IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0402

IN THE MATTER OF:

A.L.D.,
A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Russell Fagg, Presiding

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STATEMENT OF THE CASE

At the end of July 2015, the Department of Public Health and Human Services, Child and Family Services Division (DPHHS) petitioned for adjudication of A.L.D. (newborn) as a youth in need of care and temporary legal custody (TLC) based on concerns for her well-being and safety because when she was born, both A.L.D. and her birthmother, D.B. (Mother), were positive for methamphetamines, amphetamines, and marijuana. (Doc. 1, Aff.) Mother named M.D. (Father) as A.L.D.'s father. (*Id.*)

Throughout these proceedings, A.L.D. was considered to be an Indian Child pursuant to the Indian Child Welfare Act (ICWA).

See 25 U.S.C. § 1903(4).[1] A.L.D. was adjudicated as a youth in need of care and TLC was granted to DPHHS. (10/19/15 Tr.; Doc. 19, 20.) Appropriate treatment plans were developed and approved by the court in early 2016. (Docs. 23, 25.) Although TLC was extended, both parents failed to complete even one task on their plans and a petition to terminate parental rights (TPR) was filed in the fall of 2016. (Docs. 41, 42, 48.)

The TPR hearing was held in April 2017 and, based on testimony from the Child Protection Specialist (CPS) and Qualified Expert Witness (QEW) required pursuant to ICWA, the court granted the TPR petition. (04/04/17 Tr. (Hr'g); Doc. 60.) The CPS and QEW also testified about A.L.D.'s placement and commented on whether it was "in compliance with" ICWA's placement preferences. (*Id.*) The district court found that A.L.D.'s placement was not in the highest preference but that DPHHS was actively pursuing other placement options. (*Id.*)

[1] Subsequent citations to ICWA will be to the relevant section (*i.e.*, § 1912).

Father appeals the district court's order terminating his parental rights.[2]

STATEMENT OF THE FACTS

Throughout her pregnancy with A.L.D., Mother abused dangerous drugs, including methamphetamine and marijuana. (Doc. 1, Aff.) When she was admitted to the hospital, Mother refused treatment despite her admitted struggles with substance abuse. (*Id.*) DPHHS records confirmed that three of Mother's children were wards of the tribal court and were in pre-adoptive homes while Mother's other child, A.B-L. (born in 2013), had tested positive for multiple dangerous drugs and, following DPHHS intervention, Mother's parental rights were terminated to A.B.-L. (*Id.*)

When Child Protection Specialist (CPS) Kasia Harvey met with the parents at the hospital, Father expressed a desire to work towards

[2] In December 2017, this Court rejected Appellate Counsel's Motion to Withdraw filed pursuant to *Anders v. California*, 386 U.S. 738 (1967).

parenting A.L.D., but wanted paternity testing done to confirm he was her father. (Doc. 1., Aff.) Harvey contacted Father's mother, T.S., about caring for A.L.D. (*Id.*) T.S. lived in Utah and agreed to complete necessary background checks and cooperate with the Interstate Compact on Placement of Children (ICPC) process. (*Id.*) Harvey determined other family members identified for possible placement were not eligible due to prior DPHHS involvement. (*Id.*)

Based on concerns Father had substance abuse issues as well, Harvey requested Father submit to a UA. (Doc. 1, Aff.) Father agreed but declined Harvey's offer to drive him to the testing center, claiming he had a ride. (*Id.*) Father did not go to the testing center and when Harvey met with Father the next day, Father claimed he was willing to start services, but was not ready to parent A.L.D. on his own. (*Id.*) Father told Harvey two of his children were removed from their mother in Big Horn County, Montana, and are currently in protective care. (*Id.*) Harvey confirmed this information and learned Father had not been in contact with Big Horn County DPHHS about his children. (*Id.*) Father refused to provide Harvey with his current address or contact information and, although he agreed to have a drug-patch put on,

Father again failed to attend the appointment. (*Id.*) Father attended only one offered visit with A.L.D. in August and none in September. (Doc. 41.)

The August 24, 2015 show cause hearing was continued to October 19, 2015, because neither parent had successfully been served. (Docs. 9, 17; 08/24/15 Tr.) Harvey's attempts to locate Father were unsuccessful and a motion to serve Father with notice of the proceedings by publication was filed and approved by the court. (Docs. 11-15, 18.)

The court held a combined show cause, adjudication, and disposition hearing on October 19, 2015. (10/19/15 Tr.; Doc. 19, 20.) Neither parent appeared, but their appointed counsel was present. (*Id.*) At that hearing, Father's counsel, Kathryn Syth, said she had no contact with Father. (*Id.*) Syth further explained she also represented Father in his Dependent Neglect case in Big Horn County and she did not have recent contact with him in that matter either. (10/19/15 Tr. at 2.)

Without objection, DPHHS made an offer of proof that Edith Adams, the QEW, would testify that clear and convincing

evidence established that continued custody of A.L.D. by either parent would likely result in serious emotional or physical damage to the child. (10/19/15 Tr. at 2.) Following open court discussion with the parties, including stipulations to the requested relief, the district court granted the petition for adjudication and TLC. (*Id.*)

Treatment plans developed for each parent identified concerns that each parent must address and rectify before A.L.D. could be placed into their care. (Docs. 21, 22.) Both parents signed their treatment plan and in early January 2016 the district court approved both plans as appropriate. (Docs. 23, 25.) Father continued to miss the offered visits with A.L.D. and meetings with DPHHS. (Docs. 27, 41.) As of February 10, 2016, Father was incarcerated at the Yellowstone County Detention Facility (YCDF) on two felony charges and one misdemeanor charge. (*Id.*) When CPS Brittaney McNamara asked Father for names of family members who could be a placement option, he told her he did not have anyone who he felt would be appropriate. (Hr'g at 24-29.)

On May 24, 2016, DPHHS filed a petition to extend TLC to allow the parents more time to work on their treatment plans. (Docs. 27, 28, 30.) When McNamara spoke to Father about getting his chemical

dependency (CD) evaluation done or participating in drug testing, Father replied that he would think about it; however, Father made no efforts towards getting the evaluation, or any other task on his treatment plan. (Hr'g at 20-29; Doc. 41.) In June 2016 when Father was out of jail, McNamara arranged for Father to visit A.L.D. (*Id.*) Of the two June visits Father attended, he just sat on the couch and did not interact with A.L.D. (*Id.*)

On June 24, 2016, Syth notified the court she had a scheduling conflict and would not be able to attend the June 27, 2016 hearing. (Doc. 34.) Syth explained her attempts to contact Father about the TLC extension had been unsuccessful and she had no evidence to offer in opposition to extending TLC. (*Id.*) At the June 27, 2016 hearing, the court acknowledged Syth's notice as well as Mother's counsel's in-court stipulation to extending TLC, but explained the record would be "open" in case a party wished to later contest. (06/27/16 Tr.; Docs. 35, 36.)

When Father and Mother attended a visit with A.L.D. on July 20, 2016, McNamara observed that both parents appeared intoxicated and slept through most of the visit. (Hr'g at 20-29; Doc. 41.) Father was again incarcerated on July 29, 2016, when he was arrested

for felony bail jumping, felony criminal possession of dangerous drugs, misdemeanor possession of drug paraphernalia, and misdemeanor contempt of court. (*Id.*)

In August 2016, DPHHS filed a motion to approve the permanency plan which was a concurrent plan of reunification or, if either parent was unable to successfully complete their treatment plans, the plan would be amended to adoption. (Docs. 38, 37.) At the November 7, 2016 permanency plan hearing (PPH), DPHHS explained that Mother had recently given birth to another child who was also placed into protective care through Thirteenth Judicial District Cause No. DN 16-425. (11/07/16 Tr.; Doc. 42.) DPHHS advised a TPR petition would be forthcoming and the proposed permanency plan would be amended to the concurrent plan of adoption since DPHHS planned to file a TPR petition. (*Id.*) Mother's counsel explained he had no basis to oppose the permanency plan. (*Id.*) Upon request of Syth, counsel for DPHHS relayed that Syth was unable to attend the hearing and had no recent contact with the Father. (*Id.*) The court's order approving the permanency plan mistakenly implied Syth was present at the hearing. (Doc. 40.)

When DPHHS filed the TPR petition in October 2016, Father was still incarcerated at YCDF. (Docs. 41, 42, 48.) Both parents had failed to complete even one treatment plan task despite multiple attempts to engage them in services and varied offered methods of assistance (Doc. 41; Hr'g.) The TPR hearing was continued twice and was eventually held on April 4, 2017. (Docs. 49, 51-53; 12/19/16 Tr.; 01/30/17 Tr.; Hr'g.) The Turtle Mountain Band of Chippewa Cree Indians and the Fort Peck Assiniboine and Sioux Tribes were sent another notice of involuntary child custody proceeding as well as notice of the TPR petition and both hearing dates. (Docs. 44, 45, 51, 53.) No one from either Tribe appeared for the hearing and no notices of intervention were filed. Neither parent appeared for the TPR hearing but their attorneys were present along with A.D.L.'s guardian ad litem. (Hr'g.)

McNamara explained Father was unable to stay out of jail and his actions were the main hinderance to providing him with services and programs. (Hr'g at 20-29.) McNamara made multiple and varied attempts to contact Father when he was out of jail to get him engaged in services, but she was unable to locate him the majority of the time.

(*Id.*) When Father was incarcerated, McNamara visited him and sent him letters keeping him apprised of his daughter's well-being and discussing his treatment plan. (*Id.*) McNamara stated that while incarcerated, Father was physically unable to work on the tasks on his treatment plan that required him to be in the community, but admitted she did not know what programs were available at YCDF. (*Id.*)

McNamara admitted she had not checked with Big Horn County DPPHS about placement options for A.L.D. (Hr'g at 24-29.) McNamara explained that about two months before the TPR hearing, DPHHS held another meeting to discuss possible placement options. (*Id.*) The Fort Peck Assiniboine and Sioux Tribe(s) was unable to offer any new options and had reported there were no appropriate family members identified to care for A.L.D. (*Id.*) McNamara further explained that A.L.D.'s current placement was not considered her final adoptive placement and that DPHHS would continue to seek higher-preferred placement options pursuant to ICWA. (Hr'g at 28-29.)

The district court granted DPHHS's TPR petition, having found that evidence beyond a reasonable doubt established the criteria at Mont. Code Ann. § 41-3-609(1)(f) and §§ 1912(d) and (f). (Hr'g at 31;

Doc. 60.) The court stated DPHHS had made "best efforts" towards reuniting the child and parent(s) and later corrected its finding to clarify DPHHS did make active efforts. (Hr'g at 31-32; Doc. 60.)

In addition, the court found that A.L.D. was placed with siblings in a home approved by the Tribe, but also found A.L.D.'s current placement was "not in compliance" with ICWA's placement preferences at § 1915. (Doc. 60 at 10, 12.) The court further found that DPHHS had made active efforts to locate appropriate family members for placement. (Doc. 60 at 10.)

STANDARD OF REVIEW

This Court "will not disturb a district court's decision on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion." *In re H.T.*, 2015 MT 41, ¶ 10, 378 Mont. 206, 343 P.3d 159 (citation omitted); *In re K.B.*, 2013 MT 133, ¶ 18, 370 Mont. 254, 301 P.3d 836 (citation omitted). A district court abuses its discretion when it acts "arbitrarily, without employment of conscientious judgment or in excess

of the bounds of reason, resulting in substantial injustice." *In re M.J.,* 2013 MT 60, ¶ 17, 369 Mont. 247, 296 P.3d 1197 (citation omitted).

This Court reviews a district court's factual findings for clear error. *In re A.K.*, 2015 MT 116, ¶ 20, 379 Mont. 41, 347 P.3d 711. A district court's conclusions of law are reviewed for correctness. *K.B.*, ¶ 18; *H.T.*, ¶ 10 ("Compliance with state statutory requirements presents a question of law that we review for correctness."). This Court "will not reverse a district court's ruling by reason of an error that 'would have no significant impact upon the result.'" *H.T.*, ¶ 10 (citation omitted).

When ICWA applies, this Court will affirm the district court's termination of parental rights if a reasonable factfinder could conclude beyond a reasonable doubt that allowing the parent to continue with custody would likely "result in serious emotional or physical damage to the child." *K.B.*, ¶ 18.

Finally, this Court exercises plenary review of whether a parent was denied effective assistance of counsel in termination proceedings. *In re A.S.*, 2004 MT 62, ¶ 9, 320 Mont. 268, 87 P.3d 408.

SUMMARY OF THE ARGUMENT

The district court correctly ordered that Father's parental rights should be terminated. The district court did not misapprehend the substantial credible evidence that DPHHS employed active efforts in providing remedial and rehabilitative services to prevent the breakup of this family. Father's apathy towards taking advantage of the services offered when he was not incarcerated and his actions which resulted in his repeated incarceration, do not negate DPHHS's active efforts or diminish the fact the efforts were unsuccessful. Even if the district court's written order did not specify all the efforts made by DPHHS, the proper remedy is not reversal, but rather remand for entry of an amended order.

Father was not denied effective assistance of counsel as nothing in the record suggests he received anything other than zealous representation from a competent and prepared attorney and the evidence presented clearly shows Father was not prejudiced by any alleged "mistakes." Syth's cross-examination of Adams was more than sufficient when considering the only conclusion of law ICWA mandates a QEW testify about is the likelihood an Indian child would suffer

serious emotional or physical damage if the parent were to maintain custody. Father failed to establish that a different line of questioning would have caused Adams to indicate DPHHS's efforts were lacking. Nor did Father establish that additional input from Adams would have impacted the court's correct conclusion that active efforts were made.

Father also failed to establish that Syth was ineffective for asking another attorney to relay her position on the permanency plan or that the court was misinformed about her position. Father's argument that Syth's failure to attend the PPH "resulted" in A.L.D.'s "non-compliant" placement under ICWA is unsupported and confuses a PPH with a placement hearing. Other than arguing Syth should have raised an objection about A.L.D.'s *placement* in relation to § 1915, which was not before the court at the PPH, Father failed to establish how Syth could have opposed the proposed concurrent *plans* (reunification or adoption). Syth provided effective representation to Father throughout these proceedings and Father fails to establish how any of Syth's actions or inactions prejudiced him.

If this Court affirms the order terminating Father's parental rights, it need not address Father's arguments concerning the district

court's comments about A.L.D.'s placement because Father would not be able to participate in any future proceedings. The issue of A.L.D.'s placement remains ongoing. The court's comments about A.L.D.'s placement in the TPR order did not constitute a final order for the purposes of § 1915 and Father's claims concerning A.L.D.'s placement and DPHHS's compliance with ICWA's placement preferences are not appropriate bases upon which to reverse the TPR order, which is controlled by § 1914, and Father's claims related to placement do not rely upon § 1911, § 1912, or § 1913.

Nonetheless, should this Court consider the district court's comments about A.L.D.'s placement, the State respectfully asserts application of the ICWA Regulations and/or Guidelines is not appropriate since the Regulations were not in effect and the district court was not given the opportunity to consider application of any ICWA Guidelines. The district court's findings and conclusions about A.D.L.'s placement as "non-compliant" with ICWA do not constitute reversible error given the fact there was also a finding that good cause existed to diverge from the preferences. Even if this Court deems the district court's comments about placement as lacking or imprecise,

there is no placement order to "reverse" and, at most, the matter may be remanded for an amended order or separate placement hearing.

ARGUMENT

I. The district court did not abuse its discretion when it terminated Father's parental rights.

A. Applicable law and Father's single challenge to the TPR order

In termination proceedings where ICWA applies, the state and federal criteria must be established by evidence beyond a reasonable doubt. Mont. Code Ann. § 41-3-422(5)(b); §§ 1912(d) and (f). *H.T.*, ¶ 42; *In re I.B.*, 2011 MT 82, ¶ 25, 360 Mont. 132, 255 P.3d 56 (citation omitted).

Father's parental rights were terminated pursuant to Mont. Code Ann. § 41-3-609(1)(f), which requires proof that: the child was a youth in need of care; Father failed to successfully complete an appropriate treatment plan; and that the conduct or condition rendering Father unfit to parent was unlikely to change in a reasonable period of time. Father does not appeal the court's findings under Mont. Code Ann. § 41-3-609(1)(f). (Opening Brief (Br.).) Thus, Father waived review that those criteria were not established beyond a reasonable doubt.

When ICWA applies, the following criteria must also be established: "active efforts" were made to prevent the breakup of the family and those efforts proved unsuccessful; and the Indian child would likely suffer serious emotional or physical damage if the parent were to maintain custody. §§ 1912(d) and (f); *In re M.S.,* 2014 MT 265A, ¶ 24, 376 Mont. 394, 336 P.3d 930; *In re D.S.B.*, 2013 MT 112, ¶ 13, 370 Mont. 37, 300 P.3d 702. Father argues only that the court erred in concluding evidence beyond a reasonable doubt established that "active efforts" were made pursuant to § 1912(d). (Br. at 17-19.) Because Father does not challenge the district court's findings and conclusions under § 1912(f), he waived review of that criterion.

Finally, Father challenges the district court's findings and conclusions regarding placement preferences under ICWA. (Br. at 20-30.) (*See* Sections III and IV below for further discussion of that issue.) To the extent that Father attempts to incorporate his arguments on appeal challenging DPHHS's efforts regarding § 1915 placement preferences into allegations that DPHHS did not make active efforts under § 1912(d), the State argues those are entirely separate issues.

The plain language of ICWA's remedial provision supports this conclusion. Section 1914 states:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under [s]tate law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may 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 of this title.

Under this statute, causes of action for violations of ICWA must relate to §§ 1911, 1912, or 1913. Since this statute omits § 1915, a parent is precluded from seeking invalidation of a TPR order based upon allegations ICWA's placement preferences provisions were not followed or the absence of good cause to depart from the preferences.

Other jurisdictions have considered this question and have concluded § 1914 does not apply to alleged violations of § 1915. *See, e.g., Doe v. Mann*, 285 F. Supp. 2d 1229, 1241 (N.D. Cal. 2003) ("[I]t seems clear from the text of [25 U.S.C. §] 1914 that Congress intended to provide a cause of action only for violations of three ICWA sections."); *B.R.T. v. Executive Dir. of Soc. Serv. Bd.*, 391 N.W.2d 594, 601 (N.D. 1986) (action challenging an "order terminating parental rights . . . is an improper vehicle for challenging the alleged violation of the placement

preferences mandated by [25 U.S.C. Section 1915]"); *State ex rel. Juvenile Dep't of Multnomah Cnty. v. Woodruff*, 816 P.2d 623, 625 (Or. Ct. App. 1991) ("Failure to comply with the foster care placement preferences in § 1915(b) is not a basis for invalidating a court order terminating parental rights.").

Similarly, other jurisdictions have concluded that adoptive placement issues are irrelevant to whether DPHHS met its obligation to make active efforts pursuant to § 1912(d). *See, e.g., Josh L. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 276 P.3d 457, 464-66 (Alaska 2012) ("[DPHHS] was not required to actively pursue placement with [parent's] relatives as part of its active efforts to prevent the termination of [parent's] parental rights."); *State ex rel. Children v. Casey J.*, 355 P.3d 814, 819 (N.M. 2015) (Requirements that active efforts be made "under § 1912(d) supports the continued custody that is protected by § 1912(e) and § 1912(f), [i]t does not apply to facilitate the placement of the child in compliance with the placement preferences listed in § 1915.").

Accordingly, Father's argument that active efforts were not made pursuant to § 1912(d), may not incorporate allegations that DPHHS's actions regarding ICWA's placement preferences were lacking.

B. Substantial evidence established beyond a reasonable doubt that active efforts were made, but were not successful, and the district court did not abuse its discretion when it made oral and written findings to that effect.

Under ICWA,

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court 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.

§ 1912(d).

Although § 1912(d) does not set forth detailed criteria for determining whether DPHHS made active efforts, it demands that DPHHS do more than simply give a parent a treatment plan and wait for him to complete it. *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556; *In re T.W.F.*, 2009 MT 207, ¶ 27, 351 Mont. 233, 210 P.3d 174. As this Court has stated, "'active efforts' implies a heightened responsibility compared to passive efforts." *M.S.*, ¶ 24; *A.N.*, ¶ 23; *I.B.*, ¶ 38.

This Court has recognized that a "common sense" construction of the meaning of the term "active efforts" requires "that 'timely affirmative steps be taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services designated to remedy problems which might lead to severance of the parent-child relationship.'" *M.S.*, ¶ 25. Significantly, this Court also recognized that since "active efforts" are designed to prevent the breakup of an Indian family, it was appropriate to consider efforts provided to the other parent and children when evaluating the total "active efforts" and whether they were unsuccessful. *D.S.B.*, ¶ 17.

Moreover, this Court has explained that "success of the remedial services and rehabilitative programs concomitantly depends on the parents' ability and willingness to develop the necessary skills to provide their child with a safe living environment." *I.B.*, ¶ 41 (While the State cannot simply wait for a parent to complete his treatment plan, "a court may consider the parent's failure to participate."); *D.S.B.*, ¶¶ 15-17 (the father's unwillingness to participate did not negate DPHHS's active efforts); *A.N.*, ¶ 23 (DPHHS's efforts were as active as possible given parent's apathy and indifference); *T.W.F.*, ¶ 27 (court

may consider parent's failure to participate in completing his treatment plan).

Finally, "a parent's incarceration may limit the remedial and rehabilitative services that the State can make available to the parent to prevent the breakup of the Indian family." *M.S.*, ¶ 25; *D.S.B.*, ¶ 15; *In re D.A.*, 2013 MT 191, 371 Mont. 46, 305 P.3d 824 (parent's incarceration "placed significant roadblocks in [DPHHS's] ability to reunite" the family). If a parent is incarcerated, this Court does not "excuse the State's obligation to make active efforts [but will not] fault [DPHHS] if its efforts are curtailed by the parent's own criminal behavior." *M.S.*, ¶ 25 (citing *D.S.B.*, ¶ 15); *In the Interest of S.H.E.*, 824 N.W.2d 420 (S.D. 2012) (DPHHS could not be faulted in its active efforts when a father's criminal thinking choices led to his violation of parole and ultimately his incarceration thus limiting rehabilitative options and making him unavailable to parent).

As this Court explained, a parent's incarceration limits DPHHS in its attempts to rehabilitate the family. *D.S.B.*, ¶ 15. In *D.S.B.*, the father was incarcerated at the time his treatment plan was approved but, after reviewing the services made available to both the parents and child,

this Court found DPHHS made active efforts beyond a reasonable doubt when considering the father failed to avail himself of the services prior to his arrest.

Just as in *M.S., D.A., T.W.F.*, and *D.S.B*, DPHHS provided active efforts in attempts to prevent the breakup of this family through the services provided for Mother, Father, A.L.D., and A.L.D.'s siblings. The record establishes that DPHHS offered the following services in this matter: transportation assistance (including bus passes, offered rides, and plane ticket to Mother); supervised visitations; counseling and monitoring; parenting education/counseling; CPS family support network; Center for Children and Families; CD evaluations; drug monitoring services; visits with extended family; foster care; regular staff meeting with the Tribe; over three years of consistent services prior to A.L.D.'s birth; referral to Florence Crittenden; visits with extended family; correspondence with Father in YCDF and CPS visits to see Father at YCDF.

The record also supports that DPHHS made active efforts for the family in the following ways: provided Mother multiple services and

monitoring in prior DPHHS interventions (provided treatment plan, visits, consulted with the Tribe and Tribal Social Services, *etc.*); offered Mother services when A.L.D. was born; and intervened when Mother gave birth to another child while A.L.D.'s case was still ongoing. The record also established that DPHHS was working with Father and his other children in another case out of Big Horn County.

It is undisputed that Father's treatment plan was appropriate and addressed the issues he needed to work on for A.L.D. to be placed in his care. However, from the beginning of DPHHS intervention and prior to his incarceration(s), Father was reluctant to parent A.L.D. and was openly resistant to services, particularly CD evaluations and drug testing. Even when McNamara directly asked Father to engage in CD treatment, he responded that he would think about it. Moreover, Father failed to attend all but three offered visitations over a two-year period. At one of the visits he did attend, Father did not interact with A.L.D. except to offer her a soda. At another visit, Father appeared under the influence and slept through the visit. Finally, Father did not maintain contact with DPHHS or even his counsel. DPHHS had to

serve Father by publication at one point, and efforts to locate him through Mother and Father's adoptive mother were unsuccessful.

Father's apathy towards, or inability to engage in, the services offered by DPHHS, does not diminish the fact DPHHS made active efforts in this case. *See D.S.B.,* ¶ 15 (DPHHS will not be faulted if its efforts are curtailed by a parent's own behavior). Father's criminal thinking and resulting incarceration(s) "placed significant roadblocks in [DPHHS's] ability to reunite" the family" and DPHHS's active efforts should not be negated by Father's "own criminal behavior." *M.S.*, ¶ 25.

Father erroneously argues that QEW's testimony that active efforts were made is required. (Br. at 16, 19.) Father's position is unsupported. First, the only topic a QEW is statutorily mandated to attest to is whether the Indian child would likely suffer serious emotional or physical damage if the parent were to maintain custody. *See* §§ 1912(e) and (f). Conversely, § 1912(d) includes no such reference to QEW testimony and clearly states that the State "shall *satisfy the court* that active efforts have been made." (Emphasis added.)

Moreover, even when applying the plain language of § 1912(f), this Court has stated that "a district court need not conform its decision to a

particular piece of evidence or a particular expert's report or testimony as long as a reasonable person could have found [that provision was met] beyond a reasonable doubt." *A.N.*, ¶ 32; *T.W.F.,* ¶ 25; *H.T.*, ¶ 41. The same would apply to active efforts even if a QEW was required to comment on that issue. As discussed above, the district court was certainly aware of the various efforts made by DPHHS as evidenced in the pleadings and testimony. What the QEW believed about the efforts was not a necessary inquiry under § 1912(d). The court was also aware, through Syth's cross-examination of McNamara, of Father's allegations that DPHHS's efforts were lacking.

This Court does not "substitute [its] evaluation of the evidence for that of the trial court, or pass upon the credibility of witnesses." *In re T.D.H.*, 2015 MT 244, ¶ 34, 380 Mont. 401, 356 P.3d 457 (citation omitted). The existence of conflicting evidence or conflicting professional opinions concerning a required finding "does not preclude a trial court's determination that clear and convincing evidence exists to support a finding of fact." *T.D.H.*, ¶ 34 (citation omitted). Witness credibility and the weight which witness testimony should be afforded "is left to the sound discretion of the district court. It is not the role of this Court to

reweigh the evidence and substitute [its] judgment" for the trial courts'. *In re J.C.B.*, 2004 MT 111, ¶ 14, 321 Mont. 110, 88 P.3d 1280 (citation omitted).

The district court properly considered Father's own attitude and actions that hindered the effectiveness of the multitude of referrals and services offered by DPHHS. There is substantial evidence to establish "a rational trier of fact could have concluded that DPHHS made 'active efforts' to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful." *See D.S.B.*, ¶ 17.

C. Sufficiency of the district court's order

Father implies that the district court's order insufficiently addressed DPHHS's active efforts. (Br. at 19.) The State does not concede that the court's oral and written findings were not sufficient. However, even if the order was somehow infirm, this Court may still affirm the court's order. *See, e.g., In re M.R.G.*, 2004 MT 172, ¶ 16, 322 Mont. 60, 97 P.3d 1085 (even when district court did not issue specific findings on the burden of proof it applied in an ICWA case, "it

[was] certainly implicit in the court's statements, and to hold otherwise would be to elevate form over substance").

Here, the court's oral findings and comments as well its order terminating Father's rights explicitly establish the court agreed active efforts had been made and there are insufficient grounds for reversal or rehearing. As this Court has consistently held, "a district court may protect a child's best interest despite procedural errors that would have no impact upon the result." *M.S.*, ¶ 22 (citations omitted).

Father's reliance on *K.B.* is unavailing as that matter is distinguishable. (Br. at 18.) In that case, this Court noted three issues the district court need to address on remand, including the due process error that the tribe had not received proper notice of the TPR hearing. *K.B.*, ¶¶ 22-25. The additional issues noted by this Court included insufficiency of the QEW testimony and the district court order's omission of what active efforts were made. *K.B.*, ¶¶ 26-32.

Here, all the parties had sufficient notice, it was undisputed that the QEW clearly addressed the risk to A.L.D.'s emotional and physical health should either parent have custody of her, and the record and testimony discussed the active efforts made by DPHHS. The only thing

similar to *K.B.* is the lack of more detailed and specific findings on active efforts in the court's written order. Because review of the record establishes active efforts were in fact made here, this Court may affirm the district court order terminating Father's rights.

However, even if this Court determines the district court's order was insufficient under § 1912(d), reversal is not required. Rather, this Court may remand the matter to allow the district court to issue a more specific order. *See H.T.* In *H.T.,* when the district court applied the wrong standard of proof to a TPR hearing involving ICWA, this Court vacated the order and remanded the matter "for entry of a new order to address whether the evidence established beyond a reasonable doubt, as required by 25 U.S.C. § 1912(f), that continued custody of H.T. by Mother likely would result in serious emotional or physical damage to the child." *H.T.*, ¶ 43.

Thus, unlike *K.B.*, there is no need for an additional hearing because the record as a whole supports a determination that active efforts were made in this case. If necessary, pursuant to *H.T.*, this Court may simply remand this matter with instructions to the district court to issue a new order including findings regarding DPHHS's active efforts.

This Court "will not reverse a district court's ruling by reason of an error that 'would have no significant impact upon the result.'" *H.T.*, ¶ 10 (citation omitted). "This Court has consistently interpreted abuse and neglect statutes to protect the best interest of the children. 'In matters involving abused and neglected children we have consistently held that a district court may protect the children's best interest despite procedural error.'" *In re J.C.*, 2008 MT 127, ¶ 43, 343 Mont. 30, 183 P.3d 22 ("no civil case shall be reversed by reason of error which would have no significant impact upon the result; if there is no showing of substantial injustice, the error is harmless") (citation omitted).

II. Father was not denied effective assistance of counsel.

The Due Process of Clause of the Montana Constitution (article II, section 17) provides a parent in a termination of parental rights proceeding with the right to the effective assistance of counsel. *In re A.D.B.*, 2013 MT 167, ¶ 64, 370 Mont. 422, 305 P.3d 739 (citation omitted); *In re J.J.L.,* 2010 MT 4, ¶ 17, 355 Mont. 23, 223 P.3d 921. This Court has specifically held that fundamental fairness requires that parents are effectively represented by counsel at adjudicatory hearings

and TPR proceedings. *J.J.L.*, ¶ 16 (right to effective counsel at adjudication); *A.S.*, ¶ 12 (right to counsel at termination). This Court adopted "benchmark, although nonexclusive, criteria" for evaluating effectiveness of counsel in Dependent Neglect proceedings. *A.S.*, ¶ 27.

The criteria involves consideration of two main factors: (1) counsel's experience and training representing parents in Dependent Neglect proceedings; and (2) the quality of counsel's advocacy demonstrated during the proceedings. *In re C.M.C.*, 2009 MT 153, ¶ 30, 350 Mont. 391, 208 P.3d 809 (citing *A.S.,* ¶ 26). Under the advocacy prong, a court considers, among other things, whether counsel demonstrated that she possessed necessary trial skills (*e.g.,* making appropriate objections, producing evidence, and calling and cross-examining witnesses). *J.J.L.*, ¶ 19; *A.S.*, ¶ 26.

However, a parent may not sustain an ineffective assistance of counsel (IAC) claim unless the parent demonstrates he suffered prejudice because of the alleged ineffective assistance. *A.S.,* ¶ 31; *A.D.B.*, ¶ 64; *C.M.C.*, ¶ 30; *In re A.J.*W., 2010 MT 42, ¶ 24, 355 Mont. 264, 227 P.3d 1012 ("Even if there were ineffective

representation, it is inconsequential unless the parent suffered prejudice as a result.").

Father does not challenge Syth's training and experience. *C.M.C.*, ¶ 31 (when appellant failed to provide any argument about counsel's experience/training, Court could not evaluate the IAC factors and declined to speculate). Rather, Father challenges the quality of Syth's advocacy during only two discrete events: (1) failure to appear at the PPH and object to A.L.D.'s placement in a "non-ICWA-compliant home;" and (2) failure to effectively cross-examine Adams about active efforts made by DPHHS to reunite the Indian family. (Br. at 13-17.)

Syth's advocacy regarding cross-examination of Adams was not lacking. As explained above, the only issue a QEW is directed to testify about is whether the Indian child would likely suffer serious emotional or physical damage if the parent were to maintain custody. *See* §§ 1912(e) and (f). Although determinations under §§ 1912(e) and (f) are conclusions of law and not usually the purview of a witness, ICWA specifically requires QEW input on this issue. Conversely, ICWA does not require QEW input concerning the conclusion of law that active efforts were made under § 1912(d). Finally, even with regards to

§§ 1912(e) and (f), this Court has concluded that the district court would not be bound to a QEW's opinion; the same would be true for whether active efforts were made. *See D.S.B.*, ¶ 18; *H.T.*, ¶ 41; *A.N.,* ¶ 32.

Perhaps the dispositive factor concerning this issue is that Father cannot establish that more extensive cross-examination of Adams would have influenced the court's ruling on DPHHS's TPR petition. *See A.S.*, ¶¶ 32-33 (prejudice from IAC claim not established for alleged failure to subpoena witnesses when their testimony would not be relevant); *C.M.C.*, *supra* (when no showing or argument concerning trial counsel's training and experience was made and there was facially competent representation in the trial record, parent failed to establish a threshold showing of ineffective assistance of counsel, and her claims were therefore without merit); *A.J.W.*, ¶ 24; *A.D.B.*, ¶ 63.

Father cannot establish that even if Syth asked Adams about active efforts under § 1912(d) that she would have agreed with Father's position on appeal. Through her cross-examination of McNamara, Syth pointed out how DPHHS' efforts, in her opinion, were lacking. It is unlikely that had Syth asked Adams about rehabilitative and reunification efforts that any different information would have been elicited to influence the

court's conclusions. Father has failed to establish that Syth's advocacy was lacking during her cross-examination of Adams or that he suffered prejudice as a result.

Father's other IAC claim—that Syth should have appeared at the PPH to lodge an objection to A.L.D.'s placement pursuant to ICWA—should also be denied by this Court. Father does not establish how it was inappropriate for Syth to ask another officer of the court to explain her absence or that his representations to the court were incorrect. Notably, Father does not fault Syth for her written notice to the court concerning the June 2016 TLC extension hearing. (*See* Doc. 34.) Moreover, the court had made it clear that even if a party or their counsel missed a hearing, the court would always reopen the issue and allow the party the opportunity to present evidence. (06/27/16 Tr.) Finally, as the record reflects, Father had little or no contact with Syth. It was not unreasonable for Syth to advise the court she had no position to take and no contrary evidence to offer about the permanency plan.

The main thrust of this IAC claim relates to Syth not raising an ICWA-related issue at the PPH. Father mistakenly asserts that the

"Permanency Plan *resulted* in A.L.D.'s placement in a non-ICWA compliant home." (Br. at 15.) (Emphasis added.) This claim fails to appreciate the nature of a PPH and improperly presumes it was a placement hearing.

The PPH was conducted pursuant to Mont. Code Ann. § 41-3-445, which is more akin to an administrative procedure than substantive district court order like adjudication, disposition, or TPR. The requirement to hold a PPH at least every year ensures DPHHS has established one of the five enumerated *plans* for a child's permanency. *See* Mont. Code Ann. §§ 41-3-445(8)(a) through (e). Approval of a permanency plan does not necessarily require the court to approve a specifically-named person to care for the child, unless that issue was placed squarely before the court. Rather, the process and subsequent court order confirms there is a general plan for the child's future in place. *See* Mont. Code Ann. § 41-3-445(6). It is generally during separate proceedings such as adoptions or guardianship when a district court considers the appropriateness of a specifically-named person who wishes to care for a child long-term. (*See, e.g.*, Mont. Code Ann. §§ 42-5-101 (adoption proceedings); 42-2-102 (adoption proceedings

subject to ICWA); 41-3-444(2)(h) (guardianship proceeding in DN case subject to ICWA). The appropriateness of a specific person as a placement option may also be considered during a hearing pursuant to Mont. Code Ann. § 41-3-440 (when dispute over placement is raised).

Syth was not ineffective for not appearing at the PPH. Father has pointed to no facts or legal authority establishing that the quality of Syth's representation was insufficient because she asked an officer of the court to relay her circumstances and legal position to the court. Nor has Father established any prejudice related to the court approving the concurrent plans. Other than arguing Syth should have raised an objection about A.L.D.'s *placement* in relation to § 1915, which was not before the court at that time, Father offers no objection that Syth should have made about the proposed concurrent *plans*. Notably, Syth did raise an objection to A.L.D.'s placement at the TPR hearing, which is discussed more below.

As an alternative to this IAC claim, Father asks this Court to reverse the TPR order based on the district court's alleged improper acceptance of DPHHS's counsel's representation that Syth stipulated that DPHHS had submitted permanency plans for review. (Br. at 16.)

However, Father has not established that he, or Syth, had a basis to oppose the permanency plan(s) based on the relevant statutory criteria at Mont. Code Ann. § 41-3-445. Again, it appears Father is interchanging "permanency plan" under the Montana Code with "placement preferences" under ICWA. Whether the court described Father's position on the permanency plans as a "stipulation" or as "unopposed" is not relevant to Father's later argument that A.L.D. may not be in a preferred placement under ICWA.

Father's related alternative claim is the district court abused its discretion when it "held" that Syth was present at the PPH when she in fact was not. (Br. at 16-17.) The record establishes that at the hearing, the court was well aware that Syth was not present. The fact that the subsequent order mistakenly inferred Syth was present is a scrivener's error that did not affect Father's rights in any way.

Father has not established how it was reversible error for the district court to accept the parties' stipulation to the permanency plan. Father has likewise failed to demonstrate that Syth was ineffective or that he suffered any prejudice as a result.

III. Father's claim concerning A.L.D.'s placement may be deemed moot and is not based on a reviewable final order.

In addition to reversing the TPR order based on alleged lack of active efforts and/or IAC, Father requests this Court remand this case with instructions to conduct a placement hearing. However, should this Court affirm the TPR order, even if remanded, Father would no longer be a party since his parental rights would have been severed.

Therefore, should this Court affirm the district court's order terminating Father's parental rights, Father's claim concerning A.L.D.'s placement may be considered moot to the extent that this Court cannot grant any effective relief to Father. "Mootness is a threshold issue which must be considered before addressing the underlying dispute." *Povsha v. City of Billings*, 2007 MT 353, ¶ 19, 340 Mont. 346, 174 P.3d 515 (citation omitted). The question of mootness is whether this Court can grant effective relief, which will depend on the specific factual and procedural circumstances of the case and the relief sought by the appellant. *Progressive Direct Ins. v. Stuivenga*, 2012 MT 75, ¶ 49, 364 Mont. 390, 276 P.3d 867 (citation omitted).

Father asks this Court to overrule this Court's recent decision in *In re C.B.D.*, 2017 MT 108, 387 Mont. 327, 395 P.3d 202, to the extent it

precludes appellate review of his argument about A.L.D.'s placement. (Br. at 30.) Father asserts that since he simultaneously appealed the TPR order and placement issue, that he retains standing to argue ICWA placement preferences were not followed.

However, as explained above, § 1914 states that appeals may only be taken for alleged violations of §§ 1911, 1912, or 1913. Section § 1915 is omitted. The issues of TPR and placement are separate. Unlike the parent in *C.B.D.*, who asserted DPHHS failed to comply with the notice provisions (*i.e.*, § 1912(e)) related to changing the child's placement), here, Father does not assert that DPHHS violated §§ 1911, 1912, or 1913 as related to A.L.D.'s placement. Rather, he argues that DPHHS did not make sufficient efforts to place A.L.D. in compliance with the preferences under § 1915 and/or that the district court's findings whether there was good cause to depart from the placement were clearly erroneous.

Under these circumstances, there is no reason to overturn *C.B.D.* Father offers no argument or legal authority that would allow him to continue to participate in A.L.D.'s case should his parental rights be

terminated. Nor does Father acknowledge that the issue of A.L.D.'s placement remains ongoing.

At the conclusion of the TPR hearing, the district court made specific findings regarding the relief sought by the TPR petition pursuant to Mont. Code Ann. § 41-3-609(1); §§ 1912(d) and (f). The issue of A.L.D.'s placement was not before the court. While the court addressed Adams' testimony concerning the placement preferences, the resulting order concerned only whether TPR should be granted. It was not a final order concerning A.L.D.s' placement.

The Rules of Appellate Procedure allow appeal only from a final judgment or order. Mont. R. App. P. 4(5)(a), 6(3)(a). In the context of Dependent Neglect cases, this Court has defined an appealable order or "final judgment" as "one which constitutes a final determination of the rights of the parties; any judgment, order or decree leaving matters undetermined is interlocutory in nature and not a final judgment for purpose of appeal." *In re D.A.*, 2003 MT 109, ¶ 13, 315 Mont. 340, 68 P.3d 735. *See also* Mont. R. App. P. 4(1)(a). "Although not exhaustive, the following judgments and orders are among those that are not appealable: (a) In cases involving multiple parties or multiple

claims for relief, an order or judgment which adjudicates fewer than all claims as to all parties, and which leaves matter in the litigation undetermined . . . ." Mont. R. App. P. 6(5).

While the district court order made the status of Father's parental rights final, the issue of A.L.D.'s placement is not final. Despite this matter being appealed, pursuant to Mont. Code Ann. § 41-3-113(2), the district court has not been divested of jurisdiction to conduct proceedings on behalf of the child's best interests (*i.e.*, PPH), or other matters brought to the attention of the court by either DPHHS, the child's guardian ad litem, or the Tribe (should it choose to intervene). For instance, Mont. Code Ann. § 41-3-440, provides that DPHHS has the authority to place a child and the district court will resolve disputes concerning a child's placement. Finally, any adoptive proceedings will be required to also apply ICWA and the placement preferences.

Because the TPR order did not resolve all issues related to A.L.D.'s placement, which remains ongoing, the court did not issue a final order as to A.L.D.'s placement. This Court may decline to address Father's claims regarding § 1915(a). Nonetheless, should this Court

conclude the issue of A.L.D.'s placement under ICWA is properly before it, Father failed to establish reversible error on the part of the district court.

IV. The district court did not commit a reversible error in making findings and conclusions concerning A.L.D.'s placement.

Applicable law

Relevant to the situation presented here, ICWA sets forth the following preferences for adoptive placements:

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

§ 1915(a).

This Court has specifically addressed § 1915 in very few cases. *See In re Baby Girl Doe*, 262 Mont. 380, 865 P.2d 1090 (1993); *In re Adoption of Riffle*, 277 Mont. 388, 922 P.2d 510 (1996); *In re C.H.*, 2000 MT 64, 299 Mont. 62, 997 P.2d 776; and *In re M.B.*, 2009 MT 97, 350 Mont. 76, 204 P.3d 1242. In those cases, this Court considered and applied the first ICWA Guidelines issued by the Bureau of Indian

Affairs (BIA). *See* 44 Fed. Reg. 67,584-67,795 (November 26, 1979) (hereinafter, 1979 Guidelines). This Court has referred to the guidelines as persuasive authority in interpreting ICWA. *C.H.*, ¶ 12.

In February 2015, the BIA issued new guidelines. *See* 80 Reg. 10,146-10,159 (February 25, 2015) (hereinafter, 2015 Guidelines). The 2015 Guidelines were effective as of February 25, 2015, and they "supersede[d] and replace[d]" the 1979 Guidelines. (2015 Guidelines at 10,147.)

After the 2015 Guidelines were issued, the BIA engaged in a notice-and-comment process to promulgate ICWA Regulations. In June of 2016, when the BIA issued the Regulations, it explained a revised set of guidelines would be issued in December 2016. (*See* 81 Reg. 38,778-38,876 (June 14, 2016); codified at 25 C.F.R. Part 23) (hereinafter, Regulations).). The Regulations became effective on December 12, 2016. (*Id.* at § 23.143.) When the 2016 Guidelines were issued on December 30, 2016, the BIA instructed that the 2016 Guidelines would replace both the 1979 and 2015 versions. *See* 81 Reg. 96,476-96,477 (December 30, 2016) (hereinafter, 2016 Guidelines).

In support of his claim concerning A.L.D.'s placement, Father cites to the 1979 and 2015 Guidelines and the Regulations. (Br. at 26-27.) Father also cites to the 2016 Guidelines, but only concerning A.L.D's status. as an Indian child, which is not in dispute. (Br. at 2, 12.)

The State respectfully disagrees that the Regulations apply to A.L.D.'s case. The Regulations do not affect proceedings initiated before December 12, 2016. (Regulations at § 23.143.) The TPR petition in this matter was filed in October 2016. Similarly, since the 2016 Guidelines specifically reference the Regulations, they are not applicable here either.

Nor should the Regulations be applied retroactively. In general, the courts disfavor retroactivity. "Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Generally, Congress does not provide administrative agencies authority to create rules that have retroactive effect. *See, e.g.*, *Scamihorn v. General Truck Drivers*, 282 F.3d 1078, 1083 (9th Cir. 2002) (citing *Bowen*, 488 U.S. at 208) ("Regulations cannot be applied retroactively unless Congress has so

authorized the administrative agency and the language of the regulations requires this result.").

A.L.D.'s case was initiated in July 2015. Arguably, then the 2015 Guidelines would have applied at least until December 2016 when the 2016 Guidelines became effective and specifically superseded the prior guidelines. However, as noted, the 2016 Guidelines are specific to the Regulations which are not applicable to the TPR proceeding initiated in October 2016. This creates an unresolved gap concerning what guidelines should apply.

Moreover, there remain questions about applying the 2015 Guidelines in any proceeding given the varied and numerous comments made for and against the 2015 Guidelines during the process of promulgating the Regulations and the ensuing changes that were made and reflected in the Regulations. Regulations (Supplementary Information) at 38,778- 38,867; *In re Alexandria P.*, 1 Cal. App. 5th 331, 349 (Calif. Appl. Crt, 2016.) Thus, in addition to the timing gap of applicability, unanswered legal issues related to the applicability of the 2015 Guidelines remain, including to what extent they should be

considered persuasive given the procedure under which they were issued and the subsequent changes made following the comment period.

Counsel for DPHHS mentioned the fact the Regulations did not apply during open court discussions at the start of the TPR hearing. (Tr. at 3.) Father did not dispute the Regulations did not apply. Nor did Father assert that any of the Guidelines should apply. The district court was not given the opportunity to determine what version, if any, of guidelines applied, or if the Regulations should apply in some informative fashion. Generally, this Court will not review an issue raised for the first time on appeal. *H.T.*, ¶ 14 (citation omitted).

To "preserve a claim or objection for appeal, an appellant must first raise that *specific* claim or objection in the district court." *In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38 (emphasis added). It is well established that this Court will not fault a trial court for failing to rule on an issue it was never given the opportunity to consider. *In re D.H.,* 2001 MT 200, ¶ 41, 306 Mont. 278, 33 P.3d 616. Therefore, this Court may choose to disregard Father's claim concerning placement preferences to the extent he now alleges DPHHS and the district court failed to strictly follow the 2015 Guidelines or Regulations.

The State recognizes that this Court has reviewed claims concerning whether ICWA was followed despite the absence of specific objections below. *See, e.g., H.T.*, ¶ 25; *K.B.*, ¶ 22. However, in those cases, the alleged violations were directly related specific sections of ICWA which were enumerated and deemed appealable under § 1914. *K.B.*, ¶ 19. This Court also applies the principles of waiver to an appeal related to ICWA when the issue did not directly concern a specific ICWA provision. *See In re A.S.*, 2011 MT 69, ¶ 31, 360 Mont. 55, 253 P.3d 799 (appellant mother failed to properly preserve the issue of "timeliness" of a hearing).

Given the unresolved legal issues which the district court was not given the opportunity to consider, the State respectfully requests that when reviewing Father's claim about placement preferences pursuant to § 1915, this Court refrain from applying the 2015 or 2016 Guidelines or Regulations.

B. The district court's findings and conclusions about A.L.D.'s placement did not constitute reversible error.

As stated, making an adoptive placement of an Indian child, "in the absence of good cause," the preferred placement for the child is with "(1) a member of the child's extended family; (2) other members of the

Indian child's tribe; or (3) other Indian families." § 1915(a). Further, "[w]here appropriate, the preference of the Indian child or parent shall be considered . . . ." § 1915(c). When meeting these preferences, the applicable standards "shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." § 1915(d). Finally, ICWA also states that "A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section." § 1915(e).

The State respectfully asserts that unlike the situations presented in *M.B., C.H.,* and *Riffle*, the district court here was not tasked with approving a specific placement for A.L.D. as the petition before the court was a TPR petition, not a petition for adoption or a motion for resolution of placement dispute. Nonetheless, the district court issued findings about A.L.D.'s placement in the TPR order. The court acknowledged the ongoing nature of efforts to identify family members for possible placement and did not "approve" or "endorse" any specific

placement. Under these circumstances, the court did not commit reversible error concerning A.D.L.'s placement and no further action by this Court is necessary.

However, given the nature of the district court's comments absent an order concerning placement, the State offers the following discussion on the issue of A.L.D.'s placement. The district court, apparently mirroring Adams' testimony, found that A.L.D.'s placement was "not in compliance with the requirements of § 1915." (Doc. 60 at 10.) The State respectfully asserts that this comment inadvertently confuses the issue now before this Court.

For A.L.D.'s placement to not be "in compliance" with § 1915, both of the following would have to be true: (1) the placement was not one of the preferred placements *and* (2) DPHHS had not established good cause to depart from those preferences. Accordingly, the court's findings appear to conflict in two ways.

First, after noting the "non-compliance," the court nonetheless found A.L.D. was placed with siblings in a placement approved by the Tribes, which, under the rationale from *M.B.,* may constitute a placement with "extended family," the highest priority placement

preference at § 1915(a). *See M.B.,* ¶¶ 22-24 (Court agreed family that adopted M.B.'s siblings was an "extended family" as contemplated by ICWA based on the Tribe's cultural and social norms). However, despite this finding, the district court made another finding that established there was good cause to depart from the placement preferences.

The court found that despite DPHHS's and the Tribes' "active efforts," an appropriate family member had not yet been located for placement. (Doc. 60.) While not specifically applied here, the 2015 Guidelines and Regulations both provide that the unavailability of one of the three preferred placements may constitute good cause to deviate from the preferences if there is sufficient demonstration of efforts to locate a preferred placement (*e.g.,* "active efforts" under the 2015 Guidelines and "diligent search" under the Regulations). (*See* 2015 Guidelines at 10,158, F.4(c)(4); Regs at § 23.132(5), respectively).

Thus, the court issued findings and conclusions that there was good cause to deviate from § 1915(a). The finding was supported by testimony from Adams and McNamara and CPS Harvey's affidavit. (Doc. 1, Aff.; Tr. at 14, 25, 28-30.) While the finding may have been

inconsistent with its statement that A.L.D.'s placement was "non-compliant," it does not constitute reversible error. Rather, it indicates that a more appropriate conclusion was that while A.L.D. was not placed in one of the three preferred placements, DPHHS had established good cause to place her with a foster family. Should this Court determine that the district court's findings of fact and/or conclusions of law concerning A.D.L.'s placement are imprecise or lacking, the proper remedy is not to reverse the TPR order, but rather to remand with instructions to issue an amended order concerning A.L.D.'s placement. *See H.T.*, *supra*

Finally, the State recognizes that should a *new proceeding be initiated* (*i.e.,* placement hearing or adoptive proceedings) concerning A.L.D.'s adoptive placement following this Court's decision, the Regulations would apply. *See* 25 C.F.R. § 23.143 (Regulations do not apply to proceedings initiated prior to Dec. 12, 2016, but they do apply to "any subsequent proceeding in the same matter"); *In re Elizabeth M.*, 2018 Cal. App. LEXIS 42 n.11 ("child-custody proceeding" includes any action that may culminate in foster care placement, termination of parental rights, a preadoptive placement or an adoptive placement;

each action is considered a separate proceeding; and several proceedings may occur in one case. (*See* § 1903(1); Regulations at § 23.2.)

CONCLUSION

The district court order terminating Father's parental rights to A.L.D. should be affirmed.

The district court's findings and conclusions concerning A.L.D.'s placement should remain undisturbed. In the alternative, this matter may be remanded for either an amended order concerning DPHHS's compliance with ICWA's placement preferences or a newly initiated placement hearing to address the same.

Respectfully submitted this 26th day of February, 2018.

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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 Century Schoolbook 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 9,948 words, excluding certificate of service and certificate of compliance.

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