

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 22-0099

OP 22-0100

STATE OF MONTANA, DEPARTMENT OF
PUBLIC HEALTH AND HUMAN SERVICES,
CHILD AND FAMILY SERVICES DIVISION,

Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT,
CASCADE COUNTY, HON. ELIZABETH A.
BEST, Presiding,

Respondent.

**SUMMARY RESPONSE OF
GUARDIAN AD LITEM**

D.H.,

Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT,
CASCADE COUNTY, HON. ELIZABETH A.
BEST, Presiding,

Respondent.

Pursuant to the Order of this Court filed March 8, 2022, the Guardian Ad Litem for the youths submits this summary response to the Petition for Writ of Supervisory Control filed by the Montana Department of Public Health and Human Services Division (“DPHHS”) and birth mother (“D.H.”).

Montana Appellate Rule 14(7) provides for a response that summarizes the arguments

and authorities for rejecting jurisdiction and requires compliance with subsections (5)(b)(ii), (iii) and (iv). Further, no separate legal memorandum or brief is to be filed. There is virtually no case law on what constitutes a “summary response” and in reviewing pleadings from this Court’s website the responses vary from the terse to essentially a full appellate brief. See, for example, the filings in *Kasem v. Thirteenth Judicial District*, 2021 MT 317, 500 P.3d 594, 406 Mont. 482. The Guardian Ad Litem’s response is intended to comply with the letter and spirit of Rule 14 by succinctly stating the basis to urge rejection of the Petitions.

The Petitioners’ application is based on the contention the District Court had no basis in law to grant the motion to amend a petition in a dependent neglect proceeding to terminate the birth mother’s parental rights because only DPHHS is lawfully permitted to petition for a termination of parental rights. That contention is wrong and granting the Petitions is not appropriate for the following reasons:

1. **The grounds for issuance of a writ of supervisory control have not been met.** Rule 14, M.R.App.Civ.P., recognizes that supervisory control is an extraordinary remedy and only sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, or when the case involves purely legal questions, *and* when one or more of the following circumstances exist:

- (a) The other court is proceeding under a mistake of law and is causing a gross injustice;
- (b) Constitutional issues of state-wide importance are involved;
- (c) The other court has granted or denied a motion for substitution of a judge in a criminal case.

(I) **No emergency or urgency exists while factual issues remain.** There are no demonstrated urgency or emergency factors that make the normal appeal process inadequate. Further, M.H.’s and N.H.’s cases do not involve purely legal questions and none of the required circumstances to invoke supervisory control exist.

There is no emergency. Placement occurred **in June 2018** while the children were in the custody of D.H. to protect them from immediate danger of harm from abuse or neglect. They have been in the same placement ever since. No order has yet been entered to terminate D.H.'s parental rights. The two young girls subject to the efforts to terminate D.H.'s parental rights, M.H. and N.H., are in a stable home and undergoing continuing counseling to address the horrific abuse they suffered and that D.H. witnessed, tolerated, abetted or permitted. DPHHS does not intend to reunite M.H and N.H. with their birth mother. The Department *admits* that even though it has made reasonable efforts to reunite the birth mother and these girls, further efforts to reunite them would likely be unproductive. DPHHS also admits that *reunification of the birth mother and the girls would be contrary to the girls' best interest*.¹ Yet inexplicably, without any basis other than that birth mother has complied with the Department's treatment plan, it claims termination of parental rights is not in the girls' best interests and the decision to terminate is solely held by the Department.

The girls have consistently expressed their best interest is served by terminating the rights of their mother. The attorney for the girls and their GAL support that result after numerous conferences with the girls and their counselor and knowing the nightmare life they suffered while with her. In claiming that only it knows what is best for the girls, the Department wants to elevate *its* opinion of their best interests over the *court's* opinion.

This case is not limited to legal issues. There are fact issues to be resolved. The district court has not yet even held a hearing on termination of parental rights, let alone made a decision. That will be a fact-based inquiry. What is in their best interest, which is *the* ultimate legal issue based on facts, remains to be decided. While the district court is not proceeding under a mistake

¹ See State's *Petitions for Appointment of Guardian*, filed February 18, 2022.

of law, what would be a gross injustice would be to subject these children to the terrifying thought that D.H. or anyone else could seek to terminate a guardianship if that is the only option the Department considers viable.

The Statement of the Case and Facts submitted by DPHHS is neither complete nor entirely accurate. For example, it neglects to disclose that D.H. encouraged her daughters to recant testimony regarding the birth father's conduct after the event where he placed a weapon at the head of his 5-year-old son in order for her to curry favor with him. That conduct, with others, is what caused the Department in the first place to seek protection for the children from both the birth father *and* from D.H.

Second, the Department has been less than candid with the girls and the placement about their options. Third, the Department has not complied with Mont. Code Ann. § 41-3-445(9) in relation to a placement plan. Both N.H. and M.H. are now 14 years old or older. Yet the Department has failed to propose a permanency plan that has been developed "in consultation with the child" and in consultation with up to two members of the child's case planning team "chosen by the child" and who are not a foster parent or child protection specialist for the child or that identifies one person from the case management team "selected by the child" to be designated as the child's advisor and advocate for the application of the reasonable and prudent parenting standard. These are only some of the factual issues to be decided by the district court in determining their best interest.

2. **The legal issue to be decided is whether the Department alone has the legal right to seek to terminate parental rights.** The legal issues raised by the Petitioners are subsumed in this single issue.

3. **Arguments and authorities for rejecting jurisdiction.** Jurisdiction should be

rejected based on the following:

(a) While proceedings under Title 41, Chapter 3, must be *initiated* by the filing of a petition by the County Attorney, the Attorney General or an attorney hired by the County, Mont. Code Ann. § 41-3-422, subsequent filings are not so limited. Significantly, the petition may be modified for different relief *at any time within the discretion of the court*. *Id.*, section (1)(b). A GAL and an attorney for a child in dependent neglect proceedings are each entitled, as is DFS, to propose a permanency plan. Mont. Code Ann. § 41-3-445(2), (3). A permanency plan may include termination of parental rights. Mont. Code Ann. § 41-3-445.

(b) It is the policy in this State to provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for the children's care and protection. Mont. Code Ann. § 41-3-101(1)(a). In implementing this policy, the child's health and safety are of paramount concern. Mont. Code Ann. § 41-3-101(7).

(c) For a permanency plan, the best interest of the child is arguably *the* compelling standard. Mont. Code Ann. § 41-3-445(6) (b), (e)(ii).

(d) Contrary to Petitioners' claim, it is for the *district court*, not the Department, to determine what is in the child's best interest. Mont. Code Ann. § 41-3-445.

(e) The district court - not the Department - even has the discretion to enter any other order that it determines to be in the best interests of the child as long as it does not conflict with the options provided in subsection (8) of the statute and that does not require an expenditure of money by the department absent available and reasonable resources. The options in subsection (8) include adoption, which by definition is a termination of parental rights.

(f) A Guardian Ad Litem is charged with representation of the child's best interests and

is entitled to perform certain general duties. If the GAL is an attorney, his or her duties extend to filing motions to assert the child's rights. Mont. Code Ann. § 41-3-112.

(g) State law presumes if a child has been in foster care for 15 of the last 22 months, termination of parental rights is in the best interests of the child and the State is *required* to file a petition to terminate parental rights. Mont. Code Ann. § 41-3-604. These children have been in foster care for nearly *4 years*. When a child has been in foster care a significant time, it is presumed termination is in the child's best interests. *In re I.K.*, 2018 MT 270, 393 Mont. 264, 430 P.3d 86, 2018 Mont. Although time in foster care is itself not sufficient to terminate parental rights, in considering Mont. Code Ann. § 41-3-609(2), a district court may properly take the statutory presumption favoring termination into consideration. *In re D.B.*, 2007 MT 246, 339 Mont. 240, 168 P.3d 691.

(h) Mont. Code Ann. § 41-3- 433 provides in part:

A court may make a finding that the department need not make reasonable efforts to provide preservation or reunification services if the court finds that the parent has:

(a) subjected a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child; * * *

If those criteria are met, it constitutes sufficient grounds for termination under Mont. Code Ann. § 41-3-609(1)(d). Those elements exist in this case, as demonstrated by DPHHS's own filings.

The circumstances under which these children were taken from the birth mother and the birth father clearly fall within this language. Notable is the language in subsection (3) of this statute: "In considering any of the factors in subsection (2) in terminating the parent-child relationship, the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child."

(i) The Department's contention, that "[a] guardianship would provide the youths the permanency they desire which is to stay with the current placement long term and not have any contact with their Birth Mother," is legally incorrect. A guardianship is not permanent and continues only until terminated. Mont. Code Ann. §§ 72-5-201, 233. Any person claiming to be interested in the welfare of a ward may petition for removal of a guardian or termination by alleging such action would be in the best interests of the ward. Mont. Code Ann. § 72-5-234. The Department's position that it would be solely entitled to determine the guardianship should be terminated based on the "best interests" standard is incorrect.

(j) Completion of a treatment plan does not guarantee reunification. Mont. Code Ann. § 41-3-443(d).

Conclusion

For the foregoing reasons, the Court should deny the requested relief.

Respectfully submitted this 29th day of March, 2022.



Ward "Mick" Taleff
Guardian Ad Litem

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this summary response to the Petition 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 1,837 words, excluding captions, certificate of compliance, certificate of service, signature blocks, and any appendices.



Ward "Mick" Taleff
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CERTIFICATE OF SERVICE

I, Ward "Mick" Taleff, hereby certify that I have served true and accurate copies of the foregoing Summary Response of GAL on the following on March 29, 2022:

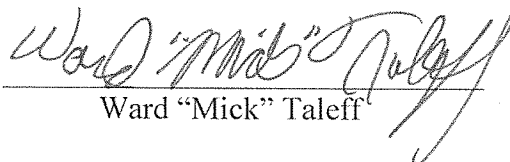
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