FILED
August 5 2011
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 11-0227

IN THE MATTER OF:

J.W.C., L.W.C., K.W.C., and C.W.C,

Youths in Need of Care.

BRIEF OF YOUTHS

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Ingrid Gustafson, Presiding

APPEARANCES:

JOSLYN HUNT
Chief Appellate Defender
KOAN MERCER
Assistant Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEYS FOR MOTHER
AND APPELLANT

ELIZABETH THOMAS, PLLC
P.O. Box 8946
Missoula, MT 59807

ATTORNEY FOR YOUTHS

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

SCOTT J. PEDERSON
Assistant Attorney General
Child Protection Unit
2525 4th Avenue N. #309
Billings, MT 59101

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF CONTENTS (Cont.)

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

The failure of the district court to appoint counsel for the minor children constitutes reversible error.

a. Appointment of counsel for a minor child in a dependency/neglect action is mandated by Montana statute and the Montana Constitution.

b. Appointment of counsel for children is necessary to protect their liberty interests.

c. The attorney GAL does not satisfy the requirement of counsel for the children.

STATEMENT OF THE CASE

This is an appeal from the termination of the mother's parental rights to her four children, J.W.C., L.W.C., K.W.C. and C.W.C. On February 24, 2011, the Thirteenth Judicial District, Yellowstone County, terminated the mother's and father's parental rights. The district court determined that both parents had failed to successfully complete their treatment plans and that the conduct or condition of the parents was unlikely to change in a reasonable amount of time.

Mother appealed, claiming error in failing to transfer the case to tribal court; error in failing to appoint counsel for the minor children; and ineffective assistance of counsel. The children join in the Mother's appeal on the issue of the failure to appoint counsel for the children.

STATEMENT OF THE FACTS

The children agree with the facts as set forth in the Mother's brief.

STANDARD OF REVIEW

The Supreme Court reviews constitutional issues of due process as a question of law. Thus this Court's review is plenary. *In re A.R.*, 2004 MT 22, ¶ 8, 319 Mont. 340, 83 P.3d 1287, *In re the Mental Health of K.G.F.*, 2001 MT 140, ¶ 17, 306 Mont. 1, 29 P.3d 485.

SUMMARY OF THE ARGUMENT

Children in dependency/neglect matters are required to have court appointed counsel. This requirement stems from Montana law and the Montana Constitution. The refusal to appoint counsel for the children violated Montana law and the children's due process. The failure to follow this statutory and due process safeguard requires reversal of the district court's order.

ARGUMENT

THE FAILURE OF THE DISTRICT COURT TO APPOINT COUNSEL FOR THE MINOR CHILDREN CONSTITUTES REVERSIBLE ERROR.

A. Appointment of Counsel for a Minor Child in a Dependency/Neglect Action Is Mandated by Montana Statute and the Montana Constitution.

At the time this proceeding commenced, Mont. Code Ann. § 41-3-425 required that the district court appoint counsel for the minor children. It states, in relevant part, "the court shall immediately appoint or have counsel assigned for: . . . any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422." Mont. Code Ann. § 41-6-425(4). Appointment of counsel for the minor children is not permissive and the failure to do so is a clear violation of the statutory scheme.

The right to counsel is further solidified under the Due Process Clause of Article II, Sections 15 and 17 of the Montana Constitution. Section 17 provides that no person shall be denied of life, liberty or property without due process of law. According to Section 15, these same protections are provided to minors. It is undisputed that a fundamental interest exists in the preservation of family and that attempts to erode that interest must be protected by fundamentally fair procedures. One such procedure is the right to be represented by counsel. *In re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, 87 P.3d 408. These fundamentally fair procedures, i.e. the right to counsel, extend to children when their liberty interest is threatened.

This Court has made clear that the statutory scheme in dependency/neglect matters is to be strictly followed and district courts and DPHHS have repeatedly been cautioned to adhere to statutory requirements. *See In re K.J.B.*, 2007 MT 216, ¶ 46, 339 Mont. 28, 168 P.3d 629 (citing dissent *In re A.R.*, ¶ 23); *Inquiry into M.M.*, 274 Mont. 166, 174, 906 P.2d 675, 680 (1995); *Matter of F.H.*, 266 Mont. 36, 40, 878 P.2d 890, 893 (1994); *Matter of R.B.*, 217 Mont. 99, 105, 703 P.2d 846, 849 (1985).

Other jurisdictions which require the appointment of counsel for minor children in dependency/neglect matters have held that the failure to appoint counsel is a reversible error. *In the Matter of Sabrina R.*, 203 P.3d 167, 171 (N.M. App. 2009) ("Absent separate counsel, Child's position was not fully developed, and Child was therefore prejudiced by not being afforded her full right to representation."); *In the Matter of Stacey S.*, 737 N.E.2d 92, 101 (Ohio App. 6th Dist. 1999) (Despite conclusion that termination factually supported, case reversed and remanded due to failure to appoint counsel for children, "failure to appoint counsel prejudiced children and concomitantly prejudiced parents."); *In the Matter of T.M.H.*, 613 P.2d 468, 470 (Okla. 1980) (Failure to appoint counsel one of two grounds for reversal, "The matter of independent representation by counsel so that a child may have his own attorney when his welfare is at stake is one of the most

significant and practical reforms that can be made in the area of children and the law.").

Here, counsel was never appointed to represent any of the four children. When this deficit was brought to the court's attention, the district court declined to appoint counsel for the minor children, citing their age, and with the justification that everyone stipulated that the children wanted to be reunited with their parents. These two reasons are insufficient to ignore the statutory and constitutional protections which are afforded to families.

B. Appointment of Counsel for Children Is Necessary to Protect Their Liberty Interests.

This Court and the Montana Legislature have determined that the intrusion of the state into family life is a risk to a constitutionally protected interest. So much so that parents are entitled to counsel to protect and safeguard that interest and to create fundamentally fair proceedings. *In re A.T.*, 2003 MT 154, ¶ 10, 316 Mont. 255, 70 P.3d 1247, *In re A.S.*, ¶ 12.

The liberty interest that exists for parents is even more pronounced for children. The termination of parental rights, from the eyes of a child, is more traumatic and acute than for parents. This is not to say that parents easily recover when they have lost custody of their children, but adults have better and more sophisticated coping mechanisms and are better able to understand the how and why of termination proceedings. Moreover, the child has an "interest in his or her

safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and having a relationship with his or her biological parents. *Kenny A. v. Perdue*, 356 F.Supp.2d 1353, 1360 (2005).

The child's liberty interest in a dependency/neglect proceeding begins long before a petition to terminate is filed. The child has a right to a competent child protection specialist, a safe placement, the least restrictive placement, a kinship placement, a placement with siblings, a secure placement so as to avoid multiple placements and timely resolution of these issues. All of these interests are best protected when a child has an attorney, advocating for each of these. Additionally, there is significant negotiating and legal wrangling that goes on outside of the courtroom. Having counsel appointed assures that the child's position is not just considered, but zealously advocated for at a family group decision meeting, treatment team meetings and conferences, long before the court hears any evidence.

In regards to J.W.C., L.W.C., K.W.C., and C.W.C., there were multiple instances where counsel for the children would have worked to protect their liberty interest. From the onset, counsel for the children could have advocated for and pursued removal to tribal court. Unfortunately, the issue of removal was not actively pursued. The issue languished and was not fully litigated.

Counsel could have also advocated and pushed the issue of placements, perhaps one of the most important aspects of this case. The testimony revealed that the two oldest children had been in five and four different placements in the past seventeen months. (2/24/11 Tr. at 41-42, 46-47.) The two youngest had been in a non-concurrent placement for the past seventeen months. (2/24/11 Tr. at 49.) The question of permanency and stability in placements was a significant issue and the children were left without a voice to advocate for their position. Compounding the placement issue is the fact that the siblings were separated, a further intrusion into their interest in maintaining the family unit. The children's interest in preserving the family unit went unheard.

There was also testimony at the termination hearing that DPHHS had been working to find family placements for all four children, but due to resources was unable to have a home study completed. (2/24/11 Tr. at 16-17.) Again, the advocacy of an attorney would have brought this to the district court's attention prior to the termination hearing and, hopefully, forced action on the home study.

A permanency hearing was held on October 7, 2010. As part of the permanency hearing, the district court is required to have "an age appropriate consultation" with the children. Mont. Code Ann. § 41-4-445(4). As far as can be gleaned from the record, there was no consultation with the children and no discussion regarding the children's position on the permanency plan. The consult

provides the child with the opportunity to be heard and express his/her concerns, fears and questions. In this matter, the children were not given the opportunity to be heard, and without the benefit of counsel, no one was there to protect their right to be heard.

There were numerous instances where the children would have benefited from the appointment of counsel. Most of those opportunities related to placement and the unity of family, but certainly would have included advocacy for reunification with their parents. The need for counsel for children arises the moment they are removed from their parents care. Issues regarding a child's liberty interest come into play at removal and continue past termination. The failure to appoint counsel violated the children's liberty interest and was a fundamental defect in the district court proceeding.

C. The Attorney GAL Does Not Satisfy the Requirement of Counsel for the Children.

Although the GAL appointed for the children was an attorney, she was not and did not act as attorney for the children, noting that she would have requested that counsel be appointed had she "realized that the children didn't have an attorney appointed." (2/24/11 Tr. at 7.) This Court recently addressed one narrow issue of attorney GAL, holding that when an attorney GAL submits a factual report, due process permits the testimony and cross-examination of the attorney GAL. *In re R.M.T.*, 2011 MT 164, ¶ 48, __ Mont. __, __ P.3d __. In his

concurring opinion, Justice Nelson took the analysis a step further and concluded that the GAL could not function as the child's attorney, even if the GAL was an attorney. *In re R.M.T.*, ¶ 55. This Court should adopt Justice Nelson's analysis regarding the requirement of a separate attorney and GAL for children, along with the distinct roles each is statutorily required to perform.

CONCLUSION

The failure of the district court to appoint counsel for the children violated Montana law and did not provide adequate protection to the children's liberty interests. The prejudice created by the lack of counsel began at removal and continued through termination. The children were without an advocate to actively represent their position. The prejudice experienced by the children is sufficient to warrant reversal.

Respectfully submitted this ____ day of August, 2011.

By: _____
ELIZABETH THOMAS
Attorney for Youths

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Youths to be mailed and/or hand delivered to:

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

SCOTT J. PEDERSON
Assistant Attorney General
Child Protection Unit
2525 4th Avenue N. #309
Billings, MT 59101

JUDY A. WILLIAMS
Attorney at Law
2619 St. Johns Ave. Ste. F
P.O. Box 1899
Billings, MT 59103-1899

Copy to S.W.C.

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

ELIZABETH THOMAS