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***IN THE MATTER OF ANHAYLA H.: THE NEXUS
BETWEEN THE “REASONABLE EFFORTS”
REQUIREMENT AND INCARCERATION***

Brent Chapman*

ABSTRACT

State proceedings that initiate and effect involuntary termination of parental rights occur only in egregious circumstances. In New Mexico, before an abusive or neglectful parent’s rights may be terminated, the state must prove, among other requirements, that it made “reasonable efforts” to provide assistance to the involved parent to remedy the causes and conditions that led to the subject abuse. Courts continue to grapple with precisely what constitutes reasonable efforts to this day because it is not concretely defined. Special cases, such as when parents have become incarcerated after an adjudication of abuse or neglect, are particularly vexing because parents behind bars are limited in their ability to communicate with their case workers and may have fewer options to comply with any treatment plan.

The New Mexico Supreme Court decided one such case, State ex rel. Children, Youth & Families Dep’t v. Keon H. (In re Anhayla H.), in June 2018. This Note compares this case to others with similar fact patterns and argues this decision may set a precedent that reduces what quantum of work is considered reasonable when CYFD assists an incarcerated parent. This Note then proposes a legislative solution to the difficulties inherent in assisting incarcerated individuals who are involved in termination of parental rights proceedings.

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INTRODUCTION

Parents have a fundamental right to the custody of their children.¹ It is a right “established beyond debate as an enduring American tradition.”² Yet, tragically, the limits of this right are often tested. In egregious cases of child abuse or neglect, the state may move to terminate parental rights, setting up a direct conflict between the parent’s right to custody and the child’s interest in health and safety³; nevertheless, such proceedings must be performed “with scrupulous fairness to the parent.”⁴ Even a parent who has severely abused a child deserves due process before the state terminates his or her parental rights. In the New Mexico termination of parental rights (TPR) statute, however, one substantive component of the amount of process due is codified in vague terms and is not further defined. This element is the “reasonable efforts” requirement. The requisite is contained in the following statute, which states that a court must terminate a parent’s right with respect to a child when:

the child has been a neglected or abused child as defined in the Abuse and Neglect Act and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite *reasonable efforts* by the department or other appropriate agency to assist the parent in adjusting the conditions that render the parent unable to properly care for the child.⁵

Thus, the state must meet three requirements. The state must prove that (1) “the department,” typically the New Mexico Children, Youth and Families Department (CYFD),⁶ has put forth reasonable efforts to reform the parent, (2) the parent will probably not change his or her behavior in the foreseeable future, and (3) abuse and/or neglect occurred. These elements must be established by clear and convincing evidence.⁷ While two of the elements are fairly easy to interpret by their plain language, “reasonable efforts” is more opaque.

1. *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982); *State ex rel. Children, Youth & Families Dep’t v. Mafin M. (In re Chad M.)*, 2003-NMSC-015, ¶ 18, 133 N.M. 827, 70 P.3d 1266; *see also Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

2. *Yoder*, 406 U.S. at 232.

3. *See State ex rel. Children, Youth & Families Dep’t v. T.J.*, 1997-NMCA-021, ¶ 11, 123 N.M. 99, 934 P.2d 293 (citations omitted) (“We agree with [the parent] that the right to retain a parental relationship with a child is a fundamental right that merits strong protection. However, the child also has fundamental rights that often compete with the parent’s interests.”).

4. *Mafin M.*, 2003-NMSC-015, ¶ 18, 133 N.M. at 831, 70 P.3d at 1270 (citation omitted).

5. N.M. STAT. ANN. § 32A-4-28 (2005) (emphasis added).

6. § 32A-1-4(G) (2016).

7. *E.g., State ex rel. Children, Youth & Families Dep’t v. Donna E.*, 2017-NMCA-088, ¶ 52, 406 P.3d 1033, 1044 (alterations in original) (citations omitted) (“The standard of proof for termination of

Many New Mexicans have had their parental rights involuntarily terminated subject to the quoted language above. One such individual, Keon H. ("Father"), went from living on the street to being incarcerated. He ultimately lost care and custody rights over his child, Anhayla H. ("Anhayla"), pursuant to *State ex rel. Children, Youth & Families Dep't v. Keon H. (In re Anhayla H.)*⁸ while in jail on domestic violence charges. The New Mexico Supreme Court concluded that the state met its burden to terminate Father's parental rights based on abuse, with the key issue being whether there was substantial evidence to support a finding that CYFD made reasonable efforts to help Father reform his behavior.

Anhayla H. illustrates how both a parent and CYFD must work together to reunify a family, even when the parent is incarcerated, and even when the parent has been violent toward family members. But did CYFD contribute its fair share of reunification efforts? On one hand, a challenging aspect of the case was Father's lack of communication with his permanency planning workers for the months when he was not in jail. On the other, CYFD never performed Father's psychosocial evaluation while he was at being held at the Metropolitan Detention Center (MDC), despite the evaluation's importance to the overall treatment plan. The New Mexico Supreme Court held that there was substantial evidence of CYFD effort, notwithstanding CYFD's lack of contact with, and services provided to, Father. This Note explores the ramifications of the New Mexico Supreme Court's decision in *Anhayla H.* and asserts the "reasonable efforts" standard has been eroded in cases where a parent is in jail or prison. The *Anhayla H.* decision will support that proposition that CYFD can be excused from fulfilling its statutory duty to a parent who has become incarcerated during the pendency of TPR proceedings, so long as the parent has been uncooperative prior to incarceration. This result could lead to a less rigorous application of due process for incarcerated parents, with closer cases than *Anhayla H.* being decided in favor of the state. As a solution, this Note asserts that New Mexico's termination of parental rights (TPR) statute should be amended: It should distinguish incarcerated parents from the general population and expressly codify and suggest which efforts are reasonable. The statutory reforms should be based on other cases involving similarly situated parents, the goal being the preservation of due process for all parents—all without losing sight of the vital importance of child safety.

With these claims in mind, Part I provides an introduction to the child welfare system. Part I also sketches the evolution of the "reasonable efforts" requirement, starting with the federal Adoption Assistance and Child Welfare Act of 1980,⁹ and, more recently, the Adoption and Safe Families Act of 1997.¹⁰ Additionally, Part I sets forth how the reasonable efforts requirement is applied under New Mexico law. Part II surveys, at the national level, the relationship between involuntary terminations of parental rights and mass incarceration to provide context and background to *Anhayla H.* Part III details the facts and procedural history of the case, from when CYFD took custody of Anhayla, to the final termination of parental

parental rights is clear and convincing evidence. 'Clear and convincing evidence' is defined as evidence that 'instantly tilt[s] the scales in the affirmative when weighed against the evidence in opposition[.]'').

8. 2018-NMSC-033, 421 P.3d 814, *rev'g*, 2017-NMCA-004, 387 P.3d 313.

9. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

10. 42 U.S.C. §§ 673b, 679, 679b (1994 & Supp. III 1995–1998).

rights hearing, to the decisions of the district court, court of appeals, and supreme court.

Part IV scrutinizes the legal analysis of the district court, arguing the district court read the reasonable efforts requirement out of the statute. Part IV additionally argues CYFD did not put forth reasonable efforts toward family reunification and parental reform. Finally, Part IV discusses the implications of *Anhayla H.* and a legislative solution.

I. THE CHILD WELFARE SYSTEM, HISTORY OF THE “REASONABLE EFFORTS” REQUIREMENT, AND NEW MEXICO’S TERMINATION OF PARENTAL RIGHTS STATUTE

A child’s entry into foster care usually begins with a report of potential abuse or neglect. In New Mexico¹¹ and many other states,¹² any person who knows or has a reasonable suspicion of child abuse is required to report it. From there, a child welfare department, such as CYFD, will investigate the reports. In cases where severe maltreatment is suspected, a child welfare agency will place the potentially abused child with relatives or foster families.

Ideally, the foster care system will provide temporary supervision over an allegedly abused child until the child can safely return home. Meanwhile, the suspected abuser will receive services and support to modify his or her behavior and habits that led to the abuse. While there are many success stories, the foster care system nevertheless exacts a toll on the country and the individual children who are in the system.¹³ Lawmakers at the national level have therefore sought to curb the number of children in foster care through major legislation.

A landmark piece of child welfare legislation, and the genesis of the “reasonable efforts” requirement, is the Adoption Assistance and Child Welfare Act of 1980 (AACWA). The Act was passed with the goal of reducing the number of children in foster care.¹⁴ To effectuate the AACWA, states were given federal funds in exchange for enacting implementing statutes.¹⁵ The AACWA strongly emphasized family reunification and preservation, regarding foster care as a “last resort rather than the first.”¹⁶ However, under the AACWA, the reasonable efforts requirement was triggered, not only in family preservation and reunification scenarios, but also in termination of parental rights (TPR) cases.¹⁷ In other words, family court or children’s court judges are responsible for determining whether child

11. § 32A-4-3 (2005).

12. See generally CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., HOW THE CHILD WELFARE SYSTEM WORKS (2013), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [<https://perma.cc/R4WG-79Q4>].

13. Logan Nakyanzi, *Foster Care System Faces Problems*, ABC NEWS (Mar. 15, 2006, 1:04 PM), <https://abcnews.go.com/Primetime/story?id=132011&page=1> [<https://perma.cc/8R6Y-JL3B>].

14. Cristine H. Kim, *Putting Reason back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 288–89, 298 (1999).

15. *Id.*

16. *Id.* at 289.

17. *Id.*

welfare agencies put forth reasonable efforts as a prerequisite to severing parental rights.¹⁸

Despite the term's importance to parents facing infringement of a fundamental liberty interest, Congress left the term undefined, and the task of specifying its meaning fell on state legislatures and judiciary.¹⁹ Over time, the ambiguity of reasonable efforts and the policy favoring family reunification over adoption led states to attempt to reunify families at almost all costs—even in cases where parental rehabilitation would clearly be futile or there was a substantial risk of placing children back in the home of a violent parent.²⁰ As a result, children became stalled in foster care while child welfare agencies endeavored to reconcile families, and, after a decline in the number of children in foster care, the number started increasing substantially.²¹

Congress's solution was to modify the AACWA with the Adoption and Safe Families Act (ASFA). The ASFA addressed the problems of the AACWA, not by explicitly defining reasonable efforts,²² but by making child safety a "paramount" concern and setting a time limit for achieving permanency.²³ As with the AACWA, states that enacted analogues of the ASFA became eligible for matching federal funds.²⁴

New Mexico explicitly incorporated language of the ASFA into its Abuse and Neglect Act in 1999.²⁵ In New Mexico, when a child has been found to be neglected or abused at a dispositional hearing, the court will order CYFD to make "[r]easonable efforts . . . to preserve and reunify the family, with the paramount concern being the child's health and safety."²⁶ In addition to making the child's safety the chief concern in the dispositional hearing statute, the New Mexico TPR statute declares that "the court shall give *primary* consideration to the mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated."²⁷ As with the ASFA, a definition of reasonable efforts is not found in New Mexico's Children's Code or under the Abuse and Neglect Act within the Code.²⁸ Thus, without guidance from the legislative or executive branches, our state's courts have been left to define reasonable efforts on a case-by-case basis.

18. *Id.* at 301.

19. Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 325 (2005).

20. *Id.* at 326 (second alteration in original) ("The charge was . . . agencies were engaged in excessive efforts to 'repair hopelessly dysfunctional families. Instead of the permanency intended by the federal reasonable efforts clause, impermanency result[ed].") (quoting Michel J. Bufkin, *The "Reasonable Efforts" Requirement: Does it Place Children at Increased Risk of Abuse or Neglect?*, 35 U. LOUISVILLE J. FAM. L. 335, 336 (1996)).

21. Jean C. Lawrence, *ASFA in the Age of Mass Incarceration: Go to Prison, Lose Your Child*, 40 WM. MITCHELL. L. REV. 990, 994 (2014).

22. Maryana Zubok, *Termination of Parental Rights*, 5 GEO. J. GENDER & LAW 587, 600 (2004)

23. *Id.* at 597.

24. *Id.*

25. N.M. STAT. ANN. § 32A-4-22 (2016).

26. § 32A-4-22(C).

27. § 32A-4-28(A) (2005) (emphasis added).

28. *See* §§ 32A-4-1 (2016), 32A-4-2 (2018).

Notwithstanding the ambiguity of the reasonable efforts requirement, the black letter law in New Mexico TPR cases is undisputed. First, because the right of care and custody of a child is a fundamental right,²⁹ the standard in TPR cases is clear and convincing evidence.³⁰ Second, the state must prove by this standard that (a) the child has been neglected or abused as defined in the Abuse and Neglect Act, (b) “the conditions and causes of neglect and abuse are unlikely to change in the foreseeable future,”³¹ and (c) change is unlikely “despite reasonable efforts by [CYFD] to assist the parent.”³² Therefore, if the state fails to prove all of the three prongs of Section 32A-4-28(B) by clear and convincing evidence, the parent will retain the rights to the child, subject to only two exceptions.³³

II. TERMINATION OF PARENTAL RIGHTS AND THE ISSUE OF MASS INCARCERATION

In 2014, 64,398 TPR petitions were granted nationwide.³⁴ At that about that time, the U.S. adult correctional population numbered 6.6 million.³⁵ The correctional population is made up of adults on probation, on parole, in prison, or in jail.³⁶ Of the 6.6 million individuals, about one-third, or 2.1 million, were actually behind bars.³⁷

A large proportion of New Mexicans are in the correctional population, as 930 adults were incarcerated for every 100,000 U.S. residents,³⁸ a rate eclipsed in only ten other states.³⁹

While mass incarceration continues nationwide and in New Mexico,⁴⁰ the nation’s incarceration rate has been gradually declining since 2009.⁴¹ Nevertheless, the effects of the correctional system touch more than the lives of those serving

29. *State ex rel. Children, Youth & Families Dep’t v. Hector C.*, 2008-NMCA-079, ¶ 11, 144 N.M. 222, 185 P.3d 1072.

30. *Id.*

31. § 32A-4-28(B)(2).

32. *Id.*

33. Efforts by CYFD are unnecessary when there is a “clear showing” that reasonable efforts would be “futile,” or when “the parent has subjected the child to aggravated circumstances.” § 32A-4-28(B)(2)(a), (b). Aggravated circumstances, defined in Section 32A-4-2(C), include when a parent, guardian, or custodian:

(1) attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child’s sibling; (2) attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child; (3) attempted, conspired to subject or has subjected the child to torture, chronic abuse or sexual abuse; or (4) had parental rights over a sibling of the child terminated involuntarily.

§ 32A-4-2(C).

34. David Crary, *Terminating Parental Rights: State Policies Vary Widely*, AP NEWS (Apr. 30, 2016), <https://apnews.com/c9fec9ee24d64f4b9e56d1425179a50e> [<https://perma.cc/AJ6S-CSZQ>].

35. DANIELLE KAEBLE & MARY COWHIG, U.S. DEP’T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 1 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> [<https://perma.cc/HM9L-QM55>].

36. *Id.*

37. *Id.* at 2.

38. *Id.* at 11–12.

39. *See id.* (New Mexico is tied with Tennessee).

40. *See id.* at 1, 11.

41. *Id.* at 1.

time—they extend to the minor children of inmates. Slightly more than half of incarcerated persons have a minor child.⁴² The vast majority of these parents are male.⁴³ As of 2011, 5.1 million children had a parent in prison or jail at some point during their adolescence.⁴⁴ Children of inmates outnumber their incarcerated parents by about two to one.⁴⁵ Moreover, a disproportionately higher number of Hispanic children than white children have a parent in jail or prison.⁴⁶

Given these figures, there is a significant connection between TPR proceedings and incarcerated parents. With so many incarcerated parents potentially facing a severance of their rights, lawmakers and those in the legal community should be informed about the process and implications of TPR proceedings.

III. ANHAYLA H.: THE NEXUS OF INCARCERATION, REASONABLE EFFORTS, AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

The subparts below provide the facts and procedural history of the dissolution of Father's parental rights with respect to Anhayla. From the time CYFD took custody of Anhayla, Father served two stretches of jailtime at MDC, and the termination of parental rights proceedings took two years.

A. Anhayla Is Treated at the Hospital and Goes into Legal Custody of CYFD

On February 20, 2013, Mother and Father brought Anhayla to the hospital.⁴⁷ The parents claimed Father accidentally dropped two-month-old Anhayla on the carpet while "standing and rocking her" two days before.⁴⁸ However, the injuries were inconsistent with a minor fall, according to Anhayla's doctors.⁴⁹ Anhayla was in critical condition, suffering from, among other injuries, "twenty-three rib fractures and four skull fractures in various states stages of healing, facial bruising, liver lacerations, brain bleeding, and a possible detached retina."⁵⁰ Due to her injuries, Anhayla was left with profound mental and physical impairments.⁵¹

On February 21, 2013, CYFD took temporary custody of Anhayla.⁵² On February 25, CYFD filed a petition that alleged she was neglected and/or abused,⁵³

42. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUST., PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2008), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> [<https://perma.cc/D8YG-HN49>].

43. THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 18 (2010), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf [<https://perma.cc/ZB3X-TLD3>].

44. THE ANNIE E. CASEY FOUND., A SHARED SENTENCE 5 (2016).

45. THE PEW CHARITABLE TRUSTS, *supra* note 43, at 18.

46. *Id.*

47. State *ex rel.* Children, Youth & Families Dep't v. Keon H. (*In re Anhayla H.*), 2018-NMSC-033, ¶ 2, 421 P.3d 814, 815.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

and, on February 26, the court granted custody of Anhayla to CYFD until further order.⁵⁴

Next, on March 7, 2013, a custody hearing was held with both parents in attendance. Custody hearings are convened in order to “determine if the child should remain in or be placed in [CYFD’s] custody pending adjudication.”⁵⁵ Additionally, at custody hearings, the court “may order the [parent/s] or the child alleged to be neglected or abused, or both, to undergo appropriate diagnostic examinations or evaluations.”⁵⁶ At the hearing, the court awarded legal custody to CYFD and ordered Mother and Father to undergo drug screens and psychosocial, domestic violence, substance abuse, psychological, and parenting assessments.⁵⁷ The court also assigned a permanency planning worker (a PPW)—Diane Drobinski—to Mother and Father.⁵⁸ The court appointed Richard Gaczewski as Anhayla’s PPW.⁵⁹ Further, the court ordered Mother and Father to inform their PPWs and attorneys of any changes to their addresses or phone numbers.⁶⁰

B. Hearings that Preceded the TPR Motion and Termination of Parental Rights Proceedings

Between March 2013 and March 2014, Mother and Father were involved in several proceedings: a mediation and plea conference, an adjudicatory and dispositional hearing, a judicial review hearing, and two permanency hearings. Father did not attend all of the hearings. After the conclusion of all hearings, Mother voluntarily surrendered her parental rights, Father did not.

i. Mediation Conference and Plea

Prior to the adjudicatory and dispositional hearing, on April 5, 2013, Mother and Father pled no contest to “abuse” as defined in the Children’s Code.⁶¹

ii. Combined Adjudicatory and Dispositional Hearing

Following the no-contest plea, the district court held an adjudicatory hearing in conjunction with a dispositional hearing on April 22, 2013.⁶² During adjudicatory proceedings, the court determines the factual question as to whether a child is abused, and, if the court concludes abuse has occurred, the court orders the child’s parent or parents to cooperate with any CYFD-created treatment plans.⁶³ The court in this case adopted the findings of fact as to the abuse and ordered the parents to undergo “initial psychosocial assessments.”⁶⁴ CYFD included only the initial

54. *Id.*

55. N.M. STAT. ANN. § 32A-4-18(A) (2016).

56. § 32A-4-18(G).

57. *Anhayla H.*, 2018-NMSC-033, ¶ 4, 421 P.3d at 815.

58. *Id.* ¶ 4, 421 P.3d at 816.

59. *Id.*

60. *Id.*

61. *Id.* ¶ 5, 421 P.3d at 816.

62. *Id.* ¶ 6, 421 P.3d at 816.

63. See N.M. STAT. ANN. § 32A-4-22(A) (2016).

64. *Anhayla H.*, ¶ 6, 421 P.3d at 816.

psychosocial assessment in Mother and Father's treatment plans because, although the court had ordered four additional assessments, the psychosocial assessments were prerequisites for more comprehensive and personalized treatment plans.⁶⁵ Father had not completed the sole item on his treatment plan at the time of the hearing.⁶⁶ Moreover, Father had not returned calls from his PPW and had missed an office visit that was scheduled between March 7 and the dispositional hearing.⁶⁷ Consequently, the court again ordered Father to complete psychosocial evaluations and to stay in contact with his PPWs and attorney.⁶⁸

iii. Initial Judicial Review Hearing

The initial judicial review hearing convened on May 20, 2013.⁶⁹ At initial judicial review hearings, the court evaluates how parents and CYFD are progressing toward completing the treatment plan, issuing any supplemental orders as necessary to ensure compliance by CYFD or parents.⁷⁰ Mother was present telephonically, but Father was not present.⁷¹ Also, at this relatively early point, Father had neither communicated with CYFD nor engaged in completing his treatment goals.⁷² Since Father was absent, the court questioned Father's attorney about any contact the attorney had been making with Father.⁷³ Father's attorney responded that she called Father the day before the hearing. She ascertained from Father that he had not communicated with CYFD, and that he was homeless but looking for a job.⁷⁴

iv. Initial Permanency Hearing

On November 25, 2013, six months after the initial judicial review, the court held a permanency hearing to evaluate options for Anhayla's custody.⁷⁵ At the time of the hearing, Father was in jail due to a domestic violence incident with Mother and was transported from MDC to the hearing.⁷⁶ Father had not begun to work on his treatment plan, the court changed Anhayla's permanency goal from reunification to adoption, and the court ordered CYFD to make reasonable efforts to effect Father's treatment plan.⁷⁷ The court likewise directed Mother and Father to make efforts to comply with CYFD.⁷⁸ Notably, during the month of the first permanency hearing, Drobinski visited father at MDC.⁷⁹ Although Father's treatment plan had been in place for over seven months and only called for an initial psychosocial

65. *Id.*

66. *Id.*

67. *Id.* ¶ 7, 421 P.3d at 816.

68. *Id.*

69. *Id.* ¶ 8, 421 P.3d at 816.

70. N.M. STAT. ANN. § 32A-4-25(A) (2016).

71. *Anhayla H.*, 2018-NMSC-033, ¶ 8, 421 P.3d at 816.

72. *Id.* ¶ 8, 421 P.3d at 817.

73. *Id.*

74. *Id.*

75. *Id.* ¶ 9, 421 P.3d at 817.

76. *Id.*

77. *Id.* ¶ 10, 421 P.3d at 817.

78. *Id.*

79. *Id.* ¶ 21, 421 P.3d at 819.

screening, Drobinski did not bring a psychologist to the jail to perform an evaluation or give Father the assessment to fill out himself.⁸⁰

v. *Second Permanency Hearing*

Father was again conveyed from MDC for the second permanency hearing on February 24, 2014.⁸¹ Father's PPW reported to the court that Father had cancelled two scheduled appointments and had not been in contact with any agents of CYFD.⁸² Yet, Drobinski also reported her visit to Father in November 2013 and that she knew that Father was transferred to Texas.⁸³

C. Termination of parental rights hearings and the procedural history of Anhayla H.

One month after the second permanency hearing, on March 26, 2014, CYFD moved to terminate Mother and Father's parental rights.⁸⁴ CYFD asserted that it put forth reasonable efforts to assist Mother and Father in reforming their behavior.⁸⁵ CYFD argued, however, that Mother had ceased to cooperate with her PPW and that Father was in "substantial non-compliance" with his treatment plan.⁸⁶ Father filed a response to CYFD's motion, denying CYFD's allegations; Mother, on the other hand, voluntarily surrendered her parental rights.⁸⁷

A third permanency hearing was held in district court on August 22, 2014.⁸⁸ As before, Father was transported from MDC.⁸⁹ The court found that CYFD had put forth reasonable efforts but ruled that Father had made "no effort" to fulfill the requirement of his treatment plan—to complete the psychosocial evaluation.⁹⁰ The court again ordered Father to undergo his treatment.⁹¹

i. *Day One of Father's TPR Hearing*

The first termination of parental rights hearing occurred shortly after the third permanency hearing on August 27, 2014.⁹² The initial witness to testify confirmed that Anhayla was healthy at birth but was now suffering from severe physical problems, including brain injuries.⁹³ The second witness, Richard Gaczewski, testified that he replaced Father's first PPW (Drobinski) on March 21,

80. *Id.*

81. *Id.* ¶ 11, 421 P.3d at 817.

82. *Id.*

83. *Id.*

84. *Id.* ¶ 13, 421 P.3d at 818.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* ¶ 14, 421 P.3d at 818.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* ¶ 15, 421 P.3d at 818.

93. *Id.* ¶ 16, 421 P.3d at 818.

2014, five days prior to when CYFD filed the TPR motion.⁹⁴ Gaczewski also stated that he had been Anhayla's PPW since the time CYFD became involved in the case. Further, Gaczewski testified that PPWs must meet every month with parents, plan and arrange services for families in need of reunification, and coordinate psychosocial assessments.⁹⁵ However, according to Gaczewski, during his term as Father's PPW, his efforts to contact Father consisted of asking Mother about Father's location and examining the MDC website once in April or May 2014, and again in July 2014.⁹⁶ Father's PPW further stated that he could not locate Father via the MDC website, but would have attempted to contact Father had he found Father using the website.⁹⁷

Father testified last and, during Father's testimony, the court remarked that PPWs routinely attempt to communicate with parents through letters in the mail, often including self-addressed and stamped envelopes for reply mail.⁹⁸ Father stated that his then-PPW, Drobinski, did not send him letters in the mail during his incarceration period that began in 2013.⁹⁹ Father confirmed, however, that Drobinski visited him at MDC in November 2013, not to perform the evaluation, but to inform him that the permanency planning goal would be changed from reunification to adoption.¹⁰⁰ Father also asserted that he had been incarcerated continuously since October 9, 2013.¹⁰¹

Upon conclusion of the first TPR hearing, CYFD stated it would call a rebuttal witness to contradict Father's assertion that he had been incarcerated without interruption since October 9, 2013.¹⁰² The court observed that a recess would be necessary and continued the hearing until February 6, 2015.¹⁰³ Six days later, Gaczewski dispatched a letter to Father containing a psychosocial assessment and self-addressed, stamped envelopes.¹⁰⁴ Father "promptly" returned a completed psychosocial assessment.¹⁰⁵

ii. Day Two of Father's TPR Hearing

Father's TPR hearing resumed after a nearly six-month recess, and Gaczewski again testified on behalf of CYFD.¹⁰⁶ Gaczewski produced bench warrants for Father from May, June, and August 2014 to rebut Father's claim of being continuously incarcerated.¹⁰⁷ Gaczewski also informed the court that upon receiving Father's psychosocial assessment, he updated Father's treatment plan to

94. *Id.* ¶ 17, 421 P.3d at 818.

95. *Id.* ¶ 18, 421 P.3d at 819.

96. *Id.* ¶ 22, 421 P.3d at 819.

97. *Id.*

98. *Id.* ¶ 25, 421 P.3d at 820.

99. *Id.* ¶ 26, 421 P.3d at 820.

100. *Id.*

101. *Id.* ¶ 25, 421 P.3d at 820.

102. *Id.* ¶ 27, 421 P.3d at 820.

103. *Id.*

104. *Id.* ¶ 29, 421 P.3d at 820.

105. *Id.*

106. *Id.* ¶ 28, 421 P.3d at 820.

107. *Id.*

include numerous requirements.¹⁰⁸ Additionally, Gaczewski stated that he sent follow-up letters in October and November 2014, that he did not receive responses to those letters from Father, and that he informed Father by letter that Father's new PPW would be Lareina Manuelito.¹⁰⁹

Manuelito also testified, explaining that she did not attempt to contact Father in November or December 2014 because she was adjusting to her role as a PPW.¹¹⁰ Manuelito also stated that Father had sent letters to her office in December 2014 and January 2015, but that the letters were addressed to Anhayla.¹¹¹

Upon the conclusion of the witnesses' testimony, the court found that CYFD made reasonable efforts to aid Father in adjusting his parenting abilities and that the causes of Anhayla's neglect and abuse were unlikely to change in the foreseeable future.¹¹² The court nonetheless rebuked CYFD for the way it handled Father's case.¹¹³ Ultimately, the district court did not enter a finding of futility.¹¹⁴

The court terminated Father's parental rights over Anhayla.¹¹⁵ Father appealed the district court's decision on the basis that CYFD did not fulfill its duty to provide reasonable efforts.¹¹⁶ The court of appeals reversed, holding that CYFD did not satisfy the reasonable efforts requirement, and CYFD petitioned for a writ of certiorari, which the supreme court granted.¹¹⁷ The supreme court held that there was "substantial evidence to support the district court's finding that [CYFD] made reasonable efforts to assist Father."¹¹⁸

IV. ANALYSIS, IMPLICATIONS, AND SOLUTION

The judgment of the New Mexico Court of Appeals should have been allowed to stand because the reasoning of the district court was flawed. Additionally, the decision of the court of appeals should have not been disturbed because there was not "substantial evidence" of reasonable efforts by CYFD, for several reasons. First, Father's PPW scheduled appointments that Father would not have been able to attend. Second, Gaczewski, a senior PPW, testified that PPWs were required to meet monthly with parents, yet Father spent months in jail without contact from his caseworker. Third, this case is distinguishable from other instances involving incarcerated parents where the court has held that CYFD satisfied the reasonable efforts requirement. Because this case ostensibly sets a new, lower standard for

108. *Id.* ¶¶ 28–29, 421 P.3d at 820–21.

109. *Id.* ¶ 31, 421 P.3d at 821.

110. *Id.* ¶ 32, 421 P.3d at 821.

111. *Id.*

112. *Id.* ¶ 33, 421 P.3d at 821.

113. *State ex rel. Children, Youth & Families Dep't v. Keon H.*, 2017-NMCA-004, ¶ 5, 387 P.3d 313, 315 ("The district court expressed the view that CYFD ought to do more for incarcerated individuals than it did in this case. The district court stated that it was 'not happy' with the manner in which CYFD dealt with Father's case and cautioned CYFD that it ought not to deal with other cases in the same way."), *rev'd*, 2018-NMSC-033, 421 P.3d 814.

114. *Anhayla H.*, ¶ 33, 421 P.3d at 821; *see supra* text accompanying note 33.

115. *Id.*

116. *Id.* ¶ 34, 421 P.3d at 821.

117. *Id.* ¶¶ 34–35, 421 P.3d at 821.

118. *Id.* ¶ 55, 421 P.3d at 826.

reasonable efforts with similar facts, *Anhayla H.* sets a troubling precedent for parents who face TPR proceedings while incarcerated.

A. The District Court Improperly Balanced Separate Prongs of the TPR Statute

Although the district court reasoned its decision was warranted because further efforts by CYFD would have been ineffective at reforming Father's behavior, that reasoning is unsound. It conflates the required showing that parental behavior is unlikely to change in the foreseeable future with the adequacy of CYFD effort and inappropriately balances two distinct prongs of the TPR statute. Again, the state must prove the three elements of Section 32A-4-28(B)(2) by a clear and convincing standard: (1) the child has been neglected/abused, (2) the "conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future," and (3) change is unlikely "despite reasonable efforts by [CYFD]."¹¹⁹ However, Section 32A-4-28(B)(2) provides that "efforts by the department are unnecessary, when . . . there is a clear showing that the efforts would be futile." Reasonable efforts will therefore be excepted when facts clearly establish futility.

The court did not make a futility finding, however.¹²⁰ Contrary to the statute, the trial court held that the reasonable efforts prerequisite was fulfilled "only because, under the circumstances of the case, little more could have been done to change Father's circumstances."¹²¹ The court explained that "the causes and conditions of the abuse had not been alleviated and were unlikely to change in the near future."¹²² At the same time, the court "expressed disdain" for CYFD's efforts, warned the Department not to repeat the way it managed the case, and advised the Department to provide more assistance for incarcerated individuals.¹²³

Thus, while acknowledging CYFD could and should have done more for Father, the district court effectively read the reasonable efforts requirement out of the statute without establishing a "clear showing" of futility.¹²⁴ The court found that a slim chance of meaningful change on Father's part relieved the Department from its duty. That was improper because the statute requires departmental effort, subject only to express exceptions. Accordingly, the court of appeals was correct in reversing the trial court, and its decision should have been affirmed.

119. See *State ex rel. Children, Youth & Families Dep't v. Nathan H.*, 2016-NMCA-043, ¶ 32, 370 P.3d 782, 789.

120. *Anhayla H.*, 2018-NMSC-033, ¶ 33, 421 P.3d at 821 ("The court did not enter a finding of futility or aggravated circumstances."); cf. *State ex rel. Children, Youth & Families Dep't v. Vanessa C.*, 2000-NMCA-025, ¶ 14, 128 N.M. 701, 997 P.2d 833 ("A finding of futility [results] in the removal of a person's expectation to the Department's reasonable assistance.").

121. *State ex rel. Children, Youth & Families Dep't v. Keon H.*, 2017-NMCA-004, ¶ 5, 387 P.3d 313, 315, *rev'd*, 2018-NMSC-033, ¶ 33, 421 P.3d 814, 821.

122. *Id.*

123. *Id.*

124. Futility, like other TPR elements, must be proved by clear and convincing evidence.

B. The record does not contain substantial evidence of reasonable efforts

Assuming *arguendo* that the trial court correctly applied the TPR statute, there was insufficient evidence to support a finding of reasonable efforts. The standard of sufficiency is “substantial evidence,” which is evidence that “a reasonable mind would accept as adequate to support a conclusion.”¹²⁵ Based on the reasons below, even if viewed in the light most favorable to the judgment of the district court, there was not substantial evidence of reasonable efforts.

i. CYFD Violated Its Own Parental Contact Policy

Father’s PPW testified during day one of the termination of parental rights hearing that PPWs are responsible for meeting monthly with parents. Additionally, during the hearing that day, the district court observed that in cases where parents are in jail or prison, CYFD “typically sends letters to incarcerated parents reminding them to work the treatment plan, along with self-addressed, stamped envelopes.”

However, in the two years from the time CYFD took custody of Anhayla to the termination of parental rights, CYFD managed to meet with Father only twice—the first time, subsequent to the March 2013 custody hearing,¹²⁶ and the second, during the November 2013 meeting at MDC. Moreover, Father’s PPW did not send him correspondence between November 2013 and February 2014, months he was likely in custody, or in December 2014, when he was in jail. It was unexplained why the Department did not send Father letters during his period of incarceration that began November 2013. As to why CYFD did not mail him correspondence in December 2014, his PPW “testified that she was acclimating to her new role as PPW.” Also, in the six months between the February 2014 permanency hearing and the first day of the parental rights hearing in August 2014, Father’s PPW attempted to locate him only three times.¹²⁷

It is true that Father was difficult to locate when out of custody, as his May, June, and August 2014 bench warrants suggest. It is also true that parents have a duty to cooperate and stay in contact with CYFD,¹²⁸ and there are large spans of time when Father failed to communicate with his PPW, such as May through October 2013 and March through July 2014. Likewise, PPWs cannot reasonably be expected to meet with parents who are unwilling or whose whereabouts are unknown. Nevertheless, CYFD caseworkers knew or should have known Father’s location and communicated with him while at MDC.¹²⁹

125. State *ex rel.* Children, Youth & Families Dep’t v. Patricia H., 2002-NMCA-061, ¶ 22, 132 N.M. 299, 47 P.3d 859.

126. See *Anhayla H.*, 2018-NMSC-033, ¶ 18, 421 P.3d at 819 (“Mr. Gaczewski said that Father came into the office at the beginning of the case but did not complete the psychosocial assessment.”).

127. See *id.* ¶ 22, 421 P.3d at 819 (“[Father’s PPW] testified that he made efforts to try to locate Father by asking Mother about Father’s whereabouts. . . . He also checked the MDC website around April or May 2014 and again in July 2014. . . .”).

128. *Id.* ¶ 48, 421 P.3d at 824.

129. See *id.* ¶ 63, 421 P.3d at 828 (Vigil, J., specially concurring) (“[W]hen a parent is in jail, the Department must do more to assist the parent, as the parent is limited in his or her ability to appear at the Department to receive information and support.”).

ii. *Father Was Probably Unable, As Opposed to Merely Unwilling, to Attend His Appointments with His Caseworker While Incarcerated*

Father was transported from MDC for the first time on November 25, 2013, for the initial permanency hearing. On February 24, 2014, for the second permanency hearing, Father again was conveyed from MDC. His PPW notified the court at the second permanency hearing that he “had twice been scheduled for his psychosocial assessment but cancelled both appointments.”¹³⁰ It is unclear as to precisely what date the appointments were to have taken place, but the Department was likely referring to appointments missed between November and February. Otherwise, CYFD would have reported the missed appointments at the initial (November) permanency hearing. Viewing the record, it is unlikely Father took affirmative steps to call off his appointments that were scheduled in that three-month span.¹³¹ He was probably incapable of attending because he was being held at MDC. In fact, Father was transferred to Texas and apparently was transferred back to MDC prior to the second permanency hearing, making the possibility of attending an assessment even more remote.¹³² Also, it is improbable that Father would have cancelled both appointments when his PPW met with him at MDC in November 2013.¹³³ Therefore, it was unreasonable for CYFD to schedule appointments that Father would be unable to attend and then cite his absence as a basis for terminating his rights.

iii. *CYFD Did Not Satisfy the Reasonable Efforts Requirement in Comparison to Other Cases with Similar Facts*

Here, the Department failed to employ reasonable efforts, unlike other New Mexico cases. For example, in *State ex rel. Children, Youth and Families Department v. William M.*,¹³⁴ CYFD took custody of the father’s children and later determined where he was incarcerated.¹³⁵ Prior to TPR hearings, CYFD looked into placing the father’s children with his mother and other relatives in Florida, and conducted a home study of those relatives, even though they resided in another state.¹³⁶ The Department also met with the father in prison, obtained a psychosocial evaluation while there, and maintained contact with the father via his attorney.¹³⁷ The court held that there was substantial evidence to support a finding of reasonable efforts.¹³⁸ Similarly, in *State ex rel. Children, Youth and Families Department v. Hector C.*,¹³⁹ CYFD filed a TPR petition before the father was released from

130. *Id.* ¶ 11, 421 P.3d 8 at 817 (majority opinion).

131. *See State ex rel. Children, Youth & Families Dep’t v. Keon H.*, 2017-NMCA-004, ¶ 13 n.5, 387 P.3d 313, 317 n.5 (“It is unclear whether these cancellations were the result of Father’s incarceration. But considered alongside the fact that Father had provided information to CYFD regarding the assessment, evidence of cancelled appointments alone cannot support the conclusion that Father had not participated in what his treatment plan required.”), *rev’d*, *Anhayla H.*, 2018-NMSC-033, 421 P.3d 814.

132. *Anhayla H.*, 2018-NMSC-033, ¶ 11, 421 P.3d at 817.

133. *Id.*

134. 2007-NMCA-055, 141 N.M. 765, 161 P.3d 262.

135. *Id.* ¶ 4, 161 P.3d at 265.

136. *Id.* ¶ 69, 161 P.3d at 278.

137. *Id.*

138. *Id.*

139. 2008-NMCA-079, 144 N.M. 222, 185 P.3d 1072.

prison.¹⁴⁰ As in *William M.*, CYFD went to the prison where the father was housed and performed a psychological evaluation.¹⁴¹ The court ultimately held that CYFD met the reasonable efforts prerequisite to terminating parental rights.¹⁴²

In this case, Diane Drobinski visited Father when he was in jail but did not have him complete a psychosocial evaluation—the one item that the Department had on his treatment plan. Moreover, one and a half years elapsed from when the district court ordered a psychosocial evaluation to when it was finally administered by mail.¹⁴³ Also, CYFD apparently made no effort to find a placement for Anhayla with relatives, which differed from its actions in *Hector C.* Given the barebones treatment strategy CYFD had prescribed for Father, and the fact that the psychosocial evaluation was a necessary predicate to designing a more comprehensive plan, CYFD's actions in this regard were not reasonable in comparison to prior cases.

Furthermore, CYFD did not attempt to communicate to Father through his attorney, even though it was clearly possible. For instance, Father was not present at the initial judicial review hearing on May 20, 2013, prompting the trial court to question Father's attorney about any contact she had made with him. Father's attorney responded that she called him the day before the hearing and he stated that he was not undertaking his court-ordered treatment. It was therefore possible to reach Father through his attorney, but the court of appeals and supreme court opinions are devoid of any mention of CYFD contacting Father through counsel, unlike the case of *William M.*

C. Implications

This case will probably erode the reasonable efforts requirement as applied to parents in jail or prison. *Anhayla H.* will stand for the proposition that CYFD can know or reasonably know a parent has been incarcerated, but so long as the parent has spent time outside jail or prison and has been uncooperative during that time, CYFD will be excused for failing to perform its duties to that incarcerated parent. That will be a troubling precedent because of the high rate of incarceration among New Mexicans with children. Although the record is clear Father was difficult or impossible to contact when not confined at MDC, this decision could have worrying implications in cases where parents have demonstrated more willingness to comply with their caseworkers and treatment plans. For example, assume a parent exhibits more cooperation than Father did with a caseworker while not incarcerated, but subsequently goes to jail or prison. *Anhayla H.* would seemingly relieve CYFD from providing timely, thorough assistance to that parent during the time of the parent's incarceration.

140. *Id.* ¶ 25, 185 P.3d at 1079.

141. *Id.* ¶ 26, 185 P.3d at 1079.

142. *Id.* ¶ 27, 185 P.3d at 1079–80.

143. See *State ex rel. Children, Youth & Families Dep't v. Keon H. (In re Anhayla H.)*, 2018-NMSC-033, ¶¶ 4, 29, 421 P.3d 814, 816–17, 820–21.

D. Amend New Mexico's TPR Statute to Include Procedural and Substantive Components

New Mexico lacks a definition for reasonable efforts in its Children's Code or Abuse and Neglect Act.¹⁴⁴ Many other states, such as Colorado, Minnesota, and South Dakota, have detailed definitions of "reasonable efforts" in their statutory codes,¹⁴⁵ and most others have statutory definitions that are general in nature.¹⁴⁶ It may not be necessary to amend the New Mexico Abuse and Neglect Act to provide more guidance as to what constitutes reasonable efforts in a generally applicable sense. Defining reasonable efforts in cases where parents are behind bars, however, would ensure adequate process to individuals who are limited in their opportunities to participate in their treatment programs.

The definition of reasonable efforts could include substantive components. For instance, Section 32A-4-28(B) could include language which provides that the Department must make efforts including, but not limited to, having a psychologist visit a parent at his or her place of confinement to perform psychosocial and/or psychological evaluations. Alternatively, the statute could specify that once the Department has reason to know a parent is imprisoned, a psychosocial evaluation would be mailed to the inmate. In addition, adding language that requires the Department to identify opportunities that would assist inmates in completing court-ordered treatment would promote compliance from both child welfare agency and parents.

Procedural components of reasonable efforts would also be elucidatory. As an example, a statute requiring documentation of the number and manner of attempts to contact a parent would aid in preventing the gaps in the record seen in *Anhayla H.* It would further ensure that CYFD and parent are more accountable to one another.

It is feasible to provide guidance by amending the NMSA because, unlike parents in other TPR proceedings, there are relatively predictable circumstances surrounding confinement, and incarcerated parents are a discrete, easily identifiable population. Thus, a black-letter rule would suit this population better than merely an undefined reasonableness standard.

CONCLUSION

The right to care and custody of one's own children is a fundamental right, and courts must afford scrupulous fairness and due process to parents involved in involuntary termination of parental rights proceedings. Such fairness and process must be extended to incarcerated parents. However, the "reasonable efforts" element in New Mexico's termination of parental rights statute may lead to unfair results because it lacks a definition. Partly due to the unclear nature of the reasonable efforts

144. See N.M. STAT. ANN. §§ 32A-1-4 (2016), 32A-4-2 (2018).

145. See Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 296 (2003); Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J. L. & PUB. POL'Y 100, 126-27 (2009).

146. See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN (2016), <https://www.childwelfare.gov/pubPDFs/reunify.pdf> [<https://perma.cc/KP7K-8E28>].

requirement, Father had a treatment plan that, for a year and a half, consisted of only one item that went unfulfilled, a psychosocial evaluation. Furthermore, although Father's PPWs had reason to know of his whereabouts while he was confined for two stretches of time at MDC, his PPWs contravened CYFD's policy of visiting monthly with parents. Father was finally given his psychosocial evaluation, but only after CYFD moved to terminate his parental rights. There is no gainsaying that Father could and should have been more engaged with his treatment when not in custody, but because the New Mexico Supreme Court has held that CYFD made reasonable efforts in his case, a standard for those efforts has emerged that may adversely affect future parents in closer cases than *Anhayla H.* Adding clarity by defining reasonable efforts in cases involving incarcerated parents could prevent the problems seen in *Anhayla H.* and protect a fundamental right.