IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0388

IN THE MATTER OF:
M. S.-L.
.

APPELLANT'S OPENING BRIEF

On appeal from the Montana
Second Judicial District Court,

County of Silver Bow,
Cause No. DA-24-388

Honorable Robert Whelan, Presiding

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STATEMENT OF ISSUES

1. Whether the District Court's Order Terminating Parental Rights violates statutory and due process requirements for termination, by:

a. Granting termination on a legal theory - previous termination of other children under similar circumstances - not pleaded by the Department in its petition, not supported by evidence or argument at hearing, and not factually supported in the termination order;

b. Failing to include complete and specific Findings of Fact sufficient to support the Court's determination; and

c. Presenting muddled, untethered boilerplate statutory excerpts as Conclusions of Law.

2. Whether the District Court erred in terminating Father's parental rights on the Department's theory of failure to complete a court-ordered treatment plan under 41-3-609(1)(f), M.C.A., when father was incarcerated.

3. Whether there was clear and convincing evidence to support termination on the grounds sought, including whether the Department made reasonable efforts to reunify the child with Father.

STATEMENT OF CASE

The Montana Department of Public Health and Human Services, Child and Family Services Division, brought this action for physical neglect of minor child M.S-L., on November 2, 2021, based on Mother's drug use during pregnancy. Petition for Adjudication, Doc. 1, pp. 7-8, par. 32.a. While still in the hospital after birth, the child was removed from the care and custody of her parents, who resided together at the time of removal.

The Child was adjudicated a youth in need of care on February 10, 2022. Order of Adjudication, Doc. 23. On June 28, 2022, the Court approved treatment plans for each parent. Orders Approving Treatment Plans, Docs. 41, 42. On October 13, 2022, The Court determined that ICWA did not apply. Order on ICWA Applicability, Doc. 54.

The Department moved for an extension of Temporary Legal Custody on August 9, 2022. Petition for Extension of TLC, Affidavit in Support, Motion to Continue TLC Pending Hearing, Order of Continuation, Docs. 44, 45, 46, 47. The Court approved the request at the hearing on September 28, 2022, and memorialized that finding in its Order of October 13, 2022, extending TLC. Minute Entry, 9-28-22, Doc. 52, Order Extending TLC, Doc. 55.

At a status hearing on January 11, 2023, The Department and parties noted that the parents were engaged in services, visitation, working on their treatment plans

and in contact with their attorneys and the Department, but that Father had recently been arrested and was incarcerated. Transcript, Status Hearing of 1-11-23, p. 6. l. 25 to p. 8, l. 23; p. 9, l. 23 to p. 10, l. 5. Whan deputy county attorney Donahue noted that temporary legal custody would expire in February, the Court declined to set a hearing until after the a new Petition for TLC was filed. The court did grant a bridging order to extend TLC until a petition could be filed and a hearing held "in the near future". Order Continuing TLC Until Hearing, January 18, 2023, Doc. 63. But a new petition for extension of TLC was never filed, and the six-month period of temporary legal custody expired on February 9, 2023. Mother's counsel filed a notice of failure to follow statutory deadline on April 14, 2021, Notice, Doc. 70, which was never addressed by the Court.

On April 11, 2023, the Department filed petitions to terminate the parents' parent rights, with supporting affidavits. Petition and Affidavit, Docs. 65, 66, 67. The petition against Father sought termination on the grounds that he failed to successfully complete a treatment plan, pursuant to 41-3-609(1)(f), M.C.A. No other basis for termination of Father's parental rights was pleaded in the Petition or the supporting Affidavit.

The Department initially agreed to a guardianship, to which the parents also stipulated, but later reneged and asked the Court to reset the matter for a termination hearing. Transcript, Status Hearing of July 12, 2023, p. 9, l. 15-17, p. 11, l. 15-19.

The termination hearing was held on May 13, 2024. After presentation of evidence and argument, the Court took the matter under advisement. Minute Entry, Doc. 119. The Court Issued Findings of Fact, Conclusions of Law, and its Order terminating the parents' parental rights on May 31, 2024, based on an unpled theory of previous termination to other sibling under similar circumstances. Order, Doc. 125.

Father appealed.

FACTS

A. Facts Relating to Issue One, *Inadequacy of the Termination Order*:

1. The Termination Order, which gives rise to the legal issues presented in Issue 1, is attached in the Appendix hereto. Termination Order, 5-31-24, Doc. 125.

Issue 1.a., Termination Based on New Theory in Order.

2. The Petition for Termination of Father's parental rights and supporting Affidavit only set forth one legal theory for termination: failure of a court-ordered treatment plan under 41-3-609(1)(f), M.C.A. Petition for Termination of Father's Parental Rights, Doc. 66, p. 2; Affidavit Supporting Termination Petition, Doc. 67, pp. 6-10, pars. 24-34.

3. The Termination Order based termination of father's parental rights on a different statutory basis, the previous termination of parent's other children under circumstance relevant to parent's ability to care for the child at issue in this case under 41-3-423(2)(e) and 41-3-609(1)(d), M.C.A.

4. The "previous termination of parent's other children" basis for termination was neither argued not discussed nor supported by evidence at the termination hearing. Transcript, Termination Hearing, 5-13-24, pp 4-51.

Issue 1.b., Insufficient, Incomplete Findings of Fact:

5. The Termination Order contains only nine specifically designated findings of fact, all of which are preliminary, jurisdictional, or procedural. Doc 125,

p. 2, FoF pars. 1-9.

6. Following the Findings of Fact is a five-paragraph section entitled **Termination of Father's Parental Rights**, which includes:

a. One paragraph setting forth the Department's termination theory of failure to complete an appropriate treatment plan, Doc. 125, p. 2-3, ToFPR par. 1; and

b. Four paragraphs of boilerplate language setting forth stitched-together bits and pieces of the provisions of 41-3-609(1), (1)(d)(ii); -(3); and -(2), M.C.A. which, aside from a statement that Father has done nothing, present summary legal conclusions and make no reference to the record other than a brief reference to an Affidavit (presumably the affidavit in support of the termination petition). Doc. 125, p.3. ToFPR pars. 2-5.

Issue 1.c., Insufficient Conclusions of Law:

7. There are only four substantive Conclusions of Law.

8. The Court concludes that that Termination is supported by clear and convincing evidence "as set forth above" establishing that a treatment plan was not required and Father had parental rights to a child's sibling involuntarily terminated under circumstances relevant to his ability to care for the child at issue, pursuant to 41-3-609(4)(a), M.C.A., 41-3-609(1)(d), M.C.A., and 41-3-423(2)(e), M.C.A.; Doc. 125, pp. 3-4, CoL par. 4.

9. There are three Conclusions of Law relating to the legal theory of failure to complete a treatment plan, determining that:

a. Continuation of the parent-child relationship would like result in continued abuse and neglect; an element under 41-3-609(1)(f) and -(2), M.C.A. of whether there a treatment plan can be completed in a reasonable amount of time;

b. Father's conduct of emotional illness, mental health illness, and unaddressed chemical abuse rendering him unable to parent is unlikely to change within a reasonable time, an element relating to failure to complete a treatment plan under 41-3-609(1)(f)(ii), M.C.A.; and

c. The best interests of the Child would be served by termination, 41-3-609(1)(f), -(2), and -(3), M.C.A.

B. Facts relating to Issue 2, *Termination Wrongly Sought for Failure to Complete Treatment Plan When Parent Incarcerated*:

10. Father had been released from Department of Corrections incarceration three months before the petition was filed. Affidavit in Support of Petition for Adjudication, Doc. 2, p. 6, pars. 20(e), -(f).

11. Father was under supervision of DOC Probation and Parole from 2023 beginning of the case until early January, 2023, when he was arrested and

incarcerated in the Butte-Silver Bow Detention Center. Transcript, Status Hearing, 1-11-23, p. 9, l. 23 to p. 10, l. 19.

12. At the time of his incarceration in early January of 2023, Father was actively engaged in completing his treatment plan, was visiting his child, was engaging in services, and was communicating with the Department. *Id*.

13. Father remained incarcerated when the Termination Petition was filed. Petition for Termination, Doc. 66, p. 1, par. 3.

14. In August of 2023, Father was transferred from the County Detention Center to the Department of Corrections after sentencing. Transcript, Termination Hearing, p. 15, l. 10-13.

15. Father remained incarcerated with the DOC at the time of the Termination Hearing. Transcript, Termination Hearing, p. 21, l. 23-25.

16. Once Father became incarcerated in early January, 2023, the Department ceased all efforts to assist father in completion of his treatment plan, including ending all communications with the Department and all visitations with M.S-L. Transcript, Termination Hearing, p. 26, l. 10-22, p. 29, l. 6-19.

17. Department representative Jennifer Hoerauf testified at the termination hearing that she did not know what the ultimate result was of Father's criminal charges, only that he was transferred to Montana State Prison.

C. Facts Relating to Issue 3, *Lack of Clear and Convincing Evidence To Support Termination For Failure To Complete Treatment Plan*.

18. The treatment plan required Father to complete an approved parenting class. The Department recommended one, and Father completed it. Transcript, Termination Hearing, p. 18, l. 3-9.

19. The treatment plan provided for visitation and contact between Father and Child. The Department provided two visits per week initially, then one per week when the child was moved to Kalispell in June, 2022. The parents attended the local visits regularly but became more sporadic when the child was moved to Kalispell. Visit interactions were positive, the child was bonding well with her parents, the parents were prepared for visitation, they went to some of the child's doctor appointments, and celebrated her birthday with her. Transcript, Termination Hearing, p. 32, l. 1 to p. 33, l. 22.

20. The treatment plan required father to complete a chemical dependency evaluation and follow the recommendations. Father likely completed one on his own as condition precedent to admission to the methadone program. **The Department never obtained a copy of it.** Doc. 67, p. 7. Par. 27; Transcript, Termination Hearing, p. 12, l. 1-25.

21. The treatment required Father to participate in ongoing drug testing. Father was tested regularly by his probation and parole officer. **The department**

never obtained those test results and instead demanded he undergo additional testing. Father agreed to wear a drug patch and the first patch was attached approximately one week before he was arrested in early January, 2023, so he was unable to provide any patch results. He signed a release for the Department to obtain the patch results. Transcript, Status Hearing, January 11, 2023, p. 7, l. 12-20; Affidavit Supporting Petition for Termination, p. 7. par. 27; Transcript, Termination Hearing, p. 21, l. 9-14., p. 28, l. 5-24.

22. The treatment plan required Father to complete a mental health evaluation. He did so on his own and provided the Department with a release to obtain the results. **The Department never obtained the mental health evaluation and insisted that he obtain another one.** Transcript, Termination Hearing, p. 19, l. 1-12.

23. The Department offered treatment team meetings every other week, which the parents sporadically attended. Transcript, Termination Hearing, p. 15, l. 19 to p. 16, l. 10. p. 20, l. 7-12. Just before Father's incarceration, the parents re checking in and participating regularly. Transcript, Status Hearing, 1-11-23, p. 6, l. 25 to p. 7, l. 14.

STANDARD OF REVIEW

This Court reviews a district court's decision to terminate parental rights for an abuse of discretion, and reviews a district court's findings of fact for clear error and its conclusions of law for correctness. *In re A.L.P., 2020 MT 87, 399 Mont. 504, 510, 461 P.3d 136, 140.* An abuse of discretion occurs when the district court has either acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *In re E.Y.R., 2019 MT 189, 396 Mont. 515, 528, 446 P.3d 1117, 1124.* The Department has the burden of proving by clear and convincing evidence that the statutory criteria for termination have been satisfied. *Id.*

This Court reviews alleged procedural due process violations to determine whether the process violates this constitutional guarantee. *Wong v. City of Billings, 252 Mont. 111, 827 P.2d 90, (1992).*

SUMMARY OF ARGUMENT

1. The district court erred in terminating Father's parental rights on an unpled, unargued theory with no evidentiary support at the termination hearing.

2. The district court's order was legally and constitutionally deficient in lacking sufficient, relevant, and specific findings of fact and conclusions of law necessary to support termination of Father's parental rights.

3. Termination of Father's parental rights on treatment plan related grounds was inappropriate because he was incarcerated at the time the termination petition was filed and for a substantial period during the pendency of the case in district court.

4. There was not clear and convincing evidence that Father did not engage in his treatment plan, that any condition rendering him unfit to parent was unlikely to change within a reasonable time, or that the Department engaged in reasonable efforts to reunify Father with his child.

ARGUMENT

The District Court Erred in Granting Termination Under 41-3-609(1)(d), M.C.A.

The Department moved for Termination of Father's parental rights on the grounds that he failed to complete his treatment plan, pursuant to 41-3-609(1)(f), M.C.A. This was the only statutory basis for termination set forth in the Department's Petition for Termination. It was the only theory for factually supported and analyzed in the Department's Affidavit in support of the Petition for Termination. It was the only theory on which evidence was presented and argument was made at the termination hearing.

However, after the termination hearing, the district court, *sua sponte*, ordered termination on a completely different legal theory: that Father had his parental rights to a sibling of M.S-L involuntarily terminated and the circumstances related to that termination are relevant to the parent's ability to adequately care for the child at issue, and that therefore a treatment plan was not required, pursuant to 41-3-609(1)(d), -(4)(a), and 41-3-423(2)(e), M.C.A.

The Sua Sponte post-termination change of termination theory denied Father his due process rights to contest.

This Court has held that, given the fundamental liberty interest at issue in termination of parental rights proceedings, allowing a party to amend pleadings at the termination hearing to proceed under a different theory creates a question of due

process. *In re T.C., 2001 MT 264, 307 Mont. 244, 249-250, 37 P.3d 70, 75.* Due process requires that a party receive notice, be allowed the opportunity to be heard, and have an adequate opportunity to prepare his case on the new issues. *Id.* This Court has held clearly that amendment of issues during a termination hearing can be a denial of due process that is reversable error:

> A natural parent's right to care and custody of a child is a fundamental liberty interest, which courts must protect with fundamentally fair procedures. *See In re E.W.,* 1998 MT 135, ¶ 12, 289 Mont. 190, ¶ 12, 959 P.2d 951, ¶ 12 (citing *In re R.B.* (1985), 217 Mont. 99, 103, 703 P.2d 846, 848). Due process requires that a party receive notice and be allowed the opportunity to be heard. *See In re A.E.* (1992), 255 Mont. 56, 62, 840 P.2d 572, 576 (citing *Byrd v. Columbia Falls Lions Club* (1979), 183 Mont. 330, 332, 599 P.2d 366, 367). Allowing a party to amend the pleadings creates a question of due process in cases where the defendant may not have had an adequate opportunity to prepare her case on the new issues raised by the amended pleadings. *See Brothers v. Surplus Tractor Parts Corp.* (1973), 161 Mont. 412, 418, 506 P.2d 1362, 1365.
>
> Generally, a district court cannot grant leave to amend the pleadings arbitrarily or perfunctorily. *See Brothers,* 161 Mont. at 418, 506 P.2d at 1365. In assessing whether DPHHS's pleadings gave notice of the issue of abandonment, we look at DPHHS's claim as a whole and to "the reason and spirit of the allegations in ascertaining its real purpose." *See Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Comm'rs,* 1999 MT 263, ¶ 29, 296 Mont. 402, ¶ 29, 989 P.2d 800, ¶ 29 (citing *Miller v. Titeca* (1981), 192 Mont. 357, 364, 628 P.2d 670, 675). While there are occasions when we will allow a party to amend the pleadings in order for a case to proceed efficiently on the merits, we see no reason to do so here. *See Brothers,* 161 Mont. at 418, 506 P.2d at 1365.
>
> DPHHS's petition, as a whole, did not provide sufficient notice to Christie on the charge of abandonment. In its petition, DPHHS alleged that Todd had abandoned the two children, but did not make a similar

> allegation against Christie. Christie first learned at the hearing that DPHHS sought to terminate her parental rights based on a theory of abandonment. While some of the facts alleged in DPHHS's petition may have been applicable to a theory of abandonment, Christie should not be required to glean from those facts which claims DPHHS could bring. We find this particularly true where DPHHS's petition asserted a claim of abandonment against Todd but not Christie. DPHHS's only reason for not mentioning abandonment as an independent theory concerning Christie was its statement at trial that it was a "technical deficiency." Such a deficiency was more than technical; it was misleading. It was DPHHS's responsibility to articulate the claims it expected to raise.
>
> We thus conclude that the District Court erred in allowing DPHHS to amend the pleadings during the hearing to include a theory of abandonment.

In re T.C., 2001 MT 264, ¶¶ 22-25, 307 Mont. 244, 249–50, 37 P.3d 70, 75.

The present case is more egregious than the situation in *T.C.* because here, there was no motion to amend, and no opportunity for Father to prepare his case on these new issues.

The Petition for Termination and supporting Affidavit provide no notice of an intent by the Department to pursue this theory, most likely because the Department did not intend to pursue this theory. The only reference to the previous cases seems to be in the Affidavit in support of the initial Petition for Adjudication, which provides summary information of previous case history.

The "prior termination of sibling" provision of the termination statute is not self-executing. This Court has made clear that statute does not create a presumption against the parent. *In re T.S.B., 2008 MT 23, 341 Mont. 204, 215, 177 P.3d 429, 437.*

Rather, the Department retains the burden of showing, by clear and convincing evidence, that the circumstances related to the prior termination of parental rights as to the siblings are still relevant to the parent's ability to care for the child at issue in the current proceeding. *Id.* No such evidence was offered at the termination hearing. There was no request for the Court to take judicial notice of the previous terminations. There was no testimony regarding this issue at all.

Under the principles enunciated in *T.C.* and *T.S.B.*, the district court's reliance on an unpled theory as the basis for terminating Father's parental rights denied Father due process and the termination decision should be reversed.

The District Court's termination order provided no adequate basis for the termination of Father's parental rights.

A district court order terminating parental rights must contain findings of fact and conclusions of law on each element necessary to establish a statutory basis for termination. As noted above, the termination ordered in this case has barely any factual findings or conclusions of law. The factual findings that do exist are conclusory statements of some of the elements but reference no testimony or documentary evidence from the termination hearing. Further, the findings and conclusions are a discordant amalgamation of elements under both the unpled theory of "previous termination of rights to sibling" and the pleaded theory of "failure of court-ordered treatment plan". As noted above, the former theory was not supported

by evidence or factual findings.

The "failure of court-ordered treatment plan" theory actually before the district court requires clear and convincing evidence that: (1), there was an appropriate treatment plan approved by the district court; (2) the department made reasonable efforts to assist the parent with completion of the treatment plan and to reunify the parent with the child; (3) the treatment plan has not been complied with or successful; (4) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time; and (5) that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or the conduct or condition of the parent renders him unfit, unable, or unwilling to give the child adequate parental care. 41-3-609(1)(f), -(2), and -(3), and 41-3-423(a)(1), M.C.A. In this case, a treatment plan was ordered by the district court for Father on June 28, 2022.

The district court's termination order makes no detailed findings of fact on any of the above elements, beyond one conclusory statement that birth father has taken no steps to change or address the safety concerns of the Department which, as set forth below, is clearly false on this record.

The absence of actual, case-specific findings related to evidence at hearing is fatal to the termination decision. This deficiency makes review of the decision difficult, perhaps even impossible, putting this Court in the position of a trial court

in terms or reanalyzing the evidence to determine what the district court might have been thinking. And the district court simply ignored the reasonable efforts component of proof, not even making a boilerplate finding that reasonable efforts were made. Reasonable efforts means that the Department shall in good faith undertake actions in ten different areas of case management and parental support and assistance. 41-3-423(1)(b), M.C.A. The district court's findings address none of these duties.

This is not an appropriate case for the Court to imply findings of fact:

> Under the doctrine of implied findings, "otherwise facially insufficient findings of fact may be minimally sufficient if, within the scope of the express findings made, more specific findings of fact 'necessary to the determination' can be clearly inferred from other express findings or the evidentiary record." *In re D.L.B.*, 2017 MT 106, ¶ 13, 387 Mont. 323, 394 P.3d 169 (quoting *In re S.G.R.*, 2016 MT 70, ¶¶ 20-24, 383 Mont. 74, 368 P.3d 1180); *see also In re J.B., Jr.*, 2016 MT 68, ¶ 25, 383 Mont. 48, 368 P.3d 715. But "the implied findings doctrine is not unlimited," particularly when the proceeding involves express statutory requirements. *In re D.L.B.*, ¶ 14. Here there are no implicit findings or conclusions regarding active efforts or the requirements of 25 U.S.C. § 1912(d). The court orally stated at the termination hearing:
>
> > With regard to [Mother] and [N.L.'s birth father], the State has met its burden of proving the termination beyond a reasonable doubt. A treatment plan has been ordered for both parents. The treatment plan has not been complied with. There's no indication that the condition bringing the parents into court is unlikely to change within a reasonable period of time. And the State has satisfied its burden, and based on the recommendation of the Guardian ad Litem, that the termination is in the best interest of the child.

> The court's oral findings and the order mirror the language of § 41-3-609(1)(f), MCA, but not the language of the federal statute. There is no language in the court's oral or written findings that implicitly suggests the Department complied with 25 U.S.C. § 1912(d). The court did not address the issue at all. The lack of findings or a conclusion that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful fails to comply with ICWA. *See In re K.B.*, ¶¶ 32-34. We reverse and remand . . . .

In re L.A.G., 2018 MT 255, ¶¶ 25-26, 393 Mont. 146, 154–55, 429 P.3d 629, 634-35. Similarly, in the instant case, there is no finding as to reasonable efforts; the district court did not address the issue at all. The four conclusory "Findings of Fact" relating to completion of the treatment plan are not minimally sufficient, as they are not supported by more specific findings of fact, nor can such findings be inferred from other express findings or the record. And, unlike in *L.A.G.*, the district court here did not make any oral findings from the bench at the termination hearing.

Similarly, there are only four substantive conclusions of law, paragraphs 4 through 7 of the Conclusions of Law section of the termination order. The first relates to an unpled theory and the next three relate to incomplete elements of the pleaded treatment plan failure theory. This weird and incomplete mix of theories and elements muddles the Order and fails to provide a permissible, coherent theory of termination. Further, there is no specific evidentiary factual support for any of the conclusions.

Colloquially, the termination order is a hot mess. Legally, it is so deficient, unclear, and incomplete as to violate Father's due process rights and hinder this Court's determination of relevant appeal issues, including whether the Department made reasonable efforts to reunify, whether father was in compliance with his treatment plan, and whether he was likely to be able to parent within a reasonable period of time.

The District Court Erred to the Extent It Terminated Father's Parental Rights for Failure to Complete His Treatment Plan, given Father's Incarceration.

A court may not find a treatment plan unsuccessful solely based upon a finding that a parent's incarceration rendered the plan unsuccessful. *In re A.T., 2003 MT 154, 316 Mont, 255, 70 P.3d 1247; In re J.B., 2016 MT 68, 383 Mont. 48, 368 P.3d 715; In re A.L.P., 2020 MT 87, 399 Mont. 504, 461 P.3d 136.* Development of a treatment plan when a parent is incarcerated and then requesting termination because of the parent's incarceration does not demonstrate a good-faith effort to preserve the parent-child relationship. *Id.*

If a parent is not in prison when the child is removed, as here, the Department may in good faith proceed with a treatment plan and must make reasonable efforts to provide services and work with the parent toward the treatment plan objectives. *In re A.L.P., 2020 MT 87, 399 Mont. 504, 461 P.3d 136.* But if such a parent becomes incarcerated, the Department must move to revise the treatment plan to tailor the

treatment plan to his status or continue to work with him on the tasks he could complete while incarcerated. *Id.* Here, the Department did neither, in spite of the fact just before being incarcerated, Father was active and engaged in his treatment plan productively, in contact with the Department, and visiting M.S-L. Once father was incarcerated, the department had no contact with him, terminated all visits and services regarding him, did not seek to amend the treatment plan, and sought termination solely for failure of the treatment plan.

Under these circumstances, termination is inappropriate because it is based on the district court's finding, *sua sponte*, after the termination hearing, that a treatment plan was not required by 41-3-609(4), M.C.A. Similarly, such an argument may not be raised on appeal by the Department, but should have been raised with the district court below. *A.L.P., Id.* But unlike A.L.P., where this Court held that this error had no significant impact on the case's result because the district court in that case made express findings of fact supporting a finding that a treatment plan was not necessary under 41-3-609(4)(c) due to the length of the parent's incarceration, ***in this case there is no factual record or finding to support*** a conclusion that Father's incarceration would be long term or prevent him from parenting within a reasonable time. To the contrary, the Department's representative at the termination hearing admitted she had no idea how long Father would be incarcerated for. She had never checked. Fact 17, above.

There is an insufficient factual record for an *In re A.L.P.* harmless error determination to avoid remand for improper reliance on a 41-3-609(4), M.C.A. finding, whether under subsection 4(a) or 4(c). This case must be remanded.

The District Court Erred in Concluding That Termination Was Supported By Clear And Convincing Evidence.

The record does not establish by clear and convincing evidence that the Department made reasonable efforts.

> Reasonable efforts means that the Department shall in good faith:
>
> (i) conduct a comprehensive assessment of the circumstances of the family, with a focus on safe reunification as the most desirable goal. The assessment must be provided to the parents and to counsel for the parents.
>
> (ii) identify appropriate services and help the parents overcome barriers, including actively assisting the parents in obtaining appropriate services;
>
> (iii) with parental consent, identify and invite the extended family to participate in providing support and services to the family and to participate in family team meetings, permanency planning, and resolution of placement issues;
>
> (iv) conduct or cause to be conducted a diligent search for the child's extended family members and contact and consult with extended family members to provide family structure and support for the child and the parents;
>
> (v) offer and employ all available and culturally appropriate family preservation strategies and facilitate the use of remedial and rehabilitative services;
>
> (vi) take steps to keep siblings together whenever possible;

> (vii) support regular visits with parents in the most natural setting possible, as well as trial home visits with the child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
>
> (viii) identify community resources, including housing, financial, transportation, mental health, substance abuse, and peer support services, and actively assist the parents or, when appropriate, the child's family in utilizing and accessing the resources;
>
> (ix) monitor progress and participation in services; and
>
> (x) consider alternative ways to address the needs of the parents and, when appropriate, the family if the optimum services do not exist or are not available.

41-3-423(1)(b), M.C.A. The Department did not offer evidence as to its compliance with subsections i, iv, v, or x.

The Department did not make reasonable efforts to preserve the parent-child relationship during the six months after the treatment plan was approved.

The Department did offer evidence that it made some efforts to engage and assist Father during this time period:

1. The treatment plan required Father to complete an approved parenting class. The Department recommended a parenting class, and Father completed it. Fact 18.

2. The treatment plan provided for visitation and contact between Father and Child. The Department provided two visits per week initially, then one per week when the child was moved to Kalispell in June, 2022. The parents attended the local

visits regularly but became more sporadic when the child was moved to Kalispell. Visit interactions were positive, the child was bonding well with her parents, the parents were prepared for visitation, they had regular video calls with her, they went to some of the child's doctor appointments, and they celebrated her birthday with her. Fact 19.

3. The treatment plan required father to complete a chemical dependency evaluation and follow the recommendations. Father likely completed one as condition precedent to admission to the methadone program. **The Department never obtained a copy of it and insisted that he obtain another one.** Fact 20.

4. The treatment required Father to participate in ongoing drug testing. Father was tested regularly by his probation and parole officer. **The department never obtained those test results and instead demanded he undergo additional testing.** Father agreed to wear a drug patch and the first patch was attached approximately one week before he was arrested in early January, 2023, so he was unable to provide any patch results. He signed a release for the Department to obtain the patch results. Fact 21.

5. The treatment plan required Father to complete a mental health evaluation. He did so on his own and provided the Department with a release to obtain the results. **The Department never obtained the mental health evaluation and insisted that he obtain another one.** Fact 22.

6. The Department offered treatment team meetings every other week, which the parents sporadically attended. Just before Father's incarceration, the parents were checking in and participating regularly. Fact 23.

As noted in bold, the Department's first six months of treatment plan efforts were somewhat sluggish. The Department chose to wastefully insist on redundent evaluations, instead of coordinating with Father's Probation and Parole officer for drug testing and copies of test results and utilizing the Department's subpoena power to obtain copies of mental health and chemical dependency evaluations. That is not reasonable, and does not constitute reasonable efforts.

The Department did not make reasonable efforts to preserve the parent-child relationship after Father was incarcerated in early January, 2023.

As noted above, the Department undertook no efforts to preserve the parent-child relationship between Father and M.S-L. after he was incarcerated, just before the Status hearing of January 11, 2023. No parent-child visits. No assessment of the treatment plan to determine programs that would satisfy the remaining elements, let alone moving to modify the treatment plan to reflect his situation and the programming available. No treatment plan support or assistance. No investigation. No communication, in person or via telephone, ever.

From January 11, 2023, until the termination hearing on May 13, 2024, not only were there no *reasonable* efforts to maintain the parent-child bond and work

toward reunification, there were no efforts at all. Facts 11, 12, 16, and 17, above. And this is tragic, given that Father had recently increased his engagement and participation in all aspects of his treatment plan. Fact 12. There was no need to rush to termination. The statutory presumption in 41-3-604(1), M.C.A., did not apply due to M.S-L.'s placement with a relative, an exception under 41-3-604(1)(a).

Father took steps to change and address the Department's safety concerns.

The district court's lone actual factual finding - that "*birth father has taken no steps to change or address the safety concerns of the Department*" - found in Paragraph 2 on page 3 of the termination order, is not supported by the record. As noted above in facts 18-23, the Department's representative testified at the termination hearing that Father completed a parenting class, visited his daughter in person and digitally, attend doctors appointments and her birthday party, underwent a mental health and a chemical dependency evaluation, participated in drug testing through the P&P office, and began the patch through the Department, signed releases, participated in treatment team and check in meetings, and had increased his involvement before he was arrested.

That is not "no steps". Each one of Father's actions was a step toward completion. The district court's blanket and unexplained finding to the contrary suggests a lack of seriousness in the drafting of the termination order, consistent with the lack of other factual findings, the smattering of boilerplate language, the mis-

matching of legal theories, and in one paragraph, the reference to father as female in language obviously cut and pasted. Just as significantly, that lone factual finding is manifestly incorrect which, to the extent the termination relies on that finding, is grounds for reversal.

CONCLUSION

The Department pursued the wrong theory for termination. The facts failed to establish that theory by clear and convincing evidence. The district court pivoted to a different theory, never advanced, to terminate Father's parental rights. The district court then issued an order that is confusing, insufficient, missing important components, and violative of basic due process requirements.

This Court should reverse the termination order and remand this case to district court with direction to order the department to undertake reasonable efforts to reunify and complete its investigations regarding the best interests of the child and the status and effects of father's incarceration on his ability to parent before filing any new petitions for termination or for a 41-3-609(4), M.C.A. determination that a treatment plan is not required.

Dated this 1st day of November, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief is proportionately spaced, has a 14-point typeface, and consists of 6025 words.

_____*Allen P. Lanning*_____
Allen P. Lanning

APPENDIX

1. Findings of Fact, Conclusions of Law And Order Terminating Parental Rights and Granting Permanent Legal Custody, Re: Birth Father.

CERTIFICATE OF SERVICE

I, Allen Page Lanning, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-01-2024:

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