DA 20-0254

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 47

IN THE MATTER OF:

J.S.L. and J.R.L.,

Youths in Need of Care.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause Nos. DN 19-18 and DN 19-19
Honorable Shane A. Vannatta, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Laura Reed, Attorney at Law, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Ivy Garlow, Deputy County Attorney, Missoula, Montana

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Submitted on Briefs: December 9, 2020

Decided: February 23, 2021

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 S.M. (Mother) appeals the Order for Placement with Father and Dismissal Without Prejudice issued by the Fourth Judicial District Court, Missoula County, on April 9, 2020. The District Court's Order dismissed pending abuse and neglect proceedings and placed Mother's children, J.S.L. and J.R.L. (Children), with their non-custodial biological parent, S.L. (Father).

¶2 We restate the issue on appeal as follows:

> *Whether the District Court erred by dismissing the abuse and neglect proceedings and placing the children with the non-custodial parent pursuant to § 41-3-438(3)(d), MCA.*

¶3 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Mother and Father are the biological parents of J.S.L. (born in 2013) and J.R.L. (born in 2014). In September 2016, the Montana Department of Public Health and Human Services, Child and Family Services Division (Department) received a referral that Mother was arrested for assaulting Father. Mother and Father each spoke with Child Protection Specialist (CPS) Jarvis about this incident. In October 2016, the Department received a new incident report regarding domestic violence in the home. The Department learned the Children were staying with their maternal grandparents and did not intervene at that time. In November 2016, Mother and Father separated and filed for dissolution. Mother was granted primary custody of the Children in a parenting plan action.

¶5 On March 18, 2017, an incident with Father occurred when he arrived intoxicated to pick up the children from Mother and the maternal grandparents outside of the Missoula

police station. The Department investigated the incident and determined intervention was not necessary despite Father being criminally charged. Ultimately, Father entered into a plea agreement and pled guilty to a misdemeanor aggravated DUI in December 2017. Father received a 12-month sentence with all but 72 hours suspended and was placed under misdemeanor supervision.

¶6 In August 2018, Father moved to Colorado. The Children remained in Missoula with Mother. In October 2018, the Department received a new report Mother was intoxicated when picking the Children up from daycare. In addition, Mother was involved in a domestic altercation with her then-boyfriend, now husband, P.M., and was incarcerated for Partner or Family Member Assault (PFMA). Due to these incidents, as well as mother's history of alcohol abuse and unaddressed mental health issues, the Department implemented a 30-day out-of-home protection plan and placed Children with their maternal grandparents. Mother began seeing an addictions counselor and the Children continued to see their own therapist. The Children were thereafter transitioned back to Mother's care.

¶7 In early January 2019, the Department received yet another report alleging domestic violence in the home of Mother and P.M., after Mother advised law enforcement P.M. punched her in the face and gave her a black eye. P.M. was cited for PFMA. Mother later admitted she gave herself the black eye and falsely accused P.M. Around this time, she was also diagnosed with Borderline Personality Disorder and depression by her therapist. In late January 2019, before the Department completed its investigation, Mother reported to police P.M. had stabbed her in the stomach. Mother was pregnant with twins at this time. The Children were in the care of the maternal grandparents during the incident, and

the Department implemented a new 30-day out-of-home protection plan—again placing the Children with the maternal grandparents. Mother later admitted to inflicting this injury on herself as well.

¶8 The Department contacted Father in Colorado, who noted his frustration at the Children once again being placed in out-of-home care due to Mother's domestic violence and drinking. Father recommended the Department seek legal custody to allow Mother to get the help she needs. At that time, Father fully disclosed the March 2017 DUI incident and informed the Department he had completed probation, as well as completed a psychological evaluation and a chemical dependency evaluation. He reported there was nothing that would deem him an "unsafe" parent, but noted he did not want to disrupt the lives of the Children in Missoula if Mother could demonstrate she was able to safely parent. Father also advised of his willingness to amend the parenting plan to seek full custody if Mother was unable to show she could safely parent the Children.

¶9 On February 15, 2019, the Department conducted an emergency removal of the Children from Mother's care due to "physical neglect by birth mother including exposure of the children to domestic violence between birth mother and her partner, concerns of birth mother's mental health instability affecting her ability to safely parent and birth father's inability or unwillingness to intervene[.]" The Children were placed in kinship foster care with the maternal grandparents once again. On February 20, 2019, the Department filed a Petition for Emergency Protective Services (EPS) and Temporary Investigative Authority (TIA). Also, on February 20, 2019, the District Court granted EPS and TIA. On February 21, 2019, the District Court set a Show Cause Hearing for March 7, 2019. Mother

was personally served with the Petition on February 28, 2019, and Father signed an acknowledgment of service on March 7, 2019. Standing Master Rubin held an Intervention Conference for Mother on March 1, 2019, and an Intervention Conference for Father on March 12, 2019.

¶10 The District Court held a Show Cause Hearing on March 7, 2019, where Mother advised the court she did not oppose TIA, while Father stated he was opposed to TIA. Mother and the Department filed a Stipulation to Temporary Investigative Authority on March 8, 2019. On March 28, 2019, the District Court held a Status Hearing, at which Father did stipulate to TIA and waived his right to a contested hearing. The District Court granted the Department TIA through June 5, 2019. At an April 25, 2019 Status Hearing Father advised the court he objected to some of the tasks set out for him during the TIA period—specifically a drug and alcohol testing requirement. Taking judicial notice of Father's 2017 DUI case, the District Court orally ordered "minimal testing . . . such as twice a month . . . to simply check in." At a May 30, 2019 Status Hearing, the District Court continued TIA until June 20, 2019. At the June 20, 2019, Status Hearing, the Department advised the court it would be filing for adjudication of the Children as youths in need of care and for temporary legal custody. The District Court extended EPS at this time.

¶11 On June 21, 2019, the Department filed a Petition for Adjudication of Child as Youth in Need of Care and Temporary Legal Custody (following TIA). At a hearing on June 27, 2019, both Mother and Father objected to the Department's petition for adjudication, and the District Court set an adjudication hearing for August 14, 2019. At

the August 14, 2019 Adjudication Hearing, Mother rescinded her objection to adjudication. Father continued to object, however, and the District Court heard testimony from Father, the addiction counselor who performed Father's chemical dependency evaluation in 2017, the Children's counselor, the maternal grandmother, and CPS Jill Patton. At the conclusion of the hearing, the District Court took the matter under advisement and ordered all previous orders to remain in place until the issuance of its decision.

¶12 On August 21, 2019, Father filed a Motion for Dismissal and Placement with Father and Brief in Support, requesting the District Court issue an order placing the Children in his care and dismissing the abuse and neglect case. On September 9, 2019, the District Court issued its Findings of Fact, Conclusions of Law & Order. In this Order, the District Court analogized this case to this Court's decision in *In re E.Y.R.*, 2019 MT 189, 396 Mont. 515, 446 P.3d 1117, and found Father's history "raised potential imminent safety risks" which "necessitate[] further investigation." The court therefore found "an imminent safety risk to the children such that immediate placement with Father is not appropriate" and that it was in the best interests of the Children to declare them Youths in Need of Care. The District Court further noted that, as in *In re E.Y.R.*, "Father's assertion that he is a safe parent and his request of placement is more appropriately considered under disposition" and did not negate the preponderance of the evidence that the Children were Youths in Need of Care. The court then set a Dispositional Hearing for September 25, 2019. Also, on September 9, 2019, the District Court issued an Order Denying Father's Motions, which, in relevant part, denied Father's Motion for Dismissal and Placement with Father as moot in light of the court's Findings of Fact, Conclusions of Law & Order.

¶13 At the Dispositional Hearing, the Department sought temporary legal custody (TLC) for six months and proposed the court order treatment plans for both parents. Father requested the Children be placed with him and the matter closed, or, in the alternative, the Children be placed with him while the matter remained open. The District Court ordered the Department to evaluate Father as a placement option within 20 days and ordered Father to cooperate with that process. The court continued the Dispositional Hearing until October 24, 2019. At the continued dispositional hearing, the District Court noted it "had hoped that there had -- would be more progress in the past 20 days, both in investigating father's living situation and background; progress, frankly, also, in providing more predictability." The District Court stated it was "going to award temporary legal custody to the Department, order treatment plans created for both father and mother, and order the Department to complete an ICPC"[1] and that it was the court's direction "to look at placement with [F]ather." On October 29, 2019, the District Court issued an order which adjudicated the children as youths in need of care, granted TLC to the Department for six months, set a Treatment Plan Hearing for November 26, 2019, and set a Permanency Plan hearing for February 15, 2020.

¶14 At the November 26, 2019 Treatment Plan Hearing, counsel for the Department informed the District Court it had just sent out the proposed treatment plans to counsel for both Mother and Father that day. The court set a status conference and further review of the treatment plans for December 12, 2019. At that status conference, Father informed the

[1] An ICPC is a home study done pursuant to the Interstate Compact on the Placement of Children.

court he generally agreed with the tasks set forth in the proposed treatment plan but noted the Department was required to "identify the direct correlation between what they are asking [Father] to do and the problems that occurred that caused the Department to become part of this" and he wished for a statement indicating he had no influence on the problems which brought the Department into this matter as he was living in Colorado at the time the Children were removed from Mother. Immediately after the hearing on December 12, 2019, the Department filed a Motion for Expedited ICPC. Also, on December 12, 2019, the District Court issued its Regulation 7 Form and Order for Expedited ICPC, which ordered an expedited ICPC process and continued the matter until a February 20, 2020 status hearing.

¶15 On January 30, 2020, Father filed a Motion for Emergency Hearing, after learning CPS Patton had authorized unsupervised parenting time for Mother. The District Court set a hearing on the motion for February 11, 2020. At the conclusion of this hearing, the court took the matter under advisement but informed the parties it was concerned with "the slow walk of the ICPC" and the "approach of the Department with respect to [Father]." The court reiterated Father has the constitutional right to parent his children and noted Father has been "making reasonable efforts, has been attempting to meet the expectations of the Court" and it intended "to move toward placement with [Father], and, again, place the burden upon the Department to provide ample reason why not."

¶16 On February 19, 2020, the Department filed CFS' Motion for Placement with Father, Superseding Prior Parenting Plan, and Dismissal Without Prejudice. In its motion, the Department recommended placement of the Children with Father due to his progress

and noted it supported "amending the disposition in this case at this time to place the children with the father and when that placement has occurred, to dismiss this matter without prejudice." The District Court held the Permanency Plan hearing on February 20, 2020. At this hearing, the Department again advised the court it was in favor of placing the Children with Father and dismissing the case. Mother objected and requested time to respond to the Department's motion. The court ordered a briefing schedule, but advised it intended to move towards placement of the Children with Father and the parties should be developing a plan for transition. The court set a status hearing for March 24, 2020.

¶17 On March 17, 2020, Father filed an Ex Parte Motion to Place Children with Father. Father informed the court the Children were currently with him in Colorado for spring break and requested an order allowing them to stay in his care in Colorado, at least until the already-scheduled March 24, 2020 status hearing, due to the outbreak of the COVID-19 pandemic. On March 18, 2020, the District Court issued an Order to Place Children with Father, placing the Children with Father "until further order of the Court." On March 23, 2020, Mother filed Mother's Emergency Motion for Order Returning Youth to Montana. That same day, she filed her response to the Department's Motion for Placement with Father, Superseding Prior Parenting Plan, and Dismissal Without Prejudice, asserting that "placement with Father may not occur until that ICPC has determined that Father is a safe placement option." The court held a status hearing on March 24, 2020, and ordered the Children to remain with Father in Colorado as a temporary placement while it took the Department's motion to place the Children with Father and dismiss the case under advisement. The court set a further status conference for April 3, 2020.

¶18 At the April 3, 2020 status conference, the Department informed the District Court ICPCs were a low priority and it could take more than three months to complete one. The Department further advised the court that Father worked his unordered treatment plan, that he was engaged with the Department and the Children, and that no concerns about his ability to be a safe parent had come to light. The District Court took the matter under advisement and again ordered the Children to remain in Father's care in Colorado until further order of the court.

¶19 On April 9, 2020, the District Court issued its Order for Placement with Father and Dismissal Without Prejudice. This Order found it was in the best interests of the Children "for the Court to amend the disposition in this case, to order placement with their Father as the primary residential parent and dismiss this action without prejudice." The court found Father had worked voluntarily with the Department and his progress alleviated any concerns of him posing an imminent safety risk to the Children if they were placed in his care in Colorado. The court further found an ICPC was not necessary before the court could place the Children with Father and close the case as the Department "has not submitted evidence that the Father is unfit to care for [Children] or that Father presents an imminent risk of harm to them. On the contrary, the Department indicates that Father is not a safety risk and has followed the recommendations of experts in developing his parenting skills." The District Court therefore granted the Department's Motion for Placement with Father, Superseding Prior Parenting Plan, and Dismissal Without Prejudice, placed the Children in the custody of Father, and dismissed the abuse and neglect proceedings without prejudice. Mother appeals.

STANDARD OF REVIEW

¶20 We review a district court's findings of fact for clear error and its conclusions of law for correctness. *In re E.Y.R.*, ¶ 21 (citing *In re M.V.R.*, 2016 MT 309, ¶ 23, 385 Mont. 448, 384 P.3d 1058). A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if our review of the record convinces this Court a mistake was made. *In re E.Y.R.*, ¶ 21 (citing *In re E.Z.C.*, 2013 MT 123, ¶ 19, 370 Mont. 116, 300 P.3d 1174). An appellant bears the burden of establishing error by the district court. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825 (citing *In re M.J.W.*, 1998 MT 142, ¶ 18, 289 Mont. 232, 961 P.2d 105).

DISCUSSION

¶21 *Whether the District Court erred by dismissing the abuse and neglect proceedings and placing the children with the non-custodial parent pursuant to § 41-3-438(3)(d), MCA.*

¶22 Mother asserts the District Court erred by dismissing the abuse and neglect proceedings and placing the Children in Father's care. In particular, she argues the District Court erred because the petition set forth allegations of neglect by Father, that the District Court had previously found Father was "an imminent safety risk" to the Children, the District Court did not order Father's compliance with a treatment plan, and the Department conducted an inadequate investigation of Father. She further asserts an ICPC was required before placement because Father was not a "non-offending" parent as that term was used in *In re E.Y.R.* and *In re B.H.*, 2020 MT 4, 398 Mont. 275, 456 P.3d 233.

¶23 In *In re E.Y.R.*, we set forth the legal framework involved in abuse and neglect proceedings involving a non-offending, non-custodial parent. *In re E.Y.R.*, ¶¶ 26-35. Last

year, in *In re B.H.*, we reiterated the applicability of this legal framework to those types of cases. *See In re B.H.*, ¶¶ 32-48. Mother contends both *In re E.Y.R.* and *In re B.H.* are distinguishable from the present case as she asserts Father was not in fact a "non-offending" non-custodial parent. We disagree and find the District Court correctly followed the mandates of *In re E.Y.R.* and *In re B.H.* in this case by placing the Children with Father and dismissing the abuse and neglect proceeding.

¶24 At the outset, we must first reiterate that "a natural parent's right to care and custody of a child is a fundamental liberty interest[.]" *In re E.Y.R.*, ¶ 27 (citation omitted). Parents have a fundamental constitutional right to make decisions concerning the care, custody, and control of their children and it is well-established that a natural parent's right in this regard is a fundamental liberty interest. *In re M.T.*, 2020 MT 262, ¶ 25, 401 Mont. 518, 474 P.3d 820; *In re M.A.L.*, 2006 MT 299, ¶ 26, 334 Mont. 436, 148 P.3d 606; *Polaska v. Omura*, 2006 MT 103, ¶ 14, 332 Mont. 157, 136 P.3d 519. The "constitutional rights to parent one's own children find protection in our statutes." *In re B.H.*, ¶ 38 (citing § 40-6-221, MCA). Section 40-6-221, MCA, provides:

> The father and mother of an unmarried minor child are equally entitled to the parenting, services, and earnings of the child. If either parent is dead or unable or refuses to exercise parenting or has abandoned the family, the other parent is entitled to the parenting, services, and earnings of the child, unless care of the child is determined otherwise pursuant to 40-4-221.[2]

Consistent with this fundamental liberty interest, upon removal of a child from a custodial parent, the Department must first consider placement of the child with the non-custodial

[2] Section 40-4-221, MCA, provides for determination of a child's care upon death of a parent and is not applicable to this case.

parent. *In re E.Y.R.*, ¶ 29. The consideration of this placement upon removal from a custodial parent must, of course, be guided by the safety of the children as we have previously noted:

> [T]he Department should determine if there are any observable or substantiable imminent safety risks to the child if the child is placed in the care of the non-custodial parent. This determination does not at the outset require full investigation of or implementation of an ICPC or a treatment plan for the non-custodial parent, but rather occurs along a continuum. Typically, this would involve conducting a CPS history and potentially a criminal background check as well as gathering information from the non-custodial parent as to his/her work and earnings, his/her residence and who, if anyone s/he resides with, who is part of his/her support system, and potential collateral contacts who can verify the information provided. If any of the information from the CPS history, the criminal background check, or other information provided by the non-custodial parent raises objective, demonstrable circumstances indicative of an imminent safety threat to the child, the CPS case worker should follow up with further investigation to confirm the information provided by the non-custodial parent. If objective, demonstrable circumstances indicate a potential imminent safety risk to the child after completing this preliminary investigation, the CPS worker may expand the investigation. If objective, demonstrable circumstances indicate a potential imminent safety risk to the child after completing this more in-depth investigation, the CPS worker may request a court order permitting the Department to further evaluate the noncustodial parent consistent with § 41-3-438(3)(b) and (c), MCA.

In re E.Y.R., ¶ 29. In *In re B.H.*, we delineated seven circumstances, which the State agreed expound on § 41-3-101(3), MCA, under which the Department may determine good cause to the contrary exists that the child's safety could not be assured if the child were immediately placed with the non-custodial parent.[3] *In re B.H.*, ¶ 43.

[3] These circumstances include: CPS history which poses a risk to the child; parental rights terminated in a dissolution decree; parental rights involuntarily terminated to another child; conviction for various felony offenses; refusal of placement by the non-custodial parent; documented mental illness impairing the ability to parent; and if the putative parent denies paternity.

¶25 "A child is not determined to be a Youth in Need of Care 'as to' anyone. The child is adjudicated a Youth in Need of Care because he or she is being, or [has] been, abused, neglected, or abandoned." *In re K.B.*, 2016 MT 73, ¶ 19, 383 Mont. 85, 368 P.3d 722. At the outset of this case, Father initially informed the Department he wished for the Children to remain in Mother's care in Montana if possible and stipulated to TIA so the Department could determine if that was possible. After stipulating to TIA, Father determined he would like the Children to be placed in his care as he believed Mother was not currently fit to safely parent them. The District Court thereafter adjudicated the Children as Youths in Need of Care in its September 9, 2019 Findings of Fact, Conclusions of Law & Order due to "the family's history of domestic violence in [Mother's] home, substance abuse, and failure to alleviate safety concerns[.]" The District Court noted further investigation of Father was warranted at the time of adjudication due to his prior history with the Department, Father's 2017 DUI, Father's previous chemical dependency evaluation and his advisal he had not discontinued use of all alcohol, and Father's engagement with therapy only two days prior to the adjudication hearing. The District Court held "Father's assertion that he is a safe parent and his request of placement is more appropriately considered under disposition[.]"

¶26 With these concerns in mind, the Department continued its investigation of Father as a potential placement option as ordered by the District Court. Consistent with the mandates of *In re E.Y.R.*, the Department conducted further investigation of the non-custodial parent after initial concerns were raised regarding potential "imminent safety risks" to the Children. *See In re E.Y.R.*, ¶ 29. After further investigating Father, the

Department ultimately moved to place the Children in his care and dismiss the case without prejudice. This is exactly the outcome which is required when such further investigation finds there is no imminent safety risk to a child from a non-custodial parent who was not involved in the circumstances that required removal of the child from the custodial parent. In accordance with §§ 40-6-221 and 41-3-101(3), MCA, placement of the child with his or her non-custodial parent is presumed to be in the best interests of the child. If good cause to the contrary does not exist, the child shall be placed with the non-custodial parent. *In re B.H.*, ¶ 43; *see also In re J.B.*, 278 Mont. 160, 162-64, 923 P.2d 1096, 1097-99 (1996) (determining that when the parental rights of one parent are terminated, the parent whose rights have not been terminated has legal custody of the child absent an adjudication of a child as a youth in need of care based on the parenting behavior of the parent whose rights had not been terminated). The Department's investigation of Father found no good cause to not place Children with Father. Therefore, placement of the Children with Father was required:

> If the child has been adjudicated a youth in need of care, and no objective, demonstrable circumstances of imminent safety risk to the child have been identified, upon disposition the court may either "order the temporary placement of the child with the noncustodial parent, superseding any existing custodial order, and keep the proceeding open pending completion by the custodial parent of any treatment plan" or "order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding."

In re E.Y.R., ¶ 31 (quoting Section 41-3-438(3)(c) and (d), MCA).

¶27 Where Mother's argument is unavailing on appeal is in her contention Father was somehow an "offending" parent. As we have previously recognized, an offending parent is a parent who has had a child removed from the home because of his or her conduct or condition. *See In re L.V.-B.*, 2014 MT 13, ¶ 19, 373 Mont. 344, 317 P.3d 191. As Father persuasively argued before the District Court, he was a non-custodial parent in Colorado at the time the Children were removed from Mother's care due to domestic violence between Mother and P.M. and concerns related to Mother's mental health, and therefore he did not inflict any abuse or neglect upon the Children. The Department did note Father was unable or unwilling to intervene at the time of its petition for EPS and TIA. As Father was in Colorado, he did not object to TIA with the Children remaining in Montana as he was initially hopeful Mother would successfully address her issues.

¶28 Though the District Court initially found Father may pose an imminent safety risk to the Children at the time of adjudication, it ordered the Department to continue its investigation of Father as a potential placement in accordance with the mandates of *In re E.Y.R.* The Department's investigation found Father did not pose an imminent safety risk. Mother argues the Department's investigation was cursory, flawed, and incomplete. We disagree. In its Motion for Placement with Father, Superseding Prior Parenting Plan, and Dismissal Without Prejudice, the Department noted "father's progress in the last four months" as the reason to amend the disposition to place the Children with Father and dismiss the case. The Affidavit of CPS Patton attested to Father's progress from his initial request the Department not consider him for placement and inconsistent engagement in the

Children's lives at the time of the Petition to an attentive and engaged father during the time the Department was investigating him as a potential placement.

¶29 Mother also argues the District Court was required to order Father to complete a treatment plan based on the following language of *In re B.H.*:

> To award temporary legal custody to the Department, the court must find by a preponderance of the evidence that (a) dismissing the petition would create a substantial risk of harm to the child or would be detrimental to the child's physical or psychological well-being; and (b) reasonable services have been provided to the parent or guardian to prevent the removal of the child from the home or to make it possible for the child to safely return home, except as provided under § 41-3-423[, MCA]. *See* § 41-3-442(1), MCA. Section [] 41-3-443(6), MCA, requires the court to order a treatment plan for an offending parent of a child adjudicated as a youth in need of a care within thirty days of the dispositional hearing, except for good cause shown. The treatment plan must identify the problems or conditions that resulted in the abuse or neglect of the child. Section 41-3-443(2)(a), MCA. Thus it follows, that when the non-custodial parent whose parental rights are intact is a possible and willing temporary or permanent placement, the court must award temporary or permanent legal custody to that non-custodial parent, unless it first makes the findings required under § 41-3-442(1), MCA, in regard to that parent to justify the need for a treatment plan under § 41-3-443(2)(a), MCA.

In re B.H., ¶ 43 n.12. Mother asserts this language required a court-ordered treatment plan for Father, while the Department asserts this footnote was merely dicta and not binding authority. Neither are correct. This language correctly indicates the state of the law—that a treatment plan is required for an "offending" parent. As described above, Opinion, ¶ 27, an "offending" parent is the parent from whom the child is removed based on that parent's conduct. When there is no allegation of abuse or neglect by the other parent, the "non-offending" parent, no treatment plan is necessarily required for that parent. Here,

Father was a "non-offending" parent as he was in Colorado and uninvolved in the conduct which necessitated the Department to remove the Children from Mother's care in 2019.

¶30 As a secondary matter, Mother asserts the District Court further erred by not requiring the Department to complete an ICPC study before placing Children with Father.[4] We have previously noted that, "[w]hile an ICPC may be indicated if objective, demonstrable circumstances warrant the Department seeking a court order to evaluate the non-custodial parent, an ICPC is not required merely because a non-custodial parent resides in another state." *In re E.Y.R.*, ¶ 30. Pursuant to ICPC Regulation No. 3, adopted by Admin. R. M. 37.50.901 (2012), placement may be made without completing an ICPC:

> 3. Placements made without ICPC protection:
>
> (a) A placement with a parent from whom the child was not removed: When the court places the child with a parent from whom the child was not

[4] As we did in both *In re E.Y.R.* and *In re B.H.*, we assume, without deciding, an ICPC can be applied to non-custodial natural parents under some circumstances, because no party has challenged such application here. *See In re B.H.*, ¶ 44 n.13. We note once again, however, that a growing number of states have rejected the validity of applying the ICPC and Regulation 3 to non-custodial parents because Regulation 3 "impermissibly expand[s] the scope of the ICPC beyond the" language of the statute and results in a system that violates the State's "constitutional responsibility to safeguard parents' fundamental right to raise their children." *In re R.S.*, 215 A.3d 392, 407, 409 (Md. Ct. Spec. App. 2019); *see also McComb v. Wambaugh*, 934 F.2d 474, 481 (3d Cir. 1991); *Ark. Dep't of Human Servs. v. Huff*, 65 S.W.3d 880, 887-88 (Ark. 2002); *In re C.B.*, 116 Cal. Rptr. 3d 294, 299-302 (Cal. Ct. App. 2010); *In re Emoni W.*, 48 A.3d 1, 6-11 (Conn. 2012); *D.B. v. Ind. Dep't of Child Servs.*, 43 N.E.3d 599, 603-04 (Ind. Ct. App. 2015); *In re S.R.C.-Q.*, 367 P.3d 1276, 1279-82 (Kan. Ct. App. 2016); *In re A.X.W.*, 2011 Mich. App. LEXIS 983, *27-31 (Mich. Ct. App. 2011); *In re Alexis O.*, 959 A.2d 176, 181-85 (N.H. 2008); *In re Rholetter*, 592 S.E.2d 237, 243-44 (N.C. Ct. App. 2004); *In re C.R.-A.A.*, 521 S.W.3d 893, 903-08 (Tex. Ct. App. 2017); *In re Dependency of D.F.-M.*, 236 P.3d 961, 966-67 (Wash. Ct. App. 2010); Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 Yale L. & Pol'y Rev. 63 (2006); Josh Gupta-Kagan, *The Strange Life of* Stanley v. Illinois*: A Case Study in Parent Representation and Law Reform*, 41 N.Y.U. Rev. L. & Soc. Change 569 (2017). Others have significantly limited the application of the ICPC in relation to noncustodial parents. *See Donald W. v. Dep't of Child Safety*, 444 P.3d 258, 269-71 (Ariz. Ct. App. 2019).

> removed, and the court has no evidence that the parent is unfit, does not seek any evidence from the receiving state that the parent is either fit or unfit, and the court relinquishes jurisdiction over the child immediately upon placement with the parent. Receiving state shall have no responsibility for supervision or monitoring for the court having made the placement.
>
> (b) Sending court makes parent placement with courtesy check: When a sending court/agency seeks an independent (not ICPC related) courtesy check for placement with a parent from whom the child was not removed, the responsibility for credentials and quality of the "courtesy check" rests directly with the sending court/agency and the person or party in the receiving state who agree to conduct the "courtesy" check without invoking the protection of the ICPC home study process. This would not prohibit a sending state from requesting an ICPC.

ICPC Regulations, Regulation No. 3(3) (Association of Administrators of the Interstate Compact on the Placement of Children 2011), https://perma.cc/7AUQ-637Y.

¶31 Here, the District Court made the placement of the Children with Father pursuant to an exception to the ICPC. The District Court correctly found an exception to the ICPC applied when the court (1) places a child with the parent from whom the child was not removed, (2) had no evidence the parent was unfit and sought none from the receiving state, and (3) relinquished jurisdiction over the child immediately upon placement with the parent. All three prongs to the exception applied in this case. First, the Children were not removed from Father—he was a "non-offending" parent in another state at the time of removal. Second, following the Department's further investigation into Father after adjudication, the District Court had no evidence Father was unfit to parent. Indeed, the Department indicated Father was a fit parent and sought to place the Children with him and dismiss the case. Third, the District Court relinquished jurisdiction over the Children immediately upon placement with Father by amending the disposition to place the Children

with Father and dismiss the case pursuant to § 41-3-438(3)(d), MCA. As all three prongs of the exception to the ICPC were met, the District Court did not err by determining the ICPC was not required in this case.

¶32 Mother has not met her burden of demonstrating the District Court's findings of fact were clearly erroneous or its conclusions of law were incorrect. The District Court did exactly what it was supposed to do in accordance with *In re E.Y.R.* and *In re B.H.* As such, the District Court's decision to place the Children in Father's care and dismiss the abuse and neglect proceeding is affirmed.

CONCLUSION

¶33 The District Court did not err when it dismissed the abuse and neglect proceedings and placed the children with their Father pursuant to § 41-3-438(3)(d), MCA.

¶34 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ JIM RICE