DA 19-0154

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 256

IN THE MATTER OF:

K.L.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. BDN-17-007
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Gregory D. Birdsong, Birdsong Law Office, PC, Santa Fe, New Mexico

For Appellee:

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

Joshua A. Racki, Cascade County Attorney, Great Falls, Montana

Submitted on Briefs: September 4, 2019

Decided: October 29, 2019

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 A.P. (Father) appeals from the Order entered February 15, 2019, by the Eighth Judicial District Court, Cascade County, terminating his parental rights to K.L. (Child). Father raises the following issue on appeal:

> *Whether the Department of Public Health and Human Services, Child and Family Services Division (the Department) engaged in active efforts to provide Father with remedial services and rehabilitative programs to prevent the breakup of Child's family as required by 25 U.S.C. § 1912(d).*

¶2 We reverse and remand for further proceedings consistent with this Opinion.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Father and C.L. (Mother) are the birthparents of Child. Mother is an enrolled member of the Little Shell Tribe of Chippewa Indians and Child is eligible for enrollment in that tribe. Although Father is not Native American, there is no dispute Child is an Indian child and that the Indian Child Welfare Act (ICWA) applies to the proceedings in this case. *See* Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* 13 (Dec. 2016), https://perma.cc/2JZM-YAUZ (2016 Guidelines) ("[A] non-Indian parent may avail himself or herself of protections provided to parents by ICWA if her child is an 'Indian child.'").

¶4 The Department removed Child at birth due to Mother's drug use. Mother and Child both tested positive for methamphetamine. At the time of Child's birth, the Department had pending petitions filed with the District Court to terminate Mother's parental rights to three of her other children and the court already had awarded custody to the birthfather of a fourth child. Mother told Child Protection Specialist Grant Van Vranken (CPS) that the

birthfather of Child was significantly older than her, he had a violent history, and she was afraid he would kill her and the baby. Mother gave CPS the incorrect name for Father and the Department was unable to immediately locate him. Based on Mother's report to CPS, the Department considered Father an offending parent at the time of Child's removal. The Department filed a Petition for Emergency Protective Services (EPS), Adjudication of Child as Youth In Need of Care (YINC), and Temporary Legal Custody (TLC) on January 4, 2017. The Department placed Child with a maternal great aunt in Box Elder, about ninety miles from Great Falls where Mother and Father live.

¶5 The District Court granted EPS on January 9, 2017, and set a show cause hearing for February 9. At the time of the February 9 hearing, the Department had not located or identified Father. The court continued the emergency protective relief previously granted and set an adjudicatory hearing for March 23, 2017. The Department filed a paternity test establishing Father as the birthfather of Child on February 28, 2017.

¶6 Father was present at the March 23, 2017 adjudication hearing and stipulated to adjudication of Child as a YINC and stipulated to the proposed treatment plan.[1] At this time, Father was participating in the Veterans' Treatment Court (VTC). As the Department did not want to duplicate services, the Department agreed that tasks Father successfully completed in VTC would satisfy tasks delineated in his treatment plan. The treatment plan

[1] Father stipulated to the proposed treatment plan under the condition that a previous anger management class be accepted for fulfillment of a treatment plan requirement if it was completed in an agreed-upon timeframe. The District Court in adopting the plan explained that anger management "would become part of his mental health programming if recommended." The plan attached to the April 10 order did not include a separate mental health component.

covered five areas. The plan required Father (1) to complete a chemical dependency evaluation, follow all recommendations, and submit to random drug testing; (2) to complete parenting classes and attend all visitation with Child; (3) to provide safe and stable housing; (4) to sign all information releases and maintain contact with the Department; and (5) to complete an anger management evaluation. The plan gave Father six months to complete it.

¶7 Father continued to participate in VTC. Throughout his participation and beyond his successful graduation from VTC on August 7, 2018, CPS repeatedly reported Father was doing well and did not indicate dissatisfaction with Father's compliance with his treatment plan or level of engagement with the Department.

¶8 CPS reported through December 2017 that Father was making progress and fulfilling all expectations of the Department.[2] At the December 2017 status hearing, Counsel for the Department reported Father was "doing well, maintaining his visits, working with the Department." At that hearing, the District Court heard Father was residing in Grace Home in Great Falls and would graduate from VTC in approximately six more months. It was further reported, due to the policies of Grace Home, Child could not reside with Father in that facility. While Father participated in VTC, Child remained with the placement in Box Elder ninety miles away. Father, however, was able to regularly attend and participate in visits as the Child's placement brought Child from Box Elder to

[2] When the Department filed to terminate Mother's parental rights to Child in September 2017, the Department stated its "intent is to continue to work to reunite the minor child with the birth father." Mother's parental rights were ultimately terminated June 2018.

Great Falls on a monthly basis. CPS did not indicate the discussed time frame for Father obtaining his own residence to be inappropriate or that Father was not completing his treatment plan and engaging with the Department as expected, but rather reported to the District Court he was "pleased with dad's progress."

¶9 In the permanency plan filed with the court on February 2, 2018, the Department wrote "the permanency plan for the child is reunification with the birth father once he has completed Veterans Court." Approximately one month later, the Department abruptly changed course. On March 22, 2018, CPS and his supervisor met with Father to discuss reunification and gave him a letter, advising Father that he needed to step-up his parenting by April 19 or the Department would file for termination. The Department indicated it expected that within the next month Father would take initiative and be responsible for providing his own transportation to visit Child,[3] making daycare arrangements, establishing care with a pediatrician, and securing safe and stable housing. This letter basically advised Father it was time to sink or swim as a parent. Here, over a year into the case, was the first time the Department expressed that Father was not meeting the Department's expectations in terms of compliance with his treatment plan and engagement with the Department. The Department filed a supplemental affidavit with the District Court on March 26, 2018, outlining the tasks in the letter it had given Father and the April 19

[3] The Department informed Father that the placement would no longer transport Child to Great Falls for visitation and Father would need to schedule and arrange transportation to visit Child on his own. At this time, the Department was aware that Father did not have a driver's license or own a vehicle and that the bus from Box Elder to Great Falls ran only once a week and conflicted with Father's work schedule.

deadline. CPS later averred he told Father at the March 22 meeting that guardianship with the kinship placement was an option, but Father "refused." In response, CPS "told [Father] in no uncertain terms that Termination of Parental Rights was the only recourse if he did not comply with, and successfully complete his treatment plan."

¶10 Father was not able to complete the tasks the Department laid out in the letter within a month but did start to work on them and continued his participation in VTC. In May 2018 Father moved out of Grace Home and secured an appropriate residence before his Section 8 housing voucher was approved in November 2018. He cleared his record of delinquent child support and court fines in order to be eligible to have his license reinstated. He took the driver's license test.[4] Despite not having a driver's license or vehicle, from September to November, Father arranged rides with a friend to see Child in Box Elder.[5]

¶11 The permanency plan filed on July 11, 2018, advocated a guardianship with the current placement, leaving Father's parental rights intact. The Department explained in the plan that Father had made progress on his treatment plan, but "the progress has been painfully slow." Despite its contrary reports to the court and Father, the Department asserted "[i]t was only when the prospect of termination of his parental rights was proposed

[4] Father failed the test on the first attempt but testified at the November hearing that he was studying to take the test again.

[5] Father did not have any visitation with Child from March to September 2018 as the Department did not offer or provide transportation to facilitate visitation from March 22, 2018, until after the first termination hearing in November 2018. After the November 2018 hearing, the Department began transporting Child to Great Falls for visitation at the Department in Great Falls.

that any measurable progress was made." At the permanency plan hearing, however, counsel for the Department stated:

> the proposed permanency plan for this youth is to continue to pursue possible reunification with the birthfather. [Father's counsel] was able to speak with me briefly about some progress that father has recently made as far as achieving some transportation independence. He got – is working on his driver's license, may have already gotten that, is going to buy a car. [Father's counsel] is working with him to establish some additional financial stability. He is going to prepare a timeline for the department so they can get that aggressive visitation schedule established and hopefully make some headway on possible reunification.

When asked if he had anything to add, CPS replied, "No." The Court approved the proposed permanency plan "to continue to offer reunification services to Birth Father, while maintaining Youth in his current placement."

¶12 Less than two months later, on September 7, 2018, the Department filed to terminate Father's parental rights for failure to complete his court-ordered treatment plan. In the petition, the Department wrote:

> Birth Father addressed chemical dependency concerns through the Veteran's Treatment Court, but has no [sic] not completed a parenting class,[6] and stopped attending visits after March 22, 2018.[7] Birth Father has advised that he addressed his mental health and anger management through Veteran's Treatment Court but has not signed releases to allow the Department to verify his claim. Birth Father has safe and stable housing but has not signed releases for the Department and has not maintained regular and consistent contact with the Department. Birth Father has not completed his treatment plan and has not addressed the concerns that led to Department involvement.

[6]The record does not show that the Department referred Father to parenting classes until after filing for termination. After getting a referral about a month before the initial November termination hearing, Father started the classes and completed two by the November hearing.

[7]The Department stopped scheduling visitation after March 22, 2018.

In the accompanying affidavit, CPS listed the following efforts he considered to be active efforts taken by the Department:

> (a) Investigation into the current report;
> (b) Review of prior reports/investigation;
> (c) Interviews with collateral contacts;
> (d) Communication with Benefis Labor and Delivery / NICU;
> (e) Ongoing Collaboration with placement, [M.D.];
> (f) Conducted diligent search to locate extended family;
> (g) Ongoing communication with Allen Lanning, counsel for birth father;
> (h) Communication with Probation and Parole.

Prior to filing the termination petition, there is nothing in the record evidencing the Department had even referred Father to any ancillary services required by the treatment plan—parenting classes, mental health assessment or anger management classes—or assisted father in addressing the transportation, daycare, or housing deficiencies asserted by the Department in its March letter.

¶13 The court held a hearing on October 18, 2018, regarding the termination petition. Because Father had not yet been served with the petition, the hearing on termination was continued to November 15. At the October hearing, the court ordered Father to maintain twice weekly contact with the Department, to submit to a urinalysis test immediately, and to obtain a drug patch. CPS filed a supplementary affidavit with the court on October 25, 2018, reporting that the urinalysis came back positive for THC, methamphetamine, and amphetamine. Father told CPS he had relapsed only one time on methamphetamine. CPS explained in the affidavit that he advised Father he should reach out to his chemical dependency provider to discuss relapse prevention strategies, but Father told CPS he was done with treatment and was attending AA. CPS averred that after graduating from VTC,

Father had "dropped off the face of the earth" and only when he realized he could lose his parental rights did he make any effort to contact the Department or visit his son.

¶14 The District Court held an initial termination hearing regarding Father' parental rights on November 15, 2018. At that hearing, for the first time, CPS alleged that Father's efforts in VTC were deficient—reporting Father's parole officer previously told him Father was "lazy but progressing." Contrary to representations at prior hearings, CPS asserted initial communication with Father was almost nonexistent and he was unable to explain his active efforts because Father was not really in the picture, he had not had any regular contact with Father until the court had ordered Father at the prior hearing in October 2018 to stay in contact, and it was not until the handwriting was on the wall that Father had done anything.

¶15 When questioned as to his now divergent characterization of Father's success and engagement, CPS admitted he did not contact the VTC judge or coordinator during Father's participation in VTC to find out how he was progressing, what services he was participating in, what his schedule was, or how the Department could coordinate with VTC to meet the requirements of Father's treatment plan, as well as VTC requirements. CPS admitted he did not attend any of Father's weekly court appearances with VTC but knew when they were occurring. CPS further admitted his only contact with VTC was through Father's probation officer, with whom CPS spoke "half a dozen" times. CPS asserted he was unable to get information about the services Father was receiving through VTC from the parole officer because Father had not signed a release, but there is no evidence CPS made any diligent effort to obtain a release from Father after purportedly not getting information from

Father's probation officer.[8] The Department did not follow up on what services Father received from VTC or refer Father to parenting classes, mental health services, anger management, or any other services referenced in his treatment plan prior to filing the petition for termination. CPS also admitted he had no idea what services Father received in VTC and had not followed Father's progress with VTC.

¶16 Despite CPS's participation at the prior hearing where Father's residence at Grace Home was discussed, CPS testified he did not know when Father was residing in Grace Home, only that it took Father eighteen months to obtain his own residence. CPS also testified Father had no bond with K.L. but then had to admit this was not based on personal observation as he had not observed most of Father's contact with Child and had not observed any visits in the month before the hearing. Near the outset of the case, CPS relied upon Father and the placement to arrange visits and the placement to bring the Child to Great Falls. CPS often did not know beforehand when visits would occur, but the placement would notify him afterward. CPS did nothing to assist Father with visitation after giving him the sink or swim letter in March 2018 and asserted Father did not advise CPS he was unable to complete the tasks in the March letter or request additional time or assistance to do so. CPS advised that although guardianship had been offered, once the Department filed for termination that option was taken off the table.

[8] It is also interesting that despite purportedly not being able to obtain information from Father's probation officer, CPS asserted Father to have been deficient in performance with VTC based on information provided by his probation officer.

¶17 At the termination hearing on November 15, 2018, the ICWA expert Anna Fisher testified the Department made active efforts, because "with Native American people I know that . . . they're a bit slower at getting things done. They do it at their own pace when they're good and ready to do it. [Father is] not Native American. He should be able to whip through whatever was given to him by the [D]epartment." Thereafter, Fisher did not delineate any specific active efforts. Fisher also testified Father did not have a bond with Child—but on cross-examination had to admit she had never observed Father with Child and that her testimony was based on information related to her by the placement. On cross-examination, she also admitted contrary to her earlier testimony the Department had made no active efforts since March 2018 and CPS had not done much when Father was in VTC.

¶18 At the termination hearing in November 2018, Father testified that immediately prior to Child's birth he was homeless and had a history of drug use. He was inducted into the VTC on February 1, 2017, and participated with the requirements of that program, including inpatient treatment in South Dakota in May and June 2017.[9] He moved into the Grace Home in Great Falls. He successfully graduated from VTC on August 7, 2018. While in VTC, he completed in- and outpatient treatment; attended three self-help meetings per week; participated with ongoing, random UA drug testing; participated in a PTSD class; and attended weekly court appearances. When he moved into Grace Home, he got on the Section 8 housing waiting list and was advised it would take approximately eighteen

[9] He could not recall if he let CPS know he went to inpatient treatment in South Dakota or not.

months to advance to the front of the list. In March when he met with CPS and was provided the sink or swim letter, he was still residing at Grace Home, had no car or driver's license, but was employed. He owed back child support and fines which had resulted in his driver's license being suspended. Father testified he related to CPS, he would not be able to get the tasks outlined in the letter accomplished within a month. However, after receiving the letter he set about paying his back child support and fines so he would be eligible for his license to be reinstated. He attempted the driver's license written test while residing at Grace Home, did not pass it on the first attempt but was studying to re-take the exam. He investigated transportation to Box Elder but the once per week shuttle was not an option if he were to maintain his employment and VTC participation. In May 2018 he secured an apartment and in November finally secured his Section 8 housing which now permitted him to save money for a vehicle. He ultimately arranged for a friend to now take him to Box Elder for visits with Child unless the placement cancelled which he asserted happened a lot.

¶19 Father testified he had just recently been referred to parenting classes and had completed two of the classes so far. He testified he had relapsed post-VTC graduation and he planned to attend AA to address his relapse but had not yet done so.

¶20 Upon close of evidence, the State asserted the Department made active efforts and any failure to provide active efforts was the result of Father's apathy or indifference, resulting in his failure to engage consistently with the Department. Contrarily, Father argued the Department had not made active efforts as required under ICWA. The District Court agreed with Father's counsel that the ICWA expert admitted the Department did not

engage in active efforts after March 2018. The court did not accept that Father was apathetic or indifferent, but rather noted Father's lack of engagement appeared to be more of an inertia and questioned whether Father had a mental health condition, which possibly interfered with his ability to engage with the Department and complete treatment plan tasks. The court then ordered the termination hearing held in abeyance for Father to obtain a mental health evaluation and directed the parties to discuss guardianship as an alternative to termination.

¶21 On January 31, 2019, the District Court resumed Father's termination hearing. CPS testified about developments in the case between the two hearings. He explained that Father completed two mental health evaluations in December 2018. After the evaluations, Father began weekly mental health counseling for major depressive disorder, recurring to mild. CPS testified the provider did not indicate Father to have any mental health condition that would prevent him from engaging with the Department. CPS also testified that Father continued to have setbacks with his chemical dependency after the November hearing with positive drug patch results between November and December 2018. In January 2019, the Department believed Father tampered with his drug patch so it could not be tested, and Father refused a requested hair sample test on January 10. By the time Father agreed to give the hair sample, the Department refused to conduct the test, expressing it was too late to get the results in time for the January 31 hearing. Documents submitted for the court's consideration indicate a recommendation for Father to participate in outpatient treatment, but CPS testified it was his understanding Father's chemical dependency provider recommended Father go to inpatient treatment and Father refused. No direct evidence from

Father's chemical dependency provider regarding a recommendation for inpatient treatment was provided. The Department did schedule visitation after the November hearing to take place at the Department in Great Falls and arranged transportation for Child to Great Falls. CPS observed visitations between Child and Father and testified that Child was wary of Father during visitations.

¶22 Father testified he was now attending group and one-on-one counseling. He took issue with the accuracy of his drug patch results but provided no competent evidence of their inaccuracy. He testified that although he had relapsed post-VTC graduation, "I'm a different person now."

¶23 After having opportunity to review additional documentation regarding Father's mental health and drug testing, as well as hearing the additional testimony, the District Court concluded the Department had made active efforts as required by ICWA,[10] Father was still not able to safely parent at two years into the case, and it was in Child's best interest to terminate Father's parental rights to assure Child's stability, security, and permanence. Father appeals.

STANDARDS OF REVIEW

¶24 We review a district court decision to terminate parental rights for an abuse of discretion, considering the applicable standards of Title 41, chapter 3, MCA, and the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. *In re D.E.*, 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586. A court abuses its discretion if it terminates parental rights

[10] The District Court did not delineate either orally at hearing or in its termination order what it considered the Department's active efforts to include.

based on clearly erroneous findings of fact, erroneous conclusions of law, or otherwise acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *In re D.E.*, ¶ 21. Findings of fact are clearly erroneous if not supported by substantial evidence, the court misapprehended the effect of the evidence, or this Court has a definite and firm conviction that the lower court was mistaken. *In re D.E.*, ¶ 21. We review conclusions of law for correctness. *In re D.E.*, ¶ 21. When ICWA applies, "we will uphold the district court's determination that the Department made active efforts if a reasonable fact-finder could conclude beyond a reasonable doubt that the Department's efforts were active." *In re A.N.*, 2005 MT 19, ¶ 19, 325 Mont. 379, 106 P.3d 556.

DISCUSSION

¶25 *Whether the Department engaged in active efforts to provide Father with remedial services and rehabilitative programs to prevent the breakup of Child's family as required by 25 U.S.C. § 1912(d).*

¶26 Father maintains on appeal the Department failed to provide him with active efforts throughout the custody proceedings as required by ICWA. Father asserts the Department failed to refer Father to appropriate services or actively assist him in utilizing and accessing those resources. The Department also failed to provide active efforts to help Father overcome barriers to completing his treatment plan, such as lack of transportation and housing. Further, Father argues, the District Court's order terminating his parental rights to Child failed to comply with ICWA because it failed to provide detailed findings of what active efforts were made to prevent the breakup of Child's family, and that those efforts were unsuccessful. The State responds that even if this court were to find the District

Court's order is deficient the record demonstrates that the Department provided Father with sufficient active efforts and that Father's own apathy and lack of effort frustrated the Department's ability to effectuate services.

¶27 In its findings of fact, the District Court found that it ordered a reasonable and appropriate treatment plan for Father and explained that Father failed to complete that treatment plan. The court explained Father completed chemical and mental health programming through VTC but did not sign releases to allow the Department to track his progress. The Court found Father continually tested positive for methamphetamine between November 15, 2018, and January 31, 2019, but denied he had used methamphetamine or needed inpatient treatment. The court explained that mental health evaluations completed after the November 15 hearing did not identify the existence of cognitive issues that would prevent Father from successfully completing his treatment plan. The court acknowledged that Father completed some parenting classes before the termination hearing, but concerns remained with Father's parenting skills. In regard to visitation, the court explained that the Department initially established visitation for Father, "but Birth Father was unable to coordinate visitation on his own [and t]ransportation to Rocky Boy was a challenge for him, which the Department made some efforts to overcome," but did not specify what those efforts were or when they occurred. Based on these findings, the District Court found that the Department engaged in "appropriate, active efforts . . . to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and those efforts proved unsuccessful." We disagree. After reviewing the record, we hold a reasonable fact-finder could not "conclude beyond a

reasonable doubt that the Department's efforts were active." *In re A.N.*, ¶ 19. The District Court's findings lack detailed documentation of the Department's active efforts or the timing of those efforts and the record does not support a finding that the Department engaged in sufficient active efforts.

¶28 ICWA requires proof beyond a reasonable doubt that a state seeking termination of parental rights to an Indian child has made "active efforts" to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful. *See In re A.L.D.*, 2018 MT 112, ¶ 6, 391 Mont. 273, 417 P.3d 342 (citing 25 U.S.C. §1912(d)); *In re G.S.*, 2002 MT 245, ¶ 33, 312 Mont. 108, 59 P.3d 1063. "The term active efforts, by definition, implies heightened responsibility compared to passive efforts." *In re A.N.*, ¶ 23; *accord* 2016 Guidelines, at 40 ("By its plain and ordinary meaning 'active' cannot be merely 'passive.'"). Federal regulations adopted in 2016 require courts to ensure active efforts were made and such "[a]ctive efforts must be documented in detail in the record." *See* 25 C.F.R. 23.120 (2019). Federal regulations define active efforts as:

> [A]ffirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. . . . Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:
> (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
> (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
>
> . . .

> (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
> (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
> (9) Monitoring progress and participation in services[.]

25 C.F.R. 23.2 (2019); *In re B.Y.*, 2018 MT 309, ¶ 9, 393 Mont. 530, 432 P.3d 129.

¶29 After the BIA promulgated the ICWA regulations in 2016, it issued new guidelines to "explain the statute and regulations and also provide examples of best practices for the implementation of the statute." Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96,476, 96,477 (Dec. 30, 2016). Those Guidelines explain that "the State agency should actively connect Indian families with substantive services and not merely make the services available." 2016 Guidelines, at 42. The 2016 Guidelines complement our own caselaw, in which we have long explained that the Department "cannot simply wait for a parent to complete a treatment plan." *In re K.B.*, 2013 MT 133, ¶ 31, 370 Mont. 254, 301 P.3d 836 (quoting *In re T.W.F.*, 2009 MT 207, ¶ 27, 351 Mont. 233, 210 P.3d 174); *see also* Child and Family Services Policy Manual, § 305-1, 23 (DPHHS 2017), https://perma.cc/LJ2L-6783 ("Active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan.").

¶30 The "court may consider a parent's demonstrated apathy and indifference to participating in treatment" in determining whether the Department has made active efforts. *In re A.N.*, ¶ 23. Further, we will not fault the Department in its active efforts if its efforts

are curtailed by the parent's own behaviors. *See In re A.L.D.*, ¶ 7. But the Department must still document, in the record, its efforts to meet ICWA requirements.

¶31 For example, in *In re A.N.*, this Court upheld the district court's finding that the Department engaged in active efforts when the Department held two family decision-making meetings, paid for a sex-offender evaluation, and arranged a good-bye visit with the children before they went to a kinship placement out of state—which the parent failed to attend. The parent did not provide the Department with any contact information, moved between multiple residences without providing any updates to the Department, and contacted the Department only once over the course of nine months. This Court concluded the Department's efforts were sufficiently active, because the parent's complete lack of involvement with the Department "prevented the Department from making active efforts at providing more intensive services." *In re A.N.*, ¶ 25.

¶32 Throughout Father's entire participation in VTC, the Department did almost nothing to refer or provide ancillary services—parenting classes, mental health assessment, or anger management classes—or monitor in any meaningful way Father's progress with VTC. CPS did not contact the VTC judge or coordinator throughout Father's participation in the court to find out how he was progressing, what services he was participating in, what his schedule was, or to coordinate services. CPS did not attend any of Father's weekly court appearances with VTC or attempt to contact him there despite knowing when they were occurring and purportedly being precluded from gaining information regarding Father's progress in VTC because CPS did not have a release from Father. CPS contacted Father's probation officer approximately six times throughout Father's involvement in

VTC. Contrary to CPS's testimony at the termination hearing in November 2018, at status hearings through December 2017 CPS reported Father was making progress and fulfilling all expectations of the Department. During this time the record does not evidence that the Department was referring Father to any ancillary services required by his treatment plan and was not monitoring his progress in VTC.[11]

¶33 At the December 2017 status hearing, CPS commended Father's progress and acknowledged that Father was still living at Grace Home and would be involved in VTC for another six months. At this hearing CPS did not state this time frame was not going to work, that Father was not making adequate progress in parenting skills, that Father was not in adequate contact with CPS, or that Father was not completing tasks within the timeframe of the Department's expectations, etc.—all of which the Department later asserted at the termination hearing was occurring at and before this time.

¶34 The Department did not advise the District Court of issues with Father's VTC compliance or the inability to provide active efforts because of Father's lack of communication until after it had filed for termination. The Department did not refer Father to parenting classes until after it filed for termination. The Department did not refer Father for mental health assessment until the District Court completed the November 2018 termination hearing and held the matter in abeyance pending such. At its March 22 meeting with Father, the Department provided Father with a list of requirements for reunification

[11] The 2016 Guidelines explain that it is "a recommended practice for a court to inquire about active efforts at every court hearing and actively monitor compliance with the active efforts requirement. This will help avoid unnecessary delays in achieving reunification with the parent, or other permanency for the child." 2016 Guidelines, at 43.

to accomplish within the next month. The record does not provide any evidence that the Department provided Father with any assistance in accomplishing these tasks. There is no evidence the Department met with Father prior to providing him the sink or swim letter to assist him in addressing his transportation barriers or the Department's expectations that he be capable of providing transportation, daycare, or housing on a different timeline than that discussed at hearings. Had the Department been engaged in active efforts throughout the case, these issues would have been well-known by the court at prior status hearings.

¶35 Further, the Department stopped scheduling visitation for Father after March 22 and did nothing to assist Father with overcoming his known transportation issues to visit Child placed ninety miles away. The Department did not schedule visitation and assist with transportation for visitation again until after the November 2018 termination hearing where the District Court agreed with Father's counsel that the Department had not provided active efforts. Finally, at the termination hearings, the Department failed to "document[] in detail in the record" sufficient active efforts it attempted before filing for termination. *See* 25 C.F.R. 23.120 (2019).

¶36 We agree with the Department that Father failed to meaningfully engage or communicate with the Department and did not request additional assistance or time to meet the requirements of his treatment plan or the checklist in the March 22 letter. The Department's failure to engage Father with additional services and participation with CPS while repeatedly representing CPS was pleased with Father's progress, however, lulled Father and the District Court to believe what Father was doing was consistent with the Department's expectations and he was on track for reunification and likely resulted in

Father not establishing better communication with the Department, signing releases, or engaging with ancillary services sooner.

¶37 ICWA requires when a parent fails to engage satisfactorily with the Department, the Department still must try to engage the parent.[12] The Department must assist in getting the parent engaged in services and document its attempts to do so. While coordinating with services parents receive through other court programs such as drug court is laudatory and should occur to avoid not only duplication of effort but also to avoid overwhelming the parent, the Department must coordinate actively with those court programs, monitor the parent's programming and progress, and actively assist the parent in utilizing and accessing identified resources to complete treatment plan tasks not provided through the other court program. The Department must also meaningfully communicate with the other entity providing services and accurately advise the court and the parties as to the parent's progress or lack thereof and actively address with the parent any barriers precluding the Department's interaction with the other entity on an ongoing basis. Further, to satisfy its obligation to provide active efforts, the Department has an ongoing responsibility to assist the parent with visitation and make sure it occurs progressively throughout the case.

[12] And the Department must document those efforts in the court record. *See* 2016 Guidelines, at 44 ("State agencies also need to help ensure that there is sufficient documentation available for the court to use in reaching its conclusions regarding the provision of active efforts."). The 2016 Guidelines make four recommendations for what State agencies should include in their documentation of active efforts: (1) "The issues the family is facing that the State agency is targeting with the active efforts"; (2) "A list of active efforts the State agency determines would best address the issues and the reasoning for choosing those specific active efforts"; (3) "Dates, persons contacted, and other details evidencing how the State agency provided active efforts"; and (4) "Results of the active efforts provided and, where the results were less than satisfactory, whether the State agency adjusted the active efforts to better address the issues." 2016 Guidelines, at 44.

¶38 At the January 2019 hearing, CPS testified to active efforts the Department engaged in between the first termination hearing in November and the second hearing in January. Although a start, these late efforts do not fulfill the Department's obligation to provide active efforts to prevent the breakup of Child's family or to satisfy the Department's obligation to provide affirmative, active, thorough, and timely efforts to reunite an Indian child with his family. Before filing for termination of Father's parental rights, the Department must engage with Father, or diligently attempt to do so, and provide active efforts for sufficient time to reasonably allow Father to complete his treatment plan or to demonstrate beyond a reasonable doubt to the District Court that Father failed to complete his treatment plan and he will not change in a reasonable time. We reverse and remand for further proceedings consistent with this Opinion.[13]

¶39 As pointed out in the concurrence and dissent, in *In re B.Y.* rather than reverse the termination, we remanded back to the district court to detail if the Department met its burden of providing active efforts. *In re B.Y.*, ¶ 11. *In re B.Y.*, however, is distinguishable from the case at hand. In *In re B.Y.* the only substantive conversation about active efforts in the record was a brief exchange about efforts prior to removal—the district court did not make any findings whatsoever on active efforts at the hearing or in its written order. *In re B.Y.*, ¶ 6 & n.1. In contrast, active efforts were argued thoroughly before the District Court in this case and the District Court made at least conclusory findings on active efforts. Here, there is no dispute that no efforts, active or otherwise, were made by the Department from

[13] On remand, we encourage the parties to mediate this cause and, as suggested by the District Court, consider alternatives to termination.

March 2018 until the initial termination hearing in mid-November 2018, and it is clear that, despite making *some* efforts prior to March 2018 and again between the first and second termination hearings, on balance these efforts could not be considered to be active pursuant to 25 U.S.C. § 1912(d) and 25 C.F.R. 23.2. Thus, remanding for the District Court to make more findings to support its conclusion that the Department engaged in active efforts is not appropriate. This Court has thoroughly reviewed the record and the District Court has already made its findings. We conclude the record does not support active efforts were made pursuant to ICWA and its guidelines.

CONCLUSION

¶40 We reverse the Order terminating Father's parental rights to Child and remand for further proceedings consistent with this Opinion.

/S/ INGRID GUSTAFSON

We concur:

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE

Justice Beth Baker, concurring in part and dissenting in part.

¶41 I share the Court's concern about the Department's efforts to prevent the breakup of the family as required by 25 U.S.C. § 1912(d). I do not join the Court's opinion, however, because the record reveals a trial court attentive to the requirements of ICWA and engaged with the progress of the case from start to finish. The hearing transcripts show

the District Court's concern about ICWA compliance and the latitude it afforded Father to complete his treatment plan. The court also suggested guardianship more than once, but the Department had determined such an approach to be inappropriate. The District Court terminated Father's rights only "reluctantly" after concluding both that the Department had complied with ICWA and that the child's best interests required termination.

¶42 Given the District Court's conscientious oversight of the case and its obvious familiarity with ICWA requirements, I would, as we did in *In re B.Y.*, 2018 MT 309, ¶ 11, 393 Mont. 530, 432 P.3d 129, "remand the matter for the court to 'document in detail' if the Department met its burden of providing 'active efforts' . . . beyond a reasonable doubt prior to termination pursuant to 25 U.S.C. § 1912(d) and 25 CFR 23.2, and to conduct any additional proceedings it determines necessary to make this determination."

/S/ BETH BAKER