights pursuant to Mont. Code Ann. § 41-3-609(1)(f). (Hr'g; Doc. 56.) To terminate a parent's rights under that subsection, the following criteria must be established:

> [T]he child is an adjudicated youth in need of care and both of the following exist: (i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and (ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

Mont. Code Ann. § 41-3-609(1)(f). On appeal, Mother challenges only the sufficiency of the evidence in support of the court's findings related to (f)(ii).[3]

When "determining whether the conduct or condition of a parent is unlikely to change within a reasonable time [as required under Mont. Code Ann. § 41-3-609(1)(f)(ii)], the court shall enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect ***or*** that the conduct or the condition of the parents renders the parents unfit,

[3] Although Mother lists completion of her treatment plan in the Summary of the Argument and Heading "II" as part of her appeal, no legal arguments relevant to whether Mother completed her treatment plan are presented in her Opening Brief. Accordingly, the State will only address Mother's challenge to the court's findings concerning the likelihood of her conduct/condition changing in a reasonable period of time.

unable, or unwilling to give the child adequate parental care." Mont. Code Ann. § 41-3-609(2) (emphasis added).

This Court recently clarified that,

> The phrase, "*the conduct or condition"* (emphasis added), indicates that § 41-3-609(1)(f)(ii), MCA, is referring to a prior finding of a conduct or condition that has rendered the parent unfit. Given the statute does not expressly require the district court to make such a finding, the meaning of the statute is that the condition rendering the parent unfit is the condition(s) or reason(s) in § 41-3-609(1)(f)(i), MCA, that caused the treatment plan to be unsuccessful.

In re J.B., 2016 MT 68, ¶ 22, 383 Mont. 48, 368 P.3d 715 (emphasis in original).

When determining whether the conduct or condition of the parent is unlikely to change, "the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child." Mont. Code Ann. § 41-3-609(3). The issue is not merely whether a parent has made progress or would make some progress in the future; the issue is whether the parent is likely to make enough progress, within a reasonable time, to overcome the circumstances rendering her unfit. *D.F.*, ¶ 43 (citation omitted).

When making such a determination, the court shall consider, but is not limited to, the following:

> (a) emotional illness, mental illness, or mental deficiency of the parent of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time;

(b) a history of violent behavior by the parent;

(c) excessive use of intoxicating liquor or of a narcotic or dangerous drug that affects the parent's ability to care and provide for the child; and

(d) present judicially ordered long-term confinement of the parent.

Mont. Code Ann. § 41-3-609(2).

As this Court explained,

> The issue here is not merely whether Appellant has made progress or whether she would make some progress in the future. Rather, the issue is whether she is likely to make enough progress, within a reasonable time, to overcome the circumstances rendering her unfit to parent D.F. What constitutes a "reasonable time" in this case is largely dependent on D.F.'s special needs. As we have held, the needs of the child are always paramount to the rights of the parent.

D.F., ¶ 43 (internal citations omitted).

Consideration of a person's past conduct is appropriate when determining whether that parent's conduct is likely to change or not. *In re R.M.T.*, 2011 MT 164, ¶ 38, 361 Mont. 159, 256 P.3d 935 (citing *D.A.*, ¶ 23); *In re A.J.E.*, 2006 MT 41, ¶ 27, 331 Mont. 198, 130 P.3d 612 (citing *In re J.C., Jr.*, 2003 MT 369, ¶ 11, 319 Mont. 112, 82 P.3d 900). As the Court has repeatedly held, "[W]e do not have a crystal ball to look into to make this determination, so it must, to some extent, be based on a person's past conduct." *In re M.T.*, 2002 MT 174, ¶ 34, 310 Mont. 506, 51 P.3d 1141 (citations omitted); *J.C., Jr.*, ¶ 11. This may include conduct prior to any work or progress made in a treatment plan. *D.F.*, ¶ 44 (citation omitted).

If the child at issue is not an Indian child, DPHHS must prove the statutory criteria for termination of parental rights by clear and convincing evidence. Mont. Code Ann. § 41-3-422(5)(a)(iv). This Court has defined clear and convincing evidence in the context of parental rights cases as:

> simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of the proof. This requirement does not call for unanswerable or conclusive evidence.

A.K., ¶ 22 (internal citations omitted).

B. Substantial, credible evidence supported the court's finding that the conduct or condition rendering Mother unfit or unwilling to parent was unlikely to change in a reasonable period of time.

Mother's argument that the court's findings that her conduct/condition was unlikely to change in a reasonable time were clearly erroneous focuses on the source of the testimony presented at the TPR hearing. (Br. at 26-29.) According to Mother's theory on appeal, the absence of evidence from Mother's treatment providers was fatal to DPHHS's TPR request. However, Mother's argument fails to recognize that Mother's own testimony supported the court's findings in addition to the CPS's testimony and GAL's report and recommendations.

It is undisputed that Mother had a history of using methamphetamine. In fact, it was her use of that drug that resulted in the trial home visit being suspended. As the court found,

> when the children were returned to [Mother's care] on a trial basis for a period of approximately two months, the trial placement failed because [Mother] tested positive for using or abusing methamphetamine. Having made real progress on the original treatment plans up to that point in time, to the trial visit, through her own choices and conduct [Mother] rendered the home unstable. The children certainly should not have been exposed to a parent who has resumed drug use or drug abuse.

(Hr'g at 52-53.)

Mother continued to test positive for methamphetamine after the children were returned to foster care. Mother admitted that she stopped doing UA tests in November 2016. Mother did choose to submit to two UA tests over the next seven months, which were negative. The district court properly observed that Mother "neglected her [c]ourt-ordered obligation to establish that she is remaining clean, drug-free, sober, in a capacity to raise these children. At best she's ignored that obligation. At worst, she's trying to manipulate the [c]ourt-ordered component, apparently willing and able to take [the drug test] when she thinks she's going to pass it." (Hr'g at 50-51.)

It is undisputed that Mother had to go to MSH at the beginning of DPHHS's intervention. Mother complied with the recommendations of her mental health providers by attending therapy from February to November 2016. But after the children were removed from her care in October, Mother, by her own admission, stopped attending her mental health appointments. As the court found, "[n]ot only have the State workers told me that mom has discontinued her therapy, mom has

told me that under oath." (Hr'g at 51.) The court further noted that, "Mom has determined that she no longer needs therapeutic help. Again, it wasn't a suggestion. It's a court order. It's how [t[his [c]ourt determines the children's safety and interests needed to be protected." (Hr'g at 51.) The district court judge reminded Mother that he presided over her involuntary commitment proceeding in September 2015 when she was in a "time of crisis" and was certainly aware of the magnitude of her mental health needs. (Hr'g at 52.) The court reiterated that the recommend mental health treatment in her treatment plan was not merely a suggestion, but a court-order and necessary to prevent her from placing her children's safety and health at risk. (Hr'g at 52.)

Mother's appeal amounts to a request that this Court reweigh the evidence and come to an alternate conclusion than the district court. However, that is not this Court's role. As this Court has repeatedly held, it is not in the position to evaluate the evidence for a different outcome; rather, it must review the case to determine if the district court abused its discretion. *See Woerner v. Woerner*, 2014 MT 134, ¶ 29, 375 Mont. 153, 325 P.3d 1244 (citation omitted) ("We review whether substantial evidence in the record supports the court's findings regardless of whether the evidence could support a different outcome as well."). When reviewing a district court's findings, this Court does not consider whether the evidence could support a different finding or "substitute its evaluation of the

evidence for that of the trial court, or pass upon the credibility of witnesses." *A.K.*, ¶ 31 (citing *In re J.M.W.E.H.*, 1998 MT 18, ¶ 43, 287 Mont. 239, 954 P.2d 26). This Court has also consistently explained that it will not reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence for that of the district court. *In re A.N.W.*, 2006 MT 42, ¶ 28, 331 Mont. 208, 130 P.3d 619 (citation omitted).

Witness credibility and the weight which witness testimony should be afforded "is left to the sound discretion of the district court. It is not the role of this Court to reweigh the evidence and substitute [its] judgment" for the trial court's. *In re J.C.B.*, 2004 MT 111, ¶ 14, 321 Mont. 110, 88 P.3d 1280 (citation omitted); *A.K.*, ¶ 31 (It is within the district court's province and discretion to weigh witness testimony and evaluate the credibility of the witnesses.); *In re T.D.H.*, 2015 MT 244, ¶ 34, 380 Mont. 401, 356 P.3d 457 (Court will "substitute [its] evaluation of the evidence for that of the trial court, or pass upon the credibility of witnesses.") Moreover, the existence of conflicting evidence or conflicting professional opinions concerning a required finding "does not preclude a trial court's determination that clear and convincing evidence exists to support a finding of fact." *T.D.H.*, ¶ 34 (citation omitted); *A.K.*, ¶ 31; *In re D.S.*B., 2013 MT 112,

¶¶ 18-19, 370 Mont. 37, 300 P.3d 702; *In re A.N.*, 2005 MT 19, ¶ 32, 325 Mont. 379, 106 P.3d 556 ("a district court need not conform its decision to a particular piece of evidence or a particular expert's report or testimony. . . . ").

A district court's primary concern when terminating a parent's rights is the best interests of the child and recognizing that "[c]hildren need not be left to twist in the wind when their parents fail to give priority to their stability and permanency." *In re T.S.*, 2013 MT 274, ¶ 30, 372 Mont. 79, 310 P.3d 538.

Here, the district court set forth detailed oral findings, properly considering the factors set forth at Mont. Code Ann. § 41-3-609(2). Even without evidence from Mother's mental health provider supporting her decision to stop treatment, the court properly concluded that her mental health condition that renders her unfit to parent was not likely to change in the reasonably foreseeable future. (Hr'g at 54.) The court concluded that the children's best interests would be served by termination of Mother's parental rights based on the length of DPHHS intervention. The court also concluded that continuation of her parent/child relationship with D.E. and A.E. "would put the children at a substantial risk of continued abuse or neglect, both emotional or physical." (Hr'g at 54-55.)

As the court explained,

> I certainly hoped it was going to change a year ago when I was advised the Department was going to return the children to mom on a trial visit, getting back in the home, mom could show me that she was ready and able to, once again, bring the kids into her own—into her

> care and protect them. I don't want to rehash what I've already said as far as my findings that that trial visit did not succeed. Mom's erratic and inconsistent behavior continued. She resorted, once again, to abuse of illegal substances. She put the children at risk.
>
> Now I have a situation where mom tells me things have stabilized and are calm again, but yet, she's unilaterally opted or of her chemical dependency compliance, she's opted out of her mental health compliance based on her own feelings of her own beliefs that we no longer need this assistance.
>
> . . . .
>
> Under the present circumstances, termination of [Mother's] rights are [sic] the only option left for the children. Once we've worked on a case for this long a period of time, under these circumstances, the children's rights to permanence, safety, stability, become paramount. They even override mom's Constitutional right to parent the children.

(Hr'g at 53:21-25 through 54:1-12; 56:3-14.)

Mother failed to meet his burden of establishing error by the district court. *See D.F.*, ¶ 22. The district court's findings are supported by substantial evidence; the court did not misapprehend the effect of the evidence; and review of the record does not leave a definite and firm conviction that the district court erred when it found appropriate treatment plans had been approved and that the condition/conduct rendering Mother unfit to parent was unlikely to change in a reasonable period of time. The district court correctly applied its findings to the proper statutory criteria and its conclusions of law were correct. *See K.B.*, ¶ 18; *H.T.*, ¶ 10.

Mother cannot establish the district court entered clearly erroneous findings of fact or made a mistake of law which amounted to an abuse of discretion. The district court did not "act[] arbitrarily, without employment of conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *See L.D.*, ¶ 10. Accordingly, there is no basis for this Court to disturb the district court's TPR orders.

Even if this Court determines the district court's written order was lacking, reversal is not required. Rather, this Court may remand the matter to allow the district court to issue a more specific order. *See H.T.* In *H.T.*, when the district court applied the wrong standard of proof to a TPR hearing involving ICWA, this Court vacated the order and remanded the matter "for entry of a new order to address whether the evidence established beyond a reasonable doubt, as required by 25 U.S.C. § 1912(f), that continued custody of *H.T.* by Mother likely would result in serious emotional or physical damage to the child." *H.T.*, ¶ 43.

Pursuant to *H.T.*, this Court may simply remand this matter with instructions to the district court to issue an amended order with more specific findings regarding its findings of fact and conclusions of law relative to Mont. Code Ann. § 41-3-609(1)(f)(ii).

CONCLUSION

The district court orders terminating Mother's parental rights to D.E. and A.E. should be affirmed.

Respectfully submitted this 30th day of April, 2018.

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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 7,975 words, excluding certificate of service and certificate of compliance.

/s/ Katie F. Schulz
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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-30-2018:

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