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STATE OF MONTANA
Case Number: DA 17-0306

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0306

IN THE MATTER OF:

P.T.D.,

A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Twelfth Judicial District Court,
Hill County, The Honorable Daniel A. Boucher, Presiding

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STATEMENT OF THE ISSUES

Whether the district court was required to make findings pursuant to ICWA for a putative father who never had custody of, or any relationship with, the youth in need of care.

If ICWA did apply, whether the district court abused its discretion when it concluded active efforts had been made.

If ICWA did apply, whether, under these unique circumstances, failure to accept QEW testimony at the TPR hearing constituted reversible error.

STATEMENT OF THE CASE

In May 2015, the Department of Public Health and Human Services, Child and Family Services Division (DPHHS) filed its second petition for emergency protective services (EPS), adjudication as a youth in need of care, and temporary legal custody (TLC) for P.T.D. (age 15 months). (Docs. 1, 13.) (*Id*.) P.T.D.'s mother (Mother) was served with the petition in jail and it took several attempts to serve A.M., a putative father named by Mother. (Docs. 24, 25.)

A.M. and his counsel appeared at the initial show cause hearing which was continued to June 22, 2015. (Docs. 20. 23.) This is the only hearing A.M. personally attended during this case. (04/10/17 Hr'g at 39.) P.T.D. was identified as an Indian child pursuant to the Indian Child Welfare Act (ICWA) and a

Qualified Expert Witness (QEW) testified at the show cause hearing. (Docs., 20, 23, 06/22/15 Tr.) P.T.D. was adjudicated as a youth in need of care and at the dispositional hearing, a treatment plan was presented for Mother, but not A.M. because he had no relationship with P.T.D. and paternity had not been established. (06/22/15 Tr.; 07/02/15; Docs. 27, 33.)

Over the next 18 months, A.M.'s whereabouts were unknown, he failed to contact DPHHS, and did not comply with multiple requests for paternity testing. (Docs. 40, 41, 43, 45, 49, 53, 54.) A petition to terminate any rights of putative fathers, including A.M., was filed in January 2017 and after a hearing on April 10, 2017, the court severed any parent-child relations between A.M. and P.T.D. based on abandonment. (04/10/2017 Tr. (Hr'g); Docs. 65, 69, and 70, attached to Appellant's Opening Brief (Br.).)

STATEMENT OF THE FACTS

In early March 2015, when local law enforcement officers responded to a domestic disturbance call, they discovered 13-month old P.T.D. crying and mother was intoxicated and passed out. (Doc. 1.) Mother was taken to jail, P.T.D. was placed with his great maternal aunt, and DPHHS filed a petition for EPS, adjudication as a youth in need of care, and TLC. (Doc. 1.) Attempts to serve A.M. were unsuccessful as he was homeless. (Doc. 12.) Before the show cause hearing,

DPHHS filed a motion to dismiss because P.T.D.'s maternal great aunt obtained custody of P.T.D. through Tribal Court of the Fort Belknap Indian Reservation. (Doc. 9.) The case was dismissed on March 12, 2015. (Doc. 10.)

However, about six weeks later, law enforcement again discovered Mother severely intoxicated while P.T.D. was in her care. (Doc. 13.) On May 19, 2015, P.T.D.'s maternal great aunt gave up custody of the child and, since Mother was again incarcerated, DPHHS intervened to place P.T.D. in a safe home. (*Id*.) DPHHS filed a second petition for EPS, adjudication as a youth in need of care, and TLC. (*Id*.) Mother was served with the petition in jail and it took several attempts to serve A.M. (Docs. 24, 25.)

Mother and A.M., through counsel, stipulated to adjudicating P.T.D. as a youth in need of care. (06/22/15 Tr.; Doc. 27.) Trudy Johnson, a QEW, testified and confirmed that P.T.D. would be at risk of serious emotional damage if placed in the care of either Mother or A.M. (*Id*.)

At the dispositional hearing on July 2, 2015, DPHHS explained a treatment plan had been developed for Mother, but not for A.M. (07/02/15 Tr.; Doc. 33.) Child Protection Specialist (CPS) Hosanna Hutchins explained that prior to DPHHS intervention, A.M. had little contact with P.T.D. so DPHHS planned to set up visits to help P.T.D. become comfortable around A.M. (*Id*.) However, Hutchins was unable to make contact with A.M. (Docs. 34, 35.) Hutchins sent a

certified letter to A.M. asking him to get in contact with her and, despite the receipt showing he received the letter, Hutchins heard nothing from A.M. (Docs. 35, 36.)

An evaluation of P.T.D. showed he was delayed in the areas of communication, adaptive behaviors, and social/emotional skills. (Docs. 34, 35.) P.T.D. was set up to work with Quality Life Concepts on these issues. (*Id*.) Through DPHHS's efforts and referrals, attempts were made to get Mother into Montana Chemical Dependency Center (MCDC) and the Carol Graham Home. (Docs. 34, 35, 36, 40, 41, 43.)

At the January 12, 2016 hearing to extend TLC, A.M. was not present, but his counsel attended. (01/12/16 Tr.; Doc. 39.) Both parents' counsel stipulated to extending TLC and the court noted that A.M. had failed to maintain contact. (*Id*.) Hutchins sent another certified letter to A.M. in March 2016, asking him to contact her. (Doc. 41.) And, just as with the October 2015 letter, despite return service confirming A.M. received the letter, Hutchins never heard from him. (*Id*.)

As of June 2016, A.M.'s whereabouts were unknown. (Doc. 43.) At the July 11, 2016 hearing to extend TLC, A.M. was not present, and his counsel explained that her only contact with A.M. was through Facebook and she did not know if he planned to attend the hearing. (07/11/16 Tr.; Docs. 40, 41.) A.M.'s counsel provided Hutchins with two possible phone numbers for A.M. (Doc. 43.) Hutchins eventually made contact with A.M., and he agreed to take a paternity test.

DNA testing was set up in Glasgow based on A.M.'s statement he could get there. (07/11/16 Tr.)

At the July 11, 2016 hearing, Hutchins testified that DPHHS sought extension of TLC because they had not been able to identify or prove who is P.T.D.'s birth father and Mother needed more time to complete her treatment plan. (07/11/16 Tr.; Doc. 45.) Hutchins explained the ongoing difficulty in contacting Father to get paternity testing accomplished. (*Id*.) A.M. had failed to follow through with the DNA testing Hutchins set up and Hutchins explained the only way to determine if A.M. was the father was through DNA testing. (*Id*.) Both Hutchins and QEW John Califlower testified about DPHHS's compliance and efforts with placing P.T.D. pursuant to ICWA's placement preferences. (*Id*.)

Mother entered MCDC in early September and successfully completed the program. (Docs. 50, 54.) However, she left the sober living facility in Rocky Boy and returned to Harlem to stay with family. (Doc. 54). In October 2016, DPHHS reported that A.M. had failed to attend another scheduled paternity testing. (Docs. 49-50, 55.) A.M. had also expressed to DPHHS that he would either personally attend or call in to the Family Engagement Meeting scheduled for October 11, 2016. (*Id*.) However, A.M. did not call in or attend the meeting. (Hr'g at 6; Doc. 55.)

The court conducted a permanency plan hearing on November 14, 2016. (11/14/16 Tr.; Doc. 53.) A.M. did not appear, but his counsel was present. (*Id*.) Hutchins reiterated the difficulty in connecting with A.M. to schedule and reschedule paternity testing. (*Id*.) Hutchins further explained that although A.M. initially indicated an interest in parenting P.T.D., none of his actions supported that claim, and based on his failure to maintain contact or follow through with DNA testing, DPHHS did not consider A.M. a part of P.T.D.'s permanency plan. (*Id*.)

On January 12, 2017, DPHHS filed a third petition to extend TLC wherein it advised that A.M.'s whereabouts remained unknown and Mother was considering relinquishing her rights. (Doc. 54.) That same day, DPHHS also filed a petition to terminate parental rights (TPR) of A.M. as a putative father and based on abandonment. (Doc. 55.) A hearing on both petitions was eventually set for March 20, 2017. (Docs. 56-59.)

New counsel was appointed to A.M. on February 22, 2017, but his new attorney did not file a notice of appearance until March 20, 2017, when he also filed a motion to continue the TPR hearing. (Docs. 61, 62.) Mother appeared at the hearing and relinquished her parental rights in front of the court. (03/20/17 Tr.; Docs. 65, 69.)

A.M. appeared by telephone and his counsel appeared by vision net for the April 10, 2017 hearing where CPS Dana Kjersem testified. (Hr'g at 4-28.)

Kjersem reiterated that A.M. had not been a part of P.T.D.'s life and had not seen him during the past two years of DPPHS' intervention. (*Id*.) Despite additional efforts to complete DNA testing, including the Great Falls medical services company traveling to a place more convenient for A.M., A.M. failed to follow through with testing and remained a putative father. (*Id*.)

A.M. never made any effort to care for or visit P.T.D. (Hr'g at 4-28.) Nor did he ever demonstrate a sincere interest in parenting P.T.D. (*Id*.) A.M. never contacted Kjersem and she left phone messages for him when his phone was working and sent letters to him. (*Id*.) However, mail was returned to DPHHS as undeliverable and A.M.'s phone was later disconnected and so Kjersem had no direct way to contact him. (*Id*.) Kjersem reached out to tribal social services but had not received any additional information. (*Id*.)

A.M. testified over the phone and claimed he sent a paternal acknowledgement to the State sometime in March 2017, but had not received a reply. (Hr'g at 29-45.) A.M. claimed he was offered only one DNA testing opportunity in Glasgow. (*Id*.) A.M. admitted that Mother did not initially acknowledge him as P.T.D.'s birth father and confirmed he had never contributed financially to P.T.D.'s care. (*Id*.) A.M. agreed he did not have a parent-child relationship with P.T.D and explained he had met P.T.D. only twice: once for an

hour and a half when P.T.D. was a year old, and a second time when he saw him for about a minute. (*Id*.)

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.

SUMMARY OF THE ARGUMENT

As a threshold matter, DPHHS was not required to establish either 25 U.S.C. §§ 1912(d) or (f) because the undisputed record establishes that A.M., a putative father, never had legal or physical custody of P.T.D. and had no relationship whatsoever with P.T.D. As explained by the United States Supreme Court in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), and adopted by this Court, since active efforts are "designed to prevent the breakup of the Indian family," when a putative father never had a relationship that could be "discontinued," § 1912(d) was not applicable. Similarly, QEW testimony concerning "continued custody" of the child with a particular parent is not applicable when the parent never had any physical or legal custody of the child.

The record clearly establishes that A.M. met P.T.D. twice for a total of less than two hours. A.M. did not contribute to P.T.D.'s care financially or emotionally. A.M. is a putative father under Montana's statutes and does not meet the definition of a parent under ICWA. The district court was not required to enter

findings and conclusions related to §§ 1912(d) and (f) and its TPR should be affirmed.

Even if ICWA applied, the district court did not abuse its discretion when it concluded active efforts were made. Despite DPHHS's multiple attempts to obtain a DNA sample, including sending the testing agency to a location approved by A.M., paternity for P.T.D. was not established. Nor did A.M. participate in any visit offered by DPHHS because his contact information was incomplete, outdated, or unavailable throughout most of this case. Even when certified letters were sent, A.M. made no reciprocal effort to connect with DPHHS. A parent's apathy or unwillingness does not negate the active efforts DPHHS tried to initiate. The district court's oral pronouncement about DPHHS's active efforts constituted sufficient findings to support its TPR order. Given the breadth of the record and findings by the court, the court's scrivener error in describing DPHHS's efforts as "reasonable" versus "active," does not constitute reversible error.

Nor was the lack of QEW testimony at the TPR hearing reversible error under these unique facts. A.M. was, and remained, a putative father throughout these proceedings and nothing in the record suggests there was any reduction in the likelihood of P.T.D. being at risk of "serious emotional or physical harm," if placed in A.M.'s custody. A.M.'s undeniable status as a putative father, who had no relationship whatsoever with P.T.D., renders the lack of QEW testimony subject

to harmless error analysis since reversing the TPR order would have no significant impact on the result and there was no showing of substantial injustice. Remanding this matter would not alter the outcome of the court's ruling and instead contravene this Court's ability to protect the best interests of a child despite a procedural mistake.

ARGUMENT

I. Since A.M. never had custody of, or any relationship with, P.T.D., QEW testimony and findings that "active efforts" were made under ICWA, were not required.

Throughout the case, P.T.D. was considered an Indian child and the necessary criteria at §§ 1912(d), (e), and (f) and heightened burdens of proof from ICWA were followed. A.M.'s rights were terminated pursuant to Mont. Code Ann. § 41-3-609(1)(b), which states a court may terminate parental rights when the child has been abandoned by the parent.

A.M. does not challenge the court's conclusion that substantial, credible evidence established he abandoned P.T.D. The record supports the conclusion that A.M. made no effort whatsoever to see P.T.D. despite knowing DPHHS would facilitate visits. A.M. failed to maintain any contact with Hutchins and did not even try to establish contact with Kjersem. Finally, A.M. failed to complete at least two paternity testing opportunities and for several months his whereabouts

were unknown. The evidence clearly made it "reasonable to believe" A.M. had no intention of caring for P.T.D. in the future. *See* Mont. Code Ann. § 41-3-102(1)(a)(i); *In re S.S.*, 2002 MT 270, ¶ 9, 312 Mont. 343, 59 P.3d 393; *In re A.E.*, 255 Mont. 56, 60, 840 P.2d 572, 575 (1992) (no express time frame applies to the definition of abandonment under Mont. Code Ann. § 41-3-102(1)(a)(i)).

Just as the record clearly established A.M. abandoned P.T.D., the record established beyond a reasonable doubt that A.M. never had any relationship with P.T.D., let alone physical or legal custody of P.T.D. The longest period of time A.M. saw P.T.D. was an hour and a half and he never contributed financially to his child's care. It was not until after the TPR petition was filed that A.M. allegedly tried to get his name added to the birth certificate. A.M.'s lack of intent to ever assume custody of P.T.D was clear throughout these proceedings.

The substantive claims A.M. raises on appeal relate to ICWA and allege that the court's order should be reversed because: (1) a QEW did not testify on April 10, 2017; and (2) there was insufficient evidence to establish beyond a reasonable doubt that DPHHS made active efforts. (Br.) However, as a threshold matter, DPHHS was not required to establish either §§ 1912(d) or (f) during A.M.'s TPR proceedings because A.M. never had custody of P.T.D. or any type of relationship with P.T.D.

If a parent never had custody of an Indian child, the criteria at §§ 1912(d), (e), and (f), need not be established. *Baby Girl*, 570 U.S. at 646-47. This Court adopted the rationale from *Baby Girl* in *In re J.S.*, 2014 MT 79, ¶ 31, 374 Mont. 329, 321 P.3d 103, and *In re S.B.C.*, 2014 MT 345, ¶ 36, 377 Mont. 400, 340 P.3d 534. In *J.S.*, although the State argued that active efforts had been made for the putative father and that QEW testimony was presented, this Court concluded that the holding in *Baby Girl* was dispositive and, thus, did not address whether the evidence supported ICWA criteria. *J.S., supra.*

First, this Court applied the rationale from *Baby Girl* and the plain language of § 1912(d) which states that active efforts are "designed to prevent the *breakup of the Indian family*." *J.S.*, ¶ 28 (emphasis added). After noting that *Baby Girl* "defined 'breakup' to mean 'the discontinuance of a relationship' or 'ending of an effective entity,'" this Court stated that

> [u]nder this definition, when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no 'relationship' that would be 'discontinu[ed]'—and no 'effective entity' that would be 'end[ed]'—by the termination of the Indian rights. In such circumstances, the 'breakup of the Indian family' has long since occurred, and § 1912(d) is inapplicable.

J.S., ¶ 29 (quoting *Baby Girl*, 570 U.S. at 651-52) (internal quotations omitted). Accordingly, since there was a non-existent relationship between J.S. and the

father as well as limited contact between the two, § 1912(d) did not apply to the father's proceeding. *J.S.*, ¶¶ 30-31.

Similarly, regarding QEW testimony, this Court explained that ICWA "conditions the involuntary termination of parental rights on a showing regarding the merits of '*continued* custody of the child by the parent.'" *J.S.*, ¶ 36 (citing *Baby Girl*, 570 U.S. at 646-47 (emphasis in original). Applying the facts to § 1912(e), this Court agreed that since the "adjective 'continued' plainly refers to a pre-existing state . . . [t]he phrase 'continued custody' [] refers to custody that a parent already has (or at least had at some point in the past)." *J.S.*, ¶ 36 (citing *Baby Girl*, 537 U.S. at 646-47). The same rationale was applied in *S.B.C.* when this Court considered application of § 1912(f). *S.B.C*, ¶ 37 (QEW testimony not applicable in TPR proceeding because the father never had any "custody" that could be continued within the meaning of § 1912(f)).

The father in *J.S.*, like the father in *Baby Girl*, "never obtained legal or physical custody of [the child] and did not initiate a relationship with [the child] until many years after his birth." *J.S.*, ¶¶ 30, 37. In *S.B.C.*, despite being given the opportunity to exercise his rights, the father "never had S.B.C. in his care." *S.B.C.*, ¶ 37.

The crux of these holdings applies equally here, because, just like A.M., in those three cases, the father never had custody of the child. In addition, in *J.S.* and *S.B.C.*, paternity testing was necessary and the putative father failed to even try and visit his child. *J.S.*, ¶¶ 5-10; *S.B.C.*, ¶¶ 35-37. The facts presented here are even more compelling because A.M. made even less effort to become involved in P.T.D.'s life than the fathers in either *J.S.* or *S.B.C.*

The record supports that A.M. never had a relationship with P.T.D. and pursuant to *J.S.* and *Baby Girl*, § 1912(d) was inapplicable. Nor did A.M. ever have custody of P.T.D. Thus, under *J.S.*, *S.B.C.*, and *Baby Girl*, § 1912(f) was also inapplicable. Neither of those provisions, therefore, support A.M.'s argument that this court should reverse the district court's order.

Finally, it is notable that under ICWA, the definition of a parent specifically excludes "the unwed father where paternity has not been acknowledged or established." §1903(9). This is similar to Montana's putative father provisions, which are an alternative theory for terminating an alleged, or putative, father's rights. *See* Mont. Code Ann. §§ 41-3-609(1)(e); -423(3)(a) through (c).

A.M. mistakenly asserts that there was "no question in the Department's mind that he is the biological father." (Br. at 20.) Rather, the record clearly shows that throughout this case, DPHHS tried to establish who P.T.D.'s father was

through paternity testing. DPHHS made it clear that unless, and until, it was established that A.M. was P.T.D.'s father, he was not considered as a placement option and a treatment plan would not be developed for him.

A.M. was properly considered a putative father throughout these proceedings. A "putative father" is defined as:

> an individual who may be a child's birth father but who:
>
> (i) is not married to the child's mother on or before the date that the child is born; or
>
> (ii) has not established paternity of the child prior to the filing of a petition for termination of parental rights to the child for purposes of adoption.

Mont. Code Ann. § 42-2-201.

A.M. remains a putative father to P.T.D. It is undisputed that he met the criteria for termination of rights under the theory of abandonment. Similarly, under those same, undisputed facts, the court could have also terminated his rights under Mont. Code Ann. §§ 41-3-609(1)(e) and 41-3-423(3)(b) because A.M. certainly did not "establish a substantial relationship" with P.T.D. using any of the three subfactors (i), (ii), or (iii).

Notably, in his prayer for relief, A.M. asks this Court to reverse the TPR order and remand to the district court to instruct DPHHS to "make active efforts to assist [A.M.] to accomplish paternity testing or place his name on the Child's birth certificate." (Br. at 24.) Even if either of those events occur (*e.g.*, paternity testing

shows A.M. is in fact P.T.D.'s father, or A.M. is allowed to put his name on P.T.D.'s birth certificate), it does not change the fact that A.M. abandoned P.T.D. (a fact A.M. does not challenge on appeal).

Not only was DPHHS not required to establish either §§ 1912(d) or (f), given that A.M. is a putative father under Montana's Code and not a "parent" under ICWA, the relief requested by A.M. would not change the ultimate outcome. However, if this Court concludes that the court was required to follow these ICWA provisions for A.M., the TPR order need not be reversed.

II. The district court did not abuse its discretion when it concluded active efforts had been made. [1]

While § 1912(d) does not set forth detailed criteria for determining whether "active efforts" have been made, this Court has explained that "[c]ommon sense construction of the meaning of 'active efforts' requires only 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.'" *In re G.S.*, 2002 MT 245, ¶ 36, 312 Mont. 108, 59 P.3d 1063 (citation omitted).

[1] In making this argument, DPHHS does not concede that § 1912(d) applied to A.M.'s TPR proceeding.

Under this standard, the State must do more than simply "give[] the parent a treatment plan and wait[] for him to complete it"—rather, § 1912(d) "implies heightened responsibility." *A.N.*, ¶ 23. 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.'" *In re M.S.*, 2014 MT 265A, ¶ 25, 376 Mont. 394, 336 P.3d 930; *G.S.*, ¶ 36.

In determining whether DPHHS made active efforts, a district court may consider "a parent's demonstrated apathy and indifference to participating in treatment," as well as "actions taken by the State to provide services for the other parent and the child." *A.N.*, ¶ 23 (DPHHS's efforts were as active as possible given parent's apathy and indifference). "The 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." *In re I.B.*, 2011 MT 82, ¶ 41, 360 Mont. 132, 255 P.3d 56 (citation omitted) (while the State cannot simply wait for a parent to complete his treatment plan, "a court may consider the parent's failure to participate.").

DPHHS offered visits between A.M. and P.T.D. However, they were never implemented because, for the duration of DPHHS's intervention, there was no way to establish or maintain contact with A.M. as his whereabouts were often unknown and there was no consistent way to get in touch with him. DPHHS offered multiple paternity testing opportunities, but A.M. failed to participate or offer explanations at the time why he did not attend.

DPHHS tried to maintain contact with A.M., but his phone(s) were not in working order. Certified letters were sent, but unanswered. A.M. made no attempt to contact DPHHS for at least the last year of the case. A.M.'s inability, or apathy, to engage in the services offered by DPHHS does not diminish the fact DPHHS made active efforts in this case. *In re D.S.B.*, 2013 MT 112, ¶ 15, 370 Mont. 37, 300 P.3d 702 (DPHHS will not be faulted if its efforts are curtailed by a parent's own behavior).

In addition, DPHHS also provided services for Mother and P.T.D. by: providing case management and support (including setting up and arranging services); conducting family group meetings; providing chemical dependency evaluations and treatments for Mother; offering mental health evaluations and treatment for Mother; and providing rehabilitative services for P.T.D. such as evaluation and services at Quality Life Concepts. This Court has recognized that since "active efforts" are designed to prevent the breakup of an Indian Family, it

was appropriate to consider all the efforts provided to other parent and children when evaluating the total "active efforts" and whether they were unsuccessful. *D.S.B.*, ¶ 17.

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." *D.S.B.*, ¶ 17.

At the conclusion of the TPR hearing, the court found that

> the State has met its burden, proof beyond a reasonable doubt, that the parental rights of [A.M.] should be terminated. The State has engaged in efforts and they were failed by [A.M.] . . . . Additionally, [A.M.] made no effort in the last two years to provide the State with updated information or explanations why he was unavailable.

(Hr'g at 46.)

In its written order, the court found, among other things, that: "The Department had made reasonable efforts to attempt reunification, but by failing to provide necessary information, the putative father has frustrated the Department's efforts to establish paternity and form a treatment plan." (Doc. 70.)[2]

A.M. argues that this Court should reverse the TPR order because the transcript, order, and minute entry conflict. Despite the fact the written order

[2] The court's *nun pro tunc* order issued on September 5, 2017, did not alter this finding. (Doc. 79.)

mistakenly uses the word "reasonable" rather than "active" when describing DPHHS's efforts, 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"); *In re J.E.L., III*, 2018 MT 50, ¶ 20, __ Mont. ___, ___ P.3d ____ (even if a court's "written findings [were] clearly erroneous" a TPR may still be affirmed when the court's oral findings are supported by evidence in the record).

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). Here, the court's oral findings and comments as well as its order terminating A.M.'s rights implicitly establish the court agreed active efforts had been made and there are insufficient grounds for reversal.

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.*, ¶ 43. 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.

There is no need for an additional hearing because the record supports a determination that "active efforts" were made in this case. Pursuant to *H.T.*, this Court may simply remand this matter with instructions to the district court to issue a new written order including findings regarding DPHHS's "active efforts."

III. Under the unique circumstances of this case, including A.M.'s status as a putative father and the fact he has no relationship whatsoever with P.T.D., lack of QEW testimony at the TPR hearing should not nullify the district court's order.[3]

This Court has held that, a district court does not have to conform its decision to the QEW's testimony. *In re A.N.*, 2005 MT 19, ¶ 32, 325 Mont. 379, 106 P.3d 556 (citation omitted). In *A.N.*, the Court clarified that § 1912 does not require a specific form of evidence or limit the evidence to only the QEW testimony when determining if continued custody of the children with the parent

[3] In making this argument, DPHHS does not concede that § 1912(f) applied to A.M.'s TPR proceeding.

would likely result in serious emotional or physical damage to the children. *A.N.*, ¶¶ 27-28.

Significantly, this Court referenced *the record* as a whole in affirming the district court's conclusion and holding a reasonable person could have found beyond a reasonable doubt that the continued custody with the parent would likely result in serious emotional damage to the child. *A.N.*, ¶ 32; *D.S.B.*, ¶ 18 ("Though expert testimony is required on the issue, a court's finding that a child will likely suffer serious emotional or physical harm if the parent continues custody does not have to be based on that testimony alone.").

A.M. does not contest that there was sufficient evidence to establish, beyond a reasonable doubt, that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *See* § 1912(f). Rather, A.M. argues this Court should reverse the TPR order because a QEW did not testify on April 10, 2017. (Br. at 17-18.)

The record shows that a QEW testified at the show cause and extension of temporary legal custody hearings. A.M.'s status as putative father never changed. A.M. never exhibited any capacity or interest in parenting P.T.D. Mother relinquished her parental rights after demonstrating she was unable to successfully address the reasons P.T.D. came into care. P.T.D. did not know A.M. A.M. never had custody

of P.T.D. and had no relationship with P.T.D., having spent only an hour and half of time with P.T.D. during his lifetime.

At the conclusion of the TPR hearing, the court correctly concluded the there existed, beyond a reasonable doubt, that "return of [P.T.D.] at this time would present reasonable risk of harm" and that there was QEW testimony supporting termination of A.M.'s rights. (Hr'g at 46.) However, as A.M. correctly points out, a QEW did not testify at the April 10, 2017 hearing.

The State acknowledges that this Court has reversed other TPR orders when insufficient QEW testimony was presented. *See, e.g., K.B.,* ¶¶ 26-30 (reversed and remanded on several ICWA-related issues, including insufficient QEW testimony); *In re K.H.*, 1999 MT 128, 294 Mont. 466, 981 P.2d 1190 (TPR reversed because QEW not appropriately qualified). However, those cases involved parents who were offered treatment plans and rehabilitative services which theoretically may have reduced potential for "serious emotional or physical damage to the child." Those cases do not concern, as this one does, a putative father who had no relationship whatsoever with the child. Nor were their parental rights terminated under a theory of abandonment.

It is undisputable that, under the facts here, "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. Remanding this matter for the district court to hear QEW testimony would not change the outcome of the court's ruling and would vault form over substance at the expense of P.T.D.

Given the unique circumstances of this case, this Court may conclude that failure to have a QEW at the April 10, 2017 hearing constituted harmless error. *See, e.g.*, *M.S.*, ¶¶ 22- 25 (applying harmless error analysis to alleged inadequate notice of TPR to the tribe); *A.N.*, ¶¶ 38-39; *J.C. supra*.

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). In *M.S.*, this Court acknowledged that when there is no reasonable probability that a parent would have obtained a more favorable result had the child's tribe received notice according to ICWA standards, reversal was not required.

This Court has consistently stated in youth in need of care cases that "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." *In re L.M.A.T.*, 2002 MT 163, ¶ 21, 310 Mont. 422, 51 P.3d 504 (citation omitted). When considering alleged procedural errors in abuse and neglect proceedings, the inquiry includes whether reversing the lower court decision "will truly produce any rational possibility of a different result."

In re J.C., 2008 MT 127, ¶ 44, 343 Mont. 30, 183 P.3d 22 (citation omitted). Under the uncontroverted and unique facts of this case, reversing the district court's order would not "produce any rational possibility of a different result."

CONCLUSION

The district court's order terminating A.M.'s rights should be affirmed.

Respectfully submitted this 6th day of April, 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 Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,874 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

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