

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 21-0194

S. P.,

Petitioner,

v.

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

Respondent.

OFFICE OF THE STATE PUBLIC DEFENDER RESPONSE TO
PETITION FOR WRIT OF SUPERVISORY CONTROL

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INTRODUCTION

This matter arises from the District Court's determination that Petitioner S.P. was not indigent and not entitled to appointment of counsel in an adoption proceeding filed by K.W.M. Initially the Court had appointed the Office of the State Public Defender (OPD) but vacated its order upon objection by OPD. Montana Legal Services brings the present Writ to "ensure that decisions regarding financial eligibility and assignment of counsel in cases brought under the Adoption Act are recognized uniformly throughout Montana." Petition For a Writ of Supervisory Control, Pg. 14. Regardless of how the Court resolves the financial eligibility question, the OPD should not be assigned counsel in actions under the Adoption Act.

ARGUMENT

1. The Matter is Appropriate for Supervisory Control.

This Court has the authority to exercise supervisory control over the District Court in this matter. M.R. App. P. 14(3); Sweeney v. Mont. Third Judicial Dist. Court, 2018 MT 95, ¶6, 391 Mont. 224, 416 P.3d 187. The presented issue is a constitutional issue of state-wide importance, involves a purely legal question (regarding whether OPD

should be appointed counsel) and the normal appeal process would be inadequate. In addition to the arguments presented by the Petitioner, different judicial districts have handled the appointment of counsel in Adoption matters in different ways.

2. The Office of the State Public Defender Should Not Be Appointed in Proceedings Under the Adoption Act.

The OPD agrees with many of the Petitioner's arguments and anticipates the District Court might also agree with some positions as well. All parties should agree that S.P. has asked for the appointment of counsel. All parties should agree a party is entitled to counsel in a proceeding to terminate his or her parental rights. In the Matter of the Adoption of A.W.S. and K.R.S., 2014 MT 322, 377 Mont. 234, 339 P.3d 414. OPD agrees with the Petitioner the process to determine indigency should be non-adversarial.

However, the issue at hand appears to be the Court's determination of S.P.'s indigency and how it was determined. Here OPD takes no position. OPD does not know whether Petitioner would qualify for the appointment of counsel or whether S.P. is indigent. OPD agrees a person does not have to be destitute to qualify for court appointed counsel. People v. Alengi, 148 P.3d 154, 159 (Colo. 2006).

However, OPD takes no position on the District Court's application of Title 25 or Title 47 with respect to a determination of indigency. OPD has not made an independent analysis of S.P.'s qualifications for OPD's services. OPD's only interest in this matter is who the District Court would appoint if the matter were reversed and sent back to the District Court. The appointment should not be OPD.

OPD lacks the statutory authority to represent a party in an action filed under the Montana Adoption Act. After S.P. requested counsel be appointed, OPD was appointed in this matter on October 14, 2020. Shortly thereafter, OPD moved to vacate the order appointing counsel arguing the District Court lacked statutory authority to make the appointment. The Court granted the motion to vacate the appointment order on December 14, 2020. That was the correct result.

OPD was created in 2005 and the Montana Legislature enumerated how and when OPD could represent Montana citizens. M.C.A. § 47-1-104. Without statutory authority, OPD has no duty or authority to represent an individual. Office of the State Pub. Defender v. Fagenstrom, 2019 MT 104, ¶10, 395 Mont. 397, 439 P.3d 1285. Pursuant to statute, M.C.A. § 47-1-104(4)(a)(c), a court may appoint

OPD in the following matters so long as the person financially qualifies for services:

- 1) For a felony or misdemeanor where incarceration is a possible sentence;
- 2) In a proceeding to determine parentage under the Uniform Parentage Act;
- 3) For a parent, guardian, or other person with physical or legal custody of a child in a removal, placement or termination proceeding or under ICWA;
- 4) An applicant in Sentence Review;
- 5) For a petitioner in post conviction relief;
- 6) For a petitioner in a habeas corpus proceeding;
- 7) For a parent or guardian in an involuntary commitment proceeding of a developmentally disabled person;
- 8) For a respondent in a proceeding for involuntary commitment for a mental disorder;
- 9) For a respondent in a proceeding for involuntary commitment for alcoholism.
- 10) For a witness in a criminal grand jury proceeding, and,
- 11) For an appellate in the cases listed above.

Pursuant to statute, M.C.A. § 47-1-104(4)(b)(c), a court may appoint

OPD in the following matters regardless of financial ability:

- 1) For children in abuse and neglect proceedings;
- 2) For minors in Youth Court proceedings for allegation of delinquency or youth in need of intervention, or for persons being prosecuted under the Extended Jurisdiction Prosecution Act;
- 3) For juveniles entitled to counsel under the Interstate Compact on Juveniles;
- 4) For a minor who petitions for waiver of parental consent for an abortion;
- 5) For the respondent in an involuntary commitment for a developmental disability;
- 6) For a minor voluntarily committed to a mental health facility;

- 7) For a person who to the subject of a petition for appointment of a guardian or conservator;
- 8) For a ward when the ward's guardian has filed a petition to require medical treatment for mental disorder of the ward; and
- 9) For an appellant in the cases listed above.

OPD follows statutory guidelines to determine if an individual is eligible for public defender services as provided in Montana Code Annotated § 47-1-111. OPD collects affidavits with supporting documentation to determine if an individual qualifies for services. If not, OPD files a motion to rescind.

In 2014, the Montana Supreme Court recognized the right to counsel for an indigent parent facing a petition to terminate their parental rights pursuant to the Montana Adoption Act. In the Matter of the Adoption of A.W.S. and K.R.S., 2014 MT 322, 377 Mont. 234, 339 P.3d 414. In A.W.S., this Court observed that OPD is responsible for appointing counsel and determining financial eligibility with regard to certain parties in abuse and neglect proceedings and in paternity proceedings, however there was no corresponding obligation for OPD to assign counsel under the Montana Adoption Act. Id. at ¶ 26, n. 3. This Court further wrote, the only mechanism under the Adoption Act for payment of fees was that the "...Act allows the payment of birth

parent's legal fees by the adoptive parent. Sections 42-7-101(1)(i), 42-7-102(2), MCA." Id. This Court remanded the A.W.S. case and directed the district court to appoint counsel for the mother if the district court determined the mother was financially eligible. Id. at ¶ 26. In A.W.S., this Court was directing district courts to appoint counsel in a private adoption where the parent facing termination was indigent. The Court did not direct the district court to appoint OPD.

This Court's treatment of this issue is appropriate because the Montana Legislature expressly articulated the types of cases in which a court may order OPD to assign counsel when it enacted the Montana Public Defender Act in 2005. The Legislature did not include adoption cases brought under the Adoption Act (Title 42) in the list of cases for which a court may assign a public defender. Since the A.W.S. decision in 2014, the Legislature has not amended the Montana Public Defender Act to include representation under the Montana Adoption Act.

Furthermore, as noted above, the Montana Adoption Act (M.C.A. §§ 42-7-101 and 42-7-102) provides for payment by a prospective adoptive parent of a birth parent's cost of legal representation for a birth parent. This provides a mechanism for district courts to ensure that indigent

birth parents are provided with counsel. It is unnecessary to involve OPD. These statutory provisions were in effect at the time the Legislature enacted the Montana Public Defender Act in 2005, the Court may presume the Legislature did not include adoption cases in Title 47 because a provision for payment of a birth parent's legal fees was already present. Because a statutory framework currently exists for appointment and payment of counsel apart of the Montana Public Defender Act, the Court should not instruct lower courts to appoint OPD to represent parents under the Montana Adoption Act.

This Court's focus in A.W.S. on appointing counsel pursuant to the Montana Adoption Act, where exclusive authority exists for appointing counsel, is consistent with long established principles of statutory construction requiring courts "to ascertain and declare what is in the terms or in the substance contained therein, not to insert what has been omitted or to omit what has been inserted." In re Inquiry into A.W., 1999 MT 42, ¶ 49, 293 Mont. 358, 975 P.2d 1250 citing M.C.A. § 1-2-101. In A.W. this Court relied on this principle to nullify a district court's attempt, without expressed statutory authority, to require parents in a dependency and neglect case to reimburse the County for

costs it incurred in hiring a guardian ad litem. Other states have likewise held that appointment of counsel and the corresponding obligation to pay for those services requires express statutory authority. See Hall v. State, 315 P.3d 798, 809 (Idaho 2013); Justice Admin. Comm'n v. Harp, 24 So. 3d 779, 780 (Fla. Dist. Ct. App. 5th Dist. 2009); Clark v. Ivy, 727 P.2d 493, 500-501 (Kan. 1986); In re Parental Relationship of J.G. v. S.G., 911 N.E.2d 36, 41-42 (Ind. Ct. App. 2009). The appointment of OPD, and the payment for the cost of that representation, requires express statutory authority. No such authority exists in the Montana Code.

Although it is true that the holding in A.W.S. somewhat alters the landscape of indigent representation in Montana, this modification does not justify a departure from long established principles of statutory construction, nor does it carve out an exception to the limitations on judicial authority. As noted by one court:

It is clear there presently exists no statutory authority, explicit or implicit, to spend public moneys to pay counsel to defend indigents in actions brought by a county under Welfare and Institutions Code section 11350 to recoup expenditures for child support. (Cf. Luke v. County of Los Angeles (1969) 269 Cal.App.2d 495 [74 Cal.Rptr. 771], where statutory authorization was implicit.) Allocation of liability for payment of attorneys' fees in such causes is the prerogative of the Legislature and not of the

courts. While the Legislature is now considering appropriate legislation on this subject, it has not yet acted to fix responsibility for payment of the costs of free legal representation for indigents in the type of cause covered by the decision in Salas v. Cortez (1979) 24 Cal.3d 22 [154 Cal.Rptr. 529, 593 P.2d 226]. Until the Legislature provides statutory authorization to pay such expenses from public funds, the trial court is not empowered to order the county to pay Holley's attorneys' fees. (Payne v. Superior Court (1976) 17 Cal.3d 908, 920 [132 Cal.Rptr. 405, 553 P.2d 565]; Jara v. Municipal Court (1978) 21 Cal.3d 181, 184 [145 Cal.Rptr. 857, 578 P.2d 94]; County of Fresno v. Superior Court (1978) 82 Cal.App.3d 191, 194-96 [146 Cal.Rptr. 880].) Until the Legislature fixes liability on some particular governmental entity to pay such attorneys' fees, appointed counsel in such causes act pro bono publico in the manner appointed counsel formerly acted for indigent defendants in state and federal criminal causes. (Rowe v. Yuba County (1860) 17 Cal. 61, Field, C. J.) We note that in comparable indigency causes the Legislature has been neither unsympathetic nor dilatory in authorizing free legal representation at public expense (see compilation of statutes in County of Fresno v. Superior Court, supra, 82 Cal.App.3d 191, at p. 196).

County of Los Angeles v. Superior Court, 102 Cal. App. 3d 926, 930-931 (Cal. App. 2d Dist. 1980). Other Montana district courts have vacated appointments under the Adoption Act for the identical reasons stated herein. Copies of order from the First Judicial District, the Eleventh Judicial District, the Eighteenth Judicial District, and the Twenty-First Judicial District vacating appointments of OPD are attached as Exhibit A.

OPD is not statutorily authorized to participate in these proceedings and any increase to OPD's burden must come with appropriate consideration and appropriation by the Legislative branch.

CONCLUSION

OPD takes no position on the issues raised by the Petitioner other than the inference that OPD should be appointed if Petitioner S.P. is found to be indigent. OPD should not be appointed as counsel in private adoption cases as there is no statutory authority for this appointment.

Dated this 1st day of June 2021.

Office of the State Public Defender

By: /s/ Brian C. Smith

APPENDIX

District Court Orders

Exh. A

Transcript of Proceedings Feb 22nd and March 19th 2021

Exh. B

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14 of the Montana Rules of Appellate Procedure, I certify that this Response to Writ of Supervisory Control is printed with a proportionately spaced Century Schoolbook 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 2095, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

By: /s/ Brian C. Smith

CERTIFICATE OF SERVICE

I, Brian Carl Smith, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 06-01-2021:

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