DA 19-0206

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 279

IN THE MATTER OF:

S.B. and A.T.,

Youths in Need of Care.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Butte-Silver Bow, Cause Nos. DN 17-31-BN and DN 17-32-BN
Honorable Ed McLean, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Kelly M. Driscoll, Montana Legal Justice, PLLC, Missoula, Montana

For Appellee:

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

Eileen Joyce, Silver Bow County Attorney, Butte, Montana

Submitted on Briefs: October 2, 2019

Decided: December 3, 2019

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 J.B. (Father) appeals the orders of the Second Judicial District Court, Butte-Silver Bow County, terminating his rights to S.B. and A.T. (Children). We restate the issues on appeal as follows:

> *1. Whether the District Court's failure to apply the Indian Child Welfare Act (ICWA) during the first year of the case requires reversal;*
>
> *2. Whether the Department of Public Health and Human Services, Child and Family Services Division (Department) failed to provide proper notice of the proceedings to the Little Shell Tribe as required by ICWA;*
>
> *3. Whether the Department provided Father with active efforts to reunify his family;*
>
> *4. Whether the District Court failed to apply the correct standards when terminating Father's parental rights.*

¶2 We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Father and S.T. (Mother) are the birthparents of Children. The Department first became involved with the family in 2014 after the birth of their oldest child, S.B., when the Department received a report Mother could not meet S.B.'s basic needs. Mother and Father were not living together at the time. Mother struggled with untreated mental health issues and unstable housing. The Department's involvement ended when Mother placed S.B. in Father's care. At some point after placing S.B. with Father, Mother moved in with Father. Over the next year, the Department received reports alleging drug use and violence in the home. After one incident, the Department put a protection plan in place. Under the protection plan, Mother moved out of Father's home, the Department monitored Father's

substance use, Father's sister and brother-in-law monitored visit exchanges between the parents, and the Department encouraged the parents to enter into a parenting plan.

¶4 Nine months later, Mother gave birth to A.T. The Department intervened at A.T.'s birth when it received reports Mother was not actively treating her mental health needs, showed signs of paranoia, and reported she did not have formula and A.T. would starve when she took the child home. The Department filed for Temporary Investigative Authority (TIA) and put an in-home safety plan with Father in place.

¶5 In March 2017, the Department received reports Father was emotionally unstable, using marijuana, and drinking heavily. Reports alleged Father yelled and screamed at Children and during one incident placed a knife against his throat in front of Children and threatened suicide. Child Protection Specialist (CPS) Jodi Burk made an unannounced home visit to Father on March 21, 2017, and Father admitted he used marijuana, was depressed, and was struggling emotionally since his mother passed away in January 2017.

¶6 Three days later the Department received a new incident report. Reportedly, on the night of March 24, Father was intoxicated and very upset. Father woke S.B. up and told her he was going to kill himself and that he was never coming back. Father then left the home. After he left, his roommate called Mother to be with Children. Mother arrived highly intoxicated. When Father returned, he was upset Mother was at the house and called law enforcement. Mother and Father got into a physical altercation while Mother was holding one of their children. In the course of the struggle, Mother punched Father in the face, and Father lost a tooth. Mother told law enforcement she punched Father because he was being too aggressive, and Father was arrested for Partner or Family Member Assault.

¶7 CPS Burk met with Mother and Father separately the following day and took their accounts of the prior evening. The Department removed Children and filed petitions for Emergency Protective Services (EPS), adjudication as Youths in Need of Care (YINC), and Temporary Legal Custody (TLC) on March 29, 2017, due to concerns of domestic violence, the parents' mental health, and marijuana and alcohol use by both parents. The Department sent notice of the petition to the Little Shell Tribe of Chippewa Indians via registered mail and filed the return receipt with the court.

¶8 At the first hearing on April 19, 2017, Mother stipulated to adjudication of Children as YINC. Father's counsel had not received the petitions and sought continuance so Father could contest the adjudication. The District Court accepted Mother's stipulation and continued the proceedings with regard to Father. At that hearing, Father's counsel reported Children are Indian children such that ICWA applied. The Department responded it had reached out to the Little Shell Tribe of Chippewa Indians to inquire whether Children were enrollable and had been informed that, because the tribe was not federally recognized, ICWA did not apply. The court questioned this testimony, indicating the Little Shell had been recognized by Montana for years and the state had long applied ICWA to the Little Shell. The Department assured the court ICWA did not apply and stated it would file the letter from the tribe and send copies to the parties. The Department did not file the letter.

¶9 The court held a contested adjudication hearing for Father on April 26, 2017. CPS Burk testified about her home visit on March 21 and her follow-up with both parents after the March 24 incident. She testified both parents admitted to the physical altercation and both admitted they were intoxicated. She also provided background on the Department's

prior interventions with the family related to domestic violence, mental health issues, and substance use. She explained the Department had previously put protection plans in place to help Mother and Father parent Children separately. When the Department dismissed its prior TIA, it left Children in Father's custody. CPS Burk believed retention of the children in the home or the return of the children to the home would place them at unreasonable risk of harm affecting their health and well-being and that the Department made reasonable efforts to avoid removal through prior protective plans and TIA.

¶10 Mother testified about the incident previously reported to the Department when Father put a knife against his neck and threatened suicide. She testified this occurred in front of Children and was very traumatizing.

¶11 Father called Heather Stenson to testify. Stenson is a family development specialist who, on a referral from the Department, had worked previously with Father on parenting skills. For about a year beginning in September 2015, Stenson had weekly appointments with Father in Father's home. She explained Father was very engaged in the program, Father's home was always clean, and she never saw any signs of drugs in the home. She stated Father had a good relationship with Children.

¶12 Father testified he has depression and PTSD, but was attending counseling for his mental health and for drugs and alcohol at the North American Indian Alliance (NAIA). He explained that since the death of his mother, he had relied on his roommate to parent because he "wasn't in a healthy state of mind to really interact with [his] children at the time." Father testified since Children's removal he had been given the names of three different case workers and was having difficulty getting the Department to return his calls.

Father reported he timely signed releases for the Department to access his counseling records. Father reported that in the six weeks since the Children's removal, he had only three visits. Father also provided an explanation of the incident with the knife. He and Mother were fighting. She poked the knife at him, and he overreacted and put the knife at his neck and said, "If you're going to do something, do it," but he never intended to hurt himself. Father said Children were in the bedroom and did not see the incident but did see Mother's hand bleeding after she grabbed the knife.

¶13 The District Court orally found, by clear and convincing evidence, that Children were YINC. The court noted real concerns about Father's mental health and domestic violence. Further, Father had admitted to using marijuana which prevented him from protecting Children and keeping them safe. The court concluded dismissal of the petitions would create a substantial risk of emotional or physical harm to the children. No qualified expert witness (QEW) testified. The court did not make any findings under ICWA and there was no discussion of ICWA requirements. In its written orders adjudicating Children as YINC, the court found, by a preponderance of the evidence, Children were abused or neglected by the parents because of a substantial risk of physical or psychological harm.

¶14 In May 2017, Father signed a treatment plan which the court approved and ordered. The plan had goals for chemical dependency, mental health, visitation and in-home services, safe and stable housing, and contact with the Department.

¶15 Sometime after adjudication, the Department realized it mistakenly sent its original inquiries about whether Children were enrollable members of the Little Shell to the Bureau of Indian Affairs and not to the tribe. The Department re-sent the inquiries to the tribe and

were notified the children were enrolled or enrollable and ICWA did apply. Almost a year after the first adjudication hearing, the Department refiled petitions for EMS, adjudication as YINC, and TLC to comply with ICWA standards. The Department re-sent notice to the tribe and filed the return receipt, showing notice to the tribe more than ten days before the court held an adjudication hearing. Father and Mother both stipulated to adjudication of Children as YINC at the May 16, 2018 hearing. A QEW, Anna Marie White, testified the Department had engaged in active efforts and, if Children were in their care, the conduct of the parents was likely to cause serious emotional or physical damage to Children. The District Court found Children to be YINC by clear and convincing evidence. The Department did not develop new treatment plans but told the court it would continue working with the parents on the previously approved treatment plans.

¶16 On November 20, 2018, the Department filed petitions to terminate parental rights of both Mother and Father. In the accompanying affidavit, Jennifer Hoerauf, a Department Regional Administrator, identified numerous Department efforts she considered to be active efforts, including developing a treatment plan; offering Family Engagement Meetings; referring Father to services, such as mental health, chemical dependency, and in-home services, random urinalysis (UA) tests, parenting classes, supervised visitation, and a sober living residence; collaborating with those service providers; providing transportation to Father; conducting monthly home visits; making arrangements for a bicycle to be donated to Father; and working with the District Court to get permission for Father to see Children after a restraining order was obtained by Mother. In its certificates

of service attached to the petitions, the Department certified it sent the petitions to the tribe via registered mail. The Department did not file return receipts with the court.

¶17 At the termination hearing on December 27, 2018, Mother relinquished her parental rights and the court held a contested hearing in regard to Father. The Department's QEW again testified Children were likely to experience serious emotional and/or physical harm if placed in Father's care and the Department had provided active efforts.

¶18 Hoerauf testified Father completed a chemical dependency evaluation in April 2017, which recommended outpatient therapy, counseling, education on coping skills and relapse triggers, and abstinence from all drug and alcohol use. After failing to abstain from drug and alcohol use, Father was referred to inpatient treatment at the Montana Chemical Dependency Center (MCDC). Father was admitted to MCDC on August 22, 2018, but two days later was terminated from the program due to a conflict with a staff member and another peer. He was then referred to an outpatient program in Butte. Father attended a few sessions in September, but the program stopped hearing from Father after October 18, 2018. Hoerauf testified the Department referred Father to its random UA program in May 2017. Father enrolled in July 2017. Between July 22, 2017 and November 1, 2018, the program called Father 141 times for random UA tests. Father failed to submit a sample 128 times, tested positive for THC 10 times, tested positive for THC and alcohol 2 times, and refused to submit a sample 1 time. Further, Father had reported daily marijuana use but continued to deny he had a chemical dependency problem.

¶19 Hoerauf explained Father also failed to complete the mental health component of his treatment plan. Father had a mental health evaluation in January 2017 and began

individual counseling with Mary Watson at NAIA. The Department referred Father to SMART for anger management in May 2017, but Father requested to transfer these services to Watson, which the Department approved. Father attended five counseling sessions with Watson, cancelled two, and did not show up for twelve of the scheduled sessions. Watson discontinued the counseling in December 2017 due to Father's noncompliance. Father attended classes for anger management in December 2017, but discontinued this treatment that same month. In September 2018, Watson agreed to again provide counseling to Father, which continued through the December termination hearing.

¶20 Hoerauf reported Father failed to address his anger management issues and in the months before the termination hearing, Father had showed up outside Mother's house despite an order of protection and, on a separate occasion which occurred outside the public library, he punched Mother's brother in the face. Father had weekly visitation with Children until October 9, 2018, but the Department had to terminate the visitation because Father was aggressive toward the visitation worker. Hoerauf attested Father had completed a parenting class as required by his treatment plan in July 2017.

¶21 Hoerauf testified the Department had engaged in the active efforts she had outlined in her affidavit filed in support of the termination petition. On cross-examination, she stated although the Department did not change its efforts after it determined ICWA applied, she believed the Department engaged in active efforts throughout the case.

¶22 Watson testified she first evaluated Father in January 2017, before the Department's involvement. At that initial appointment, she diagnosed him with anxiety, depression, and PTSD. She next saw Father in April after Children were removed. In June 2017, Watson

wrote a letter to the Department requesting accommodations for Father to complete his treatment plan, including allowing him to complete his anger management counseling with her and requesting UA testing later in the day due to his insomnia. She could not recall what modifications the Department made, but agreed the Department made modifications in response to her letter. Watson testified Father missed some counseling appointments with her because visitation was scheduled the same day, but admitted she discontinued counseling with Father in December 2017 because of his missed appointments. She resumed counseling in July 2018, after Father and the Department requested she meet with Father. Watson believed Father was capable of being a strong, loving, and supportive parent to his children, she had seen significant change in Father, and his mental health issues were treatable. Watson recommended extension of TLC rather than termination.

¶23 Father testified he successfully completed a ten-week chemical dependency course through NAIA. With regard to his UA testing, he asserted he may not have received credit for all of his UA samples as his cousin has the same name. He explained that he stopped participating in anger management because he did not have transportation and refuted punching Mother's brother, instead asserting he had "put him in check."

¶24 The District Court issued its orders terminating Father's rights on March 7, 2019. The court found Father failed to complete his treatment plan, failed to follow through with chemical dependency treatment, failed to comply with UA testing, and failed to consistently attend mental health therapy. The court did not find Watson's testimony compelling as she had never observed Father with his Children. The court also found Father's conduct or condition was unlikely to change in a reasonable time "based on his

failed treatment plan and abandonment" and "upon his history of incarceration and abandonment." The District Court found that continued custody of Children with Father was likely to result in serious emotional and physical harm to Children, based on the testimony of the QEW, and the Department had provided active efforts. The court concluded "[b]eyond a reasonable doubt, it has been established that the best interests of [Children] will be served by termination of the parent-child relationship."

STANDARDS OF REVIEW

¶25 We review a district court's decision to terminate parental rights for an abuse of discretion. *In re D.E.*, 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586. A court abuses its discretion if it terminates parental rights based on clearly erroneous findings of fact, erroneous 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.E.*, ¶ 21. Whether a district court has complied with ICWA's substantive and procedural requirements presents a question of law that we review for correctness. *In re L.A.G.*, 2018 MT 255, ¶ 10, 393 Mont. 146, 429 P.3d 629. We will not reverse a district court's termination of parental rights for an error that "would have no significant impact upon the result." *In re H.T.*, 2015 MT 41, ¶ 10, 378 Mont. 206, 343 P.3d 159 (quoting *In re J.C.*, 2008 MT 127, ¶ 43, 343 Mont. 30, 183 P.3d 22). "In a case governed by ICWA, we will uphold the district court's termination of parental rights if a reasonable fact-finder could conclude beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child." *In re K.B.*, 2013 MT 133, ¶ 18, 370 Mont. 254, 301 P.3d 836.

DISCUSSION

¶26 *1. Whether the District Court's failure to apply ICWA during the first year of the case requires reversal.*

¶27 Father argues the District Court's failure to apply ICWA during the first year of the case had a "significant ripple effect" through the rest of the proceedings. Father argues the District Court should have applied ICWA until it had a conclusive determination from the tribe whether Children were Indian children. Had the District Court applied the correct ICWA standards at the first adjudication hearing, it may not have granted TLC to the Department. Father urges this Court to reverse the order terminating his parental rights.

¶28 25 U.S.C. § 1914 allows "any parent . . . from whose custody [an Indian] child was removed" to "petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of [25 U.S.C. §§ 1911, 1912, and 1913]." 25 U.S.C. § 1914. Upon such a showing, "the court must determine whether it is appropriate to invalidate the action." 25 C.F.R. § 23.137(b). This "rule does not require the court to invalidate an action, but requires the court to determine whether it is appropriate to invalidate the action under the standard of review under applicable law." *See* Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* 76 (Dec. 2016), https://perma.cc/2JZM-YAUZ (2016 Guidelines).

¶29 We agree it was error for the District Court to proceed without applying the requirements and standards of ICWA when it had reason to know Children were Indian children and it did not have a conclusive determination from the tribe as to Children's eligibility for membership. *See In re L.D.*, 2018 MT 60, ¶ 16, 391 Mont. 33, 414 P.3d 768;

see also 25 C.F.R. § 23.108. The District Court erred in not applying ICWA during the April 2017 adjudication hearing. These violations, however, do not require invalidation of the proceedings in this case. *See In re M.E.M.*, 209 Mont. 192, 196-97, 679 P.2d 1241, 1243-44 (1984). After discovering its error, the Department refiled a petition for adjudication of Children as YINC and for TLC. At the May 16, 2018 hearing, both parents stipulated to adjudicate Children as YINC and to continued TLC. The QEW testified to the applicable ICWA standards. This subsequent ICWA-compliant adjudication, stipulated to by Father, cured the prior violations. Thus, the District Court provided Father with the relief he was entitled to for these violations—a new adjudication hearing that complied with ICWA.

¶30 *2. Whether the Department failed to provide proper notice of the proceedings to the Little Shell Tribe as required by ICWA.*

¶31 Father argues the Department failed to provide his tribe notice of the orders resetting TLC hearings, denying Father opportunity to have his tribe participate. Further, the Department failed to provide proof the Little Shell Tribe received notice of the termination petition at least ten days before the termination hearing or notice of the continuation of the termination hearing. Father maintains these violations invalidate the proceedings.

¶32 25 U.S.C. § 1912(a) requires the Department provide an Indian child's tribe notice of proceedings to place an Indian Child in foster care or terminate the parental rights to the Indian child at least ten days before any hearing. *See also* 25 C.F.R. § 23.111. The Department must provide notice "by registered or certified mail with return receipt requested," and "the court must ensure that . . . [a]n original or a copy of each notice sent

under this section is filed with the court together with any return receipts or other proof of service." 25 C.F.R. § 23.111(a)(2), (c). We have explained, however, that "ICWA's notice requirements are not jurisdictional and are subject to harmless error review." *See In re M.S.*, 2014 MT 265A, ¶ 22, 376 Mont. 394, 336 P.3d 930. "An error involving notice to a tribe is not ground for reversal unless there is a reasonable probability that the appellant would have obtained a more favorable result in the absence of the error." *In re M.S.*, ¶ 22 (internal quotation omitted).

¶33 In *In re K.B.*, we reversed a termination order, in part, for failure to provide proper notice of the termination proceedings to the Child's tribe. *In re K.B.*, ¶ 34. The termination petition indicated it was "cc'd" on the tribe, but the record did not include a certificate of service or other documentation that timely service was accomplished. *In re K.B.*, ¶ 24. Similarly, in *In re M.S.*, we held the Department provided insufficient service when it "cc'd" the tribe on the termination petition but did not include in the record a certificate of service or other proof of service. *In re M.S.*, ¶ 20. We did not reverse, however, because the error was harmless. *In re M.S.*, ¶ 23. There was no "reasonable probability" the parent would have obtained a more favorable result because the record showed the tribe was aware of the case, but there was no evidence "the Tribe intended to actively participate had it properly been notified of the termination hearing." *In re G.S.*, ¶ 23.

¶34 Here, the Department sent notice to the tribe through registered mail with return receipt requested for both TLC petitions. The tribe was thus aware of the proceedings but chose not to assume an active role and did not demonstrate an interest in participating. Although the Department did not file a return receipt, it did file a certificate of service

attesting it had provided the petition for termination to the tribe through registered mail. Even were we to find the certificate of service did not meet the requirements of 25 C.F.R. § 23.111, any error was harmless. The record demonstrates the tribe consistently chose not to involve itself and provided no indication it might in the future. While we acknowledge a tribe may choose to intervene at any time, based on this record, there is not a reasonable probability Father would have obtained a more favorable result had the Department filed a return receipt of the registered mail. The error here was harmless.

¶35 Father contends the Department was required to send the tribe notice of each hearing and failure to do so deprived him of the opportunity to have his tribe participate. ICWA, though, does not require the Department to provide notice of each hearing. *See* 2016 Guidelines, at 31 ("While not required by the Act or rule we recommend that State agencies and/or courts provide notice to Tribes . . . of[e]ach individual hearing within a proceeding."). Notice of the petitions for TLC and termination is sufficient under ICWA.

¶36 *3. Whether the Department provided Father with active efforts to reunify his family.*

¶37 Father argues the Department failed to demonstrate it made "active efforts" to prevent the breakup of the family. Father argues the Department did not provide active efforts for the first year of the case, because it was not applying ICWA. Further, the Department failed to adjust its efforts or his treatment plan after discovering ICWA applied. Father points to the Department's scheduling of his visitation and mental health services on the same day as an example of the lack of active efforts he asserts.

¶38 ICWA requires the Department to demonstrate "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup

of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d). Active efforts are "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family." 25 C.F.R. § 23.2. "The term active efforts, by definition, implies heightened responsibility compared to passive efforts." *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556. The Department "cannot simply wait for a parent to complete a treatment plan." *In re K.B.*, ¶ 31 (quoting *In re T.W.F.*, 2009 MT 207, ¶ 27, 351 Mont. 233, 210 P.3d 174). The Department must "assist[] the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan." 25 C.F.R. § 23.2.

¶39 The Department's involvement with and active efforts to prevent the breakup of this family began before the current proceedings. The Department put a protection plan into place in 2015 and under TIA in 2016 instituted an in-home safety plan due to ongoing mental health issues, substance use, and domestic violence. The Department did not remove Children until March 2017 after Father was arrested for a physical altercation with Mother and following multiple reports of mental health issues, substance use, and domestic violence. After removal of Children, the Department engaged in the efforts outlined by Hoerauf discussed above. In their totality, we conclude these efforts were active efforts.

¶40 The Department did not simply wait for Father to complete the treatment plan, but actively sought to help him do so. Its efforts were not merely passive. Father's failure to complete the treatment plan was not resultant from the Department's lack of effort, but due to Father's own actions. As example, MCDC asked Father to leave the program after only two days due to a conflict with a staff member and a peer. Father continued to deny his

substance use was a problem. Father's therapist discontinued services, including his anger management classes, because Father missed too many appointments. Father consistently failed to submit UA samples, even with an extended time period in which to do so.

¶41 Father's argument the Department's scheduling of visitation on the same day as his counseling appointments demonstrates a lack of active efforts is unpersuasive. Father admitted while he missed some counseling appointments because visitation was scheduled for the same day, "a lot of it was because me just being irresponsible." Evidence in the record demonstrates the Department provided active efforts since its first involvement with this family in 2014 and those active efforts, though unsuccessful, continued until termination. Evidence beyond a reasonable doubt supported the District Court's determination the Department provided active efforts.

¶42 *4. Whether the District Court failed to apply the correct standards when terminating Father's parental rights.*

¶43 Father raises various issues with the District Court's order terminating Father's rights. First, Father argues the District Court did not apply ICWA standards in its determination. Father maintains the District Court did not apply the beyond a reasonable doubt standard to its findings that continued custody by him would result in serious emotional or physical damage to Children as required by 25 U.S.C. § 1912(f). Rather the District Court applied the reasonable doubt standard only to its findings that the best interests of Children would be served by terminating Father's rights. Further, Father maintains the Department did not establish a causal link between Father's substance use and damage to Children. Finally, Father challenges the District Court's finding he was

unlikely to change within a reasonable time due to "his history of incarceration and abandonment." Father argues these findings are unsupported by the record and evidence beyond a reasonable doubt did not support he was unlikely to change within a reasonable time.

¶44 In cases in which ICWA applies, the Department must satisfy both state and federal statutory criteria by evidence beyond a reasonable doubt. *See In re L.A.G.*, ¶¶ 22-23. State statues require a district court to determine the child had been adjudicated a youth in need of care and (1) the parent has failed to comply with a court-approved treatment plan and (2) the conduct or condition of the parent rendering him unfit is unlikely to change within a reasonable time. Section 41-3-609(1)(f), MCA. Further, federal statutes require the court to find that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(f). "[T]he evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding." 25 C.F.R. § 23.121(c).

¶45 We have upheld a district court's termination of parental rights under ICWA when the court makes the required statutory findings but fails to specifically state that evidence beyond a reasonable doubt supports those findings. *See In re M.R.G.*, 2004 MT 172, ¶ 17, 322 Mont. 60, 97 P.3d 1085; *In re M.D.M.*, 2002 MT 305, ¶ 16, 313 Mont. 51, 59 P.3d 1142. *Cf. In re L.F.*, 266 Mont. 461, 465, 880 P.2d 1365, 1368 (1994). We upheld the district court's determination where it was implicit in the court's statements and order it

applied the correct standard of proof. *See In re M.R.G.*, ¶ 17; *In re M.D.M.*, ¶ 16; *In re L.F.*, 266 Mont. at 465, 880 P.2d at 1368.

¶46 In its orders terminating Father's parental rights, the District Court found, "[a]s established by the testimony of Anna Marie White, a qualified Expert Witness, the continued custody of [Children by Father] is likely to result in serious emotional and physical harm to [Children]." In its conclusions of law, the court determined "[b]eyond a reasonable doubt, it has been established that the best interests of [Children] will be served by termination of the parent-child legal relationship." This is the only standard of proof the District Court stated in its order. Substantial evidence supported the District Court's decision that continued custody was likely to result in serious emotional and physical harm to Children. The QEW testified she was familiar with the facts of this case and that continued custody of Children by Father would likely result in serious emotional and physical harm to Children. Hoerauf testified about the Department's efforts, Father's failure to complete his treatment plan, Father's failure to recognize how his substance abuse affected his ability to parent, and about his ongoing anger management issues. Based on the testimony and evidence before the court and its reference to the correct standard of proof in its order, we conclude the District Court applied the correct standard of proof.

¶47 Further, a causal connection between the conditions in the home and serious emotional and physical damage to Children was implicit in the District Court's finding that continued custody was likely to result in serious emotional and physical harm to Children. The evidence showed Father's substance abuse prevented him from protecting Children and keeping them safe. Children were removed after Mother and Father got into a physical

altercation involving Children while both parents were intoxicated. Father was incarcerated and charged with PFMA for this incident. Throughout the proceedings, Father continued to not recognize his substance abuse issues or that his substance use interfered with his parenting. Based on this record, the Department established a casual connection between Father's substance use and the likelihood that continued custody of Children will result in serious emotional or physical damage to Children.

¶48 The State concedes the District Court's findings that Father's conduct and condition were unlikely to change in a reasonable period of time due to incarceration and abandonment do not apply to Father's circumstances. The State maintains, however, substantial evidence establishes beyond a reasonable doubt that Father was unlikely to change within a reasonable period of time. We agree. The District Court also found Father was unlikely to change in a reasonable time based on his failed treatment plan. The Department removed Children due to concerns of substance abuse, domestic violence, and mental health issues. Father failed to appropriately address any of these concerns. Father was resistant to chemical dependency treatment, he consistently failed to engage in mental health counseling, and he did not complete his anger management classes. The District Court's finding that Father was unlikely to change in a reasonable period of time is supported by substantial evidence and not an abuse of discretion.

CONCLUSION

¶49 The District Court's orders terminating Father's parental rights are affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR