
IN THE MATTER OF:

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

Youths in Need of Care.

REPLY BRIEF OF YOUTHS

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

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The children provide the following, and concur in the briefs of Appellant Mother, in support of their position:

THE CHILDREN WERE NOT REPRESENTED BY COUNSEL DURING THE PENDENCY OF THESE PROCEEDINGS.

It is undisputed that the children had a statutory right to be represented by counsel from the onset of these proceedings. The State's position that the children were represented by counsel, in the form of the attorney/guardian ad litem, ignores the inherent conflict of interest that exists and merely gives lip service to the requirement of counsel. Moreover, it is not supported by the statement of the children's purported attorney. Williams' statement, "if I had realized that the children didn't have an attorney appointed, I probably would have made a motion to appoint an attorney for them" can only be seen as an acknowledgment that she was not acting as attorney for the children. (2/24/2011 Tr. at 7:13-16.) This statement, and Williams' position supporting termination, which was in direct contradiction with the children's stated wishes, undermines the State's position that the children were represented by counsel.

The issue of attorney representation for children in dependency/neglect cases is not unique to Montana. On August 8, 2011, The American Bar Association adopted the Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings.

http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_

[2011.pdf](#) The act mandates that children be represented by conflict free, independent counsel, separate and distinct from the role of guardian ad litem or best interest advocate. The act also provides that the right to counsel for children cannot be waived at any point during the proceeding.

SECTION 3. APPOINTMENT IN ABUSE OR NEGLECT PROCEEDING.

(a) The court shall appoint a child's lawyer for each child who is the subject of a petition in an abuse and neglect proceeding. The appointment of a child's lawyer must be made as soon as practicable to ensure effective representation of the child and, in any event, before the first court hearing.

(b) In addition to the appointment of a child's lawyer, the court may appoint a best interest advocate to assist the court in determining the child's best interests.

(c) The court may appoint one child's lawyer to represent siblings if there is no conflict of interest as defined under the applicable rules of professional conduct. The court may appoint additional counsel to represent individual siblings at a child's lawyer's request due to a conflict of interest between or among the siblings.

(d) The applicable rules of professional conduct and any law governing the obligations of lawyers to their clients shall apply to such appointed lawyers for children.

(e) The appointed child's lawyer shall represent the child at all stages of the proceedings, unless otherwise discharged by order of court.

(f) A child's right to counsel may not be waived at any court proceeding.

Commentary to the act suggests that "in order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. Moreover, providing the child with an

independent and client-directed lawyer ensures that the child's legal rights and interests are adequately protected." The comments draw distinction between the attorney appointed for the child and a best interest advocate, noting that "a best interest advocate does not replace the appointment of a lawyer for the child. A best interest advocate serves to provide guidance to the court with respect to the child's best interest and does not establish a lawyer-client relationship with the child." Although not binding upon this Court, the act reflects the best practices model and prevailing position on child representation.

Here, the record clearly reflects that Williams was acting as a best interest advocate. While she informed the district court of the children's wishes regarding termination, she did not advocate for that position or act to protect the parent-child relationship. Under the Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings, and the Montana Rules of Professional Conduct, Williams was not acting as the children's attorney. She could not. She was acting as their guardian ad litem, and in her opinion, their best interest was in direct conflict with their stated desires. As set forth in the children's brief, this Court should adopt Justice Nelson's concurring opinion, which is in line with the act, and conclude that a guardian ad litem (or best interest advocate) cannot function as the children's attorney. *In re R.M.T.*, 2011 MT 164, 361 Mont. 159, 256 P.3d 935. Because Williams did not, and could not, function

as the children's attorney, the children were left without representation and without advocacy at all points of the proceeding.

CONCLUSION

The failure of the district court to appoint counsel for the children violated Montana law and the children's right to due process. This fundamental error tainted the entire proceedings, not just the termination hearing. The failure to appoint counsel is a reversible error due to the significant prejudice suffered.

Respectfully submitted this ____ day of September, 2011.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing reply
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply 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 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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