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 REPLY BRIEF

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

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APPELLANT'S REPLY

Mother and Appellant, N.L.W. affirms the arguments set forth in her Opening Brief and offers this Reply to the arguments set forth in Appellee's Brief.

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.

N.L.W. affirms her uncontested arguments on this issue. The State...

a. Appellee's recitation of facts is moot given the nature of the appeal and is irrelevant to the issue under consideration.

Appellee engages in a lengthy recitation entitled a "Statement of Facts" in which it attempts to win the sympathy of the Court by offering a selective, one-sided narration of the evidence upon which the district court based its ultimate decision to terminate N.L.W.'s parental rights. (Resp. Br., 3-8) Given the purely procedural nature of the appeal, this recitation serves no argumentative purpose.

If the purpose of Appellee's recitation was to highlight the parenting challenges N.L.W. was trying to overcome it was equally moot. As Justice James C. Nelson noted:

> 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. Time and time again we see innocent children as the victims of sexual and physical abuse or

> abject neglect; living in filth that animal control officers would condemn; and "parented" by incompetent and uncaring "parents" who operate in a haze of methamphetamine or some other chemical. We see children whose lives and development are devastated by the people who should be teaching and nurturing them. Every case is different; but every case is as bad as, or worse than, the last. Indeed, if the best interests of the child were the sole criteria for terminating parental rights, our jobs would be simple. We could simply state the facts of the case and affirm.

In re J.C., 2008 MT 127, ¶70, 343 Mont. 30, 183 P.3d 22, dissenting.

But, Justice Nelson, argued, the facts of the case – no matter how outrageous – are irrelevant to the Court's duty to require strict statutory compliance:

> [G]iven the fundamental liberty interest of parents to parent and to not suffer termination of that interest except through fundamentally fair procedures…the 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 (citing *In re D.B.*, 2007 MT 246, ¶17, 339 Mont. 240, 168 P.3d 691).

The facts of this case are heart-wrenching. N.L.W. and her children faced challenges no parent or child should have to endure. But those facts are irrelevant to the question at issue in this case. The issue before the Court is a purely legal question: Did the district court meet the statutory requirements for termination of N.L.W.'s right to parent A.W.-S.? It did not do so because the district court failed to adjudicate A.W.-S. as a Youth in Need of Care in conformance with the requirements of Mont. Code Ann. §41-3-102 and §41-3-404. That failure to meet the statutory requirements specifically established by the Montana Legislature to

protect N.L.W.'s fundamental liberty right to parent her children deprived her of due process of law, regardless of the facts of the case. Appellee's selective recitation of those facts is moot and should not influence the Court's decision.

b. Appellee's review of the record does not refute N.L.W.'s assertion that the district court 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 undisputed that the district court did not hold a contested show cause hearing. Appellee, like N.L.W., has combed the record from below in search of a stipulation by N.L.W. that A.W.-S. was a Youth in Need of Care. Like N.L.W., Appellee has been unable to find such a stipulation. In lieu of the statutorily required stipulation, Appellee urges the Court to engage in inference, rationalization and mind-reading. (App'ee Br. at 17-19) The Court should not do so.

"A parent's right to care and custody of a child is a fundamental liberty interest." *In re J.A.B.*, 1999 MT 173, ¶14, 295 Mont. 227, 983 P.2d 387. Therefore, when determining whether to terminate parental rights, a district court must make specific factual findings in accordance with the requirements set forth in Mont. Code Ann. §41-3-609. *In re Custody of C.F.*, 2001 MT 19, ¶11, 304 Mont. 134, 18 P.3d 1014. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence or if, upon reviewing the record, this Court is left with the definite and firm conviction that the

district court made a mistake. *In re J.W.*, 2001 MT 86, ¶7, 305 Mont. 149, 23 P.3d 916.

In its Order Terminating Mother's Parental Rights and Granting Permanent Legal Custody, filed October 16, 2018, the district court erroneously finds that, "On January 21, 2017, a hearing was held regarding CFS' initial petition regarding A.W.-S. and A.W.-S. was adjudicated "a Youth in Need of Care within the meaning of Mont. Code Ann. §41-3-102…." (DC16, Finding of Fact 12). This finding of fact is clearly erroneous. It is contradicted by the evidence of the record, and it is undisputed that the district court made a mistake.

At the January 21, 2017 hearing, the N.L.W., through counsel, stipulated to TLC. This stipulation does not meet the statutory requirements. In *In re M.O.*, the Court, under similar circumstances, held that, "[the] district court's adoption of a stipulation between the parties that TLC should be granted . . . does not equate to an adjudication by the court that the children were youths in need of care." 2003 MT 4, 314 Mont. 13, 62 P.3d 265 (citing *In re T.C.*, 2001 MT 264, ¶18, 307 Mont. 244, 37 P.3d 70).

Citing *In re A.S.,* 2006 MT 281, 334 Mont. 280, 146 P.3d 778, Appellee argues that the Court should disregard the district court's error. In *In re A.S.*, despite the district court's failure to properly adjudicate A.S. as YINC, the Court declined to remand the matter, holding that: 1) "[I]t was appropriate for the court to

find A.S. a youth in need of care based upon S.B.'s own admissions, which she made in the presence of her counsel;" *In re A.S.*, ¶29 and 2) "Neither S.B. nor her counsel objected to the statements made by counsel for DPHHS that there had been an agreement regarding the adjudication in this matter." *Id.* ¶35.

In this case, the first holding of *In re A.S.* does not apply. The record from below contains no admissions by N.L.W. that A.W.-S. suffered abuse or neglect sufficient to adjudicate him as YINC. As to the second holding of *In re A.S.*, it is simply not appropriate to relieve the Department and the district court of their duty to meet statutory requirements by the semantic maneuver of rebranding those duties as mere "procedural irregularities" and shifting responsibility for meeting those requirements onto the parent whose fundamental rights they are intended to protect.

c. Appellee's argument regarding the timeliness and standing of N.L.W.'s appeal is not supported by precedent.

Citing *In re H.T.*, Appellee argues that N.L.W.'s failure to object to the district court's error below barred an appeal. It does not. The Court's reasoning in *In re H.T.* is somewhat muddled. The district court's failure to meet the statutory requirement of Mont. Code Ann. §41-3-102 is referred to as a mere "procedural error" and – after cryptically noting that the district court's error was "neither 'plain' nor 'obvious" – the Court holds that the Mother "waived her right to appeal the adjudication issue because she did not timely object or raise the issue before

the district court." 2015 MT 41, ¶21, 378 Mont. 206, 343 P.3d 159. N.L.W. strongly disagrees that the district court's complete failure to follow a threshold statutory requirement, imposed to protect the fundamental right of a parent to parent, can be passed off as "procedural error." The district court's failure to meet the requirements of Mont. Code Ann. §41-3-102 is a violation of due process, and it is incumbent upon this Court to treat it as such.

Nor does N.L.W. agree that, by failing to object to the district court's failure to adjudicate A.W.-S. as YINC, she waived her right to appeal the finding of fact entered in the termination order. First, it is procedurally impossible to object to an order before it has been entered. Second, and most importantly, responsibility for meeting statutory threshold requirements for adjudication and termination of parental rights lies with the Department and the district court. The statutes were put in place by the legislature for the protection of N.L.W.'s fundamental rights. It is fundamentally unfair – and is unsupported by statute – to shift that burden from the court or the responsible agency to the parent.

Please consider the strong dissent of Chief Justice Karla M. Gray in *In re A.S.*:

> Neither the mother nor her counsel stipulated to anything relating to the State's burden to prove the child was a youth in need of care by a preponderance of the evidence, and the District Court--not surprisingly--had no conversation with the mother about the nonexistent stipulation. Moreover, the deputy county attorney's

> reference to a treatment plan--in response to the District Court's inquiry about "some agreement regarding the adjudicatory nature in this matter"--in no way satisfies the requirement for a stipulation regarding youth in need of care status or, in the alternative, an adjudicatory hearing….
>
> Similarly, here, I do not believe our recognition of a district court's consideration of the child's best interests "erases" the due process violation that occurred when S.B.'s parental rights were terminated under §41-3-609(1)(f), MCA, without a prior adjudication of the child as a youth in need of care or a finding in the termination order that the child was so adjudicated. Nor do I agree with the Court's statement that reversing and remanding in this case would "prolong the inevitable," as such "ends justifies the means" reasoning--taken to its logical extent--could eventually vitiate all due process rights afforded to parents by Montana statutes and our cases.

In re A.S., ¶57, ¶63 (C.J. Karla M. Grey, dissenting)

CONCLUSION

In his dissent in *In re J.C.*, Justice Nelson warned against the temptation to "turn a blind eye" to 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.

While the court must always put the welfare of the child above all other concerns, it must also require the Department and the district court to comply with

statutory requirements put in place to protect a parent's fundamental rights. The district court's error in this case deprived N.L.W. of due process and – regardless of circumstances or the facts of the case – require remand of the matter.

Respectfully submitted this 28th day of April 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 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

Gregory D. Birdsong

CERTIFICATE OF SERVICE

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-28-2019:

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