

APPLICATION FOR
DISTRICT COURT JUDGESHIP
Fourth Judicial District

A. PERSONAL INFORMATION

1. Full Name: Karen Paula Kane
 - a. What name do you commonly go by? Karen
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED] Phone: [REDACTED]
4. Office Address: 2677 Palmer Street, Suite 300, Missoula, MT 59808 Phone: (406) 329-1564
5. Length of residence in Montana: 25 years
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
April 2004 to present	Missoula	Montana

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Laurel School	Shaker Heights, OH	June 1990	H.S. Diploma
The Mountain School of Milton Academy	Vershire, VT		Semester program [Jan. - May 1989]
Miami University	Oxford, OH	June 1994	B.A. English Literature
Miami University Dolibois European Center	Differdange, Luxembourg		Semester program [Aug. - Dec. 1993]
University of Montana School of Law	Missoula, MT	May 1999	J.D. (with Honors)

8. List any scholarships, awards, honors and citations that you have received:

I graduated with Honors from the University of Montana's School of Law.

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

Not applicable.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Montana State Courts and Montana Supreme Court	Sept. 27, 1999
U.S. District Court for the District of Montana	June 5, 2001
U.S. Ninth Circuit Court of Appeals	June 1, 2001

11. Indicate your present employment. (List professional partners or associates, if any).

I am an Assistant Attorney General with the Montana Department of Justice, Prosecution Services Bureau, and supervisor of the Child Protection Unit. I have the pleasure of representing the State of Montana and working for Attorney General Tim Fox. I directly supervise three other Child Protection Unit attorneys and three staff members.

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
State of Montana Department of Justice Prosecution Services Bureau 2677 Palmer Street, Ste. 300 Missoula, MT 59808	Asst. Attorney General and Supervisor of the Child Protection Unit	February 2013 to present
Connell Law Firm 502 W. Spruce Street Missoula, MT 59802	Attorney (associate)	May 2010 to February 2013
Meismer & Associates, PLLC 335 W. Spruce Street Missoula, MT 59802	Attorney (partner)	May 2004 to October 2009
Keller, Reynold, Drake, Johnson & Gillespie, PLLC 50 S. Last Chance Gulch Helena, MT 59601	Attorney (associate)	May 2001 – April 2004

Montana First Judicial District Court
Hon. Jeffrey Sherlock
228 E. Broadway Street
Helena, MT 59601

Law Clerk

Sept. 2000 – May 2001

First Judicial District Court
Hon. Thomas Honzel
228 E. Broadway Street
Helena, MT 59601

Law Clerk

Sept. 1999 – Sept. 2000

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

I have been continuously employed since completion of my formal education with the exception of October 2009 through May 2010, when I took time off from the practice of law after my law partner, Paul Meismer, died in September of 2009 after a battle with cancer, and I gave birth to my son in October 2009.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

100% of my current practice is prosecuting Dependent Neglect cases on behalf of the Attorney General's office pursuant to Title 41 in state district courts throughout western Montana.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

I primarily practiced insurance defense and personal injury law prior to prosecuting. I have also handled a smaller percentage of family law and transactional cases.

I routinely provide informal and formal training to county attorneys throughout Montana in regard to the best practices for prosecuting Title 41 Dependent Neglect cases. I train Child Protection Specialists for the Department of Public Health and Human Services, Child and Family Services Division on legal procedures, writing affidavits, and testifying in court. I provide training to Montana Qualified Expert Witnesses under the Indian Child Welfare Act. I have provided legal training to Court Appointed Special Advocates (CASA).

16. If you specialize in any field of law, what is your specialty?

I specialize in the civil prosecution of Title 41 Dependent Neglect (child maltreatment) cases currently. Prior to prosecuting, I specialized in personal injury law representing injured parties, and insurance defense, representing insurance companies in Montana state and federal court.

17. Do you regularly appear in court?

Yes. I appear in Montana District Courts throughout the state multiple times per week.

What percentage of your appearance in the last five years was in:

Federal court	0%
State or local courts of record	100%
Administrative bodies	0%
Other	0%

18. During the last five years, what percentage of your practice has been trial practice? 100%

19. How frequently have you appeared in court? 12-15 times per month on average.

20. How frequently have you appeared at administrative hearings? 0 times per month on average.

21. What percentage of your practice involving litigation has been:

Civil	100%
Criminal	0%
Other	0%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

Some of the cases that I have prosecuted have been appealed, however, I have not personally appeared at the Montana Supreme Court because the Montana Department of Justice appoints attorneys from the Appellate Division to represent the State of Montana on appeal. The cases that I have prosecuted that have been appealed include:

- In the Matter of J.B., Jr., 2016 MT 68
- In the Matter of B.J.T.H. and B.H.T.H, 2016 MT 198N
- In the Matter of K.B., DA 18-0412
- In the Matter of O.R and J.R, 2017 MT 175N
- In the Matter of X.M., 2018 MT 264
- In the Matter of M.S. and J.S., 2014 MT 220N
- In the Matter of K.B., 2019 MT 73

23. State the number of jury trials that you have tried to conclusion in the last ten years. I was involved as co-counsel defending the State of Montana in a jury trial in approximately 2002 in the 1st Judicial District Court, and the case settled on the second day of trial. I have not had an opportunity to try a case before a jury since that time.

24. State the number of non-jury trials that you have tried in the last ten years. Approximately 80 bench trials.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

Adversary Counsel	Caption	Dates of Trial	Judge
Julie Brown 415 N. Higgins Ave., Ste. 2 Missoula, MT 59802 (406) 356-6546	In the Matter of X.M.	Dec. 27, 2017	Hon. John W. Larson (406) 258-4773 x. 4736
Michael Anderson P.O. Box 3253 Billings, MT 59103 (406) 254-8904	In the Matters of B.J.T.H. and B.H.T.H (Deer Lodge County)	June 17, 2015	Hon. Ray J. Dayton (406) 563-4044
Anita Roessman 209 7 th Ave. Helena, MT 59601 (406) 461-5350	In the Matters of O.R. and J.R. (filed in Beaverhead County, transferred to Silver Bow County following recusal of Hon. Loren Tucker)	August 2, 2016	Hon. Kurt Krueger (406) 497-6410
Kelly Sather 610 N. Woody St. Missoula, MT 59802 (406) 523-5140	In the Matter of J.B., Jr.	March 9, 2015	Hon. Karen S. Townsend (406) 258-4774 x.4768
Christopher Miller 118 Cherry St. Anaconda, MT 59711 (406) 563-6586	In the Matter of K.S. (Powell County)	January 27, 2017	Hon. Ray J. Dayton (406) 563-4044

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

My law practice has not involved administrative boards or commissions during the last five years.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

In 2018, I updated all forms and templates for petitions, affidavits, proposed orders, and miscellaneous pleadings commonly used in Title 41 Dependent Neglect cases for the Department of Justice Child Protection Unit's 2018 Dependent Neglect Desk Book, which is disseminated to county attorneys and Child and Family Services representatives throughout the State.

In July of 2018, I presented to the Montana County Attorney's Association at the Summer CLE conference and discussed the updated Dependent Neglect Desk Book templates, as well as a variety of best practices in the prosecution of Dependent Neglect cases.

In September of 2018, I presented with Maylinn Smith, Adjunct Professor, Clinical Supervisor and Director of the Alexander Blewett III School of Law Indian Law Clinic to attendees at the Indian Child Welfare Act Legal Summit in regard to "Prosecutorial Best Ethics & Best Practices in ICWA Cases."

In April of 2019, I presented the Prosecutor's Perspective regarding the Indian Child Welfare Act – Compliance and Best Interest CLE during the 2019 Indian Law Week at the Alexander Blewett, III School of Law.

In June of 2019, I will be presenting on Best Practices in the Prosecution of Dependency Neglect cases to attendees of the Montana County Attorney's Association Summer CLE at Fairmont Hot Springs Resort.

I conduct regular legal trainings for the Montana Public Health and Human Services, Child and Family Services Division (CFS) to train Child Protection Specialists and other employees about Title 41, preparing for court, working with prosecutors in Dependent Neglect cases, writing effective affidavits, and testifying in court.

I have conducted legal trainings for CFS for Indian Child Welfare Act Qualified Expert Witnesses detailing what the law requires and how they can best serve the needs of Indian children involved in Title 41 Dependent Neglect cases.

I have also conducted legal trainings with Court Appointed Special Advocate (CASA) volunteers to prepare them to be advocates for children involved in child maltreatment cases.

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

I have been a member of the State Bar of Montana since 1999.

I have been a member of the Court Improvement Project (CIP) Advisory Committee since 2016. The CIP's website explains that the CIP, "... aims to improve court practice in child abuse and neglect cases so that the three goals of safety, permanence, and well-being for each child are achieved in a fair and timely manner."

Since 2018, I have been a member of the Steering Committee for the newly-created Flathead County Family Treatment Court, to be presided over by Hon. Heidi Ulbricht. I will be the sole prosecutor for the FFTC, which is active and operating as of May 2019.

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

Missoula Food Bank – Member of Board of Directors (2011-2012).

Fort Courage Child Care – Member of Board of Directors (2007-2009) and President (2010-2011). Presided over meetings of the Board of Directors to make decisions regarding the operation of the non-profit day care that my children attended.

PRO Outfitter North Fork Crossing Education Fund – Member (2008-2017) and Secretary/Treasurer (2018-present). My husband is a fly-fishing guide who guides for PRO Outfitters. This non-profit fundraises in order to generate income to distribute to employees of PRO Outfitter's North Fork Crossing (NFC) lodge located in Ovando, Montana. The majority of NFC's employees are residents of the Blackfoot Valley and come from ranching families. Applications are provided to employees to submit for a distribution of funds that can be applied to defray their costs of education. It is a wonderful way to connect to the Blackfoot Valley community and establish relationships with ranchers and families who have lived there for many generations.

30. Have you ever run for or held public office? If so, provide the details. No.

31. Explain your philosophy of public involvement and practice of giving your time to community service.

I believe that people should give back to their communities in whatever capacity they can. Volunteering can impart a sense of self-worth and gratitude to the volunteer, fostering positive mental health and a sense of belonging. Community service also strengthens a person's connection to the public and

professional community. Understanding problems that impact one's community and engaging in community dialogue is important to generating solutions.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No.

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No.

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.
No.

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.
Not applicable.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.
No.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.
No.

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?
Yes.

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities?
Yes.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?
No.

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.
No.

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

I research and draft all petitions, motions, briefs, other pleadings, and proposed orders that I file with the court.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

I routinely draft proposed orders following all contested hearings and bench trials in the Child Abuse and Neglect cases that I prosecute and provide these proposed orders to the parties and the presiding judge.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable. The writing sample should be as recent as possible.

Please see writing sample attached.

48. What percentage of your practice for the last five years has involved research and legal writing?

60%

49. Are you competent in the use of Westlaw and/or Lexis?

Yes. I have extensive experience with using both legal research platforms.

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

My husband, Patrick, is a fly-fishing and upland game bird hunting guide, and together with our two children, Seamus (9) and Shannon (12), we enjoy time on the river, fishing, rafting, and stand up paddle boarding. I also enjoy white water kayaking and playing tennis in the summers. I play adult league women's hockey in Missoula and we ski at Snowbowl as a family in the winters. We also enjoy hiking with our English Setters in the open space around Missoula.

51. Describe the jobs that you have held during your lifetime.

From 1989-1990, in high school I worked in a frozen yogurt store called North Coast Yogurt. I was often the sole employee and would open, close, and perform all duties of operating a yogurt store.

From 1991-1994, in college I worked for a very popular eatery, the Bagel & Deli. This fast-paced sandwich shop was busy all day and very busy on weekends from 1:30 a.m. to 3:00 a.m. in the college town of Oxford, Ohio.

From 1994-1996, I worked at the Great Northern, a bar and grille on the main street in Whitefish, Montana, after moving to Whitefish to ski following college. I was a short order cook in the evenings and skied at Big Mountain during the day.

From 1997-1999, after I moved to Missoula from Whitefish to attend law school, I worked at Carey, Meismer, & McKeon law firm full time during the summers and part time during the school year.

From 1999-2001, following law school I clerked for Hon. Thomas Honzel and Hon. Jeffrey Sherlock in the First Judicial District Court in Helena, Montana.

In 2001, I accepted an associate attorney position with Keller Reynolds, Drake, Johnson, and Gillespie, an insurance defense firm in Helena.

In 2004, I moved back to Missoula to work with Paul Meismer at Meismer & Associates, PLLC. Our practice was primarily personal injury and insurance defense.

In 2010, I worked as an associate attorney for Connell Law Firm in Missoula, practicing personal injury law.

In 2013, I accepted a position as Assistant Attorney General for the Montana Department of Justice, Child Protection Unit, prosecuting Dependent Neglect cases and conducting trainings for county attorney offices throughout western Montana. I was promoted to supervisor in 2016.

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I participated in a Pro Bono Clinic in Missoula designed to provide simple will drafting services for low income Missoulians. Over the years I have often provided pro bono services by giving legal advice to friends, family, and acquaintances in regard to a variety of legal issues and assisted with the preparation of legal documents.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

Clerking for Hon. Jeffrey Sherlock, and spending many hours in his courtroom, influenced the way that I view our system of justice. Judge Sherlock handled his courtroom gracefully and adeptly, while maintaining his ability to relate to all litigants before him, whether for a personal injury/insurance defense civil trial, an emotional dissolution or parenting plan action, or a criminal trial. He never appeared to be on a “high horse” and never talked down to the litigants or attorneys in his courtroom. He was able to maintain a congenial, but firm, demeanor in all of his hearings and trials. He earned respect, he did not command it. His ability to treat litigants and attorneys respectfully while maintaining his own brand of humor and humility impressed upon me the importance of establishing connections with people as a judge. His ability to make decisions, even difficult decisions, and explain his reasoning without being condescending or overly verbose impressed upon me the importance of enabling all litigants, sophisticated or not, to understand the process and to receive equitable, respectful treatment. I believe these qualities made Judge Sherlock a fine judge and underscore the concept that respect and integrity on the bench garner respect, and lead to just results.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

The qualities that I believe to be most important in a good district court judge are impartiality, humility, diligence, intelligence and competence, and a balanced temperament. A judge must listen to all facts presented and understand the parties’ positions, remaining impartial prior to making any determinations. A judge should be humble and patient and show respect for all litigants, attorneys, court staff, and colleagues. A judge should work hard and manage time and state resources wisely to keep up with the ever-increasing docket and case load. A judge should be intellectually curious, and maintain an interest in current events, community news, and bar-related topics that could improve the judge’s ability to perform judicial tasks effectively and in a timely manner. A judge should have excellent written and oral communication skills with an emphasis on clarity and without being overly wordy or confusing. A judge should be collegial and courteous and demonstrate a commitment to fairness and impartiality, and should be sensitive to all parties’ interests.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

A judge’s primary responsibility is to decide the case before it. Certainly, a judge must follow binding precedent and consider non-binding precedent before ruling on an issue or case. The value in precedent is that it provides a predictable framework for attorneys and litigants, and that provides a comfortable

setting from which to dispense legal advice as an attorney, and reach a decision as a judge. Judges must, however, decide cases on a case-by-case basis. Judges must respect the stability that following precedent creates, however, judges must acknowledge that the particular facts of one case may present a scenario where distinguishing the case, and branching out from precedent, is appropriate. Judges must make the determination on a case-by-case basis and reach decisions that the judge believes to be correct and just. It would be very difficult and dangerous for a judge to apply a formulaic approach to balancing precedent with judicial independence. A judge must be mindful of applying the law as it is, not as the judge believes it "ought to be." The value in the broader rule of law and precedent is that it creates a stable and predictable system that governs cases and legal issues. The value of judicial independence is that it recognizes that the body of law is like a living, breathing thing that, under the right facts and circumstances, may and should expand or change shape to allow for adaptations that ensure equal protection and justice under the law.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

I am seeking office as a district court judge in the 4th Judicial District because my career has allowed me to touch upon a variety of legal issues and gain insight and expertise into a variety of legal areas. As a prosecutor, have been passionate about child protection and as a district court judge I would continue to be passionate about child protection. My experience as a prosecutor has shown me that most parents involved in my child abuse and neglect cases have mental health and/or substance use disorders that contribute to the reasons for state involvement in their lives. The same reasons exist for defendants in criminal cases. I am passionate about trying to impact lives of Montana citizens who suffer from these disorders and I believe that my experience with prosecuting parents would enable me to be firm and compassionate when handling their cases as a judge. In addition, I am well versed in the rules of evidence and civil procedure and understand how judges should preside over their courtrooms as I have routinely practiced in front of a variety of district court judges throughout the state. I believe that I can responsibly handle the duties and pressures of a 4th Judicial District Judge and serve my community well.

57. What items or events in your career have distinguished you or of which you are most proud?

As an Assistant Attorney General for the Department of Justice I am proud of the fact that my work contributes to protecting the safety and welfare of Montana children. I am also proud that I have been able to train and assist the many stakeholders invested in enhancing child safety and reducing the incidences of child maltreatment in Montana, including: child abuse and neglect prosecutors in county attorney's offices, employees of Child and Family Services, Tribal representatives, and people involved in law enforcement and medical communities throughout the state. I believe I have made a positive difference in the lives of Montana's children who are drug endangered and/or suffering from abuse and neglect by their caregivers.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

As a busy mother of 2, I have a tremendous work ethic and an ability to manage my time effectively and wisely, which are attributes that would continue to serve me well if I am appointed to the Fourth Judicial District Judgeship.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

Mark Twain said, "Travel is fatal to prejudice, bigotry, and narrow-mindedness, and many of our people need it sorely on these accounts. Broad, wholesome, charitable views of men and things cannot be acquired by vegetating in one little corner of the earth all one's lifetime." I have had the good fortune and opportunity to travel extensively abroad, living in Luxembourg for 5 months exploring Europe, and traveling to China, Japan, Mexico, Costa Rica, New Zealand, Belize, Canada, and have gained perspective from my travels. A good judge must not be prejudiced, bigoted, or narrow-minded, and I am a well-rounded person who has had diverse travel experiences that have shaped my view that all people, from all walks of life and socio-economic circumstances, should be treated respectfully. As a judge, I would listen to the cases presented and address litigants' legal issues with an open mind.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 4th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

May 15, 2019
Date

Karen P. Kane
Karen P. Kane

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Thursday, May 30, 2019.

Mail the signed original to:

Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005

Send the electronic copy to: mtsupremecourt@mt.gov

Karen P. Kane's Writing Sample

STATE OF MONTANA'S RESPONSE BRIEF IN OPPOSITION TO MOTHER'S MOTION TO SET ASIDE RELINQUISHMENT DUE TO UNDUE INFLUENCE

Karen P. Kane, Assistant Attorney General on behalf of the Montana Department of Public Health and Human Services, Child and Family Services Division (CFS), respectfully files this response brief in opposition to the *Motion to Set Aside Relinquishment Due to Undue Influence* filed by OPD attorney Michael Anderson on behalf of Ms. Doe, the biological mother of the above-named youth whose parental rights to the youth were terminated on September 12, 2012. (This termination was affirmed by the Montana Supreme Court in *In the Matter of B.J.T.H. and B.H.T.H.*, 2013 MT 366; and *In the Matter of B.J.T.H. and B.H.T.H.*, 2015 MT 6.) This court should deny Ms. Doe's motion because the doctrine of *Res Judicata* bars the motion and this court lacks jurisdiction to entertain the motion.

STATEMENT OF FACTS

1. On September 6, 2012, CFS filed its *Petition for Permanent Legal Custody and Termination of Parental Rights with Right to Consent to Adoption* attaching the *Affidavit of Birthmother's Waiver of All Parental Rights, Relinquishment of Child, and Consent to Adoption*, properly executed by Ms. Doe on September 5, 2012, as Exhibit 1 in support of the petitions, in District Court Cause Nos. DN-_____ and DN-_____.

2. On September 12, 2012, the District Court issued its *Findings of Fact, Conclusions of Law and Order Terminating Birth Mother's Parental Rights* based on Mother's voluntary relinquishment.

3. On April 1, 2013, Ms. Doe filed a *Petition for an Out-of-Time Appeal* of the September 12, 2012 order terminating her parental rights with the Montana Supreme Court, which subsequently allowed her out-of-time appeal. [See Exhibit A attached to CFS' *Response Brief in Opposition to Mother's Motion to Set Aside Relinquishment of Parental Rights* filed in these companion matters on September 4, 2014 ("CFS' Response Brief")].

4. On May 16, 2013, Ms. Doe's *Notice of Appeal* was filed with the Montana Supreme Court, captioned as Cause No. DA 13-0225, appealing from the final judgment set forth in the *Findings of Fact, Conclusions of Law and Order Terminating Birth Mother's Parental Rights* filed on September 12, 2012 (although her Notice of Appeal erroneously states the order

is dated June 21, 2012) in District Court Cause Nos. DN-[REDACTED] and DN-[REDACTED]. [See Exhibit B attached to CFS' Response Brief.]

5. On August 28, 2013, Ms. Doe's opening *Brief of Appellant* was filed with the Montana Supreme Court. [See *Brief of Appellant*, pp. 31-36, attached as Exhibit C to CFS' Response Brief.]

6. On September 27, 2013, the State's *Brief of Appellee* was filed with the Montana Supreme Court.

7. On October 11, 2013, Ms. Doe's *Reply Brief of Appellant Mother S.H.V.H.* was filed with the Montana Supreme Court.

8. On December 10, 2013, the Montana Supreme Court issued its opinion on Ms. Doe's 1st appeal in Cause No. DA 13-0225, affirming the District Court's termination of her parental rights in Cause Nos. DN-11-03 and DN-11-04 in part, and remanding to the District Court for the sole purpose of determining whether Ms. Doe received the requisite relinquishment counseling for a minimum of three hours, or whether good cause existed to waive the counseling requirement, as this was not clear from the record. [See *In the Matter of B.J.T.H. and B.H.T.H.*, 2013 MT 366, attached as Exhibit D to CFS' Response Brief.]

9. In the opinion following Ms. Doe's 1st appeal, the Montana Supreme Court states that "Mother further argues that the District Court erred in accepting her relinquishment because her consent was obtained by duress and she was not offered the required three hours of relinquishment counseling." [*In the Matter of B.J.T.H. and B.H.T.H.*, 2013 MT 366, ¶11, attached as Exhibit D to CFS' Response Brief.]

10. The Montana Supreme Court has already specifically considered "Mother's request that we set aside her affidavit of relinquishment of parental rights." [*Id.*, ¶19.]

11. On January 22, 2014, the District Court held a contested hearing on remand to address the sole issue that it was ordered to address by the Montana Supreme Court, namely, whether Ms. Doe received a minimum of three hours of relinquishment counseling or whether good cause existed to waive the counseling requirement.

12. On February 27, 2014, the District Court issued its *Findings of Fact, Conclusions of Law, and Order* regarding the sole remanded issue, determining that Ms. Doe had received at least three hours of relinquishment counseling, and alternatively, even if she had not, there was good cause to waive the requirement in Ms. Doe's case.

13. On March 19, 2014, Mother's 2nd *Notice of Appeal* was filed with the Montana Supreme Court, captioned as Cause No. DA 14-0165, appealing the District Court's February 27, 2014 *Findings of Fact, Conclusions of Law, and Order* on remand determining that Ms. Doe had received at least 3 hours of relinquishment counseling.

14. On August 26, 2014, while Mother's 2nd appeal (of the District Court order issued on remand) was pending in front of the Montana Supreme Court, Ms. Doe's court-appointed OPD counsel filed a *Motion to Set Aside Relinquishment of Parental Rights with Brief Incorporated* in District Court.

15. On August 29, 2014, Ms. Doe's opening *Brief of Appellant* was filed with the Montana Supreme Court in her 2nd appeal arguing that CFS failed to prepare a written report of her relinquishment counseling in accordance with Mont. Code Ann. § 42-2-409(4); and that the District Court erred when it concluded that she received the required three hours of relinquishment counseling, a copy of which is attached hereto as **Exhibit E¹**.

16. On September 4, 2014, while Ms. Doe's 2nd appeal (of the District Court order issued on remand) was pending in front of the Montana Supreme Court, the State filed its *Response Brief in Opposition to Mother's Motion to Set Aside Relinquishment of Parental Rights* arguing that the District Court lacked jurisdiction to entertain Ms. Doe's motion, and that the motion was barred by the doctrine of res judicata, as the issues set forth in the motion were already appealed to, and rejected by, the Montana Supreme Court as evidenced by the December 10, 2013, opinion issued as a result of her 1st appeal in Cause No. DA 13-0225. [See *In the Matter of B.J.T.H. and B.H.T.H.*, 2013 MT 366, affirming the District Court's termination of Ms. Doe's parental rights in Cause Nos. DN-11-03 and DN-11-04 in part, and remanding to the District Court for the sole purpose of determining whether Ms. Doe received the requisite relinquishment counseling for a minimum of three hours, or whether good cause existed to waive the counseling requirement.]

17. On September 26, 2014, while Ms. Doe's 2nd appeal (of the District Court order issued on remand) was pending in front of the Montana Supreme Court, OPD counsel for Ms. Doe filed a *Reply to State's and Youth's Attorney's Response [sic] Briefs in Opposition to Respondent's Motion to Set Aside Relinquishment Counseling [sic]*.

¹ The exhibits attached to this brief are lettered in sequence with exhibits A through D attached to CFS' Response Brief.

18. On September 29, 2014, the State's *Brief of Appellee* was filed with the Montana Supreme Court in the 2nd appeal arguing that CFS had prepared a report of Ms. Doe's relinquishment counseling in accordance with Mont. Code Ann. § 42-2-409(4) and even if it failed to do so, it was harmless error; and that the District Court did not err when it concluded that she received the required three hours of relinquishment counseling, a copy of which is attached hereto as **Exhibit F**.

19. On October 8, 2014, while Ms. Doe's 2nd appeal (from the District Court order issued on remand) was pending in front of the Montana Supreme Court, the District Court issued its *Order Denying Respondent's Motion to Set Aside Relinquishment of Parental Rights*, denying her 1st motion to set aside her relinquishment of parental rights because the District Court lacked jurisdiction to entertain her motion while Ms. Doe's 2nd appeal of the District Court order issued on remand was pending in front of the Montana Supreme Court.

20. On November 7, 2014, Ms. Doe's *Reply Brief of Appellant* was filed with the Montana Supreme Court in her 2nd appeal, a copy of which is attached hereto as **Exhibit G**.

21. On January 6, 2015, the Montana Supreme Court issued its opinion in Ms. Doe's 2nd appeal in Cause No. DA 14-0165, holding that the District Court's determination on remand that she received the minimum 3 hours of relinquishment counseling would not be disturbed on appeal and again affirming the District Court's termination of Ms. Doe's parental rights in Cause Nos. DN-11-03 and DN-11-04. [See *In the Matter of B.J.T.H. and B.H.T.H.*, 2015 MT 6, attached hereto as **Exhibit H**.]

22. The Montana Supreme Court opinion states that "If there were any evidence which would suggest that Mother's relinquishment was not knowingly or and voluntarily made, although undeniably painful, then we may be compelled to consider this reporting deficiency in a different light. . . [h]owever, the evidence presented at the hearing established that Mother received the required amount of relinquishment counseling regarding all of the necessary topics and that she was capable of making a knowing relinquishment of parental rights." [See *In the Matter of B.J.T.H. and B.H.T.H.*, 2015 MT 6, ¶21.]

23. On February 18, 2015, almost 6 weeks after the final Montana Supreme Court opinion was issued regarding Ms. Doe's second appeal; and just under 3.5 years following the initial termination of Ms. Doe's parental rights, her OPD counsel, who previously had not

appeared in the District Court DN companion cases as Ms. Doe's counsel of record, filed Ms. Doe's 2nd Motion to Set Aside Relinquishment Due to Undue Influence in the District Court.

24. The above-named youth and his twin brother ("the twins") were born on [REDACTED] [REDACTED]. When Ms. Doe's parental rights were terminated on September 12, 2012, the twins were [REDACTED] years old. The twins will turn [REDACTED] years old on [REDACTED]. The twins with their current foster care, and potential adoptive, parents in a kinship placement since [REDACTED], for almost [REDACTED] years.

DISCUSSION

I. The doctrine of *Res Judicata* bars the relief requested in Mother's motion.

The doctrine of res judicata prevents a party from relitigating a matter that the party has already had an opportunity to litigate. *Loney v. Milodragovich, Dale & Dye, P.C.*, 273 Mont. 506, 510, 905 P.2d 158, 161 (1995). Res judicata is based on the public policy that there must be some end to litigation. *Id.*, 273 Mont. at 510, 905 P.2d at 161. The doctrine of res judicata stands for the proposition that a final judgment on the merits by a court of competent jurisdiction is conclusive as to causes of action or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. *State ex rel. Harlem Irrigation Dist. v. Montana Seventeenth Judicial Dist. Court*, 271 Mont. 129, 132, 894 P.2d 943, 944-45 (1995).

A claim is res judicata when four criteria are met: (1) the parties or their privies are the same; (2) the subject matter of the claim is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and the issues. *Loney*, 273 Mont. at 511, 905 P.2d at 161. The most important of the four criteria for res judicata is the identity of issues. *Marriage of Blair*, 271 Mont. 196, 203, 894 P.2d 958, 963 (1995).

Here, all four criteria are met and Res Judicata applies to bar Ms. Doe's instant motion:

1. The parties are the same.

Ms. Doe and the Montana Department of Public Health and Human Services, Child and Family Services Division have been the only parties involved at both the District Court level and on appeals to the Montana Supreme Court.

2. The subject matter of the claim is the same.

Ms. Doe's claim in her recently filed *Motion to Set Aside Relinquishment Due to Undue Influence* ("the Motion") is that she was "under duress when she was forced into signing the Affidavit of Waiver of All Parental Rights, Relinquishment of Child, and Consent to Adoption." [See the Motion, page 1, ll. 3-5.] This is the same claim that Ms. Doe asserted in her first appeal to the Montana Supreme Court, where Ms. Doe specifically argues:

a. That her relinquishment "was not entered into knowingly, voluntarily and intelligently. She was presented with the relinquishment papers at the time of the termination hearing, just after the Court denied her request to fire her attorney. She had only approximately 30 minutes to consider the relinquishment while in chambers and off the record . . . Based upon the circumstances, it is apparent that the relinquishment was signed under duress." [See *Brief of Appellant* filed on August 28, 2013, in the 1st appeal, pp. 21-22.]

b. That the court can set aside a relinquishment and consent to adopt if the parent who executed the relinquishment establishes by clear and convincing evidence that the consent was obtained by fraud or duress. Mont. Code Ann § 42-2-417(1)(a)." [Id., p. 31.]

c. ". . . that her relinquishment should be set aside on grounds that the consent was obtained by duress. Particularly, the Mother was receiving ineffective assistance of counsel; she was pressured into signing the relinquishment the day of the termination hearing; she had approximately 30 minutes to review and consider the relinquishment; and she was not offered relinquishment counseling . . ." [Id., p. 32.]

d. "It was error for the District Court to accept [Ms. Doe's] relinquishment as the basis to terminate Mother's parental rights and it should be set aside under 42-2-417." [Id., p. 36.]

e. "Based upon the foregoing case law and citation to authority, the Mother respectfully requests that this Court set aside the relinquishment and consent to adoption, reverse the order of termination, and remand this case for a new trial." [Id., p. 41.]

3. The issues are the same and relate to the same subject matter.

The issues in Ms. Doe's recently filed *Motion to Set Aside Relinquishment Due to Undue Influence* are the same as, and relate to the same subject matter as, the issues and subject matter before the Montana Supreme Court on Ms. Doe's first appeal, namely, whether her relinquishment was voluntary and knowing, and whether it should be set aside for any number of reasons, including Ms. Doe's assertion that she was "under duress" and forced to sign the Affidavit of Relinquishment.

The Montana Supreme Court's opinions reflect that it considered Ms. Doe's arguments on appeal that her relinquishment should be set aside because it was obtained by fraud or duress:

Mother contends on appeal that the District Court erred in failing to make an adequate inquiry into her complaints about her counsel and failing to appoint her new counsel . . . Mother further argues that the District Court erred in accepting her relinquishment because her consent was obtained by duress and she was not offered the required three hours of relinquishment counseling.

See *In the Matter of B.J.T.H. and B.H.T.H.*, 2013 MT 366, ¶11 (emphasis added).

In regard to whether Mother's relinquishment should be set aside, the Montana Supreme Court opinion concludes that the only issue upon which the Court had insufficient evidence in the record to determine was whether Ms. Doe received three hours of relinquishment counseling, therefore the case was remanded to the District Court for a determination on this specific, narrowly tailored, factual insufficiency. *Id.*, ¶18-20.

On remand, the District Court ultimately determined that Ms. Doe had received the required three hours of relinquishment counseling. Ms. Doe appealed this determination, and appealed the issue of whether CFS created a required relinquishment report following counseling, however, the Montana Supreme Court affirmed the District Court's determination and found CFS' failure to create a report harmless error, stating:

If there were any evidence which would suggest that Mother's relinquishment was not knowingly and voluntarily made, although undeniably painful, then we may be compelled to consider [CFS'] reporting deficiency in a different light. However, the evidence presented at the hearing established that Mother received the required amount of counseling regarding all of the necessary topics and that she was capable of making knowing relinquishment of parental rights. . . We therefore conclude that the deficiency in the reporting requirement is harmless in light of the evidence produced at the hearing demonstrating Mother received the required counseling on each topic and that her relinquishment was knowingly and voluntarily made.

See *In the Matter of B.J.T.H. and B.H.T.H.*, 2015 MT 6, ¶21 (emphasis added).

The Montana Supreme Court considered Ms. Doe's argument that her relinquishment should be set aside because it was obtained by duress, however, the Court implicitly rejected Ms. Doe's argument when it concluded that her relinquishment "was knowingly and voluntarily made."

4. The capacities of the persons are the same in reference to the subject matter and the issues.

Here, this criteria is met because the capacities of Ms. Doe and CFS are the same now as they were when Ms. Doe initially appealed the termination of her parental rights to the Montana Supreme Court.

Based on the foregoing, the doctrine of *Res Judicata* should bar Ms. Doe's improper attempt to re-litigate the very issue that she has already had an opportunity to litigate and appeal; namely, that her relinquishment should be set aside on several different grounds, including the grounds that she was under duress when she signed her relinquishment affidavit. Since Ms. Doe has already appealed this specific issue to the Montana Supreme Court, which rejected her argument in favor of affirming the termination of her parental rights, she should be precluded from re-litigating it now.

There must be some end to this litigation. Not only does public policy dictate that there be an end to litigation, but especially in light of the fact that Ms. Doe's motion was filed after the Montana Supreme Court conclusively resolved these cases adversely to Ms. Doe when it affirmed the termination of her parental rights. Mother has not presented a new theory for setting aside her relinquishment in her motion that she did not already present in her appeals and briefing before the Montana Supreme Court. This Court should apply the doctrine of *Res Judicata* and deny Ms. Doe's motion. Ms. Doe's relief from the Montana Supreme Court orders affirming the termination of her parental rights can only be ascertained by appealing these orders to the United States Supreme Court.

II. The District Court lacks jurisdiction to entertain Ms. Doe's motion because Ms. Doe is no longer a party to this case.

Once Ms. Doe appealed the District Court's September 12, 2012 order terminating her parental rights to the Montana Supreme Court in May of 2013, jurisdiction of the case, as it related to her involvement, vested with the Montana Supreme Court and the District Court. Although the Montana Supreme Court remanded Ms. Doe's case back to the District Court on December 10, 2013, the issue on remand was narrow since the sole purpose of the remand was for the district court to determine whether she received the required three hours of relinquishment counseling.

After the District Court determined the remand issue and Ms. Doe appealed that order, the case (as it related to Ms. Doe) was sent back to the Montana Supreme Court and the District Court was again divested of jurisdiction. The Montana Supreme Court opinion issued on

December 10, 2013 in Ms. Doe's first appeal sent the case back to the District Court because the Supreme Court needed additional information to determine whether one narrow piece of evidence regarding the relinquishment counseling could be determined. Ms. Doe's second appeal resulted in a Montana Supreme Court opinion issued on January 6, 2015 conclusively determining that Ms. Doe's relinquishment was voluntarily and knowingly given and that she received the requisite counseling. Thus, the validity of Ms. Doe's relinquishment was conclusively affirmed and Mother should not be considered a party to this case any longer. For this reason, the court lacks jurisdiction to entertain Ms. Doe's motion because she lacks standing in this case based on the Supreme Court's affirmation of the termination of her parental rights based on her valid relinquishment.

CONCLUSION

Ms. Doe's motion should be denied because it is barred by the doctrine of *Res Judicata* and her attempt to re-litigate the validity of her knowing and voluntary relinquishment should be denied in light of the public policy that there must be some end to litigation. In addition, once Ms. Doe appealed the District Court order terminating her parental rights to the Montana Supreme Court in May of 2013, jurisdiction of the case, as it related to her, vested with the Montana Supreme Court and the District Court. Although the Montana Supreme Court remanded her case for the sole purpose of determining whether she received the required three hours of relinquishment counseling, the District Court did not regain jurisdiction to entertain Ms. Doe's motion because the Supreme Court again affirmed the termination of her parental rights. Finally, this court lacks jurisdiction to entertain Ms. Doe's motion, as it was filed after the Montana Supreme Court conclusively affirmed the termination of her parental rights, therefore Ms. Doe is no longer a party to this case and lacked standing to bring the instant motion.

For the foregoing reasons, CFS respectfully requests that this Court decline to exercise jurisdiction over Ms. Doe's motion, find that the relief she requests is barred by the doctrines of *Res Judicata* and deny the motion.