FILED
06/08/2022
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 22-0177

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Attorneys for Appellants, Brittainy and Jay Doucette

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA-22-0177

IN THE MATTER OF P.R.S.,

Youth in Need of Care.

AMENDED NOTICE OF APPEAL

NOTICE is given that Brittainy and Jay Doucette, Petitioning-Intervenors denied intervention in the cause of action filed in the Thirteenth Judicial District as DN-19-194, in the County of Yellowstone, hereby appeal to the Supreme Court of the State of Montana from the final judgment entered in such action on the 14th day of March 2022.

THE APPELLANTS FURTHER CERTIFY:

1. That this appeal is not subject to the mediation process required by M. R. App. P. 7.

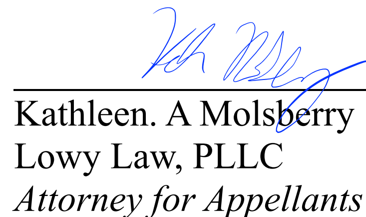
2. That this appeal is an appeal from an order certified as final under M. R.

Civ. P. 54(b). A true copy of the District Court's certification order is attached hereto as Exhibit "A."

3. Appellant has complied with the provisions of M. R. App. P. 8(3) contemporaneously with the filing of this notice of appeal.

5. That included herewith is a copy of the Order ("Exhibit B") from which Petitioning Intervenors are appealing and the $100.00 filing fee prescribed by statute.

Dated this 8th day of June, 2022.



Kathleen. A Molsberry
Lowy Law, PLLC
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 8th, 2022, I have filed a true and accurate copy of the foregoing AMENDED NOTICE OF APPEAL with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing AMENDED NOTICE OF APPEAL upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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Billings, MT 59107

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Edith Adams
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Qualified Expert Witness

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and

Brittainy and Jay Doucette, *Appellants*

EXHIBIT A

FILED
03/14/2022
Terry Halpin
CLERK
Yellowstone County District Court
STATE OF MONTANA
By: Mikelle Joki
DN-56-2019-0000194-NO
Souza, Rod
92.00

Hon. Rod Souza
District Court Judge
13th Judicial District
217 N. 27th Street, Rm. 507
P.O. Box 35029
Billings, MT 59106
(406)256-2922

IN THE THIRTEENTH JUDICIAL DISTRICT COURT OF MONTANA
YELLOWSTONE COUNTY

IN THE MATTER OF

PROMISE RAIN SPANG,

Youth In Need of Care.

Cause No. **DN-19-194**

Related Cause No. DN-18-411

Judge Rod Souza

Department No. 5

ENTRY OF FINAL JUDGMENT

Pursuant to interested parties Brittainy and Jay Doucette's Request for Entry of Final Judgment in accordance with Mont. R. of Civ. Pro. 58, IT IS HEREBY ORDERED AND ADJUDICATED, that final judgment is entered against Petitioning Intervenors Brittainy and Jay Doucette: their March 23, 2021 Motion to Intervene is **denied**.

Electronically Signed and Dated Below

CC: Heather Webster Sather
Juli Marie Pierce
James D. Reintsma
Anne-Marie K. Simeon
Yellowstone CASA
Lowy Law, PLLC
Northern Cheyenne Tribe
Chippewa Cree Tribe of the Rocky Boy's Reservation
Bureau of Indian Affairs, Rocky Mountain Region
Edith Adams

Electronically Signed By:
Hon. Judge Rod Souza
Mon, Mar 14 2022 04:07:32 PM

<u>EXHIBIT B</u>

FILED
June 29, 2021
Terry Halpin
CLERK
Yellowstone County District Court
STATE OF MONTANA
By: Joki, Mikelle
DN-56-2019-0000194-NO
Judge Rod Souza
69.00

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5 MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

6 IN RE THE MATTER OF:	Cause No.: DN 19-194
7 PROMISE RAIN SPANG,	Companion Case: DN 18-411
8 Youth In Need of Care.	Judge Rod Souza
9	ORDER **DENYING** MOTION TO INTERVENE

10

11 This matter comes before the Court on the Motion to Intervene of Brittainy and Jay
12 Doucette (hereafter "the Doucettes.") [Dkt. 60.] The Doucettes are the foster parents of Promise
13 Rain Spang, the youth in need of care (hereafter "Promise.") [Dkt. 60 at 1-2.] The Department
14 of Public Health and Human Services, Child and Family Services Division (hereafter "the
15 Department") opposes. [Dkt. 63.] The Northern Cheyenne Tribe opposes. [Dkt. 67.] "The
16 Guardian [*a*]*d* [*l*]*item*...does not oppose." [Dkt. 60 at 9.]

17 The Doucettes argue the Court should not consider the Tribe's response because it is
18 untimely under Uniform District Court Rule 2. [Dkt. 68 at 2-3.] However, when the motion to
19 intervene was filed, the Tribe had not yet intervened in this case. [*Compare* Dkt. 60 at 1 with
20 Dkt. 65 at 1.] The Tribe filed the response on May 12, 2021 [dkt. 67 at 1], 15 days after filing
21 notice of intervention on April 27, 2021 [dkt. 65.] Strict application of Rule 2 would mean the
22 Tribe, a party by right, could not oppose intervention. Additionally, Rule 2 is discretionary. *See*
23 *Marez v. Marshall*, 2014 MT 333, ¶ 36, 377 Mont. 304, 340 P.3d 520. Exercising its discretion,
the Court will consider the Tribe's opposition.

24

The Doucettes cite M.R.Civ.P. 24 as a basis for their intervention. [Dkt. 60 at 1.] M.R.Civ.P. 24 is the provision regarding intervention in the Montana Rules of Civil Procedure. Mont. Code Ann. § 41-3-422(9)(b) is an abuse and neglect statute and states when a foster parent can intervene. The Department argues M.R.Civ.P. 24 does not apply because a specific statute controls over a general statute in the event of inconsistency. [Dkt. 63 at 2.] The Court agrees with the Department. The Montana Supreme Court has evaluated the applicability of M.R.Civ.P. 24 in an abuse and neglect proceeding. *A.G. v. Mont. Eighteenth Judicial Dist. Court*, 2020 Mont. LEXIS 518. The Court acknowledges *A.G.* was published in table format and is an order upon petition for writ of supervisory control. 2020 Mont. LEXIS 518. Nevertheless, it is persuasive because it is a recent (February 18, 2020) Montana Supreme Court decision on the dispute this Court must resolve. *A.G.* instructs Mont. Code Ann. § 41-3-422(9)(b), not M.R.Civ.P 24 is the standard when determining whether to grant intervention in an abuse and neglect case. 2020 Mont. LEXIS 518 at *5-*7.

Even if the Court disregarded *A.G.* as a table order, it would still agree M.R.Civ.P. 24 does not apply to this DN case. Mont. Code Ann. § 41-3-422(4) states "[t]he Montana Rules of Civil Procedure and the Montana Rules of Evidence apply [to abuse and neglect cases] except as modified in this chapter." The Court cannot edit a Montana statute. *See* Mont. Code Ann. § 1-2-101. The prerequisite threshold to intervene under M.R.Civ.P. 24 is materially different from the prerequisite to intervene under Mont. Code Ann. § 41-3-422(9)(b). Therefore, the Court concludes Mont. Code Ann. § 41-3-422(9)(b) has modified M.R.Civ.P. 24 and displaces the Rule under Mont. Code Ann. § 41-3-422(4).

Furthermore, when construing "the various Rules of Civil Procedure, [the Montana Supreme Court] utilize[s] applicable rules of statutory construction." *Busch v. Atkinson*, 278 Mont. 478, 483, 925 P.2d 874, 877 (Mont. 1996). "[I]t is a well-settled rule of statutory construction that the specific prevails over the general." *State v. Feight*, 2001 MT 205, ¶ 21,

306 Mont. 312, 33 P.3d 623. M.R.Civ.P. 24 is written in general terms and covers "all civil actions and proceedings in [Montana] district courts…." *See* M.R.Civ.P. 1. Mont. Code Ann. § 41-3-422(9)(b) starkly contrasts. It applies to abuse and neglect cases and states when foster parents such as the Doucettes can intervene. The Court accordingly utilizes Mont. Code Ann. § 41-3-422(9)(b) to decide whether to grant the Doucettes' motion.

Mont. Code Ann. § 41-3-422(9)(b) states "[a] foster parent, preadoptive parent, or relative of the child who is caring for or a relative of the child who has cared for a child who is the subject of the petition who appears at a hearing set pursuant to this section may be allowed by the court to intervene in the action if the court, after **a hearing in which evidence is presented on those subjects provided for in 41-3-437(4)**, determines that the intervention of the person is in the best interests of the child." (emphasis added). Mont. Code Ann. § 41-3-437(4) states "[i]n a case in which abandonment has been alleged by the county attorney, the attorney general, or an attorney hired by the county, the court shall hear offered evidence, including evidence offered by a person appearing pursuant to 41-3-422(9)(a) or (9)(b), regarding any of the following subjects:

(a) the extent to which the child has been cared for, nurtured, or supported by a person other than the child's parents; and

(b) whether the child was placed or allowed to remain by the parents with another person for the care of the child, and, if so, then the court shall accept evidence regarding:

(i) the intent of the parents in placing the child or allowing the child to remain with that person;

(ii) the continuity of care the person has offered the child by providing permanency or stability in residence, schooling, and activities outside of the home; and

(iii) the circumstances under which the child was placed or allowed to remain with that other person, including:

(A) whether a parent requesting return of the child was previously

prevented from doing so as a result of an order issued pursuant to Title 40, chapter 15, part 2, or of a conviction pursuant to 45-5-206; and

(B) whether the child was originally placed with the other person to allow the parent to seek employment or attend school."

The Department argues the language in Mont. Code Ann. § 41-3-437(4) "[i]n a case in which abandonment has been alleged by the county attorney" combined with Mont. Code Ann. § 41-3-422(9)(b)'s language referencing "a hearing in which evidence is presented on those subjects provided for in 41-3-437(4)" means a foster parent can only intervene in cases where the county attorney alleges abandonment. [Dkt. 63 at 2.] The Department accordingly additionally argues since the county attorney has not alleged abandonment in this case, the Doucettes cannot intervene, and the Court should deny their motion. [*Id.*] The Northern Cheyenne Tribe concurs with the Department's statutory interpretation. [Dkt. 67 at 2-3.] The Doucettes contest this interpretation. The Doucettes argue Mont. Code Ann. § 41-3-422(9)(b)'s language "presented on those subjects provided for in 41-3-437(4)" incorporates only the enumerated subjects of § 41-3-437(4) and not the language in § 41-3-437(4) stating when the Court considers those subjects. [Dkt. 64 at 4; Dkt. 68 at 4-5.] In making this argument, the Doucettes repeatedly emphasize the word "subjects" and cite Mont. Code Ann. § 1-2-101. [Dkt. 64 at 2-4; Dkt. 68 at 3-5.]

Mont. Code Ann. § 1-2-101 states in construing "a statute… the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." The Court acknowledges statutory interpretation seeks to give meaning to a statute's every word if possible. *See Formicove, Inc. v. Burlington N.*, 207 Mont. 189, 193, 673 P.2d 469, 471 (Mont.

1983). However, giving meaning to every word does not require highlighting or emphasizing one word over the other words that compose a statute. The Montana Supreme Court has often explained "statutes must be read and considered in their entirety and the legislative intent may not be gained from the wording of any particular section or sentence, but only from a consideration of the whole." *State v. Heath*, 2004 MT 126, ¶ 27, 321 Mont. 280, 90 P.3d 426. The Court "construe[s] a statute by reading and interpreting the statute as a whole, 'without isolating specific terms from the context in which they are used by the Legislature.'" *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003.

Applying these principles, Mont. Code Ann. §§ 41-3-437(4) and 41-3-422(9)(b) must be read together. § 41-3-434(7) explicitly references Mont. Code Ann. 41-3-422(9)(b), the abuse and neglect intervention statute. This reference shows the Montana Legislature envisioned that if a party sought to intervene under § 422(9)(b), it would occur in a case where abandonment is alleged. The Court also observes that Mont. Code Ann. § 41-3-437(4) is not just a list of subjects. The Doucettes' argument would have the Court sever the list of subjects in Mont. Code Ann. § 41-3-437(4) from the context of the list, i.e. when the Court can consider that list. This is not easily done. The sentence in § 41-3-437(4) that introduces the list of subjects begins by stating when the Court "shall hear offered evidence," i.e. when abandonment is alleged. *See, also, In re J.B.*, 2015 MT 342, ¶ 25, 381 Mont. 525, 362 P.3d 859 (describing Mont. Code Ann. § 41-3-437(4)'s "provisions [as] allowing for the court to hear evidence offered by a person appearing pursuant to § 41-3-422(9)(a) or (9)(b), MCA, regarding circumstances surrounding abandonment of a child.")

While not binding, a decision of a New York Family Court shows the purpose of only allowing intervention when the State has alleged abandonment. *In re Susan*, 476 N.Y.S.2d 452

(N.Y. Family Court, Richmond County 1992). "[T]o pit the parent against the foster parent in a general best interest test would run counter to well-established authority...and would represent a serious erosion of rights which are constitutionally protected." 476 N.Y.S.2d at 454 (internal citations omitted). The Montana Supreme Court has "expounded on the pitfalls of elevating a best interest test over a parent's fundamental right to parent." *Cromwell v. Schaefer (In re A.J.C.)*, 2018 MT 235, ¶ 22, 393 Mont. 22, 427 P.3d 67. The Court explained "[o]ur case law does not permit destruction of a natural parent's fundamental right to the custody of his or her child based simply on the subjective determination of that child's best interest." *Id.* That the Doucettes' motion regards intervention, not placement is a distinction without a difference. The presence of an engaged parent working on a treatment plan does not present a reason for intervention. In contrast, allegation of abandonment means a foster parent is providing primary care of a child now and may well be providing that care for the long-term due to the abandonment of the child.

The Doucettes quote Mont. Code Ann. § 41-3-101(1)(a), (1)(d), 1(e) and (7) and § 41-3-427(1)(a). [Dkt. 60 at 4.] Montana policy is 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). Montana policy also "recognize[s] that a child is entitled to assert the child's constitutional rights [and] ensure[s] that all children have a right to a healthy and safe childhood in a permanent placement." Mont. Code Ann. § 41-3-101(1)(d), 1(e). "In implementing the policy of this section, the child's health and safety are of paramount concern." Mont. Code Ann. § 41-3-101(7) & § 41-3-427(1)(a). These policies do not change the principles of statutory interpretation the Court utilized *supra* to conclude a prerequisite threshold to a foster parent's

intervention is allegation of abandonment. The Doucettes quote *In re T.C.*, 2008 MT 335, ¶ 16, 346 Mont. 200, 194 P.3d 653. [Dkt. 60 at 4.] *T.C.* neither involves anyone seeking to intervene nor references Mont. Code Ann. § 41-3-422(9)(b). The same observations apply to *In re J.C.*, 2008 MT 127, 343 Mont. 30, 183 P.3d 22 quoted on page 5 of the Doucettes' motion.

The Doucettes cite *Thelen v. Catholic Soc. Servs.*, 691 F. Supp. 1179, 1183 (E.D. Wis. 1988); *Elwell v. Byers*, 699 F.3d 1208, 1216 (10th Cir. 2012)[1]; *M.S. v. People*, 2013 CO 35, ¶ 5, 303 P.3d 102 (Colo. 2013), and *A.M. v. A.C.*, 2013 CO 16, ¶ 20, 296 P.3d 1026 (Colo. 2013) as authority to assert "[f]oster parents have a constitutionally protected liberty interest in the children they seek to adopt." [Dkt. 60 at 5.] First, *A.M.* (an *en banc* decision) strongly supports the Court's interpretation of Mont. Code Ann. § 41-3-422(9)(b) *supra*. *A.M.* applied the plain language of Colorado's intervention statute in abuse and neglect cases, C.R.S. § 19-3-507(5)(a). 2013 CO 16 at ¶¶ 15, 20. The Colorado Supreme Court reasoned "a result, and because of our declination to read words into a statute that do not appear on its face, we conclude that the timing and scope of foster parent intervenors' participation is derived from the absence of words of limitation in [§] 19-3-507(5)(a)." 2013 CO 16 at ¶ 20.

Second, *Thelen, Elwell,* and *M.S.* do not indicate foster parents have such a liberty interest. *Thelen* cited a 7th Circuit opinion (binding on the Eastern District of Wisconsin) that "held that under the laws of Indiana, no liberty interest was created in the relationship between foster parents and foster children -- even when that relationship has continued for up to two years." 691 F. Supp. at 1184. *Elwell* states "the typical foster care arrangement generally does not create a liberty interest in familial association." 699 F.3d at 1217. *See*, *also*, *Care &*

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[1] Under a heading of "Application of Montana Law to This Case," the Doucettes cite *Elwell*. [Dkt. 60 at 6-7.] *Elwell* is a Tenth Circuit decision. The Tenth Circuit is not the federal appeals court for Montana. Thus, the Court cannot see how applying *Elwell* is an application of Montana law. The same logic applies to the Doucettes' subsequent discussion of *Thelen*, *M.S.*, and *A.M.* [*See* Dkt. 60 at 8.]

Protection of Zelda, 534 N.E.2d 7, 10 (Mass. App. Ct. 1989). ("What can be gathered from the decisions is that a liberty interest will not be recognized in the foster parents when the biological parents are demanding custody for themselves; indeed (barring an exceptional case) a liberty interest will be denied even when the biological parents are out of the case.") Regarding the last case cited by the Doucettes, Colorado's statute on intervening in an abuse and neglect case was among the authorities the Colorado Supreme Court cited in *M.S.* to "conclude that Colorado state law does not create a constitutionally protected liberty interest for preadoptive foster parents under the circumstances of this case." 2013 CO 35 at ¶¶ 14-15. *M.S.* subsequently reaches the same conclusion when applying the U.S. Constitution. *M.S.* 2013 CO 35 at ¶ 21.

The Court acknowledges *Thelen* distinguishes the Seventh Circuit decision by explaining the difference between foster parents and prospective adoptive parents. The Eastern District of Wisconsin stated "[u]nlike the foster parents, the prospective adoptive parents cannot be said to expect that their relationship with the child will be ended…the very motive of the prospective adoptive parents, as well as the State, is to secure a life-long relationship between the adoptive parents and the child." 691 F. Supp. at 1184. The Doucettes call themselves "pre-adoptive foster parents." [Dkt. 60 at 2.] However, the Department confers pre-adoptive status after "a formal selection committee has [convened] following the termination of parents['] rights." [Dkt. 63 at 2, f.n. 1.] Neither that committee nor termination of rights has yet taken place in this case. [*Id.*] The Doucettes assert "Promise [was] placed with the[m to] complet[e] an adoption with a forever family." [Dkt. 60 at 6.] The Doucettes cite no authority supporting their assertion. [*See id.*] This assertion does not reflect the reality of this case. [*See* Dkt. 34 at 3 (The Department's proposed permanency plan for Promise is reunification.); Dkt. 42 at 3 (The Court found extending temporary legal custody permitted Promise's parents to finish their treatment plans.).

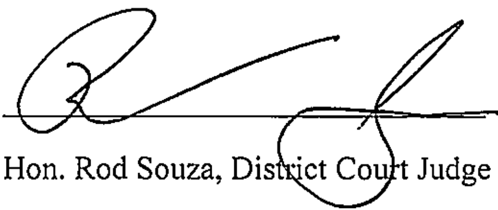
The Doucettes quote Mont. Code Ann. §§ 40-4-228(2), 40-4-211(6) and cite § 40-4-228(1). [Dkt. 60 at 5-6.] Mont. Code Ann. § 40-4-228(1) states "[i]n cases when a nonparent seeks a parental interest in a child under 40-4-211 or visitation with a child, the provisions of this chapter apply unless a separate action is pending under Title 41, chapter 3." Title 41, Chapter 3 regards Child Abuse and Neglect. This case accordingly constitutes a pending "separate action…under Title 41, chapter 3." Thus, Title 40, Chapter 4 does not apply. The Doucettes reference *Kulstad v. Maniaci*, 2009 MT 326, ¶ 70, 352 Mont. 513, 220 P.3d 595 and *Filpula v. Ankney (In re L.F.A.)*, 2009 MT 363, ¶¶ 13, 22, 353 Mont. 220, 220 P.3d 391. [Dkt. 60 at 5-6.] These cases do not analyze Mont. Code Ann. § 40-4-228(1). *Kulstad* states "[t]he State never initiated any abuse or neglect proceedings against *Maniaci* and *Kulstad* never made any allegations of abuse or neglect." 2009 MT 326 at ¶ 75. *Filpula* does not reference an abuse or neglect proceeding. *See* 2009 MT 363. The Montana Supreme Court has applied Mont. Code Ann. 40-228(1)'s plain language. "By the clear, unambiguous language of § 40-4-228(1), MCA, Grandmother lacked the ability to pursue an action to establish a parental interest while the Title 41 child dependency action was pending." *Cromwell,* 2018 MT 235 at ¶ 21.

Finally, the Doucettes argue for "fundamentally fair procedures." [Dkt. 60 at 7.] The Court agrees they are entitled to fundamentally fair procedures. Under Montana law, this right does not entitle the Doucettes to intervene. In an abuse and neglect appeal, the Montana Supreme Court stated "[k]ey components of a fair proceeding are notice and an opportunity to be heard." *In re C.J.*, 2010 MT 179, ¶ 27, 357 Mont. 219, 237 P.3d 1282. The Doucettes already have each. As foster parents, Mont. Code Ann. § 41-3-422(9)(a) requires the Doucettes "be given legal notice by the attorney filing the petition of all judicial hearings for the child and ha[ve] the right to be heard." However, the very next sentence of Mont. Code Ann. § 41-3-

422(9)(a) states "[t]he right to appear or to be heard does not make that person a party to the action." In an appeal involving parenting, the Montana Supreme Court has refused an invitation to edit a Montana statute. *Cromwell*, 2018 MT 235 at ¶¶ 19-20.

IT IS HEREBY ORDERED that the Doucettes' Motion to Intervene is **DENIED**.

DATED: this 29th day of June, 2021.



Hon. Rod Souza, District Court Judge

cc: Matthew B. Lowy, Esq., Kathleen Molsberry, Esq.

Dep. Yell. Co. Atty. Heather W. Sather

Ann-Marie Simeon, Esq.

Juli Pierce, Guardian *ad litem*

James Reintsma, Esq.

Majel M. Russell, Esq.; Georgette H. Boggio, Esq; Daniel S. Wenner, Esq; Heather M. Ready, Esq.

Yellowstone CASA

Little Shell Tribe of Chippewa Indians
615 Central Avenue West
Great Falls, MT 59404

Edith Adams, Qualified Expert Witness

Electronically Signed By:
Hon. Judge Rod Souza
Tue, Jun 29 2021 09:00:48 AM

FILED
June 29, 2021
Terry Halpin
CLERK
Yellowstone County District Court
STATE OF MONTANA
By: Joki, Mikelle
DN-56-2018-0000411-YC
Judge Rod Souza
111.00

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5 MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

6 IN RE THE MATTER OF:	Cause No.: DN 18-411
7 UNIQUE AMARIA CROSON,	Companion Case: DN 19-194
8 Youth In Need of Care.	Judge Rod Souza
9	ORDER **DENYING** MOTION TO INTERVENE

10

11 This matter comes before the Court on the Motion to Intervene of Brittainy and Jay
12 Doucette (hereafter "the Doucettes.") [Dkt. 94.] The Doucettes are the foster parents of Unique
13 Amaria Croson, the youth in need of care (hereafter "Unique.") [Dkt. 94 at 1-2.] The
14 Department of Public Health and Human Services, Child and Family Services Division
15 (hereafter "the Department") opposes. [Dkt. 95.] Mr. Devery Croson, Unique's natural father
16 opposes. [Dkt. 96.] "The Guardian [*a*]*d* [*l*]*item*...does not oppose." [Dkt. 94 at 9.] While the
17 Doucettes filed a reply to the Northern Cheyenne Tribe's response opposing intervention [dkt.
18 106], the Tribe has neither intervened in this case nor filed a response opposing the Doucettes'
intervention.

19 The Doucettes cite M.R.Civ.P. 24 as a basis for their intervention. [Dkt. 94 at 1.]
20 M.R.Civ.P. 24 is the provision regarding intervention in the Montana Rules of Civil Procedure.
21 Mont. Code Ann. § 41-3-422(9)(b) is an abuse and neglect statute and states when a foster
22 parent can intervene. The Department argues M.R.Civ.P. 24 does not apply because a specific
23 statute controls over a general statute in the event of inconsistency. [Dkt. 95 at 2.] The Court
24 agrees with the Department. The Montana Supreme Court has evaluated the applicability of

M.R.Civ.P. 24 in an abuse and neglect proceeding. *A.G. v. Mont. Eighteenth Judicial Dist. Court*, 2020 Mont. LEXIS 518. The Court acknowledges *A.G.* was published in table format and is an order upon petition for writ of supervisory control. 2020 Mont. LEXIS 518. Nevertheless, it is persuasive because it is a recent (February 18, 2020) Montana Supreme Court decision on the dispute this Court must resolve. *A.G.* instructs Mont. Code Ann. § 41-3-422(9)(b), not M.R.Civ.P 24 is the standard when determining whether to grant intervention in an abuse and neglect case. 2020 Mont. LEXIS 518 at *5-*7.

Even if the Court disregarded *A.G.* as a table order, it would still agree M.R.Civ.P. 24 does not apply to this DN case. Mont. Code Ann. § 41-3-422(4) states "[t]he Montana Rules of Civil Procedure and the Montana Rules of Evidence apply [to abuse and neglect cases] except as modified in this chapter." The Court cannot edit a Montana statute. *See* Mont. Code Ann. § 1-2-101. The prerequisite threshold to intervene under M.R.Civ.P. 24 is materially different from the prerequisite to intervene under Mont. Code Ann. § 41-3-422(9)(b). Therefore, the Court concludes Mont. Code Ann. § 41-3-422(9)(b) has modified M.R.Civ.P. 24 and displaces the Rule under Mont. Code Ann. § 41-3-422(4).

Furthermore, when construing "the various Rules of Civil Procedure, [the Montana Supreme Court] utilize[s] applicable rules of statutory construction." *Busch v. Atkinson*, 278 Mont. 478, 483, 925 P.2d 874, 877 (Mont. 1996). "[I]t is a well-settled rule of statutory construction that the specific prevails over the general." *State v. Feight*, 2001 MT 205, ¶ 21, 306 Mont. 312, 33 P.3d 623. M.R.Civ.P. 24 is written in general terms and covers "all civil actions and proceedings in [Montana] district courts...." *See* M.R.Civ.P. 1. Mont. Code Ann. § 41-3-422(9)(b) starkly contrasts. It applies to abuse and neglect cases and states when foster parents such as the Doucettes can intervene. The Court accordingly utilizes Mont. Code Ann. § 41-3-422(9)(b) to decide whether to grant the Doucettes' motion.

Mont. Code Ann. § 41-3-422(9)(b) states "[a] foster parent, preadoptive parent, or relative of the child who is caring for or a relative of the child who has cared for a child who is the subject of the petition who appears at a hearing set pursuant to this section may be allowed by the court to intervene in the action if the court, after **a hearing in which evidence is presented on those subjects provided for in 41-3-437(4)**, determines that the intervention of the person is in the best interests of the child." (emphasis added). Mont. Code Ann. § 41-3-437(4) states "[i]n a case in which abandonment has been alleged by the county attorney, the attorney general, or an attorney hired by the county, the court shall hear offered evidence, including evidence offered by a person appearing pursuant to 41-3-422(9)(a) or (9)(b), regarding any of the following subjects:

> (a) the extent to which the child has been cared for, nurtured, or supported by a person other than the child's parents; and
>
> (b) whether the child was placed or allowed to remain by the parents with another person for the care of the child, and, if so, then the court shall accept evidence regarding:
>
> > (i) the intent of the parents in placing the child or allowing the child to remain with that person;
> >
> > (ii) the continuity of care the person has offered the child by providing permanency or stability in residence, schooling, and activities outside of the home; and
> >
> > (iii) the circumstances under which the child was placed or allowed to remain with that other person, including:
> >
> > > (A) whether a parent requesting return of the child was previously prevented from doing so as a result of an order issued pursuant to Title 40, chapter 15, part 2, or of a conviction pursuant to 45-5-206; and
> > >
> > > (B) whether the child was originally placed with the other person to allow the parent to seek employment or attend school."

The Department argues the language in Mont. Code Ann. § 41-3-437(4) "[i]n a case in which abandonment has been alleged by the county attorney" combined with Mont. Code Ann.

§ 41-3-422(9)(b)'s language referencing "a hearing in which evidence is presented on those subjects provided for in 41-3-437(4)" means a foster parent can only intervene in cases where the county attorney alleges abandonment. [Dkt. 94 at 2.] The Department accordingly additionally argues since the county attorney has not alleged abandonment in this case, the Doucettes cannot intervene, and the Court should deny their motion. [*Id.*] The Doucettes contest this interpretation. The Doucettes argue Mont. Code Ann. § 41-3-422(9)(b)'s language "presented on those subjects provided for in 41-3-437(4)" incorporates only the enumerated subjects of § 41-3-437(4) and not the language in § 41-3-437(4) stating when the Court considers those subjects. [Dkt. 99 at 4.] In making this argument, the Doucettes repeatedly emphasize the word "subjects" and cite Mont. Code Ann. § 1-2-101. [Dkt. 99 at 2-4.]

Mont. Code Ann. § 1-2-101 states in construing "a statute…the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." The Court acknowledges statutory interpretation seeks to give meaning to a statute's every word if possible. *See Formicove, Inc. v. Burlington N.*, 207 Mont. 189, 193, 673 P.2d 469, 471 (Mont. 1983). However, giving meaning to every word does not require highlighting or emphasizing one word over the other words that compose a statute. The Montana Supreme Court has often explained "statutes must be read and considered in their entirety and the legislative intent may not be gained from the wording of any particular section or sentence, but only from a consideration of the whole." *State v. Heath*, 2004 MT 126, ¶ 27, 321 Mont. 280, 90 P.3d 426.

The Court "construe[s] a statute by reading and interpreting the statute as a whole, 'without isolating specific terms from the context in which they are used by the Legislature.'" *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003.

Applying these principles, Mont. Code Ann. §§ 41-3-437(4) and 41-3-422(9)(b) must be read together. § 41-3-434(7) explicitly references Mont. Code Ann. 41-3-422(9)(b), the abuse and neglect intervention statute. This reference shows the Montana Legislature envisioned that if a party sought to intervene under § 422(9)(b), it would occur in a case where abandonment is alleged. The Court observes that Mont. Code Ann. § 41-3-437(4) is not just a list of subjects. The Doucettes' argument would have the Court sever the list of subjects in Mont. Code Ann. § 41-3-437(4) from the context of the list, i.e. when the Court can consider that list. This is not easily done. The sentence in § 41-3-437(4) that introduces the list of subjects begins by stating when the Court "shall hear offered evidence," i.e. when abandonment is alleged. *See, also*, *In re J.B.*, 2015 MT 342, ¶ 25, 381 Mont. 525, 362 P.3d 859 (describing Mont. Code Ann. § 41-3-437(4)'s "provisions [as] allowing for the court to hear evidence offered by a person appearing pursuant to § 41-3-422(9)(a) or (9)(b), MCA, regarding circumstances surrounding abandonment of a child.")

While not binding, a decision of a New York Family Court shows the purpose of only allowing intervention when the State has alleged abandonment. *In re Susan*, 476 N.Y.S.2d 452 (N.Y. Family Court, Richmond County 1992). "[T]o pit the parent against the foster parent in a general best interest test would run counter to well-established authority...and would represent a serious erosion of rights which are constitutionally protected." 476 N.Y.S.2d at 454 (internal citations omitted). The Montana Supreme Court has "expounded on the pitfalls of elevating a best interest test over a parent's fundamental right to parent." *Cromwell v. Schaefer (In re*

A.J.C.), 2018 MT 235, ¶ 22, 393 Mont. 22, 427 P.3d 67. The Court explained "[o]ur case law does not permit destruction of a natural parent's fundamental right to the custody of his or her child based simply on the subjective determination of that child's best interest." *Id.* That the Doucettes' motion regards intervention, not placement is a distinction without a difference. The presence of an engaged parent working on a treatment plan does not present a reason for intervention. In contrast, allegation of abandonment means a foster parent is providing primary care of a child now and may well be providing that care for the long-term due to the abandonment of the child.

The Doucettes quote Mont. Code Ann. § 41-3-101(1)(a), (1)(d), 1(e) and (7) and § 41-3-427(1)(a). [Dkt. 94 at 4.] Montana policy is 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). Montana policy also "recognize[s] that a child is entitled to assert the child's constitutional rights [and] ensure[s] that all children have a right to a healthy and safe childhood in a permanent placement." Mont. Code Ann. § 41-3-101(1)(d), 1(e). "In implementing the policy of this section, the child's health and safety are of paramount concern." Mont. Code Ann. §§ 41-3-101(7) & 41-3-427(1)(a). These policies do not change the principles of statutory interpretation the Court utilized *supra* to conclude a prerequisite threshold to a foster parent's intervention is allegation of abandonment. The Doucettes quote *In re T.C.*, 2008 MT 335, ¶ 16, 346 Mont. 200, 194 P.3d 653. [Dkt. 94 at 4.] *T.C.* neither involves anyone seeking to intervene nor references Mont. Code Ann. § 41-3-422(9)(b). The same observations apply to *In re J.C.*, 2008 MT 127, 343 Mont. 30, 183 P.3d 22 quoted on page 5 of the Doucettes' motion.

The Doucettes cite *Thelen v. Catholic Soc. Servs.*, 691 F. Supp. 1179, 1183 (E.D. Wis. 1988); *Elwell v. Byers*, 699 F.3d 1208, 1216 (10th Cir. 2012)[1]; *M.S. v. People*, 2013 CO 35, ¶ 5, 303 P.3d 102 (Colo. 2013), and *A.M. v. A.C.*, 2013 CO 16, ¶ 20, 296 P.3d 1026 (Colo. 2013) as authority to assert "[f]oster parents have a constitutionally protected liberty interest in the children they seek to adopt." [Dkt. 94 at 5.] First, *A.M.* (an *en banc* decision) strongly supports the Court's interpretation of Mont. Code Ann. § 41-3-422(9)(b) *supra*. *A.M.* applied the plain language of Colorado's intervention statute in abuse and neglect cases, C.R.S. § 19-3-507(5)(a). 2013 CO 16 at ¶¶ 15, 20. The Colorado Supreme Court reasoned "a result, and because of our declination to read words into a statute that do not appear on its face, we conclude that the timing and scope of foster parent intervenors' participation is derived from the absence of words of limitation in [§] 19-3-507(5)(a)." 2013 CO 16 at ¶ 20.

Second, *Thelen, Elwell,* and *M.S.* do not indicate foster parents have such a liberty interest. *Thelen* cited a 7th Circuit opinion (binding on the Eastern District of Wisconsin) that "held that under the laws of Indiana, no liberty interest was created in the relationship between foster parents and foster children -- even when that relationship has continued for up to two years." 691 F. Supp. at 1184. *Elwell* states "the typical foster care arrangement generally does not create a liberty interest in familial association." 699 F.3d at 1217. *See, also, Care & Protection of Zelda*, 534 N.E.2d 7, 10 (Mass. App. Ct. 1989). ("What can be gathered from the decisions is that a liberty interest will not be recognized in the foster parents when the biological parents are demanding custody for themselves; indeed (barring an exceptional case) a liberty interest will be denied even when the biological parents are out of the case.")

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[1] Under a heading of "Application of Montana Law to This Case," the Doucettes cite *Elwell*. [Dkt. 94 at 6-7.] *Elwell* is a Tenth Circuit decision. The Tenth Circuit is not the federal appeals court for Montana. Thus, the Court cannot see how applying *Elwell* is an application of Montana law. The same logic applies to the Doucettes' subsequent discussion of *Thelen*, *M.S.*, and *A.M.* [*See* Dkt. 94 at 8.]

Regarding the last case cited by the Doucettes, Colorado's statute on intervening in an abuse and neglect case was among the authorities the Colorado Supreme Court cited in *M.S.* to "conclude that Colorado state law does not create a constitutionally protected liberty interest for preadoptive foster parents under the circumstances of this case." 2013 CO 35 at ¶¶ 14-15. *M.S.* subsequently reaches the same conclusion when applying the U.S. Constitution. *M.S.* 2013 CO 35 at ¶ 21.

The Court acknowledges *Thelen* distinguishes the Seventh Circuit decision by explaining the difference between foster parents and prospective adoptive parents. The Eastern District of Wisconsin stated "[u]nlike the foster parents, the prospective adoptive parents cannot be said to expect that their relationship with the child will be ended...the very motive of the prospective adoptive parents, as well as the State, is to secure a life-long relationship between the adoptive parents and the child." 691 F.Supp. at 1184. The Doucettes call themselves "pre-adoptive foster parents." [Dkt. 94 at 2.] However, the Department confers pre-adoptive status after "a formal selection committee has [convened] following the termination of parents['] rights." [Dkt. 95 at 2, f.n. 1.] Neither that committee nor termination of rights has yet taken place in this case. [*Id.*] The Doucettes assert "Unique [was] placed with the[m to] complet[e] an adoption with a forever family." [Dkt. 94 at 6.] The Doucettes cite no authority supporting their assertion. [*See id.*] This assertion does not reflect the reality of this case. It has long been the plan of the Department to reunite Unique with Ms. Charlotte Rodarte-Stelle (Unique's Natural Mother) before Charlotte was charged with Deliberate Homicide. [See Dkt. 40 at 2 ("[T]he permanency plan...is reunification of the child with the parents."); Dkt. 48 at 2 (Unique's options for permanency first lists reunification with Charlotte.); Dkt. 51 at 2 ("This CASA recommends reunification with [Charlotte] as Plan A."); Dkt. 65 at 3 & Dkt. 93 at 4 (The Court found extending temporary legal custody permitted Charlotte and Devery to finish their treatment plans.).

1 The Doucettes quote Mont. Code Ann. §§ 40-4-228(2), 40-4-211(6) and cite § 40-4-
2 228(1). [Dkt. 94 at 5-6.] Mont. Code Ann. § 40-4-228(1) states "[i]n cases when a nonparent
3 seeks a parental interest in a child under 40-4-211 or visitation with a child, the provisions of
4 this chapter apply unless a separate action is pending under Title 41, chapter 3." Title 41,
5 Chapter 3 regards Child Abuse and Neglect. Thus, this case constitutes a pending "separate
6 action...under Title 41, chapter 3." Thus, Title 40, Chapter 4 does not apply. The Doucettes
7 reference *Kulstad v. Maniaci*, 2009 MT 326, ¶ 70, 352 Mont. 513, 220 P.3d 595 and *Filpula v.*
8 *Ankney (In re L.F.A.)*, 2009 MT 363, ¶¶ 13, 22, 353 Mont. 220, 220 P.3d 391. [Dkt. 94 at 5-6.]
9 These cases do not analyze Mont. Code Ann. § 40-4-228(1). *Kulstad* states "[t]he State never
10 initiated any abuse or neglect proceedings against *Maniaci* and *Kulstad* never made any
11 allegations of abuse or neglect." 2009 MT 326 at ¶ 75. *Filpula* does not reference an abuse or
12 neglect proceeding. *See* 2009 MT 363. The Montana Supreme Court has applied Mont. Code
13 Ann. 40-228(1)'s plain language. "By the clear, unambiguous language of § 40-4-228(1),
14 MCA, Grandmother lacked the ability to pursue an action to establish a parental interest while
15 the Title 41 child dependency action was pending." *Cromwell,* 2018 MT 235 at ¶ 21.

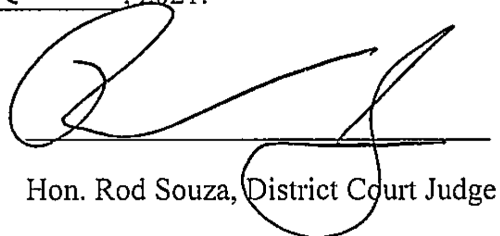
16 Finally, the Doucettes argue for "fundamentally fair procedures." [Dkt. 94 at 7.] The
17 Court agrees they are entitled to fundamentally fair procedures. Under Montana law, this right
18 does not entitle the Doucettes to intervene. In an abuse and neglect appeal, the Montana
19 Supreme Court stated "[k]ey components of a fair proceeding are notice and an opportunity to
20 be heard." *In re C.J.*, 2010 MT 179, ¶ 27, 357 Mont. 219, 237 P.3d 1282. The Doucettes
21 already have each. As foster parents, Mont. Code Ann. § 41-3-422(9)(a) requires the Doucettes
22 "be given legal notice by the attorney filing the petition of all judicial hearings for the child and
23 ha[ve] the right to be heard." However, the very next sentence of Mont. Code Ann. § 41-3-
24

422(9)(a) states "[t]he right to appear or to be heard does not make that person a party to the action." In an appeal involving parenting, the Montana Supreme Court has refused an invitation to edit a Montana statute. *Cromwell*, 2018 MT 235 at ¶¶ 19-20.

Lastly, the Court considers the current alignment of the parties before the impending placement hearing set on July 29, 2021. Devery seeks placement with himself or his mother. The Department appears to seek placement with Devery. [Dkt. 104 at 4.] Charlotte, the Guardian *ad litem*, and the Court Appointed Special Advocate (CASA) seek placement with the Doucettes. [*See* Dkt. 90 at 2, Dkt. 109 at 2.] Therefore, along with being interested parties, the Doucettes have multiple existing parties advocating for their position. As recounted *supra*, the Court has applied Mont. Code Ann. § 40-4-228's plain language. As a final coda, in the event this case is dismissed after Devery successfully completes a treatment plan, this plain language would not bar the Doucettes from filing a Mont. Code Ann. 40-4-228 action for parenting interest.

IT IS HEREBY ORDERED that the Doucettes' Motion to Intervene is **DENIED**.

DATED: this 28th day of June, 2021.



Hon. Rod Souza, District Court Judge

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Electronically Signed By:
Hon. Judge Rod Souza
Tue, Jun 29 2021 09:02:19 AM

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