

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

IN THE MATTER OF

J.A.,

A Youth in Need of Care.

PETITION FOR WRIT OF SUPERVISORY CONTROL

Original Proceedings from the Montana Eighteenth Judicial District, Gallatin
County
The Honorable Rienne McElyea, Presiding.

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INTRODUCTION

Pursuant to M.R. App. P. 14, Father J.V. respectfully requests this Court assume supervisory control in Gallatin County Cause No. DN-20-74-B, the Honorable Rienne McElyea, District Judge for the Montana Eighteenth Judicial District Court presiding.

The Writ is necessary to prevent further violation of Father’s constitutional right to parent his minor child, J.A. Father specifically seeks reversal of the District Court’s February 28, 2022 *Order Granting Extension of Temporary Legal Custody Until May 4, 2022*, which *sua sponte* ordered J.A. to temporarily remain in the Department’s custody after the Department’s continuing investigation determined no safety concerns existed to deny placement with Father, and required Father—a non-offending, non-custodial parent—to complete a treatment plan.

STATEMENT OF FACTS

On October 20, 2020, the Department of Public Health and Human Services, Child and Family Services Division (Department) removed then six-year-old J.A. from the home of his mother S.A. (Mother) after she reportedly attempted to kill herself and J.A. with a prescription medication overdose. (Doc. 1, at 3). Mother was incarcerated and charged with attempted deliberate homicide. (Doc. 1, at 6).

J.A. was placed in kinship foster care with his adult half-sister after attempts to locate his father were unsuccessful. (Doc. 1, at 5).

The Department filed a Petition for Emergency Protective Services, Adjudication of J.A. as Youth in Need of Care, and for Temporary Legal Custody of J.H. (Doc 1, at 8-10). The petition contained no factual allegations as to Father, but stated he caused J.A. “[a]ctual physical or psychological harm and substantial risk of physical or psychological harm” by abandoning J.A. and allowing him to be exposed to Mother’s alcohol and drug abuse. (Doc. 1 at 7). On July 30, 2021, the Department filed proof of service by publication stating Father had been effectively served after the Department’s attempts to locate Father were unsuccessful. (Doc. 13).

On December 30, 2020 the District Court adjudicated J.A. as a Youth in Need of Care (YINC) as to Mother and granted the Department Temporary Legal Custody (TLC) for a period of six months. (Doc. 15).

On July 1, 2021, the Department moved to extend TLC. (Doc. 28). At the July 30, 2021 show cause hearing, the parties discussed the procedure of the case related to Father. (7/30/21 Tr., at 22). At the Department’s request, the District Court found probable cause from the Department’s affidavit to adjudicate J.A. as a YINC as to Father. (7/30/21 Tr., at 25:1-17, 27:10-14). The District Court then

held the dispositional phase of the hearing. (7/30/21 Tr., at 3-12). Father's counsel was present but took no position as to the adjudication or disposition as to Father, as she had not had any contact with him. (7/30/21 Tr., at 23: 16-24; 31:11-13). The Department requested the District Court grant the Department TLC as to Father, but not order a Treatment Plan as a "placeholder," acknowledging that Father "could get involved" in the case at any time. (7/30/21 Tr., at 31: 20-25; 32: 1-15). The District Court granted the Department's request for TLC as to Father through January 4, 2022, the same date the extension of TLC as to Mother was set to expire, and did not order him to complete a treatment plan. (7/30/21 Tr., at 36: 7-13; 37:5-10). The District Court further ordered the Department to make additional efforts to locate Father. (7/30/21 Tr., at 36: 10-13).

In August 2021, the CASA located Father through a Google search and informed the Department. Father then moved to Bozeman from North Dakota to be involved in J.A.'s life. (Doc. 35; 02/11/22 Tr., at 40: 17-21; 41: 15-18). Upon the Department's motion for an amended adjudication order, the District Court ordered Father to be evaluated pursuant to § 41-3-438(3)(b), MCA, to determine if Father was a safe and appropriate placement for J.A. (Docs. 35, 41).

On November 23, 2021, Father moved to rescind adjudication, or alternatively, to immediately place J.A. with Father and dismiss the proceeding. (Doc. 52). In its response brief, the Department noted that Father's evaluation

initially raised concerns for the Department given Father's criminal history, prior Department involvement, and Father's lack of a relationship with J.A., but conceded that these concerns did not pose an imminent safety risk to the child. (Doc. 35, at 12). The Department therefore agreed that in light of *In re J.S.L.*, 2021 MT 47, 403 Mont. 326, 481 P.3d 833; *In re B.H.*, 2020 MT 4, 398 Mont. 275, 456 P.3d 233, and *In re E.Y.R.*, 2019 MT 189, 396 Mont. 515, 446 P.3d 1117, "it is legally presumed that it is in J.A.'s best interest to be placed with Father" and did "not oppose Father's request to place J.A. with him, superseding any other custodial order, and to dismiss the case." (Doc. 35, at 8, 11).

While Father's motion to dismiss was pending, the Department moved to extend TLC as to Mother on the basis that she needed more time to complete her court-ordered Treatment Plan. (Doc. 59). The Department's motion did not mention Father. (Doc. 59; 2/11/22 Tr., at 16: 23-25, 17:1-3).

The District Court held a show cause hearing on the Department's petition on February 11, 2022. Father was personally present with his counsel at the hearing. (2/11/22 Tr., at 4). The District Court denied Father's motion to dismiss, determining that adjudication was appropriate based on the abandonment allegations. (2/11/22 Tr., at 9:1-17). The Department's counsel interjected, stating:

[T]he Department doesn't actually have [TLC]. . . . We had adjudication. The disposition that the Department originally requested was [TLC]. . . . The Department then amended that request for disposition to the Department being ordered to evaluate [Father] to see if he was a safe caretaker. . . . [W]hen the Department amended that request and the Court ordered that Amended Disposition, I think that did away with the [TLC].

(2/11/22 Tr., at 15: 7-25; 16: 1-2).

The Department's counsel went on to state that "the Department only requested additional time as to Mother . . . while the Court took under consideration" Father's motion to dismiss. (2/11/22 Tr., at 16: 23-25; 17: 1-3).

Father's counsel objected to an extension of TLC and requested a hearing be held on his motion to dismiss. (2/11/22 Tr., at 21:2-14). Over these objections and the Department's agreement it was in J.A.'s best interests to be placed with Father, the District Court ordered TLC be extended and that Father complete a treatment plan. (2/11/22 Tr., at 21, 45: 11-24). The District Court issued a written order with no factual findings underlying its decision to deny Father's motion to dismiss and extend TLC as to Father by a preponderance of the evidence as required by § 41-3-442, MCA, nor did it consider Father's right to immediate placement of J.A. in the context of *In re J.S.L.*, 2021 MT 47, 403 Mont. 326, 481 P.3d 833; *In re B.H.*, 2020 MT 4, 398 Mont. 275, 456 P.3d 233, and *In re E.Y.R.*, 2019 MT 189, 396 Mont. 515, 446 P.3d 1117. (Doc. 78).

ISSUES

- A. Did the District Court err by denying Father’s motion to dismiss and place the child with him as the non-offending, noncustodial parent, and instead *sua sponte* extend TLC to the Department?
- B. Did the District Court err by denying Father’s motion to dismiss and place the child with him as the non-offending, noncustodial parent, and instead *sua sponte* order him to complete a treatment plan?

ARGUMENT

- I. Supervisory control is appropriate because the District Court is proceeding under a mistake of law by failing to immediately place J.A. with Father and instead granting an extension of TLC to the Department and ordering Father to complete a treatment plan; the constitutional right to parent is involved; and the normal appeal process is an inadequate remedy.**

Mont. Const. Art. VII, Section 2(2) gives this Court general supervisory control over all other courts. Supervisory control is appropriate where “urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when” the lower court is “proceeding under a mistake of law and is causing a gross injustice” or “[c]onstitutional issues of state-wide importance are involved.” M. R. App. 14(3)(a), (b); *J.C. v. Eleventh Judicial Dist. Court*, 2008 MT 358, ¶ 12, 346 Mont. 357, 197 P.3d 907 (quoting *Miller v. Eighteenth Judicial Dist. Court*, 2007 MT 149, ¶ 16, 337 Mont. 488, 162 P.3d 121) (Supervisory control is appropriate where a district court is “proceeding

under a mistake of law and, in doing so, is causing and gross injustice, and where the normal appeal process is not an adequate remedy).

YINC cases “present constitutional issues of statewide importance- i.e., a parent’s fundamental constitutional right to parent [his] child.” *In re J.C.*, ¶ 13. Additionally, this Court has determined that, “given the gravity of the issues” in such cases, “supervisory control affords [the Court] the opportunity to review those cases where a parent alleges that the entry of the temporary legal custody order constituted a mistake of law causing a gross injustice.” *In re D.A.*, 2003 MT 109, ¶ 18, 315 Mont. 340, 68 P.3d 735.

Supervisory control is necessary here because the District Court’s ruling denied Father’s request for the immediate placement of the child, a request which the Department did not oppose, and *sua sponte* extended the Department’s TLC as to Father, thereby violating § 41-3-442, MCA, and the rule that the non-offending, non-custodial parent is entitled to immediate placement of the child, annunciated in the line of cases *In re D.H.A.*, 2022 MT 37, ____ Mont. ____, ____ P.3d ____; *In re J.S.L.*, 2021 MT 47, 403 Mont. 326, 481 P.3d 833; *In re B.H.*, 2020 MT 4, 398 Mont. 275, 456 P.3d 233, and *In re E.Y.R.*, 2019 MT 189, 396 Mont. 515, 446 P.3d 1117. The District Court’s order caused Father a gross injustice by depriving him of his right to the care and custody of his child.

Supervisory control is also necessary because the District Court's order *sua sponte* required Father to undergo a treatment plan that has the potential to cause him to be stripped of his parental rights. See § 41-3-609(1)(f)(i), (ii), MCA (providing that a district court may terminate the parent-child relationship for a YINC upon determining from clear and convincing evidence that "an appropriate treatment plan that has been approved by the court has not complied with by the parents or has not been successful; and (2) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time."). A treatment plan "by its nature . . . delay[s] reunification; result[s] in time, expense and inconvenience to Father; and risk[s] termination of his parent rights if not completed to the Department's satisfaction." *In re E.Y.R.*, ¶ 40; § 41-3-443(5)(d), MCA ("[C]ompletion of a treatment plan does not guarantee the return of the child and that completion of the plan without a change in behavior that caused removal in the first instance may result in termination of parental rights.").

Father therefore asks this Court to accept jurisdiction to correct the District Court's mistakes of law and avoid further prejudice to his constitutional right to parent.

II. The District Court's Order should be reversed.

This Court has consistently recognized the fundamental constitutional right of a natural parent to the care and custody of his child. *In re J.S.L.*, ¶ 24.

The constitutional right to parent is guaranteed to custodial and noncustodial parents alike. *See* § 40-6-221, MCA. When a child is adjudicated as a YINC, the non-custodial, non-offending parent's fundamental liberty interests in the care and custody of the child are "not suspend[ed] or reduce[d] by the proceeding." *In re E.Y.R.*, ¶ 31. *See also In re D.H.A.*, ¶ 9 (quotations omitted) ("This Court has long recognized the constitutional rights of a natural parent to parent his/her child and the child's right to be placed with his/her legal birth parents unless that parental authority has been abused."). "The constitutional rights to parent one's own children find protection in our statutes." *In re D.H.A.*, ¶ 16 (quoting *In re B.H.*, ¶ 38).

This Court has outlined the procedure that is used when the Department removes a child from his custodial parent due to abuse or neglect. *In re E.Y.R.*, ¶¶ 28-29. "[T]he Department must first consider placement of the child with the non-custodial parent" after first determining if there are any "observable or substantiable imminent safety risks to the child if the child is placed in the care of" that parent. *In re E.Y.R.*, ¶ 29. Importantly, "[t]his determination does not at the

outset require full investigation of or the implementation of an [Interstate Compact on the Placement of Children] or a treatment plan for the non-custodial parent, but rather occurs along a continuum.” *In re E.Y.R.*, ¶ 29. The Court outlined the range of best practices the Department should use in making its determination:

Typically, this [determination] would involve conducting a CPS history and potentially a criminal background check as well as gathering information from the non-custodial parent as to his/her work and earnings, his/her residence and who, if anyone, s/he resides with, who is part of his/her support system, and potential collateral contacts who can verify the information provided.

In re E.Y.R., ¶ 29.

If these initial steps yield “objective, demonstrable circumstances indicat[ing] a potential imminent safety risk to the child,” the Department may expand its investigation. *In re E.Y.R.*, ¶ 29. If the expanded investigation yields “objective, demonstrable circumstances indicat[ing] a potential imminent safety risk to the child,” only then may the Department seek a court order allowing for further evaluation and investigation of the non-custodial parent consistent with § 41-3-438(3)(b) and (c), MCA.

If the Department identifies no “demonstrable circumstances of imminent safety risk to the child,” the court may either “order the temporary placement of the child with the noncustodial parent, superseding any existing custodial order, and

keep the proceeding open pending completion by the custodial parent of any treatment plan,” § 41-3-438(3)(c), MCA, or, under § 41-3-438(3)(d), MCA,

order the placement of the child with the noncustodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the department to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding.

Under each of these scenarios, as this Court recently summarized in *In re D.H.A.*, the non-custodial parent is entitled to immediate placement of the child. *In re D.H.A.*, ¶ 17 (quoting *In re B.H.*, ¶ 46) (“If there are no objective, demonstrable circumstances of imminent safety risk to the child upon the Department’s preliminary investigation, the Department must place the child with the non-custodial parent or document good cause to the contrary indicating how the non-custodial parent could not assure the safety of the child.”).

A non-custodial, non-offending parent’s rights are further recognized by § 41-3-424, MCA. This statute requires a district court to dismiss the case if the child remains in the home of the non-custodial parent for at least six months with no additional confirmed reports of abuse or neglect, and the Department “determines and informs the court that the issues that led to department intervention have been resolved and that no reason exists for further department intervention or monitoring.” Section 41-3-424, MCA.

None of these statutes allow the court to *sua sponte* act to ignore or limit the non-custodial parent’s right to parent. This Court has previously reversed a district court that denied a non-custodial father immediate placement and “*sua sponte* raised issues not identified by the Department” during the proceedings. *In re A.J.C.*, 2018 MT 234, ¶ 36, 393 Mont. 9, 427 P.3d 59. In doing so, the Court noted:

There are . . . few invasions by the state into the privacy of the individual that are more extreme than that of depriving a natural parent of the custody of his children. For this reason, the legislature carefully enunciated the procedures the state must follow and the findings which the court must make before custody of a child may legally be taken from his natural parent.

In re A.J.C., ¶ 39 (quotations omitted).

A. The District Court erred by denying Father’s motion to dismiss and place the child with him as the non-offending, noncustodial parent, and instead *sua sponte* extended TLC to the Department.

The District Court improperly raised issues not addressed by the Department when it denied Father’s motion to dismiss and granted the Department an extension of TLC on the basis of abandonment, despite the Department agreeing Father was a safe and appropriate placement. “[T]o maintain TLC the court must determine that Child is a [YINC] on the basis of evidence of Father’s abuse or neglect.” *In re E.Y.R.*, ¶ 46. While the Department’s abandonment allegations

may have presented a basis to grant TLC as to Father initially, a parent can only be determined to have abandoned his child if one of the following takes place:

- (1) The parent leaves a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future;
- (2) The parent willfully surrenders physical custody for a period of 6 months and during that period does not manifest to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child;
- (3) The parent is unknown and has been unknown for a period of 90 days and that reasonable efforts to identify and locate the parent have failed; or
- (4) The parent voluntarily surrenders, as defined in § 40-6-402, MCA, a newborn no more than 30 days old to an emergency services provider, as defined in § 40-6-402, MCA.

Section 41-3-102(1)(a)(i)-(iv), MCA.

Father manifested to the Department his intent to parent J.A. by moving from North Dakota to Montana, thereby obviating any abandonment concerns. The Department proceeded to further investigate Father and ultimately agreed that he has a “fundamental liberty interest to parent J.A. and the legal presumption that it is in J.A.’s best interest to be placed with Father.” (Doc. 55, at 8). Because no demonstrable circumstances of imminent safety risks to J.A. were presented to the District Court, it was required to, at a minimum, temporarily place J.A. with Father and order Mother as the custodial parent to complete a treatment plan, or place J.A. with Father and dismiss the proceedings. *See* § 41-3-438(3)(c) and (d), MCA. The

District Court was not permitted to extend TLC as to Father without further evidence of Father's abuse or neglect.

B. The District Court erred by denying Father's motion to dismiss and place the child with him as the non-offending, noncustodial parent, and instead *sua sponte* ordered him to complete a treatment plan.

The District Court further erred in ordering Father to complete a Treatment Plan, which can only be ordered in the following circumstances:

- (a) the parent or parents admit the allegations of an abuse and neglect petition;
- (b) the parent or parents stipulate to the allegations pursuant to [§] 41-3-434[, MCA]; or
- (c) the court has made an adjudication under [§] 41-3-437[, MCA,] that the child is a youth in need of care.

Section 41-3-443(1)(a)-(c), MCA.

In cases where the Department identifies no “demonstrable circumstances of imminent safety risk to the child,” only the custodial parent may be ordered to complete a treatment plan. Section 41-3-438(3)(c), MCA, provides:

If a child is found to be a [YINC] under [§] 41-3-437[, MCA], the court may . . . order the temporary placement of the child with the noncustodial parent, superseding any existing custodial order, and keep the proceeding open pending completion by the *custodial* parent of any treatment plan

(Emphasis added).

This Court addressed a similar issue in *In re E.Y.R.*, ¶ 45, determining that a father “was prejudiced by the imposition of a treatment plan as at the time it was ordered the Department had not presented evidence of recent or current abuse or neglect on Father’s part or current behaviors or living situation demonstrating need for imposition of a treatment plan.”

Here, the District Court ordered Father, the non-custodial parent, to complete a treatment plan without articulating any reason for its decision except the Department’s prior allegations of abandonment. (2/11/22 Tr., at 9:1-17). The abandonment allegations were only raised by the Department in its request for TLC, however. The Department did not raise abandonment or any other abuse or neglect allegations as bases for extending TLC and did not request a treatment plan for Father.

Just as in *E.Y.R.*, Father’s right to parent J.A. has been prejudiced as he was entitled to immediate placement of J.A. as the non-offending, non-custodial parent at the expiration of the Department’s TLC, without having to undergo a treatment plan. The District Court’s order violates § 41-3-443(1)(a)-(c), MCA, and further prejudices Father’s right to the care and custody of J.A.

CONCLUSION

The District Court is proceeding under a mistake of law and causing Father a gross injustice by failing to place J.A. with Father as the non-offending, non-custodial parent, and instead extending TLC to the Department as to Father and ordering Father to complete a treatment plan. Supervisory control is necessary to correct the District Court's errors of law and prevent Father's constitutional right to parent J.A. from further prejudice.

/s/ Adrienne Ellington
ADRIENNE ELLINGTON

CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. 11, I certify that this 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 is not more than 4,000 words, excluding the Certificate of Service and Certificate of Compliance.

/s/ Adrienne Ellington
ADRIENNE ELLINGTON

APPENDICES

Appendix A

Department's *Petition for Emergency Protective Services, Adjudication of Child as Youth in Need of Care, and Temporary Legal Custody*

Appendix B

Department's *Petition for Extension of Temporary Legal Custody*

Appendix C

Father's *Motion to Rescind Adjudication Regarding Father, or Alternatively, Place Youth with Father and Dismiss Proceeding*

Appendix D

Department's *Response to Father's Motion to Rescind Adjudication Regarding Father, or Alternatively, Place Youth with Father and Dismiss Proceeding*

Appendix E

Excerpt from Transcript of February 11, 2022 Hearing on *Petition to Extend Temporary Legal Custody*, Pages 9, 14-21

Appendix F

District Court's *Order Granting Extension of Temporary Legal Custody Until May 4, 2022*

CERTIFICATE OF SERVICE

I, Adrienne Ellington, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 03-18-2022:

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Dated: 03-18-2022