IN THE SUPREME FOR THE MONTANA

No. DA 18-0636

IN THE MATTER OF:

A.W.-S.,

A Youth In Need Of Care.

APPELLANT'S OPENING BRIEF

On Appeal from Montana's Fourth Judicial District,
Missoula County, The Honorable Robert L. Deschamps, III Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Montana Code Annotated

Montana Cases

Federal Cases

STATEMENT OF THE ISSUE

Whether the district court committed reversible error when it failed to adjudicate A.W.-S. a Youth in Need of Care.

STATEMENT OF THE CASE

Mother and Appellant, N.L.W., appeals the order entered October 16, 2018 by the Fourth Judicial District Court, Missoula County terminating her parental rights to A.W.-S. (14 years old). (Appendix A) The sole issue on appeal is the fact that the district court neglected to adjudicate the youth as a youth in need of care.

Procedural History and Facts of the Case

This appeal is procedural in nature and does not rely upon the underlying facts for determination of the issue under review. Accordingly, the statement of facts is limited to those that relate to the procedural history of the case.

The case originated January 17, 2017, when the Missoula County Attorney filed Petitions for Emergency Protective Services (EPS), Adjudication of Child as Youth In Need of Care (YINC), and Temporary Legal Custody (TLC) on behalf of the Department of Health and Human Services (the Department) for A.W.-S. (DC01). The district court immediately granted the Department's Petition and set a Show Cause hearing for January 31, 2017. (DC04) The court appointed a representative of CASA to act as Guardian ad Litem (GAL), and appointed counsel for the parents, N.L.W. and the child's natural father B.S., and for the A.W.-S.

through the Montana Public Defender's Office (the OPD). *Id.* The district court also ordered the parties to a pretrial intervention conference on January 25, 2017. (DC05)

After a continuance, the standing master held the intervention conference on January 30, 2017. (DC11) CASA reported A.W.-S. was at Watson's Children's Shelter and was "thriving and doesn't want to leave." (*Id.*, p2) According to the Intervention Conference Report, both N.L.W. and B.S. stipulated to TLC. (*Id.*, 2:12) The Conference report is silent on the question of whether there was discussion of, or stipulation to, adjudication of A.W.-S. as YINC. (Id.) B.S. stated he had not seen A.W.-S. or C.W.-S in "at least a couple of year" and would stipulate to relinquishment of his parental rights to both children. (*Id.*)[1]

The district court held the Show Cause and adjudicatory hearing on December 31, 2017 before a substitute judge. (DC12) Neither parent was present though both were represented by counsel. (*Id.*) No witnesses were sworn and no testimony was taken. The district court commenced the hearing before N.L.W.'s attorney made his appearance. (1/31/2017 Hrg Tr. 6:1)

The Minutes and Note of Ruling erroneously states, "the State advised the

[1] May 22, 2017 the district court entered an order terminating the parental rights of B.S. (DC22)

Court that the intervention conference took place yesterday and the natural parents are stipulating to adjudication and temporary legal custody, to which counsel for the natural parents concurred with." (DC12) Counsel for the Department actually advised the district court that, based on the Intervention Conference the previous day, "It was anticipated that both parents would stipulate to adjudication and six months temporary legal custody for the Department. I'm not sure what the status of the mother and her attorney is this morning." (1/31/2017 Hrg Tr. 6:24-7:3)

Counsel for the father, B.S. then stipulated to adjudication and temporary legal custody. (1/31/2017 Hrg Tr. 7:5-9) After this stipulation by B.S., the district court inquired regarding representation for N.L.W. and became aware neither N.L.W. nor her attorney were present. (*Id.* 7:10) N.L.W.'s counsel made his appearance a few moments later, at which time the court advised him, "The father has just stipulated to temporary legal custody for a period of six months. What is the mother's position?" (*Id.* 8:1-4) Counsel for N.L.W. replied, "She also stipulates." (*Id.* 8:5) The district court pronounced, "Okay. And temporary legal custody is awarded for a period of six months." (*Id.* 8:5-7) There was no inquiry, discussion, stipulation or oral pronouncement regarding adjudication of A.W.-S. as a YINC with respect to N.L.W.

Although the Minutes and Note of Ruling states that, "The Court then

adjudicated the minor child as a youth in need and granted the Department temporary legal custody for six (6) month," no such adjudication appears in the record of the hearing. (*Id.*)

This error was propagated through the remainder of the case beginning with the Order Adjudicating Child as a Youth in Need of Care and Granting Temporary Legal Custody, entered February 22, 2017, in which the district court erroneously asserts:

> The parties, through counsel, stipulated in open court that the child, A.W.-S. meets the definition of a youth in need of care by the preponderance of the evidence.

(DC16, 1:25-2:2)

Based on this false assertion, the district court erroneously entered, as a Finding of Fact, "The Court finds that the parties' stipulations are appropriately made pursuant to MCA §41-3-434 and are in the child's best interests."

The case proceeded in the usual course. A.W.-S. was placed, at various times, in kinship care or in treatment facilities. A treatment plan was ordered, and services were offered. A.W.-S was never, however, properly adjudicated as a YINC by stipulation or by contested hearing.

A Motion for Court to Order Treatment Plan for N.L.W., filed on February 17, 2017 asserts that, "In this case, the Court made an adjudication under MCA

§41-3-437 that the child is a youth in need of care on January 31, 2017." (DC14, 2:1) A Renewed Motion to Approve and Order Mother's Treatment Plan, filed May 23, 2017, asserts that, "Pursuant to Mont. Code Ann. §41-3-443(1)(c) and §41-3-443(2)(e), the Court may order N.L.W. to complete the attached proposed Treatment Plan whether or not N.L.W. has signed it, because the Court has adjudicated A.W.-S. as a Youth in Need of Care." (DC24, p2) The Order Approving Mother's Treatment Plan, entered June 21, 2017 contains the Finding of Fact, "On May 22, 2017, this court previously adjudicated the abovenamed child as a Youth in Need of Care in this matter," and the Conclusion of Law, "The above-named child was previously adjudicated as a Youth in Need of Care." The erroneous assertion that A.W.-S. had been adjudicated a YINC with respect to N.L.W. was propagated through two Petitions for Extension of TLC, the Department's Petition for Termination of Mother's Parental Rights, and the Order Terminating Mother's Parental Rights and Granting Permanent Legal Custody entered on October 16, 2018. (DC31, DC45, DC50)

July 26, 2018 the district court held a contested termination hearing, after which it granted the State's petition, terminating N.L.W.'s parental rights to parent A.W.-S. (DC66) The court entered its Findings of Fact, Conclusions of Law and Orders terminating N.L.W.'s parental rights to A.W.-S. on October 16, 2018. (DC68)) Finding of Fact number twelve states that, "On January 31, 2017, a

hearing was held regarding CFS' initial petition regarding Anthony, and Anthony was adjudicated a "Youth in Need of Care" within the meaning of Mont. Code Ann. §41-3-102,…." (DC68) The assertion is repeated in Finding of Fact number seventy-seven and Conclusion of Law number 2. (*Id.*)

October 22, 2018 the State filed Notice of Entry of Judgment. (DC69) The Clerk of the Montana Supreme Court filed its Notice of Filing and N.L.W.'s Notice of Appeal on November 9, 2018. (DC71, DC71.1)

SUMMARY OF THE ARGUMENT

Every parent has a fundamental and constitutionally-protected liberty interest to parent his or her children and to not suffer termination of that interest except through fundamentally fair procedures (see *In re D.B.*, 2007 MT 246, ¶7, 339 Mont. 240, 168 P.3d 691) The Montana legislature has devised statutes to that right. It is the duty of the State, the trial courts to follow those statutes, and it is the duty of this Court to require them to do so.

The first statutory criterion for termination of parental rights is that the child is an adjudicated youth in need of care. If the adjudication is not made at the initial show cause hearing, it must be made within 90 days thereafter. Mont. Code Ann. §41-3-432, §41-3-437. Prior to termination of parental rights, the district court must adjudicate a child alleged to have been abused or neglected, or in danger of

being abused or neglected, as a Youth in Need of Care. Mont. Code Ann. §41-3-102(34) No such adjudication was made in this case. The district court's order terminating N.L.W.'s parental rights must, therefore, be reversed.

STANDARDS OF REVIEW

The Court reviews a district court's decision to terminate parental rights to determine whether the district court abused its discretion. *In re J.W.*, 2001 MT 86, ¶7, 305 Mont. 149, 23 P.3d 916. While the district court's decision to terminate parental rights is discretionary, the decision must be supported by specific findings of fact. *In re: Custody of C.F.,* 2001 MT 19, ¶11, 304 Mont. 134, 18 P.3d 1014. The Court reviews the district court's findings of fact to determine whether they are clearly erroneous. *Id.* "A finding of fact is clearly erroneous if it is not supported by substantial evidence; if the district court misapprehended the effect of the evidence; or if, after reviewing the record, this Court is left with a definite and firm conviction that the district court made a mistake." *Id.* (citing *In re T.Z.,* 2000 MT 205, ¶10, 300 Mont. 522, 6 P.3d 960).

When the State seeks to terminate a parent's fundamental liberty interest in the care and custody of a child, due process requires that the parent not be placed at an unfair disadvantage during the termination proceedings. *In re A.S.*, 2004 MT 62, ¶12, 320 Mont. 268, 87 P.3d 408. Fundamental fairness at termination proceedings requires that a parent be represented by counsel. *Id.* Whether a person has been

denied her right to due process is a question of constitutional law. *Id.* at ¶ 9. The Court's review of questions of constitutional law is plenary. *Id.* at ¶ 9 (citing *Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290).

The Court reviews a district court's conclusions of law in terminating parental rights to determine if they are correct. *In re L.H.*, 2007 MT 70, ¶13, 336 Mont. 405, 154 P.3d 622.

ARGUMENT

1. The district court committed reversible error when it failed adjudicate A.W.-S as a Youth in Need of Care as required by Mont. Code Ann. §41-3-102 and §41-3-404.

It is well established that a natural parent retains a Constitutionally guaranteed right to due process of law in a termination case. In re A.F.-C. 2001 MT 283, ¶31, 307 Mont 358, 37 P3d 724. "[A] natural parent's 'right to care and custody of a child is a fundamental liberty interest, which must be protected by fundamentally fair procedures.'" In re M.A.E., 1999 MT 341 ¶26, 297 Mont. 394, 991 P.2d 972. The Department and district court court must provide fundamentally fair procedures "at all stages in proceedings for the termination of parental rights." Matter of A.F.-C. ¶31.

In this case, the Department and the district court failed to provide N.L.W. with fundamentally fair procedures by denying her due process of law.

By definition, a youth in need of care is a "youth who has been adjudicated or determined, after a hearing, to be or to have been abused or neglected." Mont. Code Ann. §41-3-102(34), Such an adjudication must be determined by a preponderance of the evidence. Mont. Code Ann. §41-3-437(2) (See, eg. *In re the Matter of M.O.*, 2003 MT 4, ¶14, 314 Mont. 13, 62 P.3d 265; *In re T.C.*, 2001 MT 264, ¶18, 307 Mont. 244, 37 P.3d 70 (citing *In re M.J.W.*, 1998 MT 142, ¶12, 289 Mont. 232, 961 P.2d 105) Adjudication is a necessary prerequisite to ordering the termination of parental rights. *In re B.N.Y.*, 2003 MT 241, ¶¶ 28-29, 317 Mont. 291, 77 P.3d 189 (citing *In re T.C.*, ¶15)

Mont. Code Ann. 41-3-443(a)-(c) provides that a court may order a treatment plan if the parent admits to the allegations of an abuse or neglect, a parent stipulates to allegations of abuse or neglect pursuant to Mont. Code Ann. §41-3-434, or an adjudication is made pursuant to Mont. Code Ann. §4-3-437. Mont. Code Ann. §41-3-434 allows a parent – subject to approval by the court - to stipulate: (1) that a child meets the definition of a youth in need of care by the preponderance of the evidence, or (2) to a treatment plan, if the child has been adjudicated a youth in need of care.

In this case, the procedural requirements for ordering a treatment plan or termination of N.L.W.'s parental rights were simply not met. N.L.W. never

stipulated, personally or through counsel, that A.W.-S. met the definition of a youth in need of care by a preponderance of the evidence. N.L.W. never admitted to the allegations of abuse or neglect set forth in the Petition. N.L.W. never stipulated to the Department's allegations of abuse and neglect. The Department did not demonstrate, by a preponderance of the evidence, that A.W.-S. was a youth in need of care in an adjudication hearing.

There are two cases of note concerning the issue at question in this case. In *In the Matter of B.N.Y.*, the Court entered a unanimous decision reversing a district court termination of parental rights where the court failed to "properly adjudicate B.N.Y. a youth in need of care prior to ordering the treatment plan, thereby violating [the parent's] right to due process of law and requiring reversal of the order terminating her parental rights to B.N.Y." *In re B.N.Y.*, ¶20. The Court ruled that, where the fundamental right of parenting was at stake, the district court should be held to the highest standard of statutory compliance, stating, "procedures employed to terminate the relationship between a parent and child must meet the requisites of the Due Process Clause of the Fourteenth Amendment…. We have repeatedly held that prior to terminating parental rights, the District Court must adequately address each applicable statutory requirement." (citing *In re A.M.*, 2001 MT 60, ¶34, 304 Mont. 379, 22 P.3d 185; *In re E.W.*, 1998 MT 135, ¶12, 289 Mont. 190, 959 P.2d 951; *In re J.W.*, 2001 MT 86, ¶7, 305 Mont. 149, ¶7, 23 P.3d

916; *Lassiter v. Dept. of Social Services* (1981), 452 U.S. 18, 24-32, 101 S.Ct. 2153, 2158-62, 68).

The Court was direct and unambiguous: "The absence of an adjudication prior to approval of a treatment plan renders the statutory requirements of §41-3-609(1)(f), MCA, unsatisfied. The District Court failed to comply with statute and provide fundamentally fair procedures at each stage of the termination proceedings, as required by due process, thus erring in terminating R.W.'s parental rights." *In re B.N.Y.*, ¶28.

In *In re J.C.* the Court decided, by a 5-2 majority, to distinguish from *In re B.N.Y.*, holding that the district court's failure to adjudicate a J.C. and A.D. as youths in need of care by preponderance of the evidence or by stipulation was harmless error "in the face of overwhelming evidence and repeated stipulations of the parents to allegations of abuse and neglect." *In re J.C.,* 2008 MT 127, ¶56, 343 Mont. 30, 183 P.3d 22.

In "strenuous disagreement" with the majority, Chief Justices Karla M. Gray and Justice James C. Nelson took their colleagues to task for their failure to require compliance with the statutory requirements for parental termination. Chief Justice Gray agreed with the majority that the best interest of the child are "ultimately the paramount consideration in child abuse and neglect cases" but argued that

"statutory and jurisprudential rules must be followed in reaching that ultimate stage." *In re J.C.*, ¶57. Chief Justice Gray criticized the result-oriented strategy of using harmless error to alleviate the State from following statutory requirements in dependent neglect cases, observing:

> I conclude from this that not a single statutory requirement need be followed during trial court proceedings involving allegations of child abuse or neglect—that is, any and every statutory requirement can fall to the "harmless error" axe. I cannot agree that the end justifies the means when fundamentally fair procedures are constitutionally required.

In re J.C., ¶57.

Justice Nelson was equally forceful in his condemnation using the best interest of the child as an excuse for "requiring the government to follow the law." *In re J.C.*, ¶72. Acknowledging the majority's concerns, Justice Nelson wrote:

> Youth-in-need-of-care cases are some of the most difficult this Court reviews. Indeed, in my nearly 15 years serving as a member of this Court, I can honestly say that there are few cases where the child or children would not be better off with an adoptive family, a foster family, or in a group living arrangement, than being "parented" by the biological parents.

In re J.C., ¶70.

But, Justice Nelson argued, where the fundamental right of a parent to parent and to suffer termination of that right only through fundamentally fair procedures is at issue:

> [T]he Legislature has imposed upon the government a statutory scheme which protects that right. It is the duty of the county

> attorney, DPHHS, and the trial courts to follow these statutes. And, it is our job to make sure they do.

In re J.C., ¶71.

Justice Nelson warned against the temptation to "turn a blind eye" to the statutory requirements when "in our view, the best interests of the child or children are better served that requiring the government to follow the law." He cautioned that:

> There is mischief in this approach, however. We encourage sloppy practice and procedures in the termination process, we deny parents the benefit of their constitutional rights and of the laws the Legislature has enacted, and we invite trial courts to short-circuit the statutory scheme.

In re J.C., ¶72-73.

Even if this Court favors the majority view in *In re J.C.* over the unanimous view in *In re B.N.Y.* and the views of Chief Justice Gray and Justice Nelson, the conclusion of harmless error in this case cannot be justified by the record in this case. The distinction cited by the majority in *In re J.C.* does not exist here. N.L.W. did not stipulate to abuse or neglect of A.W.-S. On the contrary, N.L.W. maintained throughout the proceedings that her care for the A.W.-S. had been successful for several years despite the child's special needs and the challenges they presented. N.L.W. repeatedly expressed her concern that the Department's placement of A.W.-S. was detrimental to his well-being and that return to the home would be in the child's best interest.

It is possible, perhaps even likely, that N.L.W.'s opinion could have been proven wrong by a preponderance of the evidence in adjudication hearing. But it was the district court's responsibility to require the state to either meet that burden of proof or to obtain N.W.L's stipulation. And it is this Court's responsibility to require that the district court require statutory compliance. The district court order should be reversed.

CONCLUSION

The Court should reverse the district court. The court failed to follow fundamentally fair procedures, failed to comply with clear and unambiguous statutory requirements and made critical factual findings that were not supported by the evidence on record. Reversal is the appropriate remedy

Respectfully submitted this March 18, 2019.

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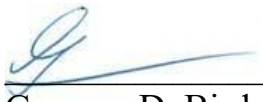
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 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.



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CERTIFICATE OF SERVICE

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-18-2019:

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