DA 19-0293

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 4

IN THE MATTER OF:

B.H. and G.H.

Youths in Need of Care.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause Nos. DN 17-1 and DN 17-2
Honorable Robert L. Deschamps, III, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Daniel V. Biddulph, Ferguson Law Office, PLLC, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Jessica Finley, Deputy County Attorney, Missoula, Montana

Submitted on Briefs: November 13, 2019

Decided: January 14, 2020

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 B.H. (Father) appeals from the termination of his parental rights issued April 23, 2019, by the Fourth Judicial District Court, Missoula County. We reverse and remand for the Department to consider Father as the first placement option for B.H. and G.H. (Children) consistent with statute, its policies, and this opinion.

¶2 We restate the issue on appeal as follows:

> *Whether Father's due process rights were infringed by ineffective assistance of counsel resulting in his parental rights being inappropriately terminated.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On January 4, 2017, the Montana Department of Health and Human Services, Child and Family Services Division (Department), filed a petition for each child, titled Petition for Emergency Protective Services, Adjudication as a Youth in Need of Care and Temporary Legal Custody after it removed Children from Mother's care, asserting Mother subjected Children to circumstances of abuse or neglect including the possession, consumption, and distribution of methamphetamine around the Children. Immediately after removal, the Department placed Children, along with a half-sibling who was also removed from Mother's care, with their maternal grandparents. The Department also alleged a history of Mother's involvement with child protective services dating back to 2014.

¶4 There were no allegations of abuse or neglect by Father who had been Children's primary parent most of their lives. Father was living in North Dakota and not involved in a relationship with Mother. At the time the Department removed Children from Mother,

she had taken them from Father for a two-week visit but had refused to return them to Father's care. Father testified at the termination hearing that prior to the Department's intervention, Children lived with him and he was their primary care provider. When Children were in his care, he recognized they had high needs and had enrolled Children in services with Healthy Steps. In 2016, Mother checked into Mountain Home, a residential treatment center for individuals with children. He had been talking with Mother and she was getting sober and wanted to see Children. They agreed to a two-week visit where Children could stay with Mother at Mountain Home. While on his way to retrieve Children from Mother, she texted him he could not have them back and she would call the police if he came. Despite her refusal to return Children to him, Father stayed in regular contact with Mother and Children while Mother pursued sobriety at Mountain Home. When the Department intervened, Mother texted him requesting he help her get Children back.

¶5 The court set an intervention conference, which Father attended on January 23, 2017, which was followed by a show cause and adjudication hearing on January 24, 2017. Father indicated to the standing master at the intervention conference his desire to have Children in his care.[1] At the January 24th hearing, the State reported both Mother and Father stipulated to its petitions[2] and asked to set a dispositional hearing. There was no

[1] Notes from the intervention conference state that Father "seeks placement of the children with him however the state is obligated to initiate an [Interstate Compact on the Placement of Children (ICPC)] as he lives in North Dakota." There is no record that Father's counsel objected.

[2] The Minute Entry reflects the parents stipulated to adjudication as Youths in Need of Care (YINC) and to Temporary Legal Custody (TLC) being granted to the Department. A written order adjudicating Children as YINC and granting the Department TLC was issued February 16, 2017.

discussion of Children's current placement status or Father's desire for immediate custody of Children. Despite Father's desire to have Children in his care, his counsel did not object to the placement with the maternal grandparents and did not request the court set a placement hearing to settle the dispute over placement.

¶6 Father then appeared at the dispositional hearing on February 14, 2017. At that hearing, the Department related the children were under the age of four and had a substantial relationship with Father and that, since the intervention conference, the Department had received "some documents from North Dakota that does [sic] present some concerns . . . or there might be more concerns" but did not elaborate as to any specific concerns the Department had with regard to Father. The Department also proclaimed as Father resided in North Dakota an ICPC was required to place Children with him. The Department also informed the court it was not going to develop a treatment plan for Father until the ICPC was completed. Father's counsel did not object to the ICPC or request a placement hearing, but rather expressed concern that without a treatment plan in place for Father, he could not be working on potential tasks during the ICPC. Counsel also advised the court that Father had custody of Children for the majority of their lives and the Department's concerns were based on unsubstantiated reports previously investigated in North Dakota. The Department then indicated that if its non-specific concerns were alleviated after the ICPC and Children could be safely placed with Father, there would be no further need for a dependent neglect (DN) case to be open on Children, and presumably no need for any treatment plan for Father. Father's counsel did not advise the court of applicable statutes and Department policy mandating Father be considered as the first

placement option. The court advised Father it did not expect him to appear in-person at every court proceeding because of the travel distance and advised Father to remain sober, stay employed, and have housing—which he was already doing. Thereafter, the Department requested an expedited ICPC.

¶7 At status hearing on March 21, 2017, the Department reported it was still waiting on the ICPC to be completed "before seeing if there's any identified concerns" regarding Father. Father's counsel again made no objection to the ICPC, did not request a placement hearing, and did not provide the Department any additional information to assist it in assessing Father, the non-offending parent, as a safe and appropriate placement. Similarly, at the status hearing on April 11, 2017, the Department again related the ICPC was not completed relating to the court "they're just finishing the process" and, upon the court asking if there was something Father needed to do to complete it, the Department assured the court there was not. Again, Father's counsel made no objection to the ICPC, did not request a placement hearing, and did not provide the Department any additional information to assist in assessing Father as a safe and appropriate placement.

¶8 At the May 30, 2017 status hearing the Department reported that the ICPC was not completed. Despite the Department's representations that an ICPC was necessary to assure Father was safe and appropriate before Children could be in his care, the Department also reported Children were currently in North Dakota for a week-long visit with Father, relating "from what I hear, that's going well." Again, Father's counsel failed to object to the ICPC, failed to request a placement hearing, and failed to point out the Department's

incongruous position that permitted Father care of Children for an extended visitation but denied him immediate placement of Children in his care.

¶9 On July 11, 2017, the court held a status and extension of TLC hearing. At this hearing, Father's counsel acquiesced to extension of TLC by not responding when the court asked if it was correct that all parties stipulated to extension of TLC. The Department additionally advised that although it had provided Father some financial assistance to accomplish prior visits with Children, it was discontinuing this assistance such that he would have to find his own resources to accomplish visitation with Children. Father's counsel did not object to this discontinuation of visitation assistance nor did she pose any objection to the ICPC. Again, she did not request a placement hearing or provide any other advocacy for placement of Children with Father.

¶10 At the status hearing on September 12, 2017, Father's counsel advised the court, although she had not spoken to Father about the issue, the ICPC process had to be started over as Father did not submit fingerprints in time. Following this representation, the court commented, "Well, it sounds like both of these parents are kind of irresponsible, you know, and helter skelter, and not very – not very well-organized. And, you know, that doesn't bode well. If a guy can't even keep a schedule to go down and get fingerprinted, I don't see how he's possibly going to take care of two kids." Rather than advising the court Father had a consistent work history, a long-term stable residence, his long-term girlfriend's two children currently resided in his home with no apparent safety concerns, and he had successfully parented Children over an extended visitation, Father's counsel did nothing to correct the court's impression of Father's inadequacy. Again, Father's counsel did not

object to the ICPC, did not request a placement hearing, and did not otherwise advocate for placement of Children with Father.

¶11 At the November 7, 2017 status hearing, nearly a year after the commencement of the case, the District Court noted a motion to approve a treatment plan for Father had just been filed. To this point, the State had still not alleged any abuse or neglect on Father's part nor identified any documented evidence to indicate that Children should not be placed with Father because of safety concerns. The State then reported a treatment plan had not been previously offered as the Department was using the ICPC to investigate Father as a possible safe placement, but was now requesting a treatment plan as the ICPC had been canceled.[3] Father's counsel again did not object to the ICPC and acquiesced to considering a treatment plan for Father and another status hearing was set for December 5, 2017. At the December 5, 2017 status hearing—which the District Court thought was a dispositional hearing—rather than object to the need for a treatment plan or request a placement hearing, Father's counsel related she would be meeting with Father's caseworker later in the day to try to address issues with the proposed treatment plan and the court set a hearing on the treatment plan for December 12, 2017.

¶12 At hearing on December 12, 2017, rather than object to the need for a treatment plan, Father's counsel indicated Father agreed to the treatment plan—which required he

[3] At the termination hearing, the Department endorsed the explanation it provided in Father's treatment plan for the failure of the first ICPC request: The ICPC was not completed as Father submitted fingerprints which needed to be redone because there was smearing and Father reported he was not told of the need to resubmit fingerprints until North Dakota canceled the initial ICPC for failure to resubmit the fingerprints.

cooperate with and complete the ICPC process; maintain contact with Children; complete a chemical dependency evaluation; and complete parenting classes. Nearly twelve months into the case and still without indication of particular safety or parenting deficiencies on Father's part, a treatment plan was ordered for Father.

¶13 At the permanency hearing on January 23, 2018, Father's counsel advised the court as to the miscommunication regarding Father's fingerprints, which Father believed had been appropriately submitted to North Dakota, and that Father had already completed a chemical dependency evaluation.[4] Father's counsel noted that prior to removal Father was an active participant in the lives of and the primary caregiver for Children. Rather than object to the need for an ICPC, Father's counsel indicated another ICPC would need to be done in order to return Children to Father. The Department reported Mother had just been released from jail after pleading guilty to a felony in Minnesota.[5] The District Court commented, "It sounds like [Mother's] making some progress. She's probably the most hopeful of the bunch here, it sounds like." Again, Father's counsel did not refute this perception and failed to provide the court information as to Father's situation. The court approved the permanency plan of reunification with Mother or Father with the alternative of adoption by the maternal grandmother. The court extended TLC for an additional six months.

[4] The evaluation did not recommend Father participate in any additional treatment or chemical dependency services, completely refuting the vague concerns the Department expressed at the outset of the case that Father possibly had drug or alcohol issues.

[5] Mother was in and out of jail throughout the pendency of the case.

¶14 On February 20, 2018, the Department renewed its request for North Dakota to conduct an ICPC. At the March 13, 2018 status hearing, the Department related there were miscommunication errors which led to the prior ICPC not being completed and the District Court suggested perhaps Father could take all three children, rather than just his two Children, expressing it would be nice to keep all the children together.

¶15 Donal Anderson, North Dakota's ICPC worker, contacted Father on March 20, 2018. Father and his significant other again completed fingerprinting in April 2018. On May 14, 2018, North Dakota Child and Family Services (CFS) mailed Father the kinship care study paperwork, which Father completed and returned by May 17, 2018.

¶16 In late May 2018, Father picked Children up for an extended visitation and took them to his home in North Dakota where they stayed with Father for approximately three weeks. During this time, North Dakota CFS had evaluated Father's home and found his home appropriate and suitable for children. North Dakota CFS requested Father provide it proof of his chemical dependency evaluation,[6] vaccinations of his dogs, and completion of parenting classes. As Father testified at the termination hearing, during this time he was working, caring for Children on their extended visitation, and waiting for his paycheck so he could complete the final dog vaccination when North Dakota CFS closed the ICPC for Father's failure to provide this documentation. The Department admitted by the time Children went to North Dakota for a three-week visit with Father the North Dakota home

[6] The Department admitted it had Father's completed chemical dependency evaluation at the time it re-requested North Dakota CFS conduct an ICPC, but that evaluation was not provided to North Dakota CFS.

study was complete, his home was safe and suitable for Children, there were no drug or alcohol concerns, Father's criminal background was for a remote DUI before Children were born, and there were no safety concerns. Despite this, the Department seemed to fault Father for caring for Children, rather than having his parents, who the Child Protection Specialist (CPS) believed to be safe, care for Children during the extended visit.[7]

¶17 At status hearing May 29, 2018, Children's attorney expressed concern that if Children were reunified with Father, there needed to be a plan for the maternal grandparents—who had been Children's placement throughout the case—to keep contact

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[7] [CPS Sorenson] No. The only concerns were the – you know, the dogs not being vaccinated. But as far as safety concerns, no.
[Father's Counsel] Okay. And by that point as well, Mr. Anderson [the North Dakota ICPC case worker] had the background checks and the fingerprints, correct?
[CPS] Yes.
[Father's Counsel] Okay. And were any concerns noted to you prior to the kids going over to North Dakota?
[CPS] No.

. . .

[Father's Counsel] Okay. So would you agree that by the time the kids went, Child and Family Services, whether in North Dakota or in Montana, had more information about [Father's] home than they did about his parents'?
[CPS] Yes.
[Father's Counsel] Okay. So there likely were not safety concerns for the children while in [Father's] care in North Dakota?
[CPS] Likely, probably not, yeah.
[Father's Counsel] Okay. And if the visit was in the first two weeks in June and they were primarily with [Father], does it surprise you, then, that he – do you suspect that he was probably fairly busy during that time frame?
[CPS] Yes. He was working quite a bit.
[Father's Counsel] And spending time with the kids?
[CPS] Yep.
[Father's Counsel] Okay. And so, he's being faulted in the ICPC over three weeks, from June 1st to June 21st, for not appropriately getting back to Mr. Anderson in North Dakota, correct?
[CPS] Correct.

with Children. Despite Children being on an extended visitation with Father and no identified safety concerns, it was related to the court that maternal grandmother was not open to a guardianship as it was not as permanent as adoption and the court then expressed, "you know, my inclination is to proceed with permanent placement with the grandmother." Father's counsel again failed to object to the ICPC, failed to request a placement hearing, and failed to advocate for reunification of Children with Father.

¶18 In early July 2018, Father suffered a significant work-related injury, requiring hospitalization and precluding him from returning to work for four months. At the status hearing on July 24, 2018, the Department reiterated North Dakota CFS had closed the ICPC and, as such, advised it would be seeking termination of Father's parental rights. At this point, Father, rather than his counsel, expressed objection, as the non-offending parent, to having to complete an ICPC.

> THE FATHER: Okay, I am so confused about all this. Like, I -- I have -- I seen worst parents than me. And I have done nothing wrong in this situation, to lose my kids. The mother (audio cutting out) I did. So how is it that I'm getting terminated because of this?
> THE COURT: Well, apparently --
> THE FATHER: And I have -- I have no prior things with kids or got in any trouble. There's worst parents out there that get their kids back. I don't get this crap.
> THE COURT: Well, this "crap" is, you got to participate.
> THE FATHER: I have been participating the whole time.
> THE COURT: According to North Dakota, you're not. I – they're there and you're there; I'm not. I'm just -- all I can tell you is what they report. So you can talk to your attorney. Maybe she can give you more information than that. But that's the reason we're where we're at.
> THE FATHER: Okay. So I'm going to get my kids taken because of -- because I have done nothing wrong?
> THE COURT: Well, because you've done nothing, apparently, yes. But, the--

> THE FATHER: I shouldn't -- I shouldn't even have to do an ICPC. I didn't do anything wrong to get them taken away from me.
> THE COURT: Unfortunately, we have to follow the law.
>
> . . .
>
> THE FATHER: The law – there's nothing against me that should be against me. I didn't get my kids taken; the mother did.

¶19 At the termination hearing on January 28, 2019, CPS Jessica Sorenson, who was the Department case worker assigned to the case from March 2018 until August 2018, testified Father was defiant toward getting tasks completed and he did not understand why he had to do an ICPC when he had not done anything wrong and had parented his children the majority of their lives.

¶20 Despite an absence of allegations in the petitions for adjudication and TLC and no treatment needs identified by Father's chemical dependency evaluation, CPS Sorenson asserted Father potentially had drug or alcohol problems. This concern centered around prior reports to North Dakota CFS. These reports were investigated and all unsubstantiated. North Dakota CFS determined they did not rise to the level supporting Department intervention. The Department was in possession of the North Dakota CFS reports at the intervention conference at the outset of the case. Although Father had a remote DUI occurring before Children were born, the Department did not request Father drug test and did not have any positive drug or alcohol tests to suggest a current drug or alcohol problem. Further, prior to renewing the ICPC request Father had undergone a chemical dependency evaluation which did not identify Father to have any treatment needs.

¶21 CPS Sorenson faulted Father for not having lined up speech or other therapists for Children; but admitted on cross-examination that when Father had previously had Children in his care, he had been able to identify issues and obtain services. She also admitted Father was not given any information as to when Children would be in his care and he could not feasibly set up such services without this information.

¶22 Jill Patton, the CPS case worker who took over the case after CPS Sorenson left, testified her primary concern was that Father struggled to call Children weekly. She related Father had not shown effort to understand his children's needs. As an example, she related that she had heard that during his summer visit with Father in 2018, B.H. was upset about Father throwing him in the pool and that Father ignored B.H. being upset. On cross-examination though she admitted she had no contact with Father or with Father's mother about what actually occurred during the summer visit, that she was not on the case at that time, and that the Department had no communication with Father to determine what his reaction was.

¶23 At the termination hearing, Father testified he was currently employed at Siewert Farms and had been so for the past four months. This was his first job after he was off for about four months recovering from a broken back sustained in a work-related accident. Prior to that, he was steadily employed in the construction industry. He had lived in his current residence for the past six years and his girlfriend, Hannah, and her two children, aged seven and twelve, had resided with him the last four years. He related he and Hannah made several trips to Montana at the outset of the case but had to stop as the trips were too expensive. Father testified that shortly after B.H. was born in 2013, Mother left him for

another guy and left B.H. in his care. Later, when G.H. was born, Mother cared for her for a short time before Mother disappeared leaving G.H. in his sole care. When Children were in his care, he arranged daycare, secured services to address Children's needs, and provided their primary care.[8] Father related that during the pendency of the case, Children had extended visits with him in which they hung out at the house and went to his mother's home, and he took them camping and fishing. He thought the visits went well and was never contacted about any concerns after the visits. On the way back to Montana from their summer 2018 visit, Children expressed they did not want to go back to their maternal grandmother. Finally, Father admitted he did not timely complete the first ICPC, and he had not been consistent with telephone calls to Children, explaining they were first going to be on Mondays but that did not work for him and the maternal grandmother, then they were going to be on Saturdays, but he started working on the weekends and got off too late to call. Maternal grandmother testified she does not like Father as a human being, did not contact him with any concerns about his visits, and faulted his girlfriend for having G.H. call her mom.

¶24 At the conclusion of the termination hearing, Mother's counsel argued that if the court did not terminate Father, it should not terminate Mother. The court then responded this was a reasonable request and related, "it's unfortunate that we didn't have this hearing about 18 months ago so that we could really see what they were up against and what they needed to do." Father's counsel did not make or even request to make closing argument to

[8] Father testified Children did spend some time with their grandparents as he thought it was normal for children to visit and spend time with their grandparents.

advocate placement of Children with Father. The District Court determined Father failed to complete his treatment plan and the conduct or condition rendering him unfit to parent was not likely to change within a reasonable period of time and terminated Father's parental rights. Although the District Court terminated Father's parental rights, it indicated the contrary in its oral order, "that if the parents establish some kind of showing that they're safe and consistent and solid, that they can continue to have contact with the children."[9] Father appeals.

STANDARD OF REVIEW

¶25 The Department has the burden of proving by clear and convincing evidence that the statutory criteria for termination of parental rights have been satisfied. *In re E.Y.R.*, 2019 MT 189, ¶ 21, 396 Mont. 515, 446 P.3d 1117; *In re K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691. For parental rights cases, clear and convincing evidence is the requirement that a preponderance of the evidence be definite, clear, and convincing. *In re E.Y.R.*, ¶ 21 (citing *In re K.L.*, ¶ 14).

¶26 This Court reviews a district court's findings of fact for clear error and conclusions of law for correctness. *In re M.V.R.*, 2016 MT 309, ¶ 23, 385 Mont. 448, 384 P.3d 1058. A factual finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if review of the record convinces the Court a mistake was made. *In re J.B.*, 2016 MT 68, ¶ 10, 383 Mont. 48, 368 P.3d 715. If the

[9] This Court has previously held that district courts have the discretion to rule it is in a child's best interest to maintain contact with a parent post-termination. However, a district court cannot order visitation, but can require the Department to give consideration to an adoptive family voluntarily allowing contact with the birth parent prior to consenting to adoption. *In re D.G.*, 244 Mont. 17, 22-23, 795 P.2d 489, 492 (1990); *In re V.B.*, 229 Mont. 133, 137, 744 P.2d 1248, 1250 (1987).

court's findings of fact are not clearly erroneous and if the court's conclusions of law are not incorrect, we will not reverse a district court's decision to terminate parental rights unless we determine the district court abused its discretion. *In re E.Y.R.*, ¶ 21; *In re K.L.*, ¶ 16.

¶27 Parents have a due process right to effective assistance of counsel. *In re A.S.*, 2004 MT 62, ¶ 20, 320 Mont. 268, 87 P.3d 408. Whether a parent has been denied his or her right to due process is a question of constitutional law over which our review is plenary. *In re A.S.*, ¶ 9.

DISCUSSION

¶28 *Whether Father's due process rights were infringed by ineffective assistance of counsel resulting in his parental rights being inappropriately terminated.*

¶29 Father asserts he received ineffective assistance of counsel as it relates to placement of Children through the ICPC, the disposition of the case, and Father's stipulation to a treatment plan. Father asserts this case is analogous to *In re E.Y.R*. in that he was the non-offending, non-custodial parent. There were no allegations of abuse or neglect ever brought by the Department in this case against him. He had priority to be considered as the first placement option. Similar to the circumstances in *In re E.Y.R.*, Father asserts that but for his counsel's failure to advocate for him to correct legal misunderstandings, failure to object to an unnecessary treatment plan containing tasks not supported by evidence, and failure to request a placement hearing to require the Department to present objective, demonstrable circumstances of imminent safety risk to Children if placed in his care and request dismissal, his parental rights would not have been terminated.

¶30 Father was the non-custodial parent at the time Children were removed and the initial petitions for EPS, adjudication, and TLC contained no allegations of abuse or neglect on Father's part. As such, Father asserts his counsel was ineffective in failing to object to the Department's requirement that placement with him be subject to an ICPC. Statements made by the Department at the intervention conference and dispositional hearing indicate Father was subject to an ICPC rather than immediate placement only because he lived out of state. Father asserts his counsel ineffectively failed to object to the ICPC and instead advised him to agree to an unnecessary ICPC. Counsel did not request documentation from the Department or otherwise hold the Department to its own standard of investigating Father or presenting Father or the court with documentation of imminent safety concerns which would prevent placement with him or necessitate more in-depth assessment through an ICPC. Father asserts his counsel ineffectively failed to request a placement hearing, which could have provided the court an opportunity to receive evidence on any imminent safety concerns and determine placement with Father did not require an ICPC. As the Department presented no evidence at disposition that Father was unfit, Father asserts his counsel should have advocated for placement with him and dismissal of the case pursuant to § 41-3-438(3)(d), MCA. By his counsel's continued failure to object to the ICPC, failure to put the Department to its evidentiary burden, failure to request a placement hearing, and failure to advocate for immediate placement and dismissal combined with counsel's advising him to agree to an ICPC and a treatment plan and then failing to object to tasks therein not supported by evidence, Father was placed on a path to termination.

¶31 The State asserts Father cannot establish how this case is analogous to *In re E.Y.R.* when *In re E.Y.R.* did not come out until months after the termination hearing in this case. The State asserts Father's arguments related to *In re E.Y.R.* are unavailing as it is unreasonable to fault Father's counsel for not advocating for standards and procedures that did not exist until this Court's decision in *In re E.Y.R.* The State asserts the process and standards for evaluating placement with a non-custodial parent set forth in *In re E.Y.R.* do not incorporate relevant statutes and Department policy. Finally, the State asserts the Department was aware of good cause to indicate Children's safety could not be assured if they were immediately placed with Father.

A. Under relevant legal authority, the Department did not prove the existence of good cause to deny immediate placement with Father.

¶32 The State asserts the framework set forth in *In re E.Y.R.*, ¶ 29, requiring the Department "determine if there are any observable or substantiable imminent safety risks to the child if the child is placed in the care of the non-custodial parent" or "objective, demonstrative circumstances indicative of an imminent safety threat," is too narrow of a standard and is not supported by §§ 41-3-101(1)(e) ("all children have a right to a healthy and safe childhood in a permanent placement") and -101(3), MCA ("whenever it is necessary to remove a child from the child's home, the [D]epartment shall, when it is in the best interests of the child, place the child with the child's noncustodial birth parent"). We do not agree.

¶33 Section 41-3-101, MCA, sets forth, in pertinent part, the policy for the state of Montana in child dependency cases:[10]

> (1) It is the policy of the state of Montana to:
> (a) provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for the children's care and protection;
> (b) achieve these purposes in a family environment and preserve the unity and welfare of the family whenever possible;
> (c) ensure that there is no forced removal of a child from the family based solely on an allegation of abuse or neglect unless the department has reasonable cause to suspect that the child is at **imminent risk of harm**;
> (d) recognize that a child is entitled to assert the child's constitutional rights;
> (e) ensure that all children have a right to a healthy and safe childhood in a permanent placement[.]

§ 41-3-101(1), MCA (emphasis added).

¶34 Consistent with the mandate of § 41-3-101(1), MCA, that there be reasonable cause to suspect a child is at "imminent risk of harm" for the Department to remove the child from his/her parent, in assessing existence of imminent risk, the Department has implemented the Montana Safety Assessment and Management System (SAMS) model. *See* Child and Family Services Policy Manual, § 201-2 (DPHHS 2015), https://perma.cc/MCD9-2HQV. To determine if removal based on imminent risk of harm—present or impending danger— is supported, the Department intake CPS completes a safety assessment. *See* Child and Family Services Policy Manual, § 201-2 (DPHHS

[10] Title 41, chapter 3, MCA, further, lays out detailed procedural requirements for the Department for investigating reports of child abuse and neglect, § 41-3-202, MCA, for providing Emergency Protective Services, §§ 41-3-301, -427, and -432, MCA, for adjudicating a youth in need of care, § 41-3-437, MCA, for determining disposition of the child after adjudication, § 41-3-438, MCA, and for seeking temporary legal custody of a child, § 41-3-442, MCA, as well as the Department's requisite burdens of proof at each stage, § 41-3-422, MCA.

2015), https://perma.cc/MCD9-2HQV. "The purpose of [the] safety assessment is to determine if there is present and/or impending danger, i.e., are there safety factors that meet the safety threshold?" *See* Child and Family Services Policy Manual, § 201-2 (DPHHS 2015), https://perma.cc/MCD9-2HQV. The safety threshold is met when five criteria apply: (1) the danger can result in a severe effect, such as significant pain, serious injury, disablement, grave or debilitating physical health or physical conditions, acute or grievous suffering, terror, impairment, or death; (2) the danger is likely to occur in the immediate to near future; (3) the danger is observable, that is, it is "real, can be seen, can be reported, and is evidenced in explicit, unambiguous ways"; (4) there is a vulnerable child; and (5) family conditions which can affect a child are out of control. Child and Family Services Policy Manual, § 201-2 (DPHHS 2015), https://perma.cc/MCD9-2HQV. Contrary to the State's assertion, the Department does recognize there must be observable and imminent safety risks—danger—to keep a child from being cared for by the child's natural parent.

¶35 Section 41-3-101(3), MCA, provides:

> In implementing this chapter, whenever it is necessary to remove a child from the child's home, the department shall, when it is in the best interests of the child, place the child with the child's noncustodial birth parent or with the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, when placement with the extended family is approved by the department, prior to placing the child in an alternative protective or residential facility. Prior to approving a placement, the department shall investigate whether anyone living in the home has been convicted of a crime involving serious harm to children.

The State argues § 41-3-101(3), MCA, allows the Department to place a child with a third-party caregiver rather than a safe, fit birth parent if the Department believes such is in the best interest of the child. We are not persuaded by this argument nor is it supported

by the Department's own policy that, "Placement with a non-custodial parent is presumed to be in the best interest of the child." Child and Family Services Policy Manual, § 304-1 (DPHHS 2013), https://perma.cc/8FXV-62VS; *see also In re J.H.*, 2016 Mont. 35, ¶ 23, 382 Mont. 214, 367 P.3d 339. Further, this Court has also held to the contrary in *In re A.J.C.*, 2018 MT 234, ¶ 41, 393 Mont. 9, 427 P.3d 59:

> Father contends, "It is not the function of the State to choose better or different parents for children whose natural parents pose no safety risk, even where, in the State's subjective view, more desirable options may be available. Such a role is not to be played by the State even at the behest of children who may wish for different parents." We agree.

There is a presumption that the best interests of the child are served in the custody of the natural parent. *In re J.H.*, ¶ 23. Thus, the State's argument that the Department may choose a third-party caregiver over a fit parent because it believes this is in the best interest of a child is incorrect.

¶36 In addition to the presumption the custody of a natural parent is in the child's best interests, the natural parent's right to the care and custody of his or her children is a fundamental constitutional interest protected by both the United States Constitution and the Montana Constitution. *See In re A.S.A.*, 258 Mont. 194, 197, 852 P.2d 127, 129 (1993) (citing Article II, § 17, of the Montana Constitution); *In re R.B.*, 217 Mont. 99, 102-03, 703 P.2d 846, 848 (1985); *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1394-95 (1982) (citing the Due Process Clause of the Fourteenth Amendment); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212-13 (1972) (citing the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment to the United States Constitution). The United States Supreme

Court "has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious . . . than property rights.'" *Stanley*, 405 U.S. at 651, 92 S. Ct. at 1212 (internal citations omitted). Both natural parents have the constitutional right to custody of their children. *See Stanley*, 405 U.S. at 651, 92 S. Ct. at 1212 ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.").

¶37 The State undeniably also has powerful interests to "provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for the children's care and protection." Section 41-3-101(1)(a), MCA. But when the State moves to intervene in a family for the protection of a child, the state "must provide the parents with fundamentally fair procedures." *See In re R.B.*, 217 Mont. at 103, 703 P.2d at 848 (quoting *Santosky*, 455 U.S. at 754, 102 S. Ct. at 1395); *see also Stanley*, 405 U.S. at 649, 92 S. Ct. at 1211. Furthermore, when the State intervenes and removes a child from one parent, it assumes a good-faith duty to provide reasonable efforts to reunite the child with the other parent. *In re A.J.C.*, ¶ 40. Thus, if a state has legitimate concerns regarding the safety of a child in a parent's custody, it must plead those concerns and prove them to the court. Here, the Department did not do so, offering only the vague assertion that there might be some concerns about Father, and depending on the ICPC to turn up concerns to retroactively justify the Department's assertion.

¶38 These constitutional rights to parent one's own children find protection in our statutes. Section 40-6-221, MCA, recognizes the mother and father of a child "are equally entitled to the parenting, services, and earnings of the child." And if one parent is "unable or refuses to exercise parenting or has abandoned the family, the other parent is entitled to the parenting, services, and earning of the child." Section 40-6-221, MCA. Title 41, chapter 3, MCA, provides procedural protections throughout the Department's intervention into a family to strike the delicate balance between ensuring the safety of children and respecting the fundamental constitutional rights of parents.

¶39 Contrary to the State's assertion, this legal framework is consistent with our prior caselaw, and this Court's recognition of the constitutional rights of a natural parent to parent his/her child and the child's right to be placed with his/her legal/birth parents unless that parental authority has been abused. "This careful protection of parental rights is not merely a matter of legislative grace, but is constitutionally required. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." *In re A.R.A.*, 277 Mont. 66, 70, 919 P.2d 388, 391 (1996) (internal quotations and citations omitted).

¶40 "It has long been the law in Montana that where a third party seeks custody to the exclusion of a natural parent, the right of the natural parent prevails until a showing of forfeiture of that right." *Babcock v. Wonnacott*, 268 Mont. 149, 152, 885 P.2d 522, 524 (1994). A finding of abuse, neglect, or dependency is the jurisdictional prerequisite for

any court-ordered transfer of custody from a natural parent to the Department.[11] *See Babcock*, 268 Mont. at 152, 885 P.2d at 524. While § 41-3-101(3), MCA, provides for consideration of the best interest of the child, we have previously held that use of the best interest standard without more is improper to grant a nonparent custody over a natural parent, in that any showing that a nonparent may be able to provide a better environment than can a natural parent is irrelevant to the question of custody between the two in view of the constitutional rights of a parent to custody. *See Cromwell*, ¶ 22. A district court may not use the best interest of the child standard as authority to deprive a natural parent of his or her constitutionally protected rights in favor of the Department absent a finding of abuse and neglect or dependency on the part of that parent. *See Cromwell*, ¶ 22; *In re A.R.A.*, 277 Mont. at 72, 919 P.2d at 392. Interpreting § 41-3-101(3), MCA, to allow the Department to use the best interest of the child test to award custody to a nonparent absent a court finding of abuse or neglect or dependency regarding the natural parent, could raise constitutional concerns.

¶41 The State asserts placement with Father was not required as the Department documented good cause not to immediately place Children with Father under Department

[11] *Babcock* and *In re A.R.A.* both involved a child custody dispute between a nonparent, third party and a natural parent. These cases were decided before the 1999 revisions to §§ 40-4-211(4)(b) and 40-4-228, MCA, which allow a court to award a parental interest to a person other than a natural parent if the natural parent engaged in conduct contrary to the parent-child relationship, the nonparent has established a child-parent relationship with the child, and it is in the best interests of the child to continue that relationship. Section 40-4-228(2), MCA. Section 40-4-228, MCA, however, does not apply when an action is pending under Title 41, chapter 3, MCA. *See* § 40-4-228(1), MCA. Thus, these cases are still valid precedent that a finding of abuse, neglect, or dependency is required to transfer custody to the Department when an action is pending under Title 41, chapter 3, MCA, as is the case here. *See Cromwell v. Shaefer*, 2018 MT 235, ¶¶ 21-22, 393 Mont. 22, 427 P.3d 67.

Policy § 304-1, which states there is no requirement to place a child with the non-custodial parent if good cause to the contrary exists. This argument, too, is not persuasive.

¶42 Consistent with our statutory framework, a parent's fundamental right to parent, and the requirements of § 40-6-221, MCA, the Department has adopted a policy regarding non-custodial parents:

> When a child must be removed from the home of the custodial parent because of child abuse or neglect, **the non-custodial parent is the first placement option for the child considered** by the Child Protection Specialist. In general, placement of the child with the non[-]custodial parent is more favored than placement with a member of the child's extended family. Placement with a non-custodial parent is presumed to be in the best interests of the child.
>
> **Unless the Department has documented evidence to indicate that the child should not be placed with the non-custodial parent because of safety concerns, the non-custodial parent should be the first placement option considered**.
>
> Legal/birth parents have the right to parent their children unless a court finding or circumstances negate that right. As a corollary, children have the right to be placed with their legal/birth parents unless that parental authority has been abused.
>
> . . .
>
> [W]hen the parental rights of one parent are terminated, the parent whose rights have not been terminated has legal custody of the child (absent an adjudication of youth in need of care **based upon the parenting behavior of the parent whose rights ha[ve] not been terminated)**.
>
> . . .
>
> **The non-custodial parent is the first placement option for the child** unless the Child Protection Specialist has documented good cause to the contrary exists indicating placement with the non-custodial parent could not assure the child's safety. The Child Protection Specialist must document and provide a written copy to the non-custodial parent as to why such placement is not in the child's best interests.

Child and Family Services Policy Manual, § 304-1 (DPHHS 2013), https://perma.cc/8FXV-62VS (emphasis added).

¶43 Department Policy § 304-1, which according to the State, expounds on § 41-3-101(3), MCA, delineates seven circumstances under which the Department may determine "good cause to the contrary" exists that the child's safety could not be assured if the child were immediately placed with the non-custodial parent:

> (a) Child Protective Services history which poses risk to the child;
> (b) Parental rights terminated under a dissolution decree;
> (c) Parental rights involuntarily terminated to a child other than the child who is the subject of the current proceeding;
> (d) Conviction within the last five years for a felony which indicates a risk to the child including, but not limited to:
> (1) child abuse or neglect;
> (2) spousal abuse;
> (3) crimes against children (including child pornography);
> (4) crime involving violence; or
> (5) drug-related offense.
> (e) Non-custodial parent refuses placement;
> (f) Documented mental illness which would impair the non-custodial parent's parenting ability; or
> (g) Putative parent denies paternity.

Child and Family Services Policy Manual, § 304-1 (DPHHS 2013), https://perma.cc/8FXV-62VS. When the non-custodial parent requests custody of the child, "documentation of good cause would result in immediate implementation of a Treatment Plan for the non-custodial parent to address current and past issues."[12] Child

[12] This follows from the requirements of §§ 41-3-442(1) and -443(6), MCA. To award temporary legal custody to the Department, the court must find by a preponderance of the evidence that (a) dismissing the petition would create a substantial risk of harm to the child or would be detrimental to the child's physical or psychological well-being; and (b) reasonable services have been provided to the parent or guardian to prevent the removal of the child from the home or to

and Family Services Policy Manual, § 304-1 (DPHHS 2013), https://perma.cc/8FXV-62VS. But the policy reiterates "[p]lacement of the child with his/her non-custodial parent is presumed to be in the best interests of the child. Therefore, if good cause to the contrary does not exist, the child shall be placed with the non-custodial parent." Child and Family Services Policy Manual, § 304-1 (DPHHS 2013), https://perma.cc/8FXV-62VS. Here, the Department did not immediately implement a treatment plan for Father as would have been required had the Department shown placement with Father to be an immediate safety risk —good cause to the contrary.

¶44 Montana has adopted the ICPC, which prohibits placing children across state lines for "foster care or as a preliminary to a possible adoption unless the sending agency shall comply with" the requirements of the ICPC statutes. Section 41-4-101, MCA. The Department adopted the regulations promulgated by the Association of Administrators of the Interstate Compact on the Placement of Children, which "include clarifications of the applicability of the interstate compact on the placement of children." *See* Admin. R. M. 37.50.901 (2012). Regulation 3 provides limited exceptions to its applicability for

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make it possible for the child to safely return home, except as provided under § 41-3-423. *See* § 41-3-442(1), MCA. Section § 41-3-443(6), MCA, requires the court to order a treatment plan for an offending parent of a child adjudicated as a youth in need of a care within thirty days of the dispositional hearing, except for good cause shown. The treatment plan must identify the problems or conditions that resulted in the abuse or neglect of the child. Section 41-3-443(2)(a), MCA. Thus it follows, that when the non-custodial parent whose parental rights are intact is a possible and willing temporary or permanent placement, the court must award temporary or permanent legal custody to that non-custodial parent, unless it first makes the findings required under § 41-3-442(1), MCA, in regard to that parent to justify the need for a treatment plan under § 41-3-443(2)(a), MCA.

placement with non-custodial parents.[13] *See* ICPC Regulation No. 3 (Association of Administrators of the Interstate Compact on the Placement of Children 2011) https://perma.cc/YC6U-5RTX. The State asserts if the exception under Regulation 3 applied, the Department would not have been able to continue working with Mother as Regulation 3 contemplates dismissal of the case without further jurisdiction. We reject use of an ICPC to thwart a fit, safe, custodial parent from being the placement for his/her child while the Department works with the offending parent—a specific disposition provided for in § 41-3-438(3)(c), MCA.[14] Such would impermissibly expand the scope of the ICPC

[13] As we did in *In re E.Y.R.*, we assume, without deciding, that the ICPC can be applied to non-custodial natural parents under some circumstances, because no party has challenged such application. We note, however, that a growing number of states have rejected the validity of applying the ICPC and Regulation 3 to non-custodial parents because Regulation 3 "impermissibly expand[s] the scope of the ICPC beyond the" language of the statute and results in a system that violates the State's "constitutional responsibility to safeguard parents' fundamental right to raise their children." *In re R.S*, 215 A.3d 392, 407, 409 (Md. Ct. Spec. App. 2019); *see also McComb v. Wambaugh*, 934 F.2d 474, 481 (3d Cir. 1991); *Ark. Dep't of Human Servs. v. Huff*, 65 S.W.3d 880, 887-88 (Ark. 2002); *In re C.B.*, 116 Cal. Rptr. 3d 294, 299-302 (Cal. Ct. App. 2010); *In re Emoni W.*, 48 A.3d 1, 6-11 (Conn. 2012); *D.B. v. Ind. Dep't of Child Servs.*, 43 N.E.3d 599, 603-04 (Ind. Ct. App. 2015); *In re S.R.C.-Q.*, 367 P.3d 1276, 1279-82 (Kan. Ct. App. 2016); *In re A.X.W.*, 2011 Mich. App. LEXIS 983, *27-31 (Mich. Ct. App. 2011); *In re Alexis O.*, 959 A.2d 176, 181-85 (N.H. 2008); *In re Rholetter*, 592 S.E.2d 237, 243-44 (N.C. Ct. App. 2004); *In re C.R.-A.A.*, 521 S.W.3d 893, 903-908 (Tex. Ct. App. 2017); *In re Dependency of D.F.-M.*, 236 P.3d 961, 966-67 (Wash. Ct. App. 2010); Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 Yale L. & Pol'y Rev. 63 (2006); Josh Gupta-Kagan, *The Strange Life of* Stanley v. Illinois*: A Case Study in Parent Representation and Law Reform*, 41 N.Y.U. Rev. L. & Soc. Change 569 (2017). Or have significantly limited the application of the ICPC in relation to non-custodial parents. *See Donald W. v. Dep't of Child Safety*, 444 P.3d 258, 269-71 (Ariz. Ct. App. 2019).

[14] This determination is not inconsistent with *In re R.J.F.*, 2019 MT 113, ¶ 37, 395 Mont. 113, 443 P.3d 387, where we noted the Department to have an obligation to place the child in close enough proximity to a parent to arrange visitation in sufficient frequency and duration to make it possible for a parent to establish a bond between the parent and the child. In *In re R.J.F.* there was no identified non-offending father for the Department to consider in making the placement determination. The Department has to evaluate each case based on the particular circumstances, recognizing the statutory protections afforded each parent.

beyond the language of our statute and violate the non-custodial parent's fundamental rights.

¶45 Upon removal of a child from a custodial parent, the Department must first consider placement of the child with the non-custodial parent. Child and Family Services Policy Manual, § 304-1 (DPHHS 2013), https://perma.cc/8FXV-62VS. In conformance with the statutes and its own policies discussed above, the Department should determine if there are any imminent safety concerns supported by documented evidence to indicate the child should not be placed with the non-custodial parent—observable or substantiable imminent safety risks to the child if the child is placed in the care of the non-custodial parent. As we noted in *In E.Y.R.*, ¶ 29, this determination does not at the outset require full investigation of or implementation of an ICPC or a treatment plan for the non-custodial parent, but rather occurs along a continuum. The Department may conduct a child protective services history and potentially a criminal background check as well as gather information from the non-custodial parent as to his/her circumstances, and potential collateral contacts who can verify the information provided. In addition, the Department may request a courtesy check of the out-of-state, non-custodial parent's home from that parent's home state. These avenues can provide the Department with a wealth of information to determine an out-of-state parent's fitness and ability to care for a child. *See, e.g.*, *In re R.S.*, 215 A.3d at 371-72.

¶46 Although the Department is obligated to initially provide the custodial parent a treatment plan and services designed to ameliorate his/her parenting deficiencies when a child has been adjudicated a youth in need of care, such does not suspend or reduce the non-custodial parent's fundamental right to parent. If there are no objective, demonstrable

circumstances of imminent safety risk to the child upon the Department's preliminary investigation, the Department must place the child with the non-custodial parent or document good cause to the contrary indicating how the non-custodial parent could not assure the safety of the child. If the child has been adjudicated a youth in need of care, and no objective, demonstrable circumstances of imminent safety risk to the child have been identified, upon disposition the court may either "order the temporary placement of the child with the noncustodial parent, superseding any existing custodial order, and keep the proceeding open pending completion by the custodial parent of any treatment plan" or

> order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding.

Section 41-3-438(3)(c) and(d), MCA. The Department cannot use the ICPC process to weaken or eliminate the statutory protections under Title 41, chapter 3, MCA, that protect a non-custodial parent's constitutional rights, simply because a non-custodial parent lives in another state.

¶47 Here, the State asserts the Department had good cause not to immediately place Children as there were prior reports made to North Dakota CFS. Recognizing these reports were investigated, not substantiated, and no intervention was made by the North Dakota CFS, the State asserts "'unsubstantiated' does not mean the report was proven untrue" and the Department's policy does not require circumstances related to child protective services history to be "substantiated" or to indicate "imminent safety risk."

¶48 The State in essence, asserts the prior unsubstantiated child protective services history provided good cause under the Department's policy to deny placement of Children with Father. Without more evidence and without allegations of current or intervening abuse or neglect, prior unsubstantiated reports without more do not provide basis to deny a non-custodial parent placement. Whether prior child protective services history is unsubstantiated or substantiated is important given the Department's burden of proof. *See* § 41-3-422, MCA. Department Policy § 101-1 defines an "Unsubstantiated Report" to mean, "After an investigation, the investigator was unable to determine by a preponderance of the evidence that the reported abuse, neglect, or exploitation has occurred." Child and Family Service Policy Manual, § 101-1 (DPPHS 2015), https://perma.cc/Q2VQ-ATSB. The Department must establish probable cause to remove a child from a parent on an emergent basis and must then prove by a preponderance of the evidence the child meets the definition of a youth in need of care to attain temporary legal custody of the child. Sections 41-3-427(1)(b), -437(2), MCA. In this case, the prior unsubstantiated reports did not pose a safety risk to Children justifying Department intervention at that time and cannot now, without more evidence, "indicate that [Children's] safety could not be assured if [Children] were immediately placed with [Father]" in this action. *See* Child and Family Services Policy Manual, § 304-1 (DPHHS 2013), https://perma.cc/8FXV-62VS. Additionally, it is disingenuous for the State to assert the Department established "good cause" to not place Children with Father when the Department did not then immediately

implement a treatment plan for Father as required by its policy.[15] A request for an ICPC cannot be used to diminish the protections for parents provided in Title 41, chapter 3, MCA, simply because the parent lives across state lines.

B. Father's fundamental rights were prejudiced by ineffective assistance of counsel.

¶49 Given the legal authority which applies to this case, we turn to Father's argument that he received ineffective assistance of counsel which resulted in termination of his parental rights. "[P]arents have a due process right to effective assistance of counsel in termination proceedings." *In re E.Y.R.*, ¶ 22 (quoting *In re A.S.*, ¶ 20). Whether assistance was effective requires review of counsel's training, experience, and advocacy. *In re A.S.*, ¶ 26. Ineffective assistance of counsel requires reversal only if the parent suffered prejudice. *In re E.Y.R.*, ¶ 22; *In re B.M.*, 2010 MT 114, ¶ 22, 356 Mont. 327, 233 P.3d 338. Effective advocacy requires investigating the case, researching and understanding the law, meeting with the client, and assiduously advocating for the client. *In re E.Y.R.*, ¶ 22; *In re A.S.*, ¶ 28. To provide effective assistance of counsel, attorneys representing parties and entities involved in abuse and neglect proceedings involving a non-offending, non-custodial parent must understand and assiduously advocate the legal framework and Department policy set forth in the prior section.

¶50 Here, the record is silent as to counsel's training and experience. However, our examination of the record leaves us convinced counsel's advocacy was ineffective: counsel either failed to investigate the case and research and understand the law or failed

[15] The Department did not implement a treatment plan with Father for nearly a year after filing its petition and during that time did not assert prior reports established "good cause" as now asserted.

to communicate that information to the District Court, and counsel failed to assiduously advocate for Father. From the adjudication through to Father's termination hearing, these failures caused Father prejudice—termination of his parental rights to Children. At the outset, Father's counsel did not assiduously advocate for placement with Father despite the provisions of § 40-6-221, MCA, and the Department's policy that "the non-custodial parent is the first placement option for the child." Child and Family Services Policy Manual, § 304-1 (DPHHS 2013), https://perma.cc/8FXV-62VS. Counsel did not seek a placement hearing under § 41-3-440, MCA, which authorizes the Department to determine the appropriate placement for children alleged to be or adjudicated as youths in need of care, **unless** there is a dispute between the parties regarding the appropriate placement—in such cases, the court must settle the placement dispute. From the record, it is clear Father wanted Children placed in his care, but his counsel did not advocate for the court to place Children immediately in Father's care—despite the fact the Department's petition and supporting affidavit failed to allege any abuse or neglect against Children on the part of Father. Rather, Father's counsel advised him to stipulate to adjudication and TLC and to evaluate Father as a possible caretaker under § 41-3-438(3)(b), MCA. Although Father's counsel advised the standing master at the intervention conference that Father desired placement of Children with him, counsel did not inform the District Court at the adjudication hearing and did not assiduously advocate for this placement but instead acquiesced to the representations and position of the Department that immediate placement with Father was not possible and the parties had stipulated to the placement. Upon stipulating to adjudication of Children as YINC, counsel did not advocate for an immediate placement

order with Father, superseding any existing custodial order and either dismissal of the proceeding with no further obligation on the part of the Department to work toward reunification with Mother or to keep the proceeding open pending Mother's completion of her treatment plan. *See* § 41-3-438(3)(c)-(d), MCA. Counsel voiced no opposition to the Department's representation that an ICPC was required to place Children with Father. Counsel evidenced no knowledge or understanding of ICPCs, including Regulation 3, which provides exceptions to the need for an ICPC for placement with a parent from whom the child was not removed. Counsel did not advocate for Father's rights as a natural parent under Montana's DN statutes.

¶51 By the time of the disposition hearing, the Department had received documents regarding prior North Dakota CFS reports involving Father which were investigated and found to be unsubstantiated. The Department was also aware Father had no criminal history that indicated an imminent safety risk to Children if they were placed in his care. Statements made by the Department at the intervention conference and dispositional hearing indicate Father was subject to an ICPC only because he lived out of state. Father's counsel did not object to the ICPC, or advocate for a 30-day visitation with Father while sorting out the ICPC issue.[16] Counsel did not educate the court regarding exceptions to obtaining an ICPC with regard to placement of a child with a parent from whom the child was not removed (a non-offending parent). Again, counsel did not request a placement

[16] Pursuant to Department Policy § 402-7, no ICPC is required to effectuate a visitation of 30 or less days. *See* Child and Family Services Policy Manual, § 402-7 (DPHHS 2012), https://perma.cc/4QVU-WXTL.

hearing to require the Department to meet its burden to present documented evidence that Children should not be placed with Father because of safety concerns consistent with §§ 41-3-438 and -440, MCA, and Department Policy § 304-1. In essence, Father's counsel did not understand Father's legal rights and did not assiduously advocate for Father in order to enforce or protect his parental rights.

¶52 We hold Father's counsel was ineffective for advising Father to stipulate to TLC and placement outside of Father's home when Father's stated intent was to have custody of Children and the Department had not alleged any abuse or neglect against Father in its petition and supporting affidavit. Counsel's error stemmed from a misunderstanding of the law that an ICPC was required even if it precluded Father from pursuing immediate placement to which he was entitled under the statutes and the Montana and federal constitutions. Given the weighty constitutional rights at stake, it was ineffective to stipulate to the placement with the maternal grandparents and not to insist the Department meet its burden under the statutes and Department policy to overcome the presumption that placement with Father was in the best interests of Children. These errors were further compounded when counsel negotiated and then advised Father to stipulate to a treatment plan to complete an ICPC.

¶53 A request for an ICPC cannot be used to diminish the protections for parents provided in Title 41, chapter 3, MCA, simply because the parent lives across state lines. Counsel was ineffective when she waived her client's statutory and constitutional rights on the mistaken presumption an ICPC was required and defeated Father's statutory and constitutional rights.

¶54 As Father's counsel was ineffective resulting in prejudice to Father—termination of his parental rights—it is appropriate to reverse Father's termination of parental rights and rewind proceedings in this case.[17] At the time of adjudication, given Mother's parental rights remained intact, and in light of *In re S.S.*, 2012 MT 78, 364 Mont. 437, 276 P.3d 883, it was appropriate for Father to stipulate to adjudication as he and his counsel would have at that time had a reasonable belief the Department would look to immediately placing Children with him and the court would look to disposing of the cause pursuant to § 41-3-438(3)(c) or (d), MCA. Thereafter, counsel's advocacy fell short as outlined above. Similar to *In re E.Y.R.*, we conclude it appropriate to rewind this case to the point where the court accepted Father's stipulation for adjudication and adjudicated Children as YINC. As Mother's parental rights have now been terminated,[18] consistent with our holdings in *In re J.B.* and *In re E.Y.R.*, to maintain TLC the court must determine that Children are youths in need of care on the basis of evidence of Father's abuse or neglect. To make that determination, the Department will need to conduct investigation of Father along a continuum, if necessary, as outlined above.

CONCLUSION

¶55 Because of counsel's ineffective assistance, Father was prejudiced and his parental rights were terminated. We reverse the termination of Father's parental rights, rewind this

[17] Clearly, both Father and maternal grandparents care deeply for Children and we encourage the parties to engage in mediation in hopes of reaching a resolution which permits Children to maintain their significant bonds with both their Father and their maternal grandparents.

[18] Mother did not appeal termination of her parental rights.

case to the point where the court accepted Father's stipulation for adjudication and adjudicated Children as YINC, and remand to the District Court for further proceedings consistent with this opinion.

¶56 Reversed and remanded.

/S/ INGRID GUSTAFSON

We concur:

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR