

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0388

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

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APPELLANT’S REPLY 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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ARGUMENT

1. The Department Concedes That the District Court's Reference in the Order of Termination to Alternative Theories Was Error.

The Department agrees that failure of treatment plan under 41-3-609(1)(d), M.C.A. was the only theory under which it sought termination of father M.C.L.'s parental rights, and that references in the district court's termination order to M.C.A. 41-3-423(2)(e) and -609(1)(d) (prior terminations of parental rights) and -609(4)(a) (treatment plan not required), were included in error.

While Father appreciates the Department's recognition that those statutory theories are not proper bases for the termination of parental rights in this case, the Department's characterization of the inclusion of these provisions as a clerical or scrivener's error seems incorrect. Unlike the missing months in a monthly payment schedule at issue in *Marriage of Schaub*, 2024 MT 299, 418 Mont. 297, 557 P.3d 924, the inclusion of these grounds for termination does not appear to be "[a]n error resulting from a minor mistake or inadvertence and not from judicial reasoning or determination; esp. a drafter's or typist's technical error that can be rectified without serious doubt about the correct reading." *Id. at fn 1*. While conceivably these incorrect conclusions of law could have resulted from the termination order's drafter carelessly failing to modify an order template in drafting the order, there is no record suggesting that was the case.

The incorrect conclusions should be ordered stricken from the termination

order, both parties agree. But Father submits they remain relevant to this appeal as a further indication of the sloppiness and lack of clarity of the order as drafted and signed.

2. The Department Concedes That the District Court’s Findings of Fact Are Deficient But Its Argument that this is an Appropriate Case to Imply Findings of Fact is Not Well-Taken.

The Department admits that a district court must adequately address each applicable statutory requirement before terminating an individual’s parental rights, citing *In re B.J.J.*, 2019 MT 129, 396 Mont. 108, 443 P.3d 488.

But the nevertheless Department asserts that this Court should review the record and redraft the District Court’s deficient order to provide the missing findings. As explained in *In re L.A.G.*, 2018 MT 255, par. 25-26, 393 Mont 146, 154-55, 429 P.3d 629, 634-35, this exceeds the scope of the doctrine of implied findings.

In *L.A.G.*, this Court held that 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 L.A.G.*, 2018 MT 255, ¶ 25, 393 Mont. 146, 154, 429 P.3d 629, 634.

The problem with the Department’s analysis is that the district court’s written order issues a summary, non-specific finding of fact and conclusion of law as to only **one** of the **five** statutory elements necessary to establish failure of a treatment plan: the element that the conduct or condition of the parent rendering him unfit is unlikely to change within a reasonable time. And the Court did not issue oral findings at hearing. The implied findings doctrine can’t be used to create minimally sufficient findings of fact as to statutory elements based on facts that are not found elsewhere in the order:

However, the implied findings doctrine is not unlimited Further, *the implied findings doctrine may apply to satisfy express statutory requirements . . . only if specific evidence referenced in other express findings clearly supports the implied statutory finding. Compare S.G.R.*, 16-24 (required § 53-21-127(8)(a) finding on §§ 53-21-126(1) and -128(1)(d) requirements for necessity of continued treatment supported by other findings referencing specific evidence clearly showing need for commitment), . . . *with In re L.L.A.*, 2011 MT 285, 13-22, 362 Mont. 464, 267 P.3d 1 (findings couched in terms of statutory language without specific reference to the respondent's circumstances and relevant behaviors insufficient to support § 53-21-126(1) finding), *G.M.*, 21-23 (conclusory restatement of statutory criteria and vague reference to witness testimony insufficient), ***We will not stretch the doctrine of implied findings to remedy commitment orders that are “beyond ‘bare-bones’ [or] ‘spartan.’ ”*** *In re C.C.*, 2016 MT 174, ¶ 23, 384 Mont. 135, 376 P.3d 105 (insufficient findings containing “no detailed facts and recount[ing] no testimony . . . specific to [the respondent's] condition, symptoms, or actions”). District courts must strictly comply with the detailed findings requirements

Matter of D.L.B., 2017 MT 106, ¶ 14, 387 Mont. 323, 328, 394 P.3d 169, 173 (emphasis added)(applying the implied findings doctrine in commitment proceedings).

Despite this clear precedential prohibition, the Department suggests that this Court should infer from the record that the father did not complete his treatment plan and that his conduct or condition rendering him unfit is unlikely to change within a reasonable period of time. Unfortunately for the Department, even this Court's inference of these elements would not satisfy the remaining elements that the Department made reasonable efforts or that the continuation of the parent-child relationship would likely result in continued abuse or neglect. The termination order is insufficient and unfixable by this Court under the implied findings doctrine.

The Department conditionally requests that if this Court finds the district court's order insufficient, it should remand the case for further findings. Sometimes, this Court remands in a way which requires the trial court to determine whether it can make findings on the missed statutory elements on the record already created, or whether additional evidentiary proceedings are necessary to address those elements. *See In re D.B., 2007 MT 246, 339 Mont. 240, 168 P.3d 691 (remanding for further proceedings); In re B.D., 2008 MT 272, 345 Mont. 225, 190 P.3d 1072 (appeal after remand).*

However, in this case, complete reversal of the termination order is appropriate on the grounds that the Department failed to show clear and convincing evidence of reasonable efforts, which requires further efforts at reunification under an appropriate treatment plan.

3. The Department's Argument that Father's Incarceration was His Fault, Ending The Department's Duty to Assist Him and Amend His Treatment Plan, Ignores This Court's Precedent.

The Department asserts that Father's incarceration is his own fault; if he had not engaged in criminal conduct, he could have still had access to service providers.

This argument ignores this Court's pronouncements as to the Department's duty to tailor its treatment plan to reflect the parent's incarceration, even if it occurs during a case and after an initial treatment plan has been approved:

If the parent is not in prison or facing extended incarceration when a child is removed, the Department certainly acts in good faith by proceeding with a treatment plan; in that case, the Department must make reasonable efforts to provide services and work with the parent toward the objectives of the treatment plan. Section 41-3-423(1), MCA. The Department also may revise a treatment plan in light of a parent's changed circumstances. *See In re M.A.E.*, 1999 MT 341, par. 10, 297 Mont. 434, 991 P.2d 972 (Department developed a second treatment plan after mother was incarcerated that specifically addressed her incarceration and tailored the treatment plan to her status).

In re A.L.P., 2020 MT 87, par. 25, 399 Mont. 504, 514, 461 P.3d 136, 143. Here, the Department should have done what it did in *In re M.A.E*; develop a second treatment plan specifically addressing Father’s incarceration. Its failure to do so is both the failure to obtain approval for an amended reasonable treatment plan when circumstances changed, and a failure to undertake reasonable efforts. These errors require reversal and remand with direction for the Department to revise its treatment plan and undertake reasonable efforts.

4. The Department Misapplies This Court’s Reasonable Efforts Jurisprudence:

Unsurprisingly, the Department seeks to downplay the effect of its lack of reasonable efforts on the outcome of this case and this Court’s jurisprudence regarding reasonable efforts. This court has stated:

[U]pon the State’s determination to seek termination, *a parent must be able to challenge, at the time of the termination proceeding, the Department’s reasonable efforts in helping the parent to achieve reunification.* This is consistent with our holdings in *C.M.* and *R.J.F.*, wherein we concluded that a parent may challenge the State’s contention that the conduct or condition rendering the parent unfit is unlikely to change within a reasonable time, by arguing that the department failed to make reasonable efforts. *In re C.M.*, par. 22; *In re R.J.F.*, par. 26. Finally, that a parent may challenge the Department’s aid during the termination proceeding should come as no surprise to the State, especially given the interrelation of the issue to the findings that must be established for termination.

In re C.M.G., 2020 MT 15, ¶ 14, 398 Mont. 369, 376–77, 456 P.3d 1017, 1021
(emphasis added).

The Department claims it was incumbent on Father to show at termination what programs the Department should have offered and how they would have made a difference. This is an unfair double-shifting by the Department – trying to make Father responsible for doing its job in finding appropriate services once he became incarcerated and then shifting its burden of proof as to the reasonableness of its efforts at the termination hearing. That attempted burden-shifting violates the policy and language of the abuse and neglect statutes, which impose those duties on the Department.

Department personnel admitted that they did not seek an amended treatment plan for father upon his incarceration and ceased all efforts and contact with him from thence forward. They made no efforts, much less reasonable ones. And, as indicated in Father’s initial brief, their efforts in the six months before his incarceration were somewhat sluggish.

As noted in Father’s opening brief, the District Court’s solitary case-specific finding – that father has taken no steps to change or address the safety concerns of the Department - is not supported by the evidence.

The Department’s statements in its brief (p. 35) about being not required to “endlessly pursue an unwilling parent who does not wish to be found with services the parent does not wish to receive” is not apropos to this issue in this case. The Department knew where father was – and that he was

incarcerated. He wasn't hiding or running away. There was no endless pursuit. There wasn't even a tiny pursuit. And there is no evidence that Father didn't wish to be found in the jail.

The Department concedes that it is "required to diligently attempt to contact reluctant parents and engage them with services". Its representative admitted that she failed to do so when Father's circumstances changed to incarceration.

Given the department's demonstrable lack of reasonable efforts, there is insufficient evidence to establish by clear and convincing evidence the one element that the district court actually put in its order – that the conduct or condition of rendering Father unfit was unlikely to change in a reasonable period of time.

CONCLUSION

For the above reasons, the Department's arguments should be rejected, and this case should be remanded to district court with an order for the Department to develop an appropriate treatment plan for father and engage in reasonable efforts to assist him to complete that plan and reunify with his child. Further, this Court should order that the delays in reunification due to the Department's failures and the district court's errors not be held against father in this proceeding.

Dated this 13st day of December, 2024.

Allen P. Lanning
Allen P. Lanning, Attorney for M.C.L.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief is proportionately spaced, has a 14-point typeface, and consists of 1909 words.

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CERTIFICATE OF SERVICE

I, Allen Page Lanning, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 12-13-2024:

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