

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Opinion Number:** _____

3 **Filing Date: June 18, 2018**

4 **NO. S-1-SC-36028**

5 **IN THE MATTER OF**
6 **ANHAYLA H., a child,**

7 **STATE OF NEW MEXICO ex rel.**
8 **CHILDREN, YOUTH AND FAMILIES**
9 **DEPARTMENT,**

10 Petitioner-Petitioner,

11 v.

12 **KEON H.,**

13 Respondent-Respondent.

14 **ORIGINAL PROCEEDING ON CERTIORARI**
15 **William E. Parnall, District Judge**

16 New Mexico Children, Youth & Families Department
17 Kelly P. O’Neill, Children’s Court Attorney
18 Albuquerque, NM

19 for Petitioner

20 Law Offices of Jane B. Yohalem
21 Jane B. Yohalem
22 Santa Fe, NM

1 | for Respondent

1 **OPINION**

2 **MAES, Justice.**

3 {1} The New Mexico Children, Youth and Families Department (the Department)
4 appeals from a judgment of the Court of Appeals reversing the district court’s
5 termination of Father’s parental rights with regard to Child. The Court of Appeals
6 concluded that the Department failed to make reasonable efforts to assist Father in
7 remedying the conditions and causes of neglect and abuse that rendered Father unable
8 to properly care for Child under NMSA 1978, Section 32A-4-28(B)(2) (2005). *See*
9 *State ex rel. Children, Youth & Families Dep’t v. Keon H.*, 2017-NMCA-004, ¶ 1,
10 387 P.3d 313. We granted certiorari to review whether the district court’s
11 determination that the Department made reasonable efforts to assist Father was
12 supported by substantial evidence. We reverse the Court of Appeals opinion and
13 affirm the district court order terminating Father’s parental rights.

14 **I. BACKGROUND**

15 {2} On February 20, 2013, Mother and Father took two-month-old Child to the
16 hospital. Mother and Father reported that two days prior Father had been standing
17 and rocking Child when he accidentally dropped her on the carpet. Child was in
18 critical condition, having sustained multiple fractures, including twenty-three rib
19 fractures and four skull fractures in various stages of healing, facial bruising, liver

1 lacerations, brain bleeding, and a possible detached retina. Doctors determined that
2 the “volume, distribution, and severity of [Child’s] injuries [were] not consistent with
3 a short fall in the home” and instead evidenced multiple incidents of blunt force
4 trauma to Child’s head and body. Child is severely physically and mentally impaired
5 as a result of the injuries.

6 {3} On February 25, 2013, the Department filed a petition with the district court
7 alleging Child to be neglected and/or abused under NMSA 1978, Section 32A-4-2
8 (2009, amended 2017). Mother and Father entered no contest pleas to the neglect and
9 abuse allegations on April 5, 2013. The adjudicatory and dispositional hearing was
10 held on April 22, 2013. An initial judicial review hearing and three permanency
11 hearings were held between May 20, 2013 and August 22, 2014. Father’s termination
12 of parental rights hearing was conducted over two days, approximately six months
13 apart, August 27, 2014 and February 6, 2015. Pertinent details of the various
14 hearings are outlined below.

15 **A. Initial Custody**

16 {4} The Department took Child into custody on February 21, 2013 on allegations
17 of neglect and/or abuse filed February 25, 2013. On February 26, 2013, the district
18 court granted the Department continued custody of Child until further order. On

1 March 7, 2013, a custody hearing was held; both Mother and Father were present.
2 At the custody hearing, the court ordered Mother and Father to participate in
3 psychosocial, psychological, domestic violence, substance abuse, and parenting
4 assessments, as well as drug screens. Mother was also instructed to participate in an
5 independent living skills assessment. The court further instructed Mother and Father
6 to keep their attorneys and the Department's permanency planning worker (PPW)
7 apprised of their current addresses and phone numbers at all times and promptly
8 notify them of any changes. The Department assigned Richard Gaczewski as the
9 PPW for Child and Diane Drobinski as the PPW for Mother and Father.

10 **B. Mediation and Plea**

11 {s} On April 5, 2013, Mother and Father participated in a mediation conference
12 and pled no contest to Child being neglected and/or abused under Section 32A-4-2
13 (2009, amended 2017). The factual basis for Mother's and Father's plea agreements
14 was that Child was seriously injured while in the care of Mother, Father, and others,
15 and "no action was taken by [Mother or Father] to protect [Child] from injury or seek
16 medical care." Mother's stipulated judgment and disposition also noted that
17 "domestic violence in the home between [Father] and [Mother] in the presence of
18 [Child] [had] impaired [Mother's] ability to provide for the care, safety and

1 supervision of [Child].”

2 **C. Adjudication and Disposition**

3 {6} At the adjudicatory and dispositional hearing on April 22, 2013, the district
4 court adopted the Department’s proffered findings of fact and incorporated into its
5 order the Department’s family treatment¹ plan and predispositional study dated April
6 16, 2013. Although the court had ordered several assessments, the treatment plans
7 recommended by the Department for Mother and Father called for initial psychosocial
8 assessments on which other Department recommendations would be based. By the
9 hearing date, Mother had completed her psychosocial assessment and the Department
10 had developed personalized treatment recommendations for her. Father had not yet
11 participated in his psychosocial assessment and thus only had the one item in his
12 treatment plan.²

13 ¹The district court’s orders in the case refer to the Department’s plans for
14 Mother and Father as “case” plans instead of “treatment” plans. The terms appear to
15 be used interchangeably by both the court and the parties. For consistency, we refer
16 to the plans as “treatment” plans throughout this opinion. We do note, however, that
17 when the Legislature amended the disposition statute in 2016, it substituted the word
18 “case” for “treatment” throughout. *See* NMSA 1978, § 32A-4-22(C) (2016).

19 ²Father’s name was not originally listed in the parent/guardian plan items of the
20 summary treatment plan; the summary only indicated that a psychosocial assessment
21 was due. This typographical error was discussed on February 24, 2014 at the second
22 permanency hearing. The parties acknowledged that this was simply an oversight.

1 {7} The record indicates that at the time of the hearing, Father was homeless and
2 did not have an address. Father was not returning phone calls from his PPW, Ms.
3 Drobinski, nor did he show for a scheduled office visit. Father's only visits with
4 Child occurred prior to the adjudicatory hearing. The Department described one visit
5 as "problematic" because Father had "angrily grabbed [Mother's] cell phone from her
6 hands" when they were having an argument. The district court ordered Mother and
7 Father to "undergo psychological evaluations and treatment to be arranged by the
8 [Department] or consistent with [the c]ourt's order." The court also ordered Mother
9 and Father to maintain regular contact with their attorneys and the PPW regarding the
10 court-ordered treatment plans, court dates, and the case in general.

11 **D. Initial Judicial Review Hearing**

12 {8} The initial judicial review hearing was held on May 20, 2013. Mother was
13 present by phone; Father was not present. The district court adopted the
14 Department's facts and proposed family treatment plan contained in the judicial
15 review and/or permanency hearing report dated May 20, 2013. The Department
16 stated in the report that it offered Mother and Father office visits with their PPW to

17 Father's name is listed in the family treatment plan, and there is nothing in the record
18 to indicate that there was any confusion about Father's responsibility to participate
19 in a psychosocial assessment.

1 conduct psychosocial assessments, create treatment plans, and coordinate supervised
2 visits with Child. The court found that Mother was participating in her treatment plan
3 and regularly visiting Child. Father, however, had made no efforts to comply with
4 his treatment plan, had made no efforts to maintain contact with Child given his
5 circumstances and his abilities, and had not been in contact with the Department since
6 the plea hearing on April 5, 2013. Because Father was not present at the hearing, the
7 court asked Father's attorney if Father had been in contact with her. Father's attorney
8 stated that she called Father the day before and asked if Father had been in contact
9 with the Department. She said that Father told her that he had not been in contact
10 with the Department, that he had not started to engage in his treatment plan, and that
11 the only thing he was doing was looking for a job.

12 **E. Initial Permanency Hearing**

13 {9} The initial permanency hearing was held on November 25, 2013. Mother was
14 present; Father was also present, having been transported from the Metropolitan
15 Detention Center (MDC). The district court adopted the Department's facts and
16 proposed family treatment plan contained in the judicial review and/or permanency
17 hearing report dated November 25, 2013. The Department informed the court that
18 Father was in custody due to a domestic violence incident with Mother. The

1 Department also informed the court that Mother had been making good efforts at
2 working her treatment plan but had recently stopped participating and that Father had
3 made no efforts to participate in his treatment plan. Father's attorney told the court
4 that Father intended to take his domestic violence charge to trial, so she did not
5 expect that case to be resolved prior to the neglect and abuse proceedings.

6 {10} During the hearing, Father's attorney volunteered that Father had not been
7 good about keeping in touch with her. In response, the court explained to Mother and
8 Father the importance of maintaining contact with the Department. The court said,
9 "When there's a problem, you need to go to the Department and let the Department
10 know . . . [if you are] homeless . . . don't have a phone . . . can't get to the [urine
11 analyses], . . . whatever. The Department's job is to make reasonable efforts to fix
12 those things; so I'll ask the Department to do that, and I'll ask you to communicate
13 with the Department so that [it will] do that." The court reminded Father that there
14 were programs Father could complete while in custody and encouraged him to "keep
15 that in mind and do what you can." Father responded, "Yes, sir." The court changed
16 Child's permanency planning goal from reunification to adoption, but ordered the
17 Department to make reasonable efforts to implement the family treatment plan and
18 ordered Mother and Father to make reasonable efforts to comply with the plan.

1 **F. Second Permanency Hearing**

2 {11} The second permanency hearing was held on February 24, 2014. Mother was
3 present; Father was also present, having been transported from MDC. The district
4 court adopted the Department’s facts and proposed family treatment plan contained
5 in the judicial review and/or permanency hearing report dated February 24, 2014. In
6 the report, Ms. Drobinski informed the court that Father had twice been scheduled for
7 his psychosocial assessment but canceled both appointments, and that Mother’s visits
8 with Child had been canceled after Mother’s domestic violence incident with Father.
9 Further, Ms. Drobinski indicated that Father had not been in touch with the
10 Department and had not participated in his treatment plan, but did note that Father
11 had once visited with Child. Ms. Drobinski also informed the court that she visited
12 Father at MDC in November 2013, that Father was transferred to Texas, and that she
13 asked Father’s attorney how to write to Father.

14 {12} The guardian ad litem, Karen Cantrell, was present and testified that Child
15 would need highly skilled and specialized care for her entire life. Ms. Drobinski was
16 also present and provided information about Child’s therapy needs and the type of
17 training a caregiver would need in order to provide Child with the twenty-four-hour-
18 a-day care that Child requires. Ms. Drobinski testified that, at a minimum, Child’s

1 caregiver would need to participate in training with the Association for Retarded
2 Citizens of Albuquerque or another agency of that type, and participate in Child's
3 occupational therapy, physical therapy, and hippotherapy.

4 **G. Motion to Terminate Parental Rights**

5 {13} On March 26, 2014, the Department filed a motion to terminate the parental
6 rights of both Mother and Father, stating that Mother and Father “have been unable
7 or unwilling to make the necessary changes to parent [Child] in a minimally safe and
8 adequate manner.” The Department alleged that Mother had stopped participating in
9 her treatment plan items and that Father was in substantial non-compliance with his
10 treatment plan and had abandoned Child. The Department asserted that, despite
11 reasonable efforts by the Department to assist Mother and Father, it was “unlikely the
12 underlying causes of the neglect [would] change in the foreseeable future.” The
13 Department also asserted that additional efforts would be futile. Father filed a
14 response to the motion, denying the allegations. Mother ultimately voluntarily
15 relinquished her parental rights.

16 **H. Third Permanency Hearing**

17 {14} On August 22, 2014, the district court held a third permanency hearing.
18 Mother was present; Father was also present, having been transported from MDC.

1 The district court adopted the Department’s facts and proposed family treatment plan
2 contained in the judicial review and/or permanency hearing report dated August 22,
3 2014. The court found that the Department had made reasonable efforts to implement
4 the treatment plans of Mother and Father, that Mother had made some efforts to
5 comply with her treatment plan but that her participation had been inconsistent, and
6 that Father had made no effort to comply with his treatment plan. Again, the court
7 ordered Mother and Father to participate in their treatment plans.

8 **I. Termination of Parental Rights Hearing—First Day**

9 {15} The termination of parental rights hearing began on August 27, 2014. On the
10 day of the hearing, Mother voluntarily relinquished her parental rights to Child.
11 Thereafter, the termination proceedings pertained solely to Father’s parental rights.
12 The court heard testimony from three witnesses: Luanne Stordahl, a family service
13 coordinator and developmental specialist at Inspirations Early Intervention, Inc.;
14 Richard Gaczewski, a senior PPW with the Department; and Father.

15 **1. Luanne Stordahl’s Testimony**

16 {16} Ms. Stordahl testified that Child did not have any medical issues at birth; but
17 when Ms. Stordahl evaluated Child in March 2013 when Child was approximately
18 three months old, Child “was not using the right side of her body” and had “difficulty

1 maintaining eye contact or [fixating] on toys or objects.” Ms. Stordahl specifically
2 described Child’s visual diagnoses, which included multiple brain and eye issues.
3 Child was assessed as having “delays in her motor skills, feeding skills, vision skills
4 . . . and communication skills.” Subsequent reassessments reconfirmed those delays.
5 Ms. Stordahl testified that as a result, Child was referred to multiple therapies, one of
6 those being hippotherapy. When asked who could participate in hippotherapy with
7 Child, Ms. Stordahl testified that both parents would have been able to participate.
8 She stated that Mother had attended some sessions, but to her knowledge Father had
9 never attended any sessions. Ms. Stordahl testified that she had not had any contact
10 with Father.

11 **2. Richard Gaczewski’s Testimony**

12 {17} Mr. Gaczewski testified that he was currently Father’s PPW and had been since
13 March 21, 2014. Mr. Gaczewski testified that he was also serving as Child’s PPW
14 and had been Child’s PPW since March 2013. As Child’s PPW, he worked closely
15 with Ms. Drobinski, Father’s first PPW, and later reviewed her notes about Father’s
16 case when he took over as Father’s PPW.

17 {18} Mr. Gaczewski testified that Department PPWs are responsible for meeting
18 monthly with parents, conducting psychosocial assessments, working with parents to

1 create treatment plans, and coordinating services for parents and children. Mr.
2 Gaczewski testified that as Child's PPW, he participated in the creation of the
3 treatment plans in this case. When asked why Father's treatment plan contained only
4 one element—the psychosocial assessment—as opposed to Mother's treatment plan
5 which incorporated numerous items, Mr. Gaczewski explained that the psychosocial
6 assessment is the first step of a treatment plan and that when the psychosocial
7 assessment is complete, the Department establishes a more comprehensive treatment
8 plan based upon the client's needs. Mr. Gaczewski said that Father came into the
9 office at the beginning of the case but did not complete the psychosocial assessment.

10 {19} Mr. Gaczewski testified that Mother, on the other hand, completed her
11 psychosocial assessment right away and had been working her treatment plan. Mr.
12 Gaczewski indicated that as Child's PPW, he worked more with Mother than Father
13 because Mother was involved in the case and Father was not. Mr. Gaczewski
14 testified that Mother regularly attended sessions, that he interacted with Mother
15 during visits, and that he performed Mother's independent living assessment. He said
16 he would have done the same for Father had Father shown interest in being involved
17 in the case.

18 {20} Mr. Gaczewski testified that Father was present at the custody hearing on

1 March 7, 2013 and the mediation conference and plea hearing on April 5, 2013, and
2 was made aware of his treatment plan. Father was also provided with the
3 Department's contact information. Mr. Gaczewski testified that a PPW is always
4 present at mediations and court hearings and that the PPW carries business cards
5 containing the Department's contact information. To Mr. Gaczewski's knowledge,
6 Father was not incarcerated between March 2013 and November 2013.

7 {21} Father was arrested in November 2013 for a domestic violence incident with
8 Mother.³ Mr. Gaczewski testified that Ms. Drobinski visited Father at MDC after this
9 arrest, but Father's psychosocial assessment was not completed at that time. Mr.
10 Gaczewski testified that Ms. Drobinski's notes from the visit did not indicate
11 anything other than the fact that Father told Ms. Drobinski he had been homeless and
12 without a phone and that was why he had not contacted the Department.

13 {22} The remainder of Mr. Gaczewski's testimony focused on the contact Mr.
14 Gaczewski had with Father after being assigned as Father's PPW on March 21, 2014.
15 Mr. Gaczewski testified that he had not had any contact with Father because Father's
16 whereabouts were unknown to him until August 2014. He testified that he made

17 ³On January 15, 2015, the State filed a nolle prosequi as to Father's criminal
18 charges related to the domestic violence incident with Mother. *See* Case No. D-202-
19 CR-2013-05298.

1 efforts to try to locate Father by asking Mother about Father's whereabouts, but
2 Mother provided no information. He also said he checked the MDC website around
3 April or May 2014 and again in July 2014, but Father was not listed as an inmate the
4 times Mr. Gaczewski checked. Mr. Gaczewski testified that he did not send Father
5 letters because Father was not listed on the MDC website, but said he would have
6 sent Father letters if he had located him. Mr. Gaczewski testified that between March
7 2014 and July 2014 Father had not contacted him, nor had Father visited Child.

8 {23} Mr. Gaczewski testified that Father had contact information for the Department
9 but never attempted to make contact with the Department, never sent letters to the
10 Department, never made phone calls to the Department, and never had anyone contact
11 the Department on his behalf. Mr. Gaczewski reiterated that both the Department and
12 Father were responsible for making efforts toward reunification of the family and that
13 it was not solely the Department's responsibility. Mr. Gaczewski testified that Ms.
14 Drobinski left a message on her voice mail when she left her PPW position which
15 provided Mr. Gaczewski's phone number and Mr. Gaczewski's supervisor's phone
16 number, and that the voice mailbox was open through July 2014. Mr. Gaczewski
17 testified that he never received a message from Father and that Mr. Gaczewski's
18 supervisor never contacted Mr. Gaczewski about receiving any messages from Father.

1 {24} Mr. Gaczewski testified that in his opinion, Child would incur great bodily
2 harm if Child were returned to Father. He testified that Child's highly specialized
3 needs would not be met given Father's lack of involvement in any services to date.
4 To mitigate these safety threats, he noted that Father would have to participate in the
5 psychosocial assessment, that the Department would have to look at Father's "levels
6 of functioning," that "referrals would . . . need to be made," and that Father would
7 have to be involved "with [Child's] service providers over a period of time, maybe
8 six months, so that [Father could] have a full understanding of the long-term needs
9 of [Child]." Mr. Gaczewski testified that Father had made no attempts to provide for
10 Child and that the last contact Father had with Child was in March 2013. Mr.
11 Gaczewski testified that in light of this information, the conditions that rendered
12 Father unable to properly care for Child could not be changed in the foreseeable
13 future. He further testified that Child was adoptable, based on monthly home visits
14 he conducted with Child from March 2013 to April 2014, and that it was in Child's
15 best interest to terminate Father's parental rights.

16 **3. Father's Testimony**

17 {25} Father testified that he had been incarcerated continuously since October 9,
18 2013. He stated that MDC sent him to Texas twice but that during those times his

1 name would have appeared on MDC's website as being in custody at MDC had the
2 Department attempted to locate him. Father reiterated that he had never, at any point
3 since October 9, 2013, been released from MDC's custody.

4 {26} The district court noted during Father's testimony that the Department typically
5 sends letters to incarcerated parents reminding them to work the treatment plan, along
6 with self-addressed, stamped envelopes. Father testified that Ms. Drobinski did not
7 have Father participate in a psychosocial assessment when she visited him in custody
8 at MDC in November 2013, nor did she ever send him letters or self-addressed,
9 stamped envelopes. He also testified that Ms. Drobinski never invited Father to make
10 an appointment to do a psychosocial assessment or offered Father any dates to do the
11 assessment. Father further testified that when Ms. Drobinski visited Father at MDC
12 in November 2013, the only information Ms. Drobinski provided to Father was that
13 Child's permanency planning goal would be changed from reunification to adoption.
14 Father also testified, however, that he never communicated with the Department
15 while he was in custody, never requested that a psychosocial assessment be
16 completed, and never requested to participate in his treatment plan.

17 {27} At the end of the first day of the termination of parental rights hearing, the
18 Department indicated that it needed to call a rebuttal witness. The court determined

1 that a recess would be required and continued the hearing for approximately six
2 months. The hearing resumed on February 6, 2015.

3 **J. Termination of Parental Rights Hearing—Second Day**

4 **1. Richard Gaczewski's Testimony**

5 {28} Mr. Gaczewski testified again for the Department. Mr. Gaczewski first
6 addressed Father's testimony that Father had been continuously incarcerated since
7 October 2013. To rebut this testimony, the Department introduced bench warrants
8 issued for Father in May, June, and August 2014 in Father's pending criminal cases.
9 Mr. Gaczewski testified that he checked Father's pending criminal cases and was able
10 to determine that, contrary to Father's testimony, Father had, in fact, been in and out
11 of custody during this time. Mr. Gaczewski stated that he checked the MDC website
12 around the time the bench warrants were issued and that Father was not listed as an
13 inmate. Mr. Gaczewski testified further that in reviewing Father's pending criminal
14 cases, he determined that Father's current incarceration was for neglect and abuse
15 charges, the same allegations that brought Child into the Department's custody.

16 {29} Mr. Gaczewski testified that on September 2, 2014, six days after the first day
17 of the termination hearing, he mailed a letter to Father at MDC. With the letter, he
18 included a psychosocial assessment and self-addressed, stamped envelopes. Father

1 promptly completed and returned the psychosocial assessment. Upon receiving
2 Father's psychosocial assessment, Mr. Gaczewski updated Father's treatment plan
3 with personalized treatment recommendations. On September 23, 2014, Mr.
4 Gaczewski mailed Father another letter in which he specified the treatment plan items
5 and suggested ways for Father to meet the items while incarcerated.

6 {30} At the hearing, Mr. Gaczewski identified many of the requirements outlined in
7 Father's plan: participate in psychological, substance abuse, and parenting
8 assessments and follow the recommendations; participate in domestic violence
9 counseling classes; participate in Child's non-emergency medical appointments;
10 provide contact information for possible placements for Child; provide a financial
11 plan for how Father would support Child; maintain contact with the Department PPW
12 at least once a month; inform the Department PPW of any changes in Father's address
13 or phone number; and provide contact information for Father's case manager at
14 MDC. Mr. Gaczewski acknowledged that some of the items in the new treatment
15 plan, such as Father attending Child's medical appointments, were impossible for
16 Father to fulfill while in jail, but Mr. Gaczewski had included recommendations for
17 how Father could fulfill each item while incarcerated. For example, as to Child's
18 medical appointments, Mr. Gaczewski indicated that he intended to provide Father

1 with updates regarding Child's medical needs. Mr. Gaczewski testified that he never
2 heard back from Father. Father only sent letters to Child.

3 {31} Mr. Gaczewski testified that he sent follow-up letters to Father on October 16,
4 2014 and again on November 21, 2014, but did not receive a response. Mr.
5 Gaczewski further testified that he informed Father in his November 21, 2014 letter
6 that Father and Child were receiving new PPWs and he provided contact information
7 for those workers. Father's new PPW was identified as Lareina Manuelito.

8 **2. Lareina Manuelito's Testimony**

9 {32} Lareina Manuelito, Father's third PPW, then testified about her contact with
10 Father in the months leading up to the second day of the termination of parental rights
11 hearing. Ms. Manuelito testified that she received letters from Father in December
12 2014 and January 2015, but the letters were specifically directed to Child, not to her.
13 She testified that she sent a letter to Father at the end of January 2015, attaching a
14 copy of Father's previous treatment plan, notes from the last home visit with Child,
15 and self-addressed, stamped envelopes so Father could correspond with her and with
16 Child. When Ms. Manuelito was asked why she had not contacted Father in
17 November or December 2014, Ms. Manuelito testified that she was acclimating to her
18 new role as a PPW. Ms. Manuelito also testified that the Department was not

1 currently authorizing visits to clients in jail and that PPWs were only communicating
2 through letters. Ms. Manuelito testified that she had not received any documentation
3 from Father regarding his treatment plan.

4 **K. Termination of Father’s Parental Rights**

5 {33} At the close of the second day of the termination of parental rights hearing, the
6 district court criticized the Department for not doing more for Father while he was
7 incarcerated, but ultimately found that the Department made reasonable efforts to
8 assist Father under the facts and circumstances of the case. The court also found that
9 the conditions and causes of Child’s neglect and abuse were unlikely to change in the
10 foreseeable future. The court did not enter a finding of futility or aggravated
11 circumstances. The court terminated Father’s parental rights.

12 {34} Father appealed the termination of his parental rights, arguing that the
13 Department had not fulfilled its obligation to make reasonable efforts and that the
14 Department “made its own determination from the outset that efforts to work with
15 Father toward reunification would be futile.” The Court of Appeals reversed, finding
16 that there was not substantial evidence to prove by clear and convincing evidence that
17 the Department made reasonable efforts. *Keon H.*, 2017-NMCA-004, ¶¶ 1, 19. The
18 Court of Appeals noted that the Department was free to bring additional allegations

1 of neglect or abuse on remand. *Id.* ¶ 18.

2 {35} The Department petitioned for a writ of certiorari on the issue of whether the
3 Court of Appeals erred in reversing the district court’s finding of reasonable efforts.
4 We granted certiorari and exercise our jurisdiction to review the opinion of the Court
5 of Appeals under Article VI, Section 2 of the New Mexico Constitution and Rule 12-
6 502 NMRA.

7 **II. STANDARD OF REVIEW**

8 {36} There is no dispute that Child was neglected and/or abused as defined by the
9 Children’s Code. *See* § 32A-4-2 (2009, amended 2017). The issue before the Court
10 is whether there was substantial evidence to support the district court’s finding that
11 the Department made reasonable efforts to assist Father. *See* § 32A-4-28(B)(2). “The
12 statutory prerequisite of reasonable efforts to assist the parent must be satisfied before
13 parental rights may be terminated.” *State ex rel. Children, Youth & Families Dep’t*
14 *v. Patricia H.*, 2002-NMCA-061, ¶ 21, 132 N.M. 299, 47 P.3d 859. “Substantial
15 evidence is relevant evidence that a reasonable mind would accept as adequate to
16 support a conclusion.” *Id.* ¶ 22 (internal quotation marks and citation omitted).

17 {37} “Parents have a fundamental liberty interest in the care and custody of their
18 children; due process of law is required before parents can be deprived of that right.”

1 *State ex rel. Children, Youth & Families Dep't v. Marlene C.*, 2011-NMSC-005, ¶ 37,
2 149 N.M. 315, 248 P.3d 863. Due process requires that findings necessary to
3 terminate parental rights be supported by clear and convincing evidence. *Santosky*
4 *v. Kramer*, 455 U.S. 745, 747-48 (1982); *State ex rel. Children, Youth & Families*
5 *Dep't v. Nathan H.*, 2016-NMCA-043, ¶ 31, 370 P.3d 782. “Clear and convincing
6 evidence means evidence that instantly tilts the scales in the affirmative when
7 weighed against the evidence in opposition and the fact finder’s mind is left with an
8 abiding conviction that the evidence is true.” *Nathan H.*, 2016-NMCA-043, ¶ 31
9 (internal quotation marks and citation omitted).

10 {38} “Our standard of review is therefore whether, viewing the evidence in the light
11 most favorable to the [Department], the fact finder could properly determine that the
12 clear and convincing evidence standard was met.” *In re Termination of Parental*
13 *Rights of Eventyr J.*, 1995-NMCA-087, ¶ 3, 120 N.M. 463, 902 P.2d 1066; *see also*
14 *State ex rel. Children, Youth & Families Dep't v. Hector C.*, 2008-NMCA-079, ¶ 11,
15 144 N.M. 222, 185 P.3d 1072 (requiring clear and convincing evidence in termination
16 cases). Our standard of review does not require us to determine “whether the
17 [district] court could have reached a different conclusion.” *Patricia H.*, 2002-
18 NMCA-061, ¶ 31. Furthermore, this Court is not permitted to “reweigh the

1 evidence.” *Eventyr J.*, 1995-NMCA-087, ¶ 3; *see also State ex rel. Children, Youth*
2 *& Families Dep’t v. Vanessa C.*, 2000-NMCA-025, ¶¶ 24, 28, 128 N.M. 701, 997
3 P.2d 833 (providing that when reviewing a termination of parental rights case, the
4 appellate court must not reweigh the evidence nor assess the credibility of witnesses,
5 but must defer to the conclusions of the trier of fact).

6 **III. DISCUSSION**

7 **A. Termination of Parental Rights Proceedings and the Reasonable Efforts** 8 **Requirement**

9 {39} The reasonable efforts requirement originated in the Adoption Assistance and
10 Child Welfare Act of 1980, which conditioned federal funding on the requirement
11 that states put forth reasonable efforts to reunify a family before placing a child up
12 for adoption. *See* Cristine H. Kim, *Putting Reason Back into the Reasonable Efforts*
13 *Requirement in Child Abuse and Neglect Cases*, 1999 U. Ill. L. Rev. 287, 288 (1999)
14 (citing 42 U.S.C. §§ 620-28, 670-79a) (1991, amended 1997). Congress enacted this
15 legislation to limit the “unnecessary placement of children in foster care who could
16 have been adequately protected at home if their families had access to support
17 services.” Kim, *supra*, at 289. Congress later amended this legislation to clarify that
18 the child’s health and safety is the paramount concern in determining the reasonable
19 efforts to be made and in making those efforts. *See* Adoption and Safe Families Act

1 of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered
2 sections of 42 U.S.C.); 42 U.S.C. 671(a)(15)(A) (2012). In the amended legislation,
3 Congress sought to strike a balance between the interests of family unity and health
4 and safety. Kim, *supra*, at 316-17.

5 {40} The New Mexico Legislature has adopted the same approach to the reasonable
6 efforts requirement: “Reasonable efforts shall be made to preserve and reunify the
7 family, with the paramount concern being the child’s health and safety.” See § 32A-
8 4-22(C) (2009, amended 2016); *see also In re Grace H.*, 2014-NMSC-034, ¶ 45, 335
9 P.3d 746 (“A child’s health and safety shall be the paramount concern.” (quoting
10 NMSA 1978, § 32A-1-3(A) (2009))). District courts, in termination of parental rights
11 proceedings, are instructed to “give primary consideration to the physical, mental and
12 emotional welfare and needs of the child.” Section 32A-4-28(A). Section 32A-4-
13 28(B)(2) provides that the district court shall terminate parental rights to a neglected
14 or abused child when

15 the conditions and causes of the neglect and abuse are unlikely to
16 change in the foreseeable future despite *reasonable efforts* by the
17 [D]epartment or other appropriate agency to assist the parent in
18 adjusting the conditions that render the parent unable to properly care
19 for the child.

20 (Emphasis added.) The district court may excuse the reasonable efforts requirement

1 when “there is a clear showing that the efforts would be futile” or “the parent has
2 subjected the child to aggravated circumstances.” Section 32A-4-28(B)(2)(a), (b).

3 {41} Section 32A-4-28(B)(2) does not enumerate the specific methods of assistance
4 that are sufficient to constitute reasonable efforts, beyond stating that the efforts
5 should be directed to assist the parent in remedying the conditions and causes of
6 neglect and abuse. That being the case, we have traditionally considered the totality
7 of the circumstances when reviewing the district court’s determination. *See State ex*
8 *rel. Children, Youth & Families Dep’t v. Alfonso M.-E.*, 2016-NMCA-021, ¶ 59, 366
9 P.3d 282; *Patricia H.*, 2002-NMCA-061, ¶ 31. Efforts to assist a parent “may include
10 individual, group, and family counseling, substance abuse treatment, mental health
11 services, transportation, child care, and other therapeutic services.” *Patricia H.*,
12 2002-NMCA-061, ¶ 26. As our Court of Appeals has noted, “[w]hat constitutes
13 reasonable efforts may vary with a number of factors, such as the level of cooperation
14 demonstrated by the parent and the recalcitrance of the problems that render the
15 parent unable to provide adequate parenting.” *Id.* ¶ 23.

16 {42} The district court’s consideration of Child’s health and safety does not relieve
17 the Department of the statutory requirement that reasonable efforts be made. *See id.*
18 ¶ 21. When examining whether the Department’s efforts were reasonable in this case,

1 we find it helpful to look to the distinction our Court of Appeals has drawn between
2 “active” efforts and “passive” efforts in other termination cases. *See State ex rel.*
3 *Children, Youth & Families Dep’t v. Yodell B.*, 2016-NMCA-029, 367 P.3d 881. In
4 cases where the Indian Child Welfare Act (ICWA) applies, a showing of *active* efforts
5 on the part of the Department is required before a parent’s parental rights may be
6 terminated. *Id.* ¶ 8. The Court of Appeals has distinguished active efforts from
7 passive efforts, determining that “active efforts connotes a more involved and less
8 passive standard than that of reasonable efforts.” *Id.* ¶ 20 (internal quotation marks
9 and citation omitted). The Court of Appeals describes the distinction as follows:

10 Passive efforts are where a plan is drawn up and the client must develop
11 his or her own resources towards bringing it to fruition. Active efforts
12 . . . is where the state [PPW] takes the client through the steps of the
13 plan rather than requiring that the plan be performed on its own.

14 *Id.* ¶ 17 (internal quotation marks and citation omitted). “The term active efforts, by
15 definition, implies heightened responsibility compared to passive efforts. Giving the
16 parent a treatment plan and waiting for [the parent] to complete it would constitute
17 passive efforts.” *Id.* (quoting *In re A.N.*, 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d
18 556). “[A]ctive efforts requires more than pointing the parent in the right direction,
19 it requires ‘leading the horse to water.’” *Yodell B.*, 2016-NMCA-029, ¶ 17 (internal
20 quotation marks and citation omitted).

1 **B. The District Court’s Determination That the Department Made**
2 **Reasonable Efforts to Assist Father Is Supported by Substantial Evidence**

3 {43} In this case, the Department’s efforts, although imperfect, were reasonable. *See*
4 *Patricia H.*, 2002-NMCA-061, ¶ 28 (“[O]ur job is not to determine whether [the
5 Department] did everything possible; our task is . . . to [determine] whether [the
6 Department] complied with the minimum required under law.”). In the beginning
7 months of the case, the Department prepared a treatment plan for Father, went over
8 the treatment plan with Father, provided Father with the Department’s contact
9 information, and scheduled appointments for Father’s psychosocial assessment.
10 Father did not show up for the appointments and did not participate in the
11 psychosocial assessment.

12 {44} The district court heard testimony that Father was taken into custody in either
13 October or November 2013. This means that Father was not incarcerated for the first
14 seven or eight months of this case; that is, March 2013 to October/November 2013.
15 Father was present at the custody hearing on March 7, 2013 and the mediation
16 conference and plea hearing on April 5, 2013, was made aware of his treatment plan,
17 and was provided the Department’s contact information. But Father never contacted
18 the Department when he was out of custody during the first several months of the
19 case or during any other period of time when he was out of custody. The same is true

1 for the time Father was incarcerated; he made no attempts to contact the Department.

2 {45} The Department's senior PPW, Mr. Gaczewski, has been personally and
3 intimately involved with this case since Child was taken into the Department's
4 custody on February 21, 2013. He served as Child's PPW from March 2013 to
5 November 2014 and served as Father's PPW from March 2014 to November 2014.
6 For almost two years, Mr. Gaczewski served a critical role in this matter and, having
7 done so, was able to testify to Father's lack of participation in the case from its
8 inception.

9 {46} Mr. Gaczewski's continuous involvement in the case may have provided the
10 district court with the nexus it needed to gain a broader understanding of the
11 Department's efforts to assist Father. Although the picture of the Department's
12 efforts is by no means perfectly complete, Mr. Gaczewski's testimony, even without
13 the testimony of Father's first PPW, Ms. Drobiniski, appears to have been adequate
14 to fill any questionable void. If not, however, when the termination of parental rights
15 hearing resumed on February 6, 2015, the court heard from Mr. Gaczewski about his
16 additional efforts to assist Father while the court was in recess. There is no reason
17 why the court could not consider these additional efforts when determining whether
18 the Department's efforts as a whole were reasonable.

1 {47} Six days after the first day of the termination of parental rights hearing, the
2 Department sent a letter to Father along with the psychosocial assessment and self-
3 addressed, stamped envelopes. When Father returned the psychosocial assessment,
4 the Department prepared a comprehensive treatment plan for Father and sent Father
5 a letter detailing the ways Father could comply with the plan while in custody. Father
6 never responded to the Department or acknowledged the treatment plan. Even after
7 the Department sent follow-up letters, Father did not respond. Father only sent letters
8 to Child.

9 {48} Both the Department and Father are responsible for making efforts toward
10 reunification of the family. *See* § 32A-4-22(C) (2009, amended 2016) (“[T]he court
11 shall . . . order the [D]epartment to implement and the child’s parent . . . to cooperate
12 with any treatment plan approved by the court.”). While we acknowledge that Father
13 finally completed the psychosocial assessment, Father has continuously failed to
14 show any desire or willingness to address the conditions and causes that brought
15 Child into custody. Father never contacted the Department, he missed or canceled
16 scheduled appointments with the Department, and he only visited Child once or twice
17 at the beginning of the case.

18 {49} Around the time of the plea hearing in April 2013, Father was homeless and did

1 not have an address. Although Father had been instructed by the court to maintain
2 regular contact with his attorney and the Department, he did not do so. When Father
3 failed to attend the initial judicial review hearing on May 20, 2013, Father's attorney
4 informed the court that she did not know why Father was not in court and volunteered
5 that when she had spoken with Father the day before, Father stated that he had not
6 been in touch with the Department, he had not begun to engage in his treatment plan,
7 and he was only looking for a job. Later, at the initial permanency hearing on
8 November 25, 2013, Father's attorney again informed the court that Father had not
9 kept in touch with her, contrary to the court's instructions.

10 {50} Father was given another chance during the recess of the termination hearing
11 to show his willingness to work with the Department on a treatment plan and declined
12 to participate in any meaningful way. Although the new treatment recommendations
13 proposed by the Department were not yet approved by the district court, the delay in
14 formulating a more comprehensive treatment plan could be attributed to Father's lack
15 of initiative in participating in the psychosocial assessment at the outset. The record
16 indicates that the Department made reasonable efforts to assist Father, but Father did
17 not take advantage of those efforts.

18 {51} We do acknowledge that there are some conflicts in the testimony of Mr.

1 Gaczewski and Father, specifically those pertaining to the dates Father was in and out
2 of custody and Ms. Drobinski's visit to Father at MDC in November of 2013. Based
3 on the evidence presented at the termination hearing, the district court could have
4 concluded that Mr. Gaczewski was a more credible witness than Father. It is not our
5 job to assess the credibility of witnesses; it is our duty to defer to the district court's
6 conclusions in this regard. *See Vanessa C.*, 2000-NMCA-025, ¶ 24.

7 {52} When making a determination as to whether the Department's efforts to assist
8 Father were reasonable, the district court was required to consider Child's health and
9 safety. *See* § 32A-4-22(C) (2009, amended 2016) ("Reasonable efforts shall be made
10 to preserve and reunify the family, with the paramount concern being the child's
11 health and safety."); § 32A-4-28(A) ("In proceedings to terminate parental rights, the
12 court shall give primary consideration to the physical, mental and emotional welfare
13 and needs of the child, including the likelihood of the child being adopted if parental
14 rights are terminated."). Throughout the course of the proceedings in this case,
15 Child's guardian ad litem, Karen Cantrell, testified to Child's extensive injuries and
16 the highly specialized care that Child would need for the rest of her life. At the
17 termination hearing, Ms. Stordahl testified to the numerous therapies Child had been
18 receiving and the continued treatments that would be required to keep her alive. As

1 was the case in *Patricia H.*, “[t]he testimony raised significant questions regarding
2 [Father’s] present ability to meet Child’s specialized needs.” 2002-NMCA-061, ¶ 33
3 (affirming termination of mother’s parental rights where child had specialized needs
4 requiring a high level of care and mother stopped participating in services). Indeed,
5 the district court expressed concern that Father had not shown any interest or
6 initiative in learning about Child’s needs and had not obtained any training on how
7 to care for Child.

8 {53} Aside from a reasonable efforts determination, the district court was also
9 required under Section 32A-4-28(B)(2) to determine whether the conditions and
10 causes of the neglect and abuse were unlikely to change in the foreseeable future.
11 “Foreseeable future” means “a reasonably definite time or within the near future.”
12 *Patricia H.*, 2002-NMCA-061, ¶ 34 (internal quotation marks and citation omitted).
13 The court found, based on Father’s lack of performance in the past two years, that
14 Father would not realistically be able to care for Child. The court also considered the
15 fact that Father was currently incarcerated on criminal allegations of abuse stemming
16 from the case at hand, with no anticipated release date.⁴ *See Patricia H.*, 2002-

17 ⁴Father subsequently pled no contest to four counts of child abuse in the
18 criminal matter. *See* Case No. D-202-CR-2014-00244.

1 NMCA-061, ¶ 34 (“[I]n balancing the interests of the parents and children, the court
2 is not required to place [Child] indefinitely in a legal holding pattern.” (internal
3 quotation marks and citation omitted)).

4 {54} Because of Child’s highly specialized needs and Father’s inability to meet
5 those needs in the near future, as well as Father’s failure to maintain contact with
6 Child and the Department, the district court determined that termination was in
7 Child’s best interest. In addition to finding that the Department made reasonable
8 efforts to assist Father, the court found that Father did not “substantially comply with
9 his court-ordered treatment plan and was not successful in addressing his issues with
10 substance abuse, housing and mental health.” We will not disturb the district court’s
11 findings.

12 **IV. CONCLUSION**

13 {55} Considering the totality of the circumstances, there was substantial evidence
14 for the district court to find that the conditions and causes of Child’s neglect and
15 abuse were unlikely to change in the foreseeable future despite reasonable efforts by
16 the Department under Section 32A-4-28(B)(2). The Court of Appeals usurped the
17 role of the district court by reweighing the evidence and failing to give deference to
18 the district court’s determinations. Therefore, we reverse the opinion of the Court of

1 Appeals, affirm the district court order terminating Father’s parental rights, and
2 remand for proceedings consistent with this opinion.

3 {56} **IT IS SO ORDERED.**

4
5

PETRA JIMENEZ MAES, Justice

6 **WE CONCUR:**

7
8

JUDITH K. NAKAMURA, Chief Justice

9
10

CHARLES W. DANIELS, Justice

11 **BARBARA J. VIGIL, Justice, specially concurring**

12 **GARY L. CLINGMAN, Justice, not participating**

1 **VIGIL, Justice (specially concurring).**

2 {57} I agree with the majority that substantial evidence supported the termination
3 of parental rights. The totality of the circumstances sustained the district court’s
4 eventual determination that the Department made reasonable efforts to assist Father
5 under Section 32A-4-28(B)(2). Respectfully, I write separately to underscore three
6 points. First, a parent’s recalcitrance does not in itself relieve the Department from
7 the responsibility to render reasonable efforts. *See* maj. op. ¶ 48. Second, passive
8 efforts are not reasonable efforts under Section 32A-4-28(B)(2). *Contra* maj. op. ¶ 42.
9 Third, the Department must do more than it did in this case to assist a parent who is
10 incarcerated in order to meet its statutory responsibility under Section 32A-4-
11 28(B)(2).

12 {58} First, the district court cannot terminate parental rights unless it finds that the
13 Department made “reasonable efforts . . . to assist the parent in adjusting the
14 conditions that render the parent unable to properly care for the child.” Section 32A-
15 4-28(B)(2). The methods of assistance required to support a finding of reasonable
16 efforts vary with the facts and circumstances of the case. *Patricia H.*, 2002-NMCA-
17 061, ¶¶ 23, 26. Although the totality of the circumstances may be considered in
18 establishing reasonable efforts, including “the level of cooperation demonstrated by

1 the parent and the recalcitrance of the problems that render the parent unable to
2 provide adequate parenting,” Section 32A-4-28(B)(2) requires the Department to
3 provide the parent with a reasonable and appropriate level of support under the
4 individual circumstances. *See Patricia H.*, 2002-NMCA-061, ¶¶ 23, 26, 31. This
5 requires ongoing efforts to engage the parent in a way that will reasonably enable the
6 parent to adjust the causes and conditions that led to the abuse and neglect of the
7 child. *See* § 32A-4-28(B)(2).

8 {59} In this case, the district court could have concluded that Father was
9 uncooperative when the Department initiated reasonable efforts to engage him and
10 Father did not respond. *Patricia H.*, 2002-NMCA-061, ¶ 23. It must be noted,
11 however, that parental cooperation is but one circumstance informing whether the
12 Department made reasonable efforts. *See id.* A lack of engagement on the part of the
13 parent does not authorize the Department to abandon its ongoing responsibility to
14 reach out to the parent to render assistance. This would be contrary to the statute,
15 under which the Department may be relieved from its statutory responsibility based
16 only upon a showing that further efforts would be futile or the child has been
17 subjected to aggravated circumstances. *See* § 32A-4-28(B)(2)(a)-(b); *see also* NMSA
18 1978, § 32A-4-29(I) (2009) (providing that the exceptions must be proven by clear

1 and convincing evidence). The Department may not circumvent these statutory
2 requirements with a posthoc claim that a parent was uncooperative after failing to
3 make reasonable efforts in the first place. Absent a finding of futility or aggravating
4 circumstances, the Department’s statutory responsibility remains in place.

5 {60} Reasonable efforts is a mandatory predicate to the termination of parental
6 rights, and reflects a legislative determination that when there are grounds for a child
7 to be taken into custody, the Department is required to make efforts to assist the
8 parent. *See Patricia H.*, 2002-NMCA-061, ¶ 21. While reunification may ultimately
9 turn on a parent’s success in treatment, it is the Department’s responsibility to initiate
10 and continually pursue communication and efforts to assist the parent in treatment.
11 *See* Section 32A-4-28(B)(2). These efforts are a component of due process and
12 consistent with the fundamental nature of parental rights. *Marlene C.*, 2011-NMSC-
13 005, ¶ 37; *see also Santosky*, 455 U.S. at 747, 769.

14 {61} Second, “reasonable efforts” is an affirmative responsibility, not a passive one.
15 The majority implies that passive efforts may suffice for reasonable efforts, citing
16 *Yodell B.*, 2016-NMCA-029, ¶ 17. In *Yodell B.*, however, the Court of Appeals
17 considered whether there was substantial evidence to support a finding that the
18 Department made *active efforts* to assist a parent. *Id.* ¶ 1. “Active efforts” is an

1 independent statutory directive arising under the Indian Child Welfare Act, 25 U.S.C.
2 § 1912(d) (ICWA). In *Yodell B.*, the Court of Appeals distinguished “active efforts”
3 from “passive efforts,” a term other states have used in construing the ICWA,⁵ and
4 explained that “active efforts connotes a more involved and less passive standard than
5 that of reasonable efforts.” 2016-NMCA-029, ¶ 20 (citing *In re C.D.*, 2008 UT App
6 477, ¶ 34, 200 P.3d 194). The Court of Appeals did not conclude that passive efforts
7 are sufficient to fulfill New Mexico’s reasonable efforts requirement, and this Court
8 does not do so here.

9 {62} Neither “active” nor “passive” efforts are the equivalent of “reasonable” efforts
10 under Section 32A-4-28(B)(2). These standards are separate and distinct from the
11 requirement that the Department make reasonable efforts to assist a parent. By
12 contrast, reasonable efforts are efforts tailored to the circumstances of a case. And
13 under all of these standards, the Department must develop a treatment plan directed

15 ¹*Yodell B.*, 2016–NMCA–029, ¶ 17 (citing *A.A. v.*
16 *State*, Dep’t of Family & Youth Servs., 982 P.2d 256,
17 261 (Alaska 1999); *In re Welfare of Child of E.A.C.*,
18 812 N.W.2d 165, 174 (Minn. Ct. App. 2012); *In re A.N.*,
19 2005 MT 19, ¶ 23, 325 Mont. 379, 106 P.3d 556; *In*
20 *re J.S.*, 2008 Okla. Civ. App. 15, ¶ 16, 177 P.3d 590); *but see In*
21 *re Michael G.*, 63 Cal. App. 4th 700, 714 (1998) (noting that while state law did not
22 require “active efforts,” “[e]ach reunification plan must be appropriate to the parent’s
23 circumstances. The plan should be specific and internally consistent, with the overall
24 goal of resumption of a family relationship.” (citation omitted)).

1 to assist the parent in his or her specific circumstances and individualized needs. *See*
2 *Yodell B.*, 2016-NMCA-029, ¶ 17.

3 {63} Third, the Department’s responsibility to render assistance does not cease
4 because a parent is incarcerated. To the contrary. The Department must refrain from
5 pursuing a termination of parental rights on the sole basis that a parent is incarcerated.
6 Section 32A-4-28(D). As stated, Section 32A-4-28(B)(2) requires the Department to
7 render individualized support. Therefore, when a parent is in jail, the Department
8 must do more to assist the parent, as the parent is limited in his or her ability to appear
9 at the Department to receive information and support. *See, e.g., State ex rel. Children,*
10 *Youth & Families Dep’t v. William M.*, 2007-NMCA-055, ¶¶ 27, 68-71, 141 N.M.
11 765, 161 P.3d 262; *Hector C.*, 2008-NMCA-079, ¶ 26.

12 {64} In other cases involving incarcerated parents, the Department has diligently and
13 intentionally fulfilled its responsibility by maintaining contact with the parent and the
14 parent’s counsel; calling and visiting the parent in jail; bringing an interpreter to the
15 jail to assist the parent in completing a psychosocial assessment; arranging visits
16 between the parent and child at the jail; and following up on the parent’s request to
17 complete a home study of relatives who lived out of state. *William M.*, 2007-NMCA-
18 055, ¶¶ 68-71; *Hector C.*, 2008-NMCA-079, ¶ 26.

1 {65} The Department knew Father was incarcerated in this case and visited Father
2 in jail in November 2013. *See* maj. op. ¶ 21. Yet, for reasons that are not explained,
3 the Department did not assist Father with his psychosocial assessment at that time.
4 *Id.* The Department did not contact Father until the first day of the termination
5 hearing on August 27, 2014, and the psychosocial assessment remained pending. *See*
6 *id.* ¶¶ 22, 26. At the hearing, Mr. Gaczewski testified that he was unaware that Father
7 was still in jail and had been unsuccessful in locating Father on the jail website. *See*
8 *id.* ¶ 22. Not until the nearly sixth-month recess between the first and second days of
9 the termination hearing did the Department mail the psychosocial assessment to
10 Father, who completed it forthwith. *Id.* ¶ 29. Only then did the Department proceed
11 to develop an individualized treatment plan. *Id.*

12 {66} Although the precise dates of Father’s incarceration are unclear from the
13 record, what is clear is that the Department knew Father was incarcerated in
14 November 2013 and failed to assist Father in completing the psychosocial assessment
15 at that time. Maj. op. ¶ 21. In other cases, the Department has assisted incarcerated
16 parents with the psychosocial assessment, and the Department offered no explanation
17 for why it did not do so in this case. *See, e.g., William M.*, 2007-NMCA-055, ¶¶ 27,
18 69; *Hector C.*, 2008-NMCA-079, ¶ 26. The failure to do so was not reasonable and

1 left to speculation how Father would have otherwise progressed in treatment,
2 particularly given that he promptly completed the psychosocial assessment when
3 provided with it. *Keon H.*, 2017-NMCA-004, ¶¶ 11, 16-17.

4 {67} In conclusion, I agree that the totality of the circumstances supported a finding
5 that the Department made reasonable efforts to address the causes and conditions of
6 abuse and neglect. The Department initiated efforts to engage Father and renewed its
7 efforts during the recess between the first and second day of the termination hearing.
8 *See* maj op. ¶ 29. However, I write separately to clarify that Father’s recalcitrance did
9 not relieve the Department from its statutory responsibility; passive efforts are not
10 reasonable efforts under Section 32A-4-28(B)(2); and the Department should have
11 done more to assist Father while he was incarcerated.

12
13

BARBARA J. VIGIL, Justice