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.

---

D.H.,

Petitioner,

v.

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

Respondent.

# CHILDREN'S SUMMARY RESPONSE TO PETITIONS FOR WRIT OF SUPERVISORY CONTROL

Pursuant to the Order of this Court filed March 8. 2022, the Youths, through counsel, submit this Summary Response to the Petitions for Writ of Supervisory Control filed by the Montana Department of Public Health and Human Services ("DPHHS") and birth mother (D.H.).

The Montana Supreme Court may order a summary response under Rule 14(7)(a), M.R.App.P., which shall "summarize the arguments and authorities for rejecting jurisdiction and shall otherwise comply with (5)(b)(ii) and (iii) and, to the extent necessary, 5(b)(iv) of [Rule 14]."

## ADDITIONAL LEGAL ISSUES RAISED

On page 2 of its Petition, DPHHS identified the issue raised as whether the District Court erred in granting a motion to amend the petition for adjudication into a petition for termination of parental rights against the DPHHS's objection. On page 5 of her Petition, D.H. raises the same issue and adds a second one: whether it would be an abuse of discretion for the District Court judge to preside over a case in which the judge signed and filed an Amended Petition to Terminate Parental Rights.

Counsel for the Youths submits that the following issues are also before the Court in this proceeding:

1. Does a District Court have the statutory and inherent power to enforce a permanency plan which it has adopted and approved pursuant to 41-3-445(6) and -(8)(c), M.C.A.; and

2. Whether amendment under 41-4-422(1)(b), M.C.A., is an appropriate action for a District Court when DPHHS, in an action brought under 41-3-422(1), M.C.A., refuses to follow the Court's orders.

## ADDITIONAL RELEVANT FACTUAL CIRCUMSTANCES

### A. Facts Relating to the Court's Determination that Termination of Mother's Parental Rights Was the Appropriate Permanency Plan for N.H. and M.H.

As in District Court, DPHHS asserts in its application for a writ that there is no legal basis to support a petition for termination as to mother. D.H. joins in this assertion. Since DPHHS omitted the factual basis for the District Court's determination that termination of D.H.'s parental rights and adoption by the kinship placement was the appropriate permanency plan, those facts are set forth here:

1. For months after adjudication, both parents continued to be difficult, aggressive, and deceptive in their interactions with the Department personnel and the Court. In its order on the Review Hearing of March 14, 2019, the Court ruled:

> The Youths are terrified of Birth Father, and express fear that Birth Mother is unable or unwilling to protect them. The Youths struggle with their mental health. *(Doc. 9; BDN-18-346).* [DPHHS Ex. 4]

[DPHHS Ex. 16, p.3, par.6]

2. At the time of the Court's Ruling on September 15, 2021, N.H. and M.H. were fifteen and fourteen years of age, respectively. They did not want a relationship with their mother. They do not trust her to keep them safe or to stay away from their birthfather, whose rights were terminated. [DPHHS Ex. 16, p.4, par.11-13]

3. N.H. and M.H. fear that even with a guardianship, D.H. could eventually have the guardianship terminated and regain custody of them. That has caused each of them significant emotional and psychological distress, regressive self-harm ideation

and acts, and mental health deterioration. [DPHHS Ex. 16, p.4, par.16]

4. Kimberly Cummings, who has been the children's counselor for most of this case, and who still counsels the girls, testified at the contested permanency plan hearing. She testified that both N.H. and M.H. suffer from significant ongoing trauma from the abuse and neglect they suffered at the hands of their parents, including D.H.'s failure to protect them from their father. Both have significant ongoing fears about being reunified with either of their parents. When these fears surface, as they have been triggered multiple times in this case, both girls suffer severe emotional regression. With N.H., that manifests in lack of emotional regulation, and running away and self-harm acts and ideation. With M.H., it results in self-isolating, closing herself off, and significant increases in anxiety. The girls feel safe with their placement, but that feeling of safety is fragile in the absence of permanent legal protections. [DPHHS Ex. 16, p.4-5, par.17]

5. Ms. Cummings offered the professional opinion that adoption was in the girls' best interest. The therapeutic basis for her opinion is that by severing their legal ties with their natural parents and eliminating their fear of being forced to return to live with D.H., adoption would prevent regression and allow the girls to manage their fears. A guardianship would not provide that degree of safety. The idea of a guardianship has caused regression of the girls' mental conditions, increased their fears, and has specifically harmed and damaged them by causing setbacks during the course of this case. [DPHHS Ex. 16, p.5-6, par.18]

6. Ms. Cummings' testimony was uncontested and was the only professional expert testimony offered on the issue of whether a guardianship or adoption were in the girls' best interests. Neither DPHHS nor D.H. offered any expert testimony on this issue. The District Court found Ms. Cummings' testimony and its interview of the girls compelling. The District Court concluded that the Department erred in failing to give weight to Ms. Cummings' professional opinion as to the best interests of N.H. and M.H. in determining the optimal permanency option for them. [DPHHS Ex. 16, p.6, par.19]

7. The attorney Guardian ad Litem, appointed pursuant to 41-3-112, M.C.A., determined and advised the District Court that termination and adoption was required by the girls' bests interests. [DPHHS Ex. 16, p.6, par.20]

8. The District Court held that adoption is the preferred permanency option required by N.H. and M.H.'s psychological and mental health needs and found that while D.H. loves her children, her desire to keep a door open for reunification with N.H. and M.H. must yield to the safety and well-being of her daughters, including their mental and psychological health needs. [DPHHS Ex. 16, p.7, par.21-22]

9. The District Court ruled that there are compelling reasons why N.H. and M.H. may not be returned to their mother's care or be placed with their kinship placement under a guardianship, namely that either option will cause significant emotional and psychological harm to these girls, who have suffered intense and severe trauma, which has improved, but persists. Any lack of finality in their permanency

which presents a chance that D.H. could take custody of them in the future causes dangerous regression in their mental and emotional health, self-harming behaviors, and setbacks. To reach ongoing mental health, safety, and stability, N.H. and M.H. must have their remaining legal ties to their mother severed through termination and to be adopted by their placement. Where there is a conflict between the children's best interests and the rights of the parent, the children's best interests must prevail. [DPHHS Ex. 16, p.13, par.13(2nd)]

**B. Facts Relating to the Department's Refusal to Follow the District Court's Orders.**

9. DPHHS has refused to finalize the District Court's permanency plan as to N.H. and M.H., as required by 41-3-445(1)(a)(ii), M.C.A., and has not undertaken intensive and ongoing efforts to secure permanent placement of the children with the prospective adoptive parent under the permanency plan, as required by 41-3-445(10), M.C.A. DPHHS's only effort to effectuate the permanency plans consisted of counseling D.H. on relinquishment. It has not filed petitions for termination. It refuses to do so despite the clear directive from the Court. [DPHHS Ex. 16, p. 10-11, par. 7-8; Petitioners' factual recitations, DPHHS Petition, pp 2-8; D.H.'s Petition, pp 5-9].

## ARGUMENTS AND AUTHORITIES

**A. Arguments for Declining Jurisdiction.**

**1. The Issues Raised do not Satisfy the Standard for Granting a Writ of Supervisory Control.**

A Writ of Supervisory Control is an extraordinary remedy. Rule 14(3),

M.R.App. P. There are three conditions that must be met before a Writ of Supervisory Control may even be considered:

1. When urgency or emergency factors exist making the normal appeal process inadequate;

2. When the case involves purely legal questions; and

3. 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.

Even when all of these factors have been met, the Writ of Supervisory Control is only ***sometimes*** justified, to be determined on a case-by-case basis. Rule 14(3), M.R.App.P.

**a. There are No Urgent/Emergent Factors and the Normal Appeal Process is Adequate.**

There is no situation of urgency or emergency in this case. The normal appeal process provides DPHHS and D.H. an adequate remedy. The physical placement of the girls will not change either way. The Department, D.H., and the youths all will have the right to appeal any decision by the District Court – when it actually rules on the petitions for termination. The District Court can set the hearings on the Amended Petitions to Terminate D.H.'s parental rights and DPHHS's Petitions for Guardianship for the same time, so all parties can argue for the permanency option they believe to be supported by the evidence.

The judicial economy argument based on *Redding v. Montana First Judicial District Court, 2012 MT 144A, 365 Mont. 316, 281 P.3d 189* does not apply, as there will be no more discovery or extensive prehearing proceedings, and the Department and D.H are not foreclosed from either arguing for guardianship or arguing that the legal basis for termination has not been met. In short, there will be no actual prejudice to DPHHS or D.H. in allowing the case to proceed, judicial economy will be furthered by allowing evidence of all the permanency options to be considered at one time, and all parties will have preserved their right to appeal.

DPHHS claims that allowing the termination petitions to proceed will unnecessarily delay permanency, to the detriment of the children. Filing this petition has delayed the proceeding more. *See Kennedy v. Montana First Judicial District. 407 Mont. 3, 2021 WL 5232307(Writ denied where ordering response and then determining matter would cause more delay than underlying delay complained of).*

**b. The Case Does Not Involve Purely Legal Questions.**

There are factual issues as to whether the basis for termination can be proven under the higher evidentiary standard applied at a termination hearing, including whether D.H. subjected these two children to any of the aggravated circumstances listed in 41-3-423(2)(a), M.C.A., whether the treatment plan has been unsuccessful pursuant to 41-3-443(5)(d)41-3-609(1)(f)(i), M.C.A., whether termination is in the best interests of the children, giving primary consideration to the physical. mental, and emotional condition and needs of the children pursuant to 41-3-609(3), M.C.A., and as

to all of the other factors that must be considered in determining whether the condition of D.H. rendering her unfit is likely to change within a reasonable period of time pursuant to 41-3-609(1)(f)(ii) and (2), M.C.A.

The issue of whether a petition for relief should modified under 41-3-422(1)(b), M.C.A. is a matter of discretion based on facts, and so does not present a purely legal issue. *See Henderson v. Montana Third Judicial Dist., 2022 WL 483957 (Feb. 15, 2022.).*

**c.1 The District Court is Not Operating Under a Mistake of Law or Causing a Gross Injustice.**

The Children disagree that the District Court is operating under a mistake of law. But even if one is present, that mistake causes no gross injustice. DPHHS and D.H. have lost no procedural rights.

**c.2 No Constitutional Issue of State-wide Importance is Involved.**

DPHHS and D.H. have raised a constitutional argument that the Court's action in amending the petitions violates the separation of powers. That argument ignores the fact that the District Court has acted consistent with its powers and in accordance with applicable statutes as noted above and the District Court only acted after DPHHS contemptuously and repeatedly defied the Court's orders. Further, even assuming the constitutional argument has some merit, the circumstances of this case are so unique that it does not rise to an issue of statewide importance that justifies resolution other than by the normal route of a full record in the District Court and appellate briefing.

## B. Arguments Pertaining to the Merits of the Particular Questions and Issues Raised.

### 1. The Court has Authority in Child Abuse and Neglect Cases to Order and Enforce a Permanency Plan.

A permanency hearing is mandatory in child abuse and neglect cases brought under 41-3-422, M.C.A. 41-3-445(1), M.C.A. A permanency report must be submitted by DPHHS and may be submitted by the GAL or by counsel for the parents or GAL. 41-3-445(2), M.C.A. Any party is entitled to contest the permanency plan proposed by DPHHS, and the Court does not have to accept DPHHS's recommendations for permanency. See, e.g. 41-4-445(5)(a), M.C.A. The Court is required to approve a specific permanency plan that is in the best interests of the child. 41-3-445(6)(b), M.C.A. DPHHS is required to make reasonable efforts to finalize the Court-ordered permanency plan (41-4-445(1)(a)(ii), -(2), -(6)(c), M.C.A.), and DPHHS's efforts to effectuate the permanency plan must be intensive and ongoing. 41-3-445(10), M.C.A.

### 2. DPHHS Disagrees with the District Court's Permanency Plan and Refuses to Effectuate or Finalize it.

In this case, the District Court, after extensive briefing, multiple contested hearings, and interviews with the children, determined that the appropriate permanency plan for N.H. and M.H. is termination of D.H.'s parental rights and adoption by the children's placement. Of necessity, effectuating and finalizing this permanency plan requires DPHHS to file a petition for termination and, if that is granted, a petition for adoption.

DPHHS disagrees with this permanency plan and refuses to effectuate it. DPHHS asserts that there are insufficient factual or legal grounds for a petition for termination. Its attorneys claim they cannot ethically sign such a petition under Rule 11.

But DPHHS did not request a writ of supervisory control for judicial review of the District Court's permanency plan and its duties thereunder. Nor has it requested certification of the permanency plan order as appealable under Rule 54(b), M.R.Civ.P. Instead, DPHHS took the obstructionist and contemptuous position that it just wasn't going to follow the Court's permanency plan order and the Court couldn't make it comply. Rather than holding DPHHS in contempt, as it might have, the District Court exercised its legally authorized discretion in directing the attorney for the youths and the Guardian ad Litem to propose such a petition and then granted the requested relief.

**3. DPHHS's Position that There are No Grounds for a Petition to Terminate D.H.'s Parental Rights is Not Supported by Fact or Law.**

The District Court determined that termination of D.H.'s parental rights and adoption of N.H. and M.H. by their kinship placement was the appropriate permanency plan, based upon:

1. the wishes of the children;

2. the findings and recommendation of the Guardian ad Litem;

3. uncontested expert testimony at hearing as to the children's deep and continuing mental health injuries and diagnoses resulting from their

longstanding abuse by their parents;

4. the expert's uncontested opinion that adoption was the only resolution that would guarantee the mental and emotional health of these two children, taking into account their mental and emotional conditions and needs;

5. uncontested evidence that establishing a guardianship would actively harm these children; and

6. that DPHHS's consideration of and argument for guardianship has caused regressive harmful mental health setbacks and behaviors in M.H. and N.H.

In short, the evidence established that these two children have been so psychologically damaged by the abuse and neglect of their parents, that even the potentiality of a guardianship being terminated and them returning to their mother's care seriously harms these children and interferes with their constitutional right to a safe and healthy childhood in a permanent placement. 41-3-101(1)(d), (e), M.C.A. The District Court's order and factual findings create probable cause to file a petition under 41-3-607 and 609(1)(b) and (f), M.C.A.

DPHHS claims that it is legally impossible under 41-3-609(1)(f), M.C.A. for the district court to terminate D.H.'s parental rights because she completed her treatment plan. Department's Petition, p. 11. The Department ignores the plain language of the relevant statutes. The fact that a treatment plan was completed does not prevent termination of parental rights under subsection (f). A treatment plan must be successful

to prevent termination of parental rights. *Id*.

> [C]omplying with a treatment plan—that is, completing all the tasks—is not equivalent to "successful" completion of a treatment plan. *D.F.*, ¶ 36.

*Matter of B.F., 2020 MT 223, ¶ 51, 401 Mont. 185, 200, 472 P.3d 142, 153*. Completion of a treatment plan does not guarantee the return of the child. 41-3-443(5)(d), M.C.A. Completion of a plan without a change in the behavior that caused removal in the first instance may result in termination of parental rights. *Id.*

And, as noted, the Amended Petition for Termination also alleges aggravated circumstances under subsection (d) of 41-3-609(1), M.C.A., as to which failure of a treatment plan is not required.

**4. The Plain Language of 41-3-422(1)(b), M.C.A. Permits the Court the Discretion to Modify a Petition for Relief.**

DPHHS created a crisis in the judicial management of this action by refusing to effectuate the Court's permanency plan or seek appropriate appellate relief or review as to the permanency plan. Counsel for the children and the GAL then moved the Court to amend the petitions for adjudication to petitions for termination pursuant to 41-3-422(1)(b), M.C.A. to resolve that procedural standoff in a way which would not force DPHHS personnel to file a petition they claimed would be unethical and would not require another party to file the petition for termination.

41-3-422(1)(b), M.C.A., states that a petition filed under 41-3-422, M.C.A. "may be modified for different relief at any time within the discretion of the court". *In Re S.P., 241 Mont. 190, 786 P.2d 642 (1990), In Re C.L.R., 211 Mont. 381, 685*

*P.2d 926 (1984) (amending petition of adjudication to petition for termination at adjudicatory hearing); In Re B.S., 2009 MT 98, 350 Mont. 86, 206 P.3d.* The statute does not require that the Department request the modification. The rules of statutory construction support the District Court's interpretation of and use of this statute. The procedural safeguards of service and notice provided the same procedural due process to D.H. as she would have been entitled to had DPHHS filed the petition.

**5. The Court's Approval of the Permanency Plan of Termination and Adoption does Not Call into Question the Court's Ability to Preside Fairly and Impartially over the Termination Hearing.**

D.H. argues that because Judge Best determined that termination and adoption was the appropriate permanency plan, she cannot now be trusted to be fair and impartial in presiding over the termination hearing, despite her multiple statements to the contrary. This Court has already rejected the argument that a permanency plan order demonstrated bias toward the parents or required a particular outcome:

> Section 41–3–445(6), MCA, required the District Court to enter written findings as to whether DPHHS's proposed permanency plan for reunification was in the best interests of D.A. and M.A. This is what the District Court's May 15, 2007, order did. After making findings of fact regarding the extensive testimony and evidence the District Court heard at the permanency hearing, the District Court concluded that the permanency plan presented by DPHHS, which advocated reunification after another six months of temporary custody, was not in the children's best interest. There is no plain error in the District Court issuing findings required by statute, and, as discussed above, there is sufficient evidence in the record to support the District Court's findings.
>
> The District Court's order was in accord with § 41–3–445(6), MCA, which requires a specific permanency plan. Having appropriately rejected the plan proposed by DPHHS, which would have continued

> foster care placement for a significant time, the District Court had the authority to order DPHHS to take specific steps to effectuate an alternate plan. Section 41–3–445(6)(c), MCA. The ordered plan could include adoption of the children. Section 41–3–445(8)(c), MCA. This order did not require a particular outcome or demonstrate any bias towards the parents. The order did not terminate the treatment plan, and it remained possible to complete it, albeit in a shortened time frame. The District Court properly exercised its discretion under § 41–3–445(7), MCA, by entering an order that would advance the best interests of D.A. and M.A. as they appeared at that time. The District Court did not commit plain error and violate the parents' due process rights in its order following the permanency plan hearing.

*In re Custody of D.A., 2008 MT 247, ¶¶ 36-37, 344 Mont. 513, 521–22, 189 P.3d 631, 638 (Affirming District Court's order that DPHHS take steps to have children permanently placed within three months following permanency hearing at which Court rejected DPHHS's proposed permanency plan.)* Unlike the present case, DPHHS presumably followed the Court's permanency order in the D.A. case.

## CONCLUSION

For the foregoing reasons, the Court should deny the requested relief and dismiss the Petition for Writ of Supervisory Control.

DATED this March 29, 2022.

LAW OFFICE OF ALLEN P. LANNING, P.C.

By */s/ Allen P. Lanning*
ALLEN P. LANNING
Attorneys for Youths

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this summary response to the Petitions is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,487 words, excluding captions, certificate of compliance, certificate of service, and service blocks.

*/s/Allen P. Lanning*_____
ALLEN P. LANNING
Attorneys for Youths

## CERTIFICATE OF SERVICE

I, Allen Page Lanning, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 03-29-2022:

Cori Danielle Losing (Govt Attorney)
215 North Sanders
Helena MT 59620
Representing: Child and Family Services, DPHHS
Service Method: eService

Brooke Erin Baracker-Taylor (Govt Attorney)
2525 4th Avenue North
Suite 309
Billings MT 59101
Representing: Child and Family Services, DPHHS
Service Method: eService

Kelly M. Driscoll (Attorney)
521 N. Orange
Missoula MT 59802
Representing: D. H.
Service Method: eService

Ward E. Taleff (Attorney)
300 River Drive North,
Suite 5
GREAT FALLS MT 59401
Representing: Youths' Guadian Ad Litem
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: Child and Family Services, DPHHS
Service Method: eService

Elizabeth Best (Respondent)
415 2nd Avenue North, Rm. 203
Great Falls MT 59401
Service Method: E-mail Delivery

Katherine A. Sharp (Attorney)
615 2nd Ave N 3rd Fl
Great Falls MT 59401
Representing: D. H.
Service Method: E-mail Delivery

Electronically Signed By: Allen Page Lanning
Dated: 03-29-2022