

DA 22-0568

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 161

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IN THE MATTER OF:

R.K.,

A Youth in Need of Care.

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APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. BDN-2020-134  
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Kali L Griffin, Hathaway Law Group, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Bjorn Boyer, Assistant  
Attorney General, Helena, Montana

Kevin Downs, Lewis and Clark County Attorney, Ann B. Penner, Deputy  
County Attorney, Helena, Montana

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Submitted on Briefs: July 19, 2023

Decided: August 22, 2023

Filed:

  
Clerk

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Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 L.C. (Mother) appeals the September 9, 2022 Order of the Montana First Judicial District Court, Lewis and Clark County, ordering termination of her parental rights to R.K.

¶2 We affirm and restate the issues as follows:

1. *Did Mother receive due process when the District Court, after providing notice, conducted status hearings in her absence?*
2. *Did the District Court abuse its discretion when it terminated Mother's parental rights?*

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶3 On November 25, 2020, the Department of Public Health and Human Services, Child and Family Services Division (Department), received a report that Mother had left R.K., who was six months old, with his older half-siblings for an extended period of time. R.K.'s half-siblings were too young to provide care for R.K. Mother admitted she made a poor decision leaving R.K. unattended with his half-siblings.<sup>1</sup> As a result, the Department removed R.K. from Mother's care for physical neglect and failure to provide R.K. with basic necessities.<sup>2</sup> The Department filed a Petition for Emergency Protective Services,

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<sup>1</sup> R.K.'s half-siblings were ultimately placed with their father and their abuse and neglect case was dismissed.

<sup>2</sup> At the time the Department removed R.K., A.K. was presumed to be his father because he was listed on R.K.'s birth certificate. A.K. was initially involved in the case and stipulated to a treatment plan. After a paternity test showed A.K. was not R.K.'s father, the court dismissed A.K. from the case. The Department made efforts to find R.K.'s biological father, but Mother could not identify him, and his identity remains unknown.

Adjudication of Child as Youth in Need of Care (YINC), and Temporary Legal Custody (TLC) of R.K. on December 1, 2020.<sup>3</sup> The Department placed R.K. in foster care.

¶4 On December 23, 2020, the court conducted a show cause hearing for Mother. During the hearing, the Department indicated Mother agreed to stipulate to Temporary Investigative Authority (TIA). The court explained to Mother that during the period of TIA she may be required to complete an evaluation or home study while emergency protective services continued. Mother stipulated. The District Court granted the Department TIA for 90 days and set an adjudicatory hearing.

¶5 Mother appeared at the adjudicatory hearing on March 24, 2021, and stipulated to R.K. being a YINC. The Department was granted TLC. At the treatment plan hearing, Mother stipulated to and signed her treatment plan. The treatment plan required Mother to “cooperate with, and regularly meet with, any in-home services provider . . . .” Mother was also ordered to work with SafeCare, Dan Fox home-based services, Parents as Teachers, and visitation coach Jill Henry (Henry). For her mental health, Mother was ordered to participate in therapy conducted by a provider approved by the Department. The treatment plan mandated Mother acquire a “home that [met] the basic needs of her child/ren.” Mother was also required to update the Department if she changed her address or telephone number. Lastly, the treatment plan required Mother to maintain regular contact with her caseworker, Martin Burrright (Burrright), by phone or in-person

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<sup>3</sup> The Department has provided services to Mother since 2010 relating to her other five children. At the time of R.K.’s removal, Mother did not have legal custody of R.K.’s five older siblings, and her parental rights to her third-oldest child were terminated in 2017.

communication. The court advised Mother of the importance of fully completing her treatment plan, stating that the court would not “accept half complied treatment plans.”

¶6 Prior to the first status hearing, the CASA submitted a report updating the court on Mother’s lack of progress. The CASA stated Mother had not attended visits with R.K. for two months, having last seen him on April 19, 2021. The CASA continued that Mother had not made progress on her treatment plan and was declining in-home service providers. At this time, Mother was pregnant again and reported that her new boyfriend, W.D., was the expecting father. The CASA reported the Foster Care Review Committee (Committee) had met on June 17, 2021, and unanimously recommended adoption was in R.K.’s best interests. The Committee’s decision to support adoption was based on Mother being “disengaged for a couple months,” not attending visits, and not progressing in her treatment plan.

¶7 On July 14, 2021, the court held a status hearing. At the hearing, the CASA filed an updated report recommending termination of Mother’s parental rights to R.K. The CASA represented that Mother had not attended visitations with R.K. since late April and had not allowed providers into her home. The court asked Mother if she reviewed the CASA’s report. Mother responded that she had “been sick off and on,” that she had been communicating with the Department, and that she just resumed visitation with R.K. two days before the hearing. She complained R.K. was sick frequently so she did not want to expose him to her illness. Mother also explained she had communicated with the Department although she missed visits with R.K. because of her illness. Mother then stated

the Department had not come to her home yet to provide in-home safety care because she was in the process of relocating to a new residence.

¶8 On September 22, 2021, the Department moved for a six-month extension of TLC and to adopt a permanency plan. Burrighr proposed reunification as the permanency plan with a concurrent plan for adoption and reported Mother was “not allowing service providers in her home and [had] made no progress on her treatment plan.”

¶9 On September 29, 2021, the court held a status hearing. Mother did not appear at the hearing but was represented by counsel. Counsel reported he had not consulted with Mother though he left her a message and sent her the motion and affidavit to extend TLC. Counsel did not take a position on the permanency plan or petition to extend TLC. During the hearing, Burrighr reported he had been “consistently trying to reach” Mother weekly or bi-weekly. The court recognized the CASA’s position that Mother’s parental rights be terminated. Specifically, the CASA summarized, “[b]ecause [Mother] has done nothing on her treatment plan, does not allow service providers into her home and has ceased to participate in supervised visits with [R.K.], her parental rights should be terminated.” At the conclusion of the hearing, the court adopted the Department’s permanency plan and extended TLC for six months. The court addressed Mother’s counsel:

I would strongly encourage you . . . to get [the CASA’s] report to your respective clients and make sure that they understand that this Court is not going to wait around for them to—essentially for another permanency hearing and another extension.

If they don’t get their stuff together, I expect the Department to file termination and/or guardianship. Enough is enough with this child.

¶10 On October 20, 2021, the District Court conducted a status hearing in response to the CASA’s request to address the possibility of the Department sending R.K. to Oklahoma to live with A.K.’s brother. Mother and A.K. were absent at the hearing. The CASA reported concerns about this kinship placement. Once again, the CASA indicated a strong recommendation that R.K. be adopted by his foster family and Mother’s parental rights be terminated. The Department also agreed that placing R.K. in his uncle’s care in Oklahoma was not an option and that it had concurrent plans of reunification. The court ordered R.K. not to be moved without prior permission from the court.

¶11 On December 16, 2021, Mother gave birth to a son, L.D. Burrignt worked with Mother and W.D. for L.D. to be released to their care upon hospital discharge with an in-home safety plan. However, upon discharge, hospital staff learned Mother and W.D. lied about having a car seat available for L.D. Hospital staff and Burrignt were also concerned because Mother did not have baby formula and she admitted she had never mixed baby formula before. As a result, the Department removed L.D. from Mother’s and W.D.’s care and placed him in foster care.<sup>4</sup> In L.D.’s case, Mother had to comply with conditions for the Department to return L.D. to her care. The conditions for L.D.’s return included Mother and W.D. participating in classes called “Taking Care of You,” “RE Family Services,” “SafeCare,” and “Parents as Teachers.” L.D. was never adjudicated a YINC and Mother and W.D. were never required to complete treatment plans. However,

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<sup>4</sup> The abuse and neglect case involving L.D. is filed under a separate cause number and forms part of the supplemented record on appeal.

several of the conditions imposed overlapped with provisions of Mother's treatment plan in R.K.'s case.

¶12 Shortly after L.D.'s birth, the court held a status hearing on December 22, 2021, in response to a report filed by the CASA. The CASA's report insisted that Mother's parental rights be terminated and R.K. be adopted by his foster family. Mother did not appear at this hearing nor did her newly appointed counsel.<sup>5</sup> Despite the hearing having been scheduled for months, the hearing date was not listed on the court's daily docket. Because of this, Mother's counsel had been in a different court on other cases and was unable to attend Mother's status hearing. Nonetheless, the court held the hearing, noting R.K. was doing well in foster care; Mother was still not attending visits with R.K.; Mother has "done nothing on her treatment plan;" and Mother would not allow service providers in her home. Without Mother or her counsel present, the court announced:

I would encourage the Department to strongly consider [the CASA's] recommendations with respect to termination. The child certainly is in a great place with his foster care family at this time. Based upon [the CASA's] report, and if there is going to be a termination, I do not expect a motion to extend custody. It's either going to [be a] motion for guardianship or motion to terminate.

The court expressed it wanted to "move on for the sake of [R.K]."

¶13 The Department filed a petition to terminate Mother's rights to R.K. on March 29, 2022, based on Mother's failure to complete her treatment plan. Burrignt, in his affidavit in support of termination, indicated Mother had not completed her treatment plan, despite his persistent attempts to encourage Mother to engage. Mother motioned the court before

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<sup>5</sup> Mother was assigned new counsel on November 24, 2021.

the termination hearing to take judicial notice of the proceedings, records, and facts in L.D.'s case. L.D. had been in foster care for 52 days and was returned to Mother's and W.D.'s care on February 7, 2022. During L.D.'s proceedings, Mother was engaged in all services and meeting the demands of the Department and the CASA. On July 18, 2022, ten days after the termination hearing in R.K.'s case, the court granted the Department's request to dismiss the petition for TLC relating to L.D. based on Mother's satisfactory completion of the conditions imposed by the Department for L.D.'s return and because Mother was able to provide care for L.D.

¶14 On July 8, 2022, the District Court held the termination hearing regarding R.K. and took judicial notice of Mother's progress and performance in L.D.'s case. The CASA now testified that while she did still have concerns for Mother's ability to care for R.K., her biggest concern was R.K.'s connection with his foster family for almost 20 months. The CASA again advocated for R.K. to be adopted by his foster family despite her admission that she saw a "big shift recently in [Mother's] life" since L.D.'s birth. Mother expressed to the court she had struggled to contact the Department during the eight-month period where she did not visit R.K. because her phone was unable to receive calls when not connected to Wi-Fi. Mother further disclosed she was in an abusive relationship during the times she missed visits with R.K. She has since found a supportive partner—the birthfather of L.D.—who is able and eager to parent R.K. alongside Mother.

¶15 Child Protective Service (CPS) workers testified at the termination hearing. CPS Henry testified about the supervised visits between Mother and R.K. which began in December 2020. Initially, Mother did well with the visits and had attended the three



scheduled visits per week. Henry mentioned Mother had a challenging time understanding some of R.K.'s needs when he bumped his head and started crying. However, when Mother attended visits, she was generally engaged in the visits and Henry had no overt safety concerns. Henry stated Mother missed a "couple visits in a row" and then would attend visits "for a couple of weeks, and then she would miss visits again." At times, Mother would "no-show" for her visits without giving notice to the Department. Eventually, Mother ceased all communications with Henry after consistently missing visits. Once Mother stopped appearing for visits in July 2021, Henry removed Mother from the visitation schedule. Mother did not have any visits with R.K. between July 23, 2021 and March 29, 2022. The visits resumed in late March 2022, but it had been eight months since Mother last saw R.K.

¶16 In addition to the missed visits, Burrig testified Mother had made "very little progress on [her] treatment plan." Burrig indicated Mother had assured him she could contact the Department through Wi-Fi calling and she should return missed calls when connected to Wi-Fi. Burrig explained he was never able to reach Mother despite numerous attempts, such as going to her residence and sending Mother written letters to initiate contact. Burrig further testified Mother had been complying with the conditions imposed in L.D.'s case and had participated in a voluntary protection plan, including some of the same tasks as required in Mother's treatment plan associated with R.K. Notwithstanding, Burrig stated R.K. and L.D. are "two separate [children]," and expressed concern that Mother seemed "more interest[ed]" in parenting L.D. than R.K, and that he worried Mother would not follow through on R.K.'s medical appointments

necessary for his occupational therapy and eczema.<sup>6</sup> Burrigh stated Mother would periodically inquire about R.K.'s health and how he was doing, but she did not express a desire to "actively engage in parenting" R.K. Burrigh was also concerned about the size of Mother's apartment and that she may be overwhelmed by caring for two children. In May 2022, Burrigh left the Department and transferred Mother's case to his supervisor, Yvette Keller (Keller).

¶17 Keller testified Mother "quickly engaged in services" regarding parenting L.D., but had not been willing to engage in services at the same level for R.K. Based on Keller's previous experience working with Mother, Keller reported Mother "gets very easily overwhelmed with more than one child." Keller expressed concerns that Mother could not parent without a supportive partner or parent more than one child, even with a supportive partner. Keller explained Mother's history of missing visits that hindered the "consistent contact" she would need to "rebuild" a relationship with R.K. Keller opined Mother would not be able to reestablish a relationship with R.K. within a reasonable amount of time based on her history and because R.K. had been in foster care for 16 months before Mother started making progress on her treatment plan.

¶18 Mother also testified at the hearing. Mother excused her failure to contact the Department for months because she alleged the missed calls did not show up on her phone when she was disconnected from Wi-Fi. Mother testified she got a "Straight Talk" phone plan "immediately" to address the issue. Mother did not request financial help from the

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<sup>6</sup> A doctor also testified at the termination hearing due to medical issues the CASA raised in her May 26, 2022, report. The doctor noted R.K. had eczema and slight motor issues.

Department to purchase minutes or a phone card. Mother also attributed her missed visits with R.K. to his “medical conditions,” which prevented her from seeing him. Mother stated her lack of progress on her treatment plan had been partially due to her abusive relationship with A.K., an alcoholic who did not support her working with the Department. Mother explained her relationship with W.D. was different than her relationship with A.K., and she believed she and W.D. would be a good parenting team.

¶19 Mother started communicating with the Department and engaging with some providers once L.D. was born. For instance, Mother reinitiated contact with her mental health provider, Dr. Mark Mozer, on January 24, 2022. Dr. Mozer did not provide any recommendations, so Mother began seeing a therapist, Kalana Creek (Creek). Her first session with Creek occurred on April 13, 2022. Creek testified she had 13 therapy sessions with Mother between April and the termination hearing. Creek believed Mother could continue to make progress, acknowledging they had yet to address Mother’s PTSD diagnosis. At the time of the termination hearing, Mother was still working on her “SafeCare” class but had not completed it. This class provided services to Mother that would allow her to maintain a safe home for R.K. and L.D.<sup>7</sup>

¶20 After hearing testimony, the District Court determined it was in R.K.’s best interests to terminate Mother’s parental rights, relying on the CASA’s recommendation for termination despite the CASA’s acknowledgment that Mother had made progress in her treatment plan since giving birth to L.D. The court noted R.K. had been in foster care for

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<sup>7</sup> Mother appears to have finished the SafeCare class the week following the termination hearing as it was required to dismiss L.D.’s case.

590 days total. The court found Mother had not consistently visited with R.K. as required by her treatment plan, stating she missed visits for 8 months, and then after reestablishing visits, continued to miss visits in May, June, and July 2022. The court acknowledged Mother's ability to successfully parent L.D. with W.D.'s assistance but lacked confidence that this success would transfer to R.K.'s care due to lack of bond between Mother and R.K. and the fact that W.D. was not R.K.'s father. The District Court found Mother could eventually change her conduct toward R.K., but could not improve in a reasonable amount of time necessary to care for R.K. The court explained it was not willing to "require [R.K.] to wait any longer." Mother now appeals.

#### **STANDARD OF REVIEW**

¶21 "Whether a parent has been denied his or her right to due process is a question of constitutional law over which this Court's review is plenary." *In re D.A.D.*, 2021 MT 2, ¶ 13, 402 Mont. 399, 478 P.3d 809. This Court reviews a district court's evidentiary rulings and its decision to terminate parental rights for abuse of discretion. *In re M.C.*, 2017 MT 252, ¶ 7, 389 Mont. 78, 403 P.3d 1266 (citation omitted). A court abuses its discretion if it terminates parental rights based on clearly erroneous findings of fact or conclusions of law, or otherwise acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *In re D.D.*, 2021 MT 66, ¶ 9, 403 Mont. 376, 482 P.3d 1176. "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 A.B.*, 2020 MT 64, ¶ 23, 399 Mont. 219, 460 P.3d 405.

## DISCUSSION

¶22 1. *Did Mother receive due process when the District Court, after providing notice, conducted status hearings in her absence?*

¶23 A parent's due process rights to the custody of their children requires "fundamentally fair procedures at all stages of termination proceedings." *In re K.B.*, 2019 MT 73, ¶ 11, 395 Mont. 213, 437 P.3d 1042. Due process requires that parents in abuse and neglect proceedings receive "notice and an opportunity to be heard." *In re C.B.*, 2019 MT 294, ¶ 18, 398 Mont. 176, 454 P.3d 1195.

¶24 Initially, we must observe that Mother did not raise a violation of her due process rights based on lack of notice when she was before the District Court. We have held that failure to object to notice issues constitutes a waiver of that issue on appeal. *See In re T.C.*, 2008 MT 335, ¶ 20, 346 Mont. 200, 194 P.3d 653 (holding a parent waives a lack of notice argument on appeal in an abuse and neglect case when the parent had the opportunity to object but failed to do so in the district court). Mother did not raise a due process violation before the District Court, and has therefore waived any alleged error relating to notice.

¶25 Nonetheless, Mother's notice issue can be dispensed with easily. Here, Mother asserts her due process rights were violated when the court conducted several hearings without allegedly providing her notice, identifying three status hearings for which she was absent on September 29, 2021, October 20, 2021, and December 22, 2021. Mother's counsel, however, was present for the September 29, 2021 and October 20, 2021 hearings. While the December hearing was not listed on the court's docket calendar, the parties had been on notice of the hearing since September when the court sent hearing minutes to

counsel. Therefore, Mother was on notice, through her attorneys, that the court was going to hold a status hearing on December 22, 2021. Accordingly, Mother's due process rights were not violated because she had notice about the status hearings for which she could have appeared.

¶26 2. *Did the District Court abuse its discretion when it terminated Mother's parental rights?*

¶27 A "natural parent's right to care and custody of a child is a fundamental liberty interest which courts must protect with fundamentally fair procedures at all stages of the proceedings for the termination of parental rights." *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282 (citing *In re B.N.Y.*, 2003 MT 241, ¶ 21, 317 Mont. 291, 77 P.3d 189). The U.S. Constitution and Montana Constitution require strict compliance with the statutory requirements governing proceedings involving the termination of parental rights, and the failure to strictly comply with the statutory requirements should generally result in the reversal of the termination. *In re J.C.*, 2008 MT 127, ¶ 53, 343 Mont. 30, 183 P.3d 22. A district court may order the termination of the parent-child legal relationship if there is clear and convincing evidence that (1) the child was adjudicated as a YINC, (2) the parent failed to comply with an appropriate court-approved treatment plan, and (3) the condition or conduct that rendered the parent unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f)(i)-(ii), MCA; *In re B.J.J.*, 2019 MT 129, ¶ 20, 396 Mont. 108, 443 P.3d 488.

¶28 On appeal, "this Court does not substitute its judgment as to the strength of the evidence for that of the district court." *B.J.J.*, ¶ 10. "The district court, as the fact finder,

evaluates if the Department has met its burden of presenting clear and convincing evidence regarding all required elements for termination of a parent’s rights.” *B.J.J.*, ¶ 10. When a district court makes a finding that a parent is unlikely to change within a reasonable time, despite the Department’s efforts, the finding “does not replace the two-prong statutory inquiry mandated by § 41-3-609(1)(f), MCA.” *In re D.B.*, 2007 MT 246, ¶ 25, 339 Mont. 240, 168 P.3d 691.

¶29 Here, Mother does not dispute R.K. was properly adjudicated as a YINC. Mother contends that because she complied with the necessary provisions to be reunified with L.D. in his case, she complied with her treatment plan in R.K.’s case. However, Mother failed to complete the visitation component of her treatment plan in R.K.’s case. Based on the evidence, Mother would attend visits “for a couple of weeks, and then she would miss visits again.” She would often “no-show” for her visits without giving notice to the Department and soon ceased all communications with the Department. Mother did not have any visits with R.K. for eight months. When the visits resumed in late March 2022, she again missed visits in the subsequent months between May and July. Since Mother failed to completely comply with her treatment plan by not attending consistent visitation with R.K., the District Court did not erroneously terminate Mother’s parental rights to R.K.

¶30 Additionally, “[i]f a child has been in foster care under the physical custody of the state for 15 months of the most recent 22 months, the best interests of the child must be presumed to be served by termination of parental rights.” Section 41-3-604(1), MCA. Here, R.K. had been in the custody of the state and placed in foster care from November 2020 until the termination hearing in July 2022—a total, as the District Court found, of 590

days or nearly 20 months. Children require a stable home and should not have to “adjust their timelines and subordinate their needs to meet the timelines of their parents. . . .” *In re Custody & Parental Rights of D.A.*, 2008 MT 247, ¶ 26, 344 Mont. 513, 189 P.3d 631. Here, the presumption favors terminating Mother’s rights to R.K. and the District Court had substantial evidence supporting its conclusion that Mother could not reestablish a relationship with R.K. and resume care within a reasonable period of time.

¶31 Nonetheless, it must be noted that the first goal of the Department, the court, CASAs, and guardian ad litem is to seek reunification before suggesting termination of parental rights. The CASA, here, was focusing on termination in the very early stages of this case and advocating for placement with the foster family. This undermines the purpose of the dependency statutes. “The department shall make reasonable efforts to prevent the necessity of removal of a child from the child’s home and to reunify families that have been separated by the state.” Section 41-3-423(1)(a), MCA. In fact, the statute “plainly contemplates that the department will make reasonable efforts to reunify families throughout the proceeding.” *In re C.M.G.*, 2020 MT 15, ¶ 14, 398 Mont. 369, 456 P.3d 1017. The CASA’s role is to advocate for the children they represent in youth and neglect proceedings based on the child’s best interests. When a CASA seeks termination of parental rights at the outset without the goal of reunification, he or she acts contrary to the principles guiding this statute. It is inappropriate in a dependency proceeding to immediately seek or encourage termination, absent the presence of certain statutory factors, without making sincere efforts at reunification. If the Department believes reunification efforts are unsuccessful and it has “clear and convincing evidence” that termination of



parental rights is in the best interests of the child, the Department may file a petition seeking termination and the court *then* may exercise its discretion to terminate. Although Mother's history of parenting is dismal, all involved were obligated to work towards reunification. However, recognizing this, we are nonetheless convinced that Mother's failure to complete her treatment plan and to maintain consistent visitation with R.K. to reestablish a parent-child relationship supported the termination of her parental rights. We reach this conclusion noting, as well, the presumption of 41-3-423(1)(a), MCA, that termination after such a lengthy placement in foster care was in R.K.'s best interest.

### CONCLUSION

¶32 The District Court's order terminating Mother's parental rights to R.K. is affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ INGRID GUSTAFSON

/S/ DIRK M. SANDEFUR

/S/ BETH BAKER

/S/ JIM RICE