

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21 - \_\_\_\_\_

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S.P.,

Petitioner,

v.

MONTANA SIXTH JUDICIAL DISTRICT COURT,  
PARK COUNTY, HON. BRENDA R. GILBERT,  
DISTRICT JUDGE,

Respondent.

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PETITION FOR A WRIT OF SUPERVISORY CONTROL

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ATTORNEYS FOR PETITIONER

William F. Hooks  
Tal M. Goldin  
Brittney Mada  
Montana Legal Services Association  
616 Helena Avenue, Ste. 100  
406-442-9830 Ext. 125  
whooks@mtlsa.org  
tgoldin@mtlsa.org  
bmada@mtlsa.org

RESPONDENT

Hon. Brenda R. Gilbert,  
Sixth Judicial District Judge  
414 East Callender Street  
P.O. Box 437  
Livingston, MT 59047

ATTORNEY FOR PETITIONER K.W.M  
In the District Court Proceeding

Rebecca R. Swandal  
Swandal Law PLLC  
305 E. Lewis Street  
Livingston, MT 59047  
406-222-3301  
swandal.law@gmail.com

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
I. INTRODUCTION.....	1
II. DISCUSSION .....	1
A. The Court Has Authority to Exercise Supervisory Control .....	1
B. The Facts Support the Exercise of Jurisdiction.....	2
C. The District Court Erred as a Matter of Law When it Failed to Apply the Applicable Legal Standards to Determine Whether the Natural Mother is Indigent for Purposes of the Right to Assigned Counsel in a Parental Rights Termination Case.....	5
1. The District Court Erred When it Failed to Apply Guidelines for Assessing Indigence in Civil Cases as Set Out in Title 25 of the Montana Code .....	6
2. The District Court Erred When it Misapplied Financial Eligibility Protocols that are Reserved by Title 47 of the Montana Code for Use by the Office of the Public Defender, Rather than a Court .....	10
3. The District Court Erred When it Applied an Ordinary Dictionary Definition of “Indigent” Rather than the Title 25 Statutory Structure. ....	12
D. The Court’s Error of Law Causes a Gross Injustice. ....	13
E. Constitutional Issues of State-wide Importance are at Issue .....	14
F. The Normal Appeal Process is Inadequate. ....	14

III. CONCLUSION .....	1
APPENDIX.....	14
CERTIFICATE OF COMPLIANCE.....	15

## TABLE OF AUTHORITIES

### CASES

<i>Anaya v. Baker</i> , 427 F.2d 73 (10 <sup>th</sup> Cir. 1970). .....	13
<i>A.W.S. v. A.W.</i> , 2014 MT 322, 377 Mont. 234, 339 P.3d 414.....	6, 13, 14, 15
<i>Hanson v. Edwards</i> , 2000 MT 221, 301 Mont. 185, 7 P.3d 419.....	7
<i>In re A.S.</i> , 2011 MT 69, 360 Mont. 55, 253 P.3d 799 .....	5
<i>In re B.N.Y.</i> , 2003 MT 241, 317 Mont. 291, 77 P.3d 189 .....	5
<i>In re A.S.A.</i> , 258 Mont. 194, 852 P.2d 127 (1993) .....	13
<i>In re B.H.</i> , 2020 MT 4, 398 Mont. 275, 456 P.3d 233.....	5
<i>In re L.F.R.</i> , 2019 MT 2, 394 MT 61, 432 P.3d 1030 .....	6, 14

<i>King v. Smith,</i> 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968) .....	9
<i>MC, Inc. v. Cascade City-County Bd. of Health,</i> 2015 MT 52, 378 Mont. 267, 343 P.3d 1208.....	12
<i>Morey v. State,</i> 744 S.W.2d 668 (Tex.App. 1988) .....	13
<i>People v. Alengi,</i> 148 P.3d 154 (Colo. 2006) .....	13
<i>Rogers v. Lewis &amp; Clark Cty.,</i> 2020 MT 230, 401 Mont. 228, 472 P.3d 171 .....	15
<i>Santosky v. Kramer,</i> 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982) .....	5
<i>Sanders v. State,</i> 612 So. 2d 1199 (Ala. 1993) .....	9
<i>State v. Smith,</i> 262 N.W.2d 567 (Iowa 1978) .....	13
<i>State v. Vaughn,</i> 279 S.W.3d 584 (Tenn. App. 2008) .....	9
<i>Sweeney v. Mont. Third Judicial Dist. Court,</i> 2018 MT 95, 391 Mont. 224, 416 P.3d 187.....	2

## CONSTITUTIONAL AUTHORITY

Mont. Const. art. VII, § 2(2) .....	1
-------------------------------------	---

## MONTANA CODE ANNOTATED

Mont. Code Ann. § 25-10-404.....	6, 12, 14
Mont. Code Ann. § 25-10-404(1) .....	6
Mont. Code Ann. § 25-10-404(3) .....	7
Mont. Code Ann. § 25-10-404(4) .....	7
Mont. Code Ann. § 42-4-309 .....	10
Mont. Code Ann. § 42-5-106 .....	10
Mont. Code Ann. § 47-1-111 .....	10
Mont. Code Ann. § 47-1-111(1) .....	10
Mont. Code Ann. § 47-1-111(2) .....	10

## MONTANA RULES OF APPELLATE PROCEDURE

M. R. App. P. 14(3) .....	1
---------------------------	---

## MONTANA RULES OF CIVIL PROCEDURE

Rule 5, M.R.Civ.P. ....	6
-------------------------	---

## ADMINISTRATIVE RULES OF MONTANA

A.R.M 2.69.301(7).....	10
A.R.M 23.2.301.....	7, 14

## LEGISLATIVE HISTORY

Sec. 1, Ch. 447, L. 1993.....	7
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## **I. INTRODUCTION**

An indigent parent at risk of losing her parental rights as part of a step-parent adoption proceeding has a constitutional right to court-appointed counsel. The district court granted S.P.'s request to waive filing fees and costs, but then held an adversarial hearing after the petitioner questioned S.P.'s financial eligibility for appointed counsel.

The court declined to apply the standards set out in Title 25 for determining whether a civil litigant is indigent, and instead applied the standards set out in Title 47 by which OPD determines the eligibility of its applicants. The court also assessed indigency according to a dictionary definition offered as an exhibit by K.W.M. The court concluded that S.P. is not indigent and denied her request for appointed counsel.

As a result, a mother faces the daunting task of fighting to retain her parental rights on her own, without a trained attorney advocate. An evidentiary hearing on the petition is set for May 5, 2021.

## **II. DISCUSSION**

### **A. The Court Has Authority to Exercise Supervisory Control.**

This Court has supervisory control over all other courts in Montana, and may, on a case-by-case basis, supervise a district court through a writ of supervisory control. Mont. Const. art. VII, § 2(2); M. R. App. P. 14(3).



Supervisory control is appropriate when the normal appeal process is inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist: (1) the other court is proceeding under a mistake of law and is causing a gross injustice; (2) constitutional issues of state-wide importance are involved; or (3) the other court has granted or denied a motion for substitution of a judge in a criminal case.

*Sweeney v. Mont. Third Judicial Dist. Court*, 2018 MT 95, ¶ 6, 391 Mont. 224, 416

P.3d 187 (citation omitted); M. R. App. P. 14(3).

B. The Facts Support the Exercise of Jurisdiction.

J.S.M. and S.P. are the natural father and mother, respectively, of C.M., a six year old child. J.S.M. filed an action seeking dissolution of his marriage to S.P. and a parenting plan. Montana Sixth Judicial District Court, Park County, Cause No. DR 17-142.

J.S.M. subsequently remarried. On September 24, 2020, J.S.M.'s wife, K.W.M., filed a petition for termination of S.P.'s parental rights and a petition for a step-parent adoption. Case Registry, included in the Appendix to this Petition as Exhibit A (hereafter, "App. A"). K.W.M. has at all relevant times been represented by counsel.

S.P. appeared *pro se*, and moved the Court to appoint counsel. She filed a Motion and Supporting Brief to Appoint Counsel with an attached Indigency Questionnaire. App. B, C. The District Court granted S.P.'s request for waiver of court fees and costs. Order, App. D. The Court ordered the state Office of the

Public Defender (OPD) to assign counsel to represent S.P., pursuant to *A.W.S. v. A.W.*, 2014 MT 322, 377 Mont. 234, 339 P.3d 414. App. E. OPD moved to vacate the order, arguing the case did not fall within the case types set out in Title 47 in which OPD may be ordered to assign counsel. The District Court granted S.P. an opportunity to file a response to OPD's motion to vacate.

S.P. re-asserted her rights as a parent and maintained that she had attempted to retain her relationship with her son. She reaffirmed she could not afford counsel and did not waive or relinquish her right to counsel. She renewed her request that the District Court appoint counsel to represent her.

On December 14, 2020 the District Court issued an Order vacating its order directing OPD to assign counsel to represent S.P. The court then issued an Order granting petitioner K.W.M. an opportunity to respond to S.P.'s response asserting her right to counsel.

K.W.M., through counsel, argued S.P.'s request for appointment of counsel should be denied for two reasons. First, appointment of the public defender to represent a parent in this type of case is not supported by state law. Second, statutes which authorize payment of one party's legal fees by another party in adoption cases don't apply here.

On December 31, 2020 the District Court issued an Order denying S.P.'s

motion for appointment of legal counsel. The District Court held the “legal authority is clear” that OPD does not have any statutory authority to represent a parent in a private adoption. The court also held that Mont. Code Ann. §§ 42-7-101 and -102, which authorize payment of legal fees incurred for services on behalf of the placing parent in step-parent adoptions, do not apply. App. F.

On February 24, 2021 K.W.M filed a Supplemental Verified Response to Motion for Appointment of Counsel and attachments attacking S.P.’s status as indigent. Counsel with Montana Legal Services Association entered a limited appearance and submitted a Brief in Support of Court’s Determinations of Indigency and Eligibility for Appointment of Counsel, together with exhibits establishing that S.P. is the recipient of SNAP and Medicaid benefits. App. G.

The District Court held an adversarial evidentiary hearing on March 18, 2021, and issued its Findings of Fact, Conclusions of Law and Order Following Hearing Regarding Indigency Determination. App. H (minute entry); App. I.<sup>1</sup> The court did not apply the standards set out in Mont. Code Ann. § 25-10-404 for determining whether a party is indigent. Instead, the court applied the Title 47

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<sup>1</sup> S.P. contested and objected to much of the evidence offered by Petitioner K.W.M. at the hearing, and S.P. does not concede the accuracy or sufficiency of the court’s Findings of Fact. However, the issue raised in this Petition focuses on the district court’s conclusions of law and S.P.’s contentions are not based on disputed questions of fact.

financial eligibility standards the Office of the Public Defender is directed to use, even though the court had previously ruled that OPD could not be assigned to the case. The court imputed to S.P. unverified income and assets belonging to her boyfriend. The court also applied a general dictionary definition of the word “indigent” in “the ordinary sense” of the term.

The district court erred as a matter of law in the manner in which it concluded that S.P. is not financially eligible for assigned counsel in this parental rights termination case.

C. The District Court Erred as a Matter of Law When it Failed to Apply the Applicable Legal Standards to Determine Whether the Natural Mother is Indigent for Purposes of the Right to Assigned Counsel in a Parental Rights Termination Case.

A natural parent’s right to the care and custody of her children “is a fundamental constitutional interest protected by both the United States Constitution and the Montana Constitution.” *In re B.H.*, 2020 MT 4, ¶ 36, 398 Mont. 275, 456 P.3d 233; *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982). Courts must protect a natural parent’s rights “with fundamentally fair procedures at all stages of the proceedings for the termination of parental rights.” *In re A.S.*, 2011 MT 69, ¶ 33, 360 Mont. 55, 253 P.3d 799, citing *In re B.N.Y.*, 2003 MT 241, ¶ 21, 317 Mont. 291, 77 P.3d 189 (other citations omitted). These fundamentally fair procedures must include the stage at which a court determines

whether a parent involved in a private termination case is eligible for waiver of courts costs and fees and assignment of counsel.

1. The District Court Erred When it Failed to Apply Guidelines for Assessing Indigence in Civil Cases as Set Out in Title 25 of the Montana Code.

“Montana’s right to equal protection requires that counsel be appointed for indigent parents in termination proceedings brought under the Adoption Act.”

*A.W.S. v. A.W.*, 2014 MT 322, ¶ 26; *In re L.F.R.*, 2019 MT 2, ¶ 9, 394 MT 61, 432 P.3d 1030. While the Adoption Act set out in Title 42 does not provide a mechanism for determining a parent’s financial eligibility and assigning counsel in parental termination and step-parent adoption cases, those guidelines are provided in Title 25. The court erred as a matter of law when it failed to determine whether S.P. is indigent by applying the Title 25 statutory structure which, by its express text, is to be used “in determining indigence.”

Title 25 codifies the principle that a person should not be denied an opportunity to commence or defend a court action because they lack financial resources. Mont. Code Ann. § 25-10-404(1) provides that a person may request a waiver of filing fees and court costs by filing an affidavit, supported by a financial statement, stating that the person has a good cause of action or defense and is unable to pay the costs or procure security to secure the cause of action or defense.

Subsection (3) creates an exception: a person represented by an entity that provides free legal services to indigent persons is not required to file the financial affidavit.

The Department of Justice adopted, by rule, a form of the financial statement “*for use in determining indigence*” as required by Mont. Code Ann. § 25-10-404(4) (emphasis added). The legislative intent for this rule was “that the form require sufficient information regarding income and assets to allow a reasonable determination of indigence.” Sec. 1, Ch. 447, L. 1993.<sup>2</sup>

The form adopted by the department in response to this mandate is found at ARM 23.2.301. The Rule sets out three bases for asserting indigence, two of which are:

☐ I am represented by an entity that provides free legal services to low-income persons.

*Or*

\*

☐ I receive one or more of these benefits: (Check the box for each benefit you receive.)

☐ SNAP ☐ TANF ☐ SSI ☐ Medicaid ☐ WIC ☐ LIEAP

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<sup>2</sup> “Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language. See § 1-2-106, MCA. In the construction of a statute, the intention of the legislature is to be pursued if possible. See § 1-2-102, MCA.” *Hanson v. Edwards*, 2000 MT 221, ¶ 19, 301 Mont. 185, 7 P.3d 419.

If any of the boxes is checked, the applicant need not fill out the remainder of the form. Otherwise, the applicant would need to provide specific financial information, including household size; the household's annual income, before taxes; and, the number of persons in the household who depend on the applicant financially. The form requires information about the applicant's marital status, and emphasizes that if the applicant is not married, is separated from a spouse or filing for dissolution of marriage, "you do not need to provide your spouse's income below." (emphasis in original).

Proper application of the Title 25 guidelines would have compelled the conclusion that S.P. was indigent and eligible for waiver of fees and costs. She received public benefits, in the form of Supplemental Nutrition Assistance Program (SNAP) benefits and Medicaid benefits. She was represented at the indigency hearing by counsel for Montana Legal Services Association, a non-profit law firm that provides free legal services to indigent persons. If S.P. could not afford to pay filing fees due to her indigent status, she certainly could not have afforded to retain a private attorney to represent her in the parental rights termination case.

Had the court applied the Title 25 guidelines, it would not have imputed to S.P. income and assets belonging to her boyfriend. S.P. and her friend are not

married to each other. Her friend has no legal duty to support her or to provide financial resources by which S.P. could retain private counsel in Montana.

The emphasis on the applicant's marital status as a factor in determining indigence is consistent with the weight of authority in analogous inquiries into a criminal defendant's eligibility for court-appointed counsel. "The financial condition of a defendant's relatives has no bearing on the question of the defendant's solvency." *State v. Vaughn*, 279 S.W.3d 584, 600-601 (Tenn. App. 2008). Accord, *Sanders v. State*, 612 So. 2d 1199, 1201 (Ala. 1993).

The court's erroneous ruling resembles a theory the United States Supreme Court rejected in *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). There, under the "man-in-the-house" rule, a child who qualified for AFDC benefits was denied those benefits if the child's mother was in a relationship with a man other than the child's father, that is, a substitute father. The Supreme Court struck down the regulation, holding that Congress did not intend to require children "to look for their food to a man who is not in the least obliged to support them[.]" 392 U.S. at 330.

The imputation to S.P. of her friend's apparent wealth, income and assets was clearly an error of law. This error directly and adversely impacts S.P.'s fundamental rights to the assistance of counsel and to parent her child.



2. The District Court Erred When it Misapplied Financial Eligibility Protocols that are Reserved by Title 47 of the Montana Code for Use by the Office of the Public Defender, Rather than a Court.

When a court orders the office of the state public defender to assign counsel to an applicant for public defender services, the office must immediately assign counsel and determine the applicant's financial eligibility. Mont. Code Ann. § 47-1-111(1). The financial information provided by the applicant may be private, and the eligibility process is non-adversarial. A court's role in the Title 47 eligibility determination process is limited to reviewing the agency's determination. If the agency determines that an applicant is ineligible and moves to rescind an order of appointment, the applicant may request a hearing on the motion to rescind. The purpose of the hearing is limited to eligibility, and only evidence relating to eligibility may be introduced. Evidence may not be used in other criminal or civil actions, subject to certain exceptions. Mont. Code Ann. § 47-1-111(1)(a)-(c)(i-vii); (2)(c). All information collected on forms used to capture financial information from an applicant for public defender services must be treated as confidential, except as required in Mont. Code Ann. § 47-1-111, or "when judicial review of the determination is required by the applicant. At that time, the forms shall be submitted to the court for in camera inspection." ARM 2.69.301(7).

OPD did not assign counsel, enter an appearance or make any determination

of S.P.'s financial eligibility. Despite concluding that this case did not fit with the statutory scheme which defines OPD's duties, the court used OPD's financial eligibility guidelines to evaluate S.P.'s right to counsel. However, the court conducted the hearing as an adversarial proceeding. This was error as a matter of law.

The harm to S.P. is manifest. First, the hearing should not have been an adversarial proceeding. The Statement of Inability to Pay Court Costs and Fees is not a pleading, motion, brief, or other advocacy paper triggering filing, service, record generation, and notification under Rule 5, M.R.Civ.P. A determination of indigence is a communication between the requesting party and the court, exclusively. The statute provides that a person requests a waiver and the court either approves the waiver or not. There is no provision for an adversarial proceeding on the application. See, Mont. Code Ann. § 25-10-404.

K.W.M. had no financial stake in the outcome. S.P. was not asking that the court order K.W.M. to pay S.P.'s legal fees under Title 42, and the court had already ruled that Title 42 did not apply. K.W.M.'s legitimate interests were in no way implicated by a determination on S.P.'s financial eligibility for counsel. The adversarial proceeding gave K.W.M. the opportunity to offer evidence, cross-

examine S.P. and portray her as an unfit parent. Issues related to one's fitness to be a parent should be resolved in the context of the parental-rights termination proceeding, where evidentiary rules and fundamental fairness guide the process.

3. The District Court Erred When it Applied an Ordinary Dictionary Definition of "Indigent" Rather than the Title 25 Statutory Structure.

The court also determined S.P.'s financial eligibility according to a dictionary definition of "'indigent' in the ordinary sense of that term" as "'lacking food, clothing, and other necessities of life because of poverty; needy; poor; impoverished.'" Based on this definition, the court concluded that S.P. is not indigent "in the ordinary sense of that term." Order Following Hearing, p. 7, Conclusion K. The court erred as a matter of law.

The statutory structure set out in Title 25 prevails over a general, "ordinary sense" definition. "[A] dictionary definition cannot contravene or render useless a statutory definition or the statutory structure itself." *MC, Inc. v. Cascade City-County Bd. of Health*, 2015 MT 52, ¶ 20, 378 Mont. 267, 343 P.3d 1208. Were it otherwise, a requirement that a person establish indigence only by showing she is lacking food or clothing or is impoverished, in order to be deemed eligible for counsel, would render meaningless the operative language within Mont. Code Ann. § 25-10-404, which requires a showing of an inability to pay costs.

The court's reliance on a dictionary definition of indigence not only conflicts with the Title 25 structure, it also is contrary to the weight of general authority. "A defendant need not be destitute to qualify for court-appointed counsel; 'it is sufficient that the defendant lack the necessary funds, on a practical basis, to retain competent counsel.'" *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006); accord, *State v. Smith*, 262 N.W.2d 567, 574 (Iowa 1978); *Morey v. State*, 744 S.W.2d 668, 669 (Tex.App. 1988); *Anaya v. Baker*, 427 F.2d 73, 75 (10<sup>th</sup> Cir. 1970).

D. The Court's Error of Law Causes a Gross Injustice.

Without the benefit of counsel, S.P. faces a substantial disadvantage in fighting back against the attempt to terminate her rights to parent C.M.

Without representation, a parent would not have an equal opportunity to present evidence and scrutinize the State's evidence. The potential for unfairness is especially likely when an indigent parent is involved. Indigent parents often have a limited education and are unfamiliar with legal proceedings. If an indigent parent is unrepresented at the termination proceedings, the risk is substantial that the parent will lose her child due to intimidation, inarticulateness, or confusion.

*A.W.S.*, 2014 MT 322, ¶ 25, quoting *In re A.S.A.*, 258 Mont. 194, 198, 852 P.2d 127, 129 (1993). The unfairness of this situation also poses a substantial risk of harm to the child. "Unfairness in a termination proceeding also has profound implications for the future of the child, and the risk of an unfair decision is equally significant to parent and child in both public and private proceedings." *Ibid.*

E. Constitutional Issues of State-wide Importance are at Issue.

Title 42 does not provide any statutory mechanism for determining a parent's financial eligibility and assigning counsel in termination proceedings brought under the Adoption Act. Mont. Code Ann. § 25-10-404 and ARM 23.2.301 provide the clear guidelines to inform a court's decision on whether a civil party is indigent. Supervisory control is an appropriate step by which the Court can ensure that decisions regarding financial eligibility and assignment of counsel in cases brought under the Adoption Act are recognized uniformly throughout Montana.

F. The Normal Appeal Process is Inadequate.

The District Court's mistakes of law should be addressed and rectified now, so the district court can apply the indigence factors set out in Title 25 and reconsider whether S.P. is eligible for appointed counsel. Only in this manner will S.P.'s right to fundamentally fair proceedings be protected. There is no purpose in forcing S.P. to proceed without counsel in a contested hearing that would ultimately will be reversed if the District Court terminates S.P. S.P.'s parental rights. "Violation of the right to counsel pervades a proceeding and requires reversal." *In re L.F.R.*, 2019 MT 2, ¶16, 394 Mont. 61, 432 P.3d 1030 (citing *A.W.S.*, ¶ 25 for the rule that fundamentally fair procedures, including appointment

of counsel for an indigent parent, are required in a proceeding to terminate parental rights). The interests of judicial economy support a grant of relief now. “Judicial economy and inevitable procedural entanglements [have been] cited as appropriate reasons for this Court to issue a writ of supervisory control.” *Rogers v. Lewis & Clark Cty.*, 2020 MT 230, ¶ 16, 401 Mont. 228, 472 P.3d 171 (citation omitted).

Allowing the termination and adoption to proceed only to be reversed on appeal would also undermine the best interests of the child. *A.W.S. v. A.W.*, at ¶ 16; *cf.* Mont. Code Ann. § 42-5-106(1)(e) (requiring a finding that adoption is in the best interests of the child) and *id.* at § 42-4-309 (requiring the court to consider a child’s best interests before waiving preplacement evaluation in stepparent adoption).

### **III. CONCLUSION**

This Petition presents purely legal questions. The District Court erred as a matter of law in the manner in which it re-assessed S.P.’s financial eligibility for assigned counsel and determined that she was not indigent. Fundamentally, the court erred in failing to use the applicable statutory structure to determine indigence, and instead assessing indigence under inapplicable standards and generic dictionary definitions. The court’s decision denies S.P. her right to counsel and causes a gross injustice in her efforts to retain her parental rights. This Court’s

affirmation that Title 25 governs indigence determinations in Title 42 cases would facilitate decisions regarding a parent's constitutional right to counsel on a state-wide level. The normal appeal process is inadequate.

For these reasons, this Court should accept jurisdiction and, in the exercise of its supervisory control, vacate the District Court's order, order that the May 5, 2021 hearing on the petition be vacated, and direct the District Court to conduct an eligibility determination in a non-adversarial manner consistent with the mechanism set out in Title 25 and related administrative rule.

Dated this 27<sup>th</sup> day of April, 2017.

Montana Legal Services

By: /s/ William F. Hooks

/s/ Tal M. Goldin

/s/ Brittney Mada

## APPENDIX

Park County District Court case registry .....	App. A
Respondent's Motion and Supporting Brief to Appoint Counsel.....	App. B
Indigency Questionnaire .....	App. C
Order Regarding Statement of Inability to Pay Court Costs .....	App. D
Order Appointing Public Defender.....	App. E
Order Denying Biological Mother's Motion For Appointment of Legal Counsel .....	App. F
Natural Mother's Brief in Support of the Court's Determination of Indigency and Eligibility for Appointment of Counsel .....	App. G
District Court Minutes: Thursday, March 18, 2021 .....	App. H
Findings of Fact, Conclusions of Law and Order Following Hearing Regarding Indigency Determination.....	App. I



## CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14 of the Montana Rules of Appellate Procedure, I certify that this Petition for a Writ of Supervisory Control 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 3,733, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

By: /s/ William F. Hooks

## **CERTIFICATE OF SERVICE**

I, Brittney Lynn Mada, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 04-28-2021:

Tal M. Goldin (Attorney)  
Montana Legal Services Association  
616 Helena Ave., Ste. 100  
Helena MT 59601  
Representing: S. P.  
Service Method: eService

William F. Hooks (Attorney)  
P.O. Box 118  
Helena MT 59624  
Representing: S. P.  
Service Method: eService

Brenda R. Gilbert (Respondent)  
414 East Callender Street  
Livingston MT 59047  
Representing: Self-Represented  
Service Method: E-mail Delivery

Electronically Signed By: Brittney Lynn Mada  
Dated: 04-28-2021