IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0210

IN THE MATTER OF:

C.A.M.H.,

A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Holly Brown, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
SHERI K. SPRIGG
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

SCOTT J. PEDERSON
Assistant Attorney General
Child Protection Unit
175 North 27th Street
P.O. Box 3354
Billings, MT 59103-3354

ATTORNEYS FOR APPELLEE

JIM WHEELIS
Chief Appellate Defender
KELLI S. SATHER
Assistant Appellate Defender
301 South Park, Room 568
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEY FOR APPELLANT
FATHER

SUZANNE NELLEN
Attorney at Law
1800 West Koch, Suite 5
Bozeman, MT 59715

ATTORNEY FOR GUARDIAN
AD LITEM

TABLE OF CONTENTS

TABLE OF AUTHORITIES
(Cont.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(Cont.)

OTHER AUTHORITIES

STATEMENT OF THE ISSUE

Did the district court abuse its discretion when it terminated the Appellant Father's parental rights to his daughter C.A.M.H.?

STATEMENT OF THE CASE

The Appellant Father, L.H., appeals from the district court's order of February 3, 2009 terminating his parental rights to C.A.M.H. (Appellant's App. C.)

STATEMENT OF FACTS

The Court is already familiar with the facts of this case, as this is the third appeal by L.H. from orders terminating his parental rights to his five children. In the first two appeals, this Court affirmed the termination of L.H.'s parental rights to four other children. In re L.R.H., No. DA 08-0540, 2007 MT 107N (March 31, 2009); In re C.A.H., No. DA 09-0019, 2007 MT 232N (July 14, 2009).

This appeal involves the termination of L.H.'s parental rights to his youngest child, C.A.M.H. C.A.M.H. was born in August 2007. (D.C. Doc. 1, Ex. A at 2, ¶ 4(a).) At the time of her birth, all four of C.A.M.H.'s older siblings--three

brothers and a half-sister[1]--were in the temporary legal custody of the Department of Public Health and Human Services ("the Department"). (Appellant's App. A at 2-3.) The bases for the Department's initial involvement with C.A.M.H.'s family had been (a) a determination that L.H. had taken the children to casinos and left them alone in his car for hours while he gambled; (b) a charge that L.H. had used duct tape to fasten the arms of C.A.M.H.'s half-sister to her body and to cover her mouth; (c) a determination that the family's residence was unsanitary and unsafe for children; and (d) the fact that L.H. was in violation of a California restraining order and, as a result, was arrested and incarcerated. L.R.H., ¶ 3; see also Appellant's App. A at 2-3. The California restraining order had prohibited L.H.'s contact with the children's mother. (D.C. Doc. 44 at 3.)

C.A.M.H. lived with her mother from the time of her birth. (D.C. Doc. 1, Ex. A at 3, ¶ 5.) C.A.M.H.'s mother and L.H. were already separated when she was born, and C.A.M.H. has never lived with L.H. (Id.; see also 1/15/09 Tr. at 42-43.) Nevertheless, L.H. visited C.A.M.H. on a regular basis, and participated to an extent in her care, until November or December 2007, when C.A.M.H. was

[1] The siblings and their ages at the time of C.A.M.H.'s birth were: C.A.H (half-sister, age 9), L.R.H.(brother, age 3), R.H. (brother, age 2), and C.H. (brother, age 1). (D.C. Doc. 17 at 1.) C.A.H. had a different mother, who was not a party to the Montana youth in need of care proceedings. (D.C. Doc. 16 (Appellant's App. A) at 2, ¶ A.1.)

three months old. (1/15/09 Tr. at 13, 43.) L.H. has not seen or contacted C.A.M.H. since that time. (D.C. Doc. 44, attached Affidavit at 5.)

At the time of C.A.M.H.'s birth, her mother and L.H. were working on treatment plans to regain custody of her siblings. (Appellant's App. A at 3, ¶ 6.) L.H. was released on bond pending trial on charges of felony assault of C.A.M.H.'s half-sister. (D.C. Doc. 3 at 2; Appellant's App. C at 3, ¶ 10.) His living situation was inappropriate for children, as he was living with a woman who had been involved in substantiated cases of abuse or neglect and had been convicted of driving under the influence. (1/15/09 Tr. at 12, 63.) The Department petitioned for adjudication of C.A.M.H. as a youth in need of care on October 18, 2007, when she was about two months old. (Appellant's App. A at 2, ¶ 3.)

Sometime in November or December, 2007, L.H. absconded from Montana without permission, in violation of his release conditions, and without notifying the Department. (Appellant's App. C at 2, ¶ 4; 1/15/09 Tr. at 43.) His whereabouts were unknown until he was arrested in Arkansas and involuntarily returned to Montana on January 2, 2008. (Appellant's App. C at 2, ¶ 5; D.C. Doc. 44, Affidavit at 4-5; 1/15/09 Tr. at 18.) L.H. failed to contact the Department's social worker upon his involuntary return. (Appellant's App. C at 5, ¶ 17.)

An adjudication hearing regarding C.A.M.H. was held on January 18, 2008. (D.C. Docs. 1, 10.) At that hearing, the judge told C.A.M.H.'s mother: "[Y]ou

need to continue to work all the aspects of your treatment plan and do everything that you need to in other cases . . . ." (1/18/08 Tr. at 66.) She said to L.H.: "And Mr. [H.], same for you. You need to sort of pick up where you left off and get reestablished with [the social worker] as to what you need to do on your treatment plan in the other cases . . . . Okay?" L.H. responded: "Understood." (1/18/08 Tr. at 67.)

On February 20, 2008, the district court issued an order finding C.A.M.H. to be a youth in need of care. (Appellant's App. A at 11, ¶ 1.) The primary factual finding of the court was that "C.A.M.H. is at substantial risk of harm in the family situation because four children, siblings of C.A.M.H., are adjudicated youths in need of care and have been placed in foster care for at least the last ten months, pending completion of treatment plans by the parents." (Appellant's App. A at 4, ¶ 11.) Although many of the findings and conclusions of the order dealt primarily with the mother, with whom C.A.M.H. had lived since birth, the order also included the following factual finding: "The father does not presently have a home, employment, or the ability to care for a child or to provide the basic necessities for a child." (Appellant's App. A at 6, ¶ 15.) At the time, L.H. was incarcerated on the charge of assaulting C.A.M.H.'s half-sister. (Appellant's App. C at 3, ¶ 10.)

After her adjudication as a youth in need of care, C.A.M.H. was briefly removed from her mother's home and placed in foster care from February 21, 2008 to March 10, 2008. (D.C. Doc. 36 at 2.)

L.H.'s initial reaction to the youth in need of care adjudication was to try to fire his court-appointed lawyer and use a jail-mate as his unlicensed lawyer. (D.C. Docs. 18-23; 27-29; 3/14/08 Tr. at 3-4.) As a result, L.H. had not consulted with his appointed lawyer prior to the dispositional hearing held on March 14, 2008. (3/14/08 Tr. at 4.) Therefore, the disposition as to L.H. was postponed. (3/14/08 Tr. at 14-15.) Meanwhile, C.A.M.H.'s mother had signed her treatment plan prior to the hearing, and continued to progress on meeting her goals with respect to C.A.M.H.'s siblings. (3/14/08 Tr. at 6, 9.)

At this hearing, the judge urged L.H. to discuss any concerns about his proposed treatment plan with the Department's social worker pending appointment of new counsel. (3/14/08 Tr. at 17.) L.H. claimed that he was unable to contact the social worker. (Id.) The social worker responded: "Your Honor, when I have a client that's incarcerated, they can call collect, and I don't accept the call but I hear that they're trying to call me and I do contact them at that time." (Id.) The judge told L.H.: "Okay. Well, don't quit, okay? Keep trying." (Id.) Later, she advised L.H.: "So, when you do get new counsel, then, Mr. [H.], let them know to

contact [the social worker's supervisor] at the Department," because the social worker was planning to be on vacation. (3/14/08 Tr. at 18.)

The proposed treatment plan had three basic requirements: (A) address underlying mental health issues, (B) address underlying chemical dependency issues, and (C) demonstrate the ability to maintain a safe and healthy home and provide for his child. (D.C. Doc. 31 (attached as Appendix).) The judge advised L.H.: "Certain parts of [the proposed treatment plan], certain programs and services are available at the Detention Center for parents that are working on treatment plans." (3/14/08 Tr. at 13.) Later, she reiterated to L.H.: "[D]iscuss [the proposed treatment plan] over there at the Detention Center because I know that some of those programs can be accomplished and you could start on those; you don't have to wait." (3/14/08 Tr. at 19.)

At the postponed disposition hearing on March 28, 2008, L.H. appeared with his original court-appointed attorney. (3/28/08 Tr. at 3.) L.H. objected to the requirements for psychological and chemical dependency evaluations and for drug and alcohol testing. (Appellant's Br. at 4.) There followed some discussion about

the need for new evaluations, as explained in the proposed treatment plan.[2] (App. at 2; 3/28/08 Tr. at 6-11.)

Following the discussion, L.H.'s treatment plan was amended to require the Department to provide L.H. with a description of what needed to be addressed in the psychological evaluation (App. at 2), and to require the Department to arrange the chemical dependency evaluation (App. at 3). In addition, the plan was amended to specify that the Department would accept pretrial drug and alcohol monitoring if that were ordered. (Id.) L.H. signed the treatment plan as amended and a dispositional order was issued. (D.C. Docs. 31-32; App. at 7.)

By the time of a review hearing on May 9, 2008, L.H. had completed the chemical dependency evaluation and had scheduled a psychological interview for May 12, 2008. (5/9/08 Tr. at 4.) However, there is nothing in the record to show that L.H. followed up in any way on the evaluations. (D.C. Doc. 33; Appellant's App. C at 5, ¶¶ 17, 19.)

On June 12, 2008, L.H. was convicted of the offense of assault on his oldest daughter, C.A.H. (Appellant's App. C at 3, ¶ 10.) On July 7, 2008, he was sentenced to a five-year commitment to the Department of Corrections.

[2] The judge noted that she had not seen the previous evaluations, and could make no judgment as to their validity unless L.H. submitted them to her. (3/28/08 Tr. at 6-7.) L.H. apparently never did so, as none of the psychological or chemical dependency evaluations appear in the record of this case.

(Appellant's App. C at 3, ¶ 11.) Meanwhile, C.A.M.H.'s mother had divorced L.H., moved away from Bozeman, and remarried. (D.C. Doc. 37 at 2; 11/7/08 Tr. at 3.) L.H.'s three sons had been returned to her care on May 1, 2008. (D.C. Doc. 37 at 1.)

On October 2, 2008, L.H.'s parental rights to his four older children were terminated because of his failure to successfully complete treatment plans in those cases. (Appellant's App. C at 3, ¶ 12.) See L.R.H.; C.A.H., supra.

On November 7, 2008, the district court stated on the record that the treatment plan for C.A.M.H.'s mother had been "successfully completed." (11/7/08 Tr. at 8-9.) The only legal issue outstanding with respect to C.A.M.H.'s case was L.H.'s parental status. (11/7/08 Tr. at 14.)

A termination hearing for L.H. was held on January 15, 2009. (D.C. Doc. 51.) Following this hearing, the district court terminated L.H.'s parental rights to C.A.M.H., making the following findings of fact, among others:

> 16. . . . . L.H. never established appropriate housing prior to his incarceration.
>
> 17. . . . . There was no contact between L.H. and his [social] worker, other than court appearances, since November 19, 2007. L.H. was given his worker's contact numbers and still never contacted her.
>
> . . . .
>
> 19. Upon his involuntary return to the state, the father failed to pursue services to work towards reunification with his children,

including contact the social worker, his former counselor, AA or requesting visits with his children.

. . . .

24. The father poses a danger to his children.

(Appellant's App. C at 5-6.)

The orders terminating L.H.'s parental rights to his four oldest children were affirmed by this Court on March 31, 2009, and July 14, 2009. In re L.R.H., No. DA 08-0540, 2007 MT 107N (March 31, 2009); In re C.A.H., No. DA 09-0019, 2007 MT 232N (July 14, 2009).

STANDARD OF REVIEW

A district court's decision to terminate an individual's parental rights is reviewed for abuse of discretion. In re A.H.D., 2008 MT 57, ¶ 11, 341 Mont. 494, 178 P.3d 131. Findings of fact are reviewed to determine whether they are "clearly erroneous," and conclusions of law are reviewed for correctness. A.H.D., ¶ 12.

SUMMARY OF THE ARGUMENT

A finding that a child is a "youth in need of care" meets the threshold requirement of Mont. Code Ann. § 41-3-602 that there be "a determination that a child is abused or neglected" before an individual's parental rights may be

terminated. There is nothing in the law to support L.H.'s assertion that the determination of abuse or neglect must be re-litigated at the termination hearing.

A determination that the child is "at substantial risk of physical or psychological harm" meets the "abused or neglected" requirement. The evidence in this case demonstrated that C.A.M.H. was at substantial risk of physical or psychological harm from birth, as all of her siblings were in the temporary custody of the State, and neither of her parents had successfully completed their treatment plans.

The circumstances of the termination of L.H.'s parental rights to C.A.M.H.'s four older siblings--failure to successfully complete his treatment plans--were clearly relevant in C.A.M.H.'s case. The same issues that made L.H. an unfit parent for C.A.M.H.'s older brothers and sister--unresolved mental health and chemical dependency issues, as well as the unwillingness to provide an adequate home for children--made him an unfit parent for C.A.M.H. The evidence demonstrated that L.H. did nothing to change those circumstances between the time of the termination of parental rights to the older children and the termination of parental rights to C.A.M.H. The district court's failure to specify precisely which "circumstances of previous terminations" remained relevant was not reversible error under the circumstances of this case.

The district court did not abuse its discretion in terminating L.H.'s parental rights. C.A.M.H. is now two years old, and has had no contact with L.H. since he absconded from the state, in violation of pretrial release conditions, when she was three months old. He was subsequently convicted and incarcerated for assaulting her older half-sister. As indicated by the strong support of the guardian ad litem for termination in this case, it was in C.A.M.H.'s best interest to terminate the parent-child relationship.

ARGUMENT

THE DISTRICT COURT'S TERMINATION OF L.H.'S PARENTAL RIGHTS TO C.A.M.H. COMPLIED WITH THE STATUTES AND WAS NOT AN ABUSE OF DISCRETION.

The Department's initial Petition for Termination of Parental Rights was based on Mont. Code Ann. § 41-3-609(1)(f), which provides:

> The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence . . . that any of the following circumstances exist:
>
> . . . .
>
> (f) the child is an adjudicated youth in need of care and both of the following exist:
>
> (i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and
>
> (ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

After L.H.'s parental rights to his four other children were terminated, the petition was amended to rely on Mont Code Ann. §§ 41-3-609(1)(d) and 41-3-423(2)(e), which provide that termination may be based on a finding established by clear and convincing evidence "that the parent has . . . had parental rights to the child's sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue."

The district court, in an abundance of caution, examined L.H.'s case and terminated his parental rights under both theories. (Appellant's App. C at 7-9, ¶¶ 8-10, 12, 14.) L.H.'s appeal does not directly address the theory involving failure to successfully complete a treatment plan. (Appellant's Br. at 10, 35.) The State contends that termination of L.H.'s parental rights was appropriate under either theory, but will limit its argument, as L.H. has, primarily to the theory involving prior terminations of parental rights to siblings.

A. The District Court Correctly Determined That C.A.M.H. Was "Abused or Neglected."

A district court terminating parental rights to a child based on a termination with respect to a sibling under Mont. Code Ann. § 41-3-609(1)(d) must first "determine" that the child is "abused or neglected" under Mont. Code Ann. § 41-3-602. A determination that the child "was at substantial risk of physical or psychological harm" meets that threshold requirement. In re K.J.B., 2007 MT 216,

¶ 29, 339 Mont. 28, 168 P.3d 629 (citing Mont. Code Ann. §§ 41-3-602, 41-3-102(3) and 41-3-102(7)(a)(ii)); see also Mont. Code Ann. § 41-3-102(7)(b)(i)(A).

The "determination" of abuse or neglect may be made in connection with an adjudication of a child as a "youth in need of care" many months before a termination hearing is held. See K.J.B., ¶ 32 (youth in need of care adjudication in December 2005; termination hearing in December 2006); cf. In re A.H.D., 2008 MT 57, ¶ 38, 341 Mont. 494, 178 P.3d 131 (determination of abuse or neglect made at the hearing on whether reunification services were needed was still applicable at the termination hearing six months later). There is nothing in the statutes or case law to support L.H.'s argument that the "abused or neglected" determination must be made again as of the date of the termination hearing. (Appellant's Br. at 16-18.)

In C.A.M.H.'s case, the district court's termination order noted specifically that C.A.M.H. "was adjudicated a Youth in Need of Care on February 19, 2008." (Appellant's App. C at 2-3, ¶ 7; see also 6, ¶ 2.) In this case, then, the required determination of abuse or neglect was made in connection with the youth in need of care adjudication. See Mont. Code Ann. § 41-3-102(34) (defining a "youth in need of care" as "a youth who has been adjudicated or determined, after a hearing, to be or to have been abused, neglected, or abandoned").

The district court's findings of fact in the youth in need of care adjudication stated:

> 11. . . . . C.A.M.H. is at substantial risk of harm in the family situation because four children, siblings of C.A.M.H., are adjudicated youths in need of care and have been placed in foster care for at least the last ten months, pending completion of treatment plans by the parents. . . . .
>
> 12. Although the mother is currently making progress on her treatment plan regarding the adjudicated children, the father stopped working on his treatment plan for a period of time when he left the area in November of 2007. On January 18, 2008, the date of the adjudication hearing on C.A.M.H., the father was again in custody. As of January 18, 2005 [sic], neither parent has successfully completed their treatment plans, which remains the condition upon which the four children adjudicated as youths in need of care can be safely returned to the care of either parent.
>
> . . . .
>
> 15. The father does not presently have a home, employment, or the ability to care for a child or to provide the basic necessities for a child.
>
> 16. . . . . [T]he Department is seeking adjudication of C.A.M.H. on the basis of the adjudication of all the siblings in the family before the birth of C.A.M.H. The Department believes the risk present for four children who cannot return to the home is applicable to the infant child as well. . . .

(Appellant's App. A at 4-6.)

For the most part, L.H. does not dispute any of the facts relied on, but argues that they do not rise to the level of "substantial risk of physical or psychological harm." He points to clear evidence of "potential" risk, but argues that a "potential"

risk cannot be substantial. (Appellant's Br. at 28.) This argument overlooks the fact that *all* risk is "potential." The very definition of risk is the "*possibility* of suffering harm or loss." Webster's II New College Dictionary 979 (3d ed. 2005) (emphasis added).

A district court must rely on past experience with the parents when trying to determine whether a "substantial risk" exists. See, e.g., In re D.A., 2008 MT 247, ¶ 23, 344 Mont. 513, 189 P.3d 631 (district courts must look at a parent's past conduct because the courts do not have crystal balls). The possibility in this case, based on solid evidence of recent problems in the family, was that C.A.M.H.'s mother would harm her physically or psychologically because of problems with chemical dependency or an inability to cope if her older children were returned to her care, and that C.A.M.H.'s father would either be completely unable to provide her with basic necessities or would subject C.A.M.H. to psychological or physical abuse (as he did her older sister) because of his failure to address mental health and chemical dependency issues. These would appear to be substantial risks, especially for a baby who was only five months old at the time.

L.H.'s argument against a finding of abuse or neglect is based primarily on evidence that C.A.M.H.'s *mother* was working on her treatment plans at the time of C.A.M.H.'s birth and eventually successfully completed them. See, e.g., Appellant's Br. at 18 ("the mother's circumstances having changed . . ."). But this

case involves C.A.M.H.'s *father*, who at no time has provided C.A.M.H. with an appropriate living situation, who has contributed nothing to C.A.M.H.'s support or upbringing since she was three months old, and who has physically and psychologically harmed her half-sister. In a case such as this, where both parents had demonstrated an inability to parent appropriately in the immediate past, the fact that the child, fortunately, was "healthy and happy" at the time of adjudication did not rebut the substantial risk of harm to the child from either parent in the future. The fact that the risk from the mother diminished over time did not diminish the risk from the father.

This Court has recognized that a parent's mistreatment of one child in a family poses a substantial risk of harm to all of the other children in the family. That was the theory under which the State proceeded in this case, and the district court properly found a substantial risk of harm to C.A.M.H. based on the continuing risk to the other children.

So, for example, in In re T.Y.K., 183 Mont. 91, 95-96, 598 P.2d 593, 595-96 (1979), the Court said:

> [W]here the abuse of one child is less than the abuse of another, various jurisdictions have upheld the authority of a court to remove both children. The more enlightened majority rule appears to be that a parent does not have the privilege of inflicting brutal treatment upon each of his children in succession before they may individually obtain the protection of the state. [Citations from Washington, South Dakota, Colorado, and Illinois omitted.]

> Section 41-3-101 et seq., MCA, grants to the District Court the ability to make a determination of neglect and abuse as to all children in a family based on the policy that abuse of one child has a detrimental effect on the other children's development.

Accord In re M.B., 2004 MT 304, ¶ 31, 323 Mont. 468, 100 P.3d 1006; In re J.A.B., 1999 MT 173, ¶¶ 11-12, 295 Mont. 227, 983 P.2d 387; In re T.C., 240 Mont. 308, 313, 784 P.2d 392, 395 (1989).

The fact that C.A.M.H. was born after the other children were removed from the home did not affect the risk that the lack of proper parenting by both the mother and the father posed to every child in the family. Many youth-in-need-of-care cases involve children born after the initial intervention, and those children are as entitled to protection as their older brothers and sisters. Cf., e.g., In re A.H.D., 2008 MT 57, ¶¶ 3-6, 341 Mont. 494, 178 P.3d 131 (child born while parents were subject to treatment plans for other children).

The district court properly determined during the youth in need of care adjudication that C.A.M.H. was at substantial risk of physical or psychological harm. The facts on which that determination was based are undisputed. In the time since the determination was made, those facts have supported the termination of L.H.'s rights to four other children. The threshold requirement of Mont. Code Ann. § 41-3-602 was clearly met.

B. The District Court Correctly Found That the Circumstances Related to the Termination of Parental Rights to C.A.M.H.'s Siblings Are Relevant to L.H.'s Ability to Adequately Care for C.A.M.H.

This Court has held repeatedly that "the circumstances of a prior termination continue to be relevant in a later termination of a sibling under §§ 41-3-609(1)(d) and 41-3-423(2)(e), MCA, unless the circumstances have changed." See, e.g., In re A.H.D., 2008 MT 57, ¶ 21, 341 Mont. 494, 178 P.3d 131 (emphasis added). Furthermore, in determining whether the circumstances have changed, the final termination order must be read in conjunction with the earlier termination orders, as well as the testimony presented.[3] A.H.D., ¶ 23.

It is very clear in this case that the circumstances regarding L.H.'s parenting were completely unchanged between the time his rights to the older children were terminated and the time his rights to C.A.M.H. were terminated. Many of the facts on which the district court relied in the C.A.M.H. case were exactly the same facts that were relied on in the earlier cases. The key point in all the cases, as evidenced by all the treatment plans, was that L.H. needed to address mental health and chemical dependency problems and find a living situation that was appropriate for

[3] In this case, the judge "note[d] for the record that the Court is aware of the testimony [in the previous termination cases] because this Court actually took and heard that testimony." (1/15/09 Tr. at 71.) However, the judge also noted that she did not have access to transcripts of that testimony, and urged L.H.'s attorney to "file that after the hearing, . . . anything particular you want me to consider . . . ." (Id.) Apparently, none were filed.

children. The fact that he failed to meet those goals was relevant to his ability to care for each one of his children.

L.H. was subject to treatment plans for C.A.M.H.'s siblings at the time a petition for adjudication of C.A.M.H. as a youth in need of care was filed in October 2007. At that time, although L.H. was out of jail and was compliant with some aspects of his original treatment plans, he failed to establish or maintain appropriate housing for his children, despite his social worker's admonitions. (Appellant's App. C. at 4-5, ¶ 16.) Then, L.H. "quit working on his treatment plan for the siblings of C.A.M.H. in mid to late November of 2007 and left the jurisdiction of the court in early December." (Appellant's App. C at 2, ¶ 4.) Sometime after L.H.'s arrest and return to the Gallatin County Detention Center in January 2008, L.H. submitted to new psychological and chemical dependency evaluations pursuant to his C.A.M.H. treatment plan, but the evaluations were "inconclusive" because, in an attempt at "impression management," L.H. did not approach the evaluations in an "open and honest manner." (Appellant's App. C at 4, ¶¶ 14-15; see also 1/15/09 Tr. at 19-20 (social worker's testimony that L.H. "did the evaluations but the evaluators felt he wasn't forthright").) L.H. was convicted of felony assault on a minor, his daughter, on June 12, 2008, and sentenced to five years with the Department of Corrections the following month. (Appellant's App.

C at 3, ¶¶ 10-11.) L.H.'s parental rights to C.A.M.H.'s siblings were terminated on October 2, 2008. (Appellant's App. C at 3, ¶ 12.)

The circumstances that led to the termination of L.H.'s parental rights to C.A.M.H.'s siblings did not change between October 2, 2008 and the termination of L.H.'s parental rights to C.A.M.H. on February 2, 2009. L.H. remained incarcerated. (Appellant's App. C at 5, ¶ 19.) "There was no contact between L.H. and his worker, other than court appearances, since November 19, 2007. L.H. was given his worker's contact numbers and still never contacted her." (Appellant's App. C at 5, ¶ 17.) "Upon his involuntary return to the state, the father failed to pursue services to work towards reunification with his children, including contact the social worker, his former counselor, AA or requesting visits with his children." (Appellant's App. C at 5, ¶ 19.)

In short, it was L.H.'s behavior that led to the termination of his parental rights to the older children. The specific factual findings cited above make it clear that the behavior did not change between the termination of parental rights to the older children and the termination of parental rights to C.A.M.H. The circumstances related to the termination of L.H.'s parental rights to his older children, his failure to address the goals of his treatment plan for the siblings (Appellant's App. C at 2, ¶ 4), were ongoing and remained relevant to his ability to adequately care for C.A.M.H.

In this case, the judge was very familiar with the circumstances of the prior terminations, as she had presided over them as well. Under these circumstances, it was not an abuse of discretion for the district court to fail to state precisely *which* "circumstances of previous terminations" remained relevant to L.H.'s ability to care for C.A.M.H. See In re K.J.B., 2007 MT 216, ¶ 36, 339 Mont. 28, 168 P.3d 629.

C. The District Court Correctly Found It to Be in C.A.M.H.'s Best Interest to Terminate the Parental Relationship and Did Not Abuse Its Discretion in Doing So.

Contrary to L.H.'s assertions, there is absolutely nothing in the record to "show[] that it would be in CAMH's best interests to have the father remain legally responsible for her care" or that "it is always in a child's best interest to have a loving biological parent in their life." (Appellant's Br. at 33.) In fact, it is well-established that "love and willingness are sometimes not sufficient to establish fitness to parent." In re J.B.K., 2004 MT 202, ¶ 31, 322 Mont. 286, 95 P.3d 699 (citations omitted).

Furthermore, the evidence in no way supports L.H.'s claim that "[w]hen the father was not incarcerated, he was progressively and successfully working on his treatment plan." (Appellant's Br. at 34.) To the contrary, the evidence shows that when L.H. was not incarcerated, he "quit working on his treatment plan" and "absconded from the State." (Appellant's App. C at 2, ¶ 4 and 5, ¶ 17.)

The State disagrees strongly with L.H.'s assertion that "there are no facts to show that it would harm CAMH to wait for her father to get out of jail and successfully complete his treatment plan . . . ." (Appellant's Br. at 34.) First of all, the district court found specifically: "Based upon L.H.'s behavior and his conduct during the course of the proceedings as set forth above, the conduct or condition of L.H. rendering him unfit is unlikely to change within a reasonable time . . . ." (Appellant's App. C at 8-9, ¶ 14.) Secondly, this Court has often recognized that "children cannot always afford to wait for their parents to be able to parent." In re L.S., 2003 MT 12, ¶ 17, 314 Mont. 42, 63 P.3d 497.

C.A.M.H. does not have any sort of a relationship with L.H. She is now two years old, and has had no contact with her father since she was three months old. She never lived with him. He voluntarily left town without permission of the court when she was three months old, and then was incarcerated. The reason for his incarceration was an assault on her older half-sister. C.A.M.H.'s guardian ad litem recommended in this case that L.H.'s parental rights be terminated and that the Department be granted the right to consent to adoption or guardianship subject to the mother's parental rights. (D.C. Doc. 60 at 1.) The district court's finding that "[i]t is in the best interests of C.A.M.H. to terminate the parental rights of the father" is well-supported by the evidence in this case. (Appellant's App. C at 5-6,

¶ 23.) The district court did not abuse its discretion in ordering those rights to be terminated.

CONCLUSION

The State respectfully requests that the order terminating L.H.'s parental rights to C.A.M.H. be affirmed.

Respectfully submitted this 3rd day of September, 2009.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
SHERI K. SPRIGG
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Ms. Kelli S. Sather
Assistant Appellate Defender
301 South Park, Room 568
P.O. Box 200145
Helena, MT 59620-0145

Ms. Suzanne Nellen
Attorney at Law
1800 West Koch, Suite 5
Bozeman, MT 59715

Mr. Scott J. Pederson
Assistant Attorney General
Child Protection Unit
175 North 27th Street
P.O. Box 3354
Billings, MT 59103-3354

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,206 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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SHERI K. SPRIGG