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Case Number: DA 22-0311

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0311

On appeal from the Montana Thirteenth Judicial District Court

County of Yellowstone

Cause No. DN-18-411

Honorable Rod Souza, presiding

IN THE MATTER OF U.A.C.

Youth in Need of Care.

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STATEMENT OF THE ISSUE

Does foster parents intervention pursuant to Mont. Code. Ann. § 41-3-422(9)(b) require "abandonment" within the meaning of Mont. Code Ann. § 41-3-102(1) as a prerequisite?

STATEMENT OF THE CASE

Foster Parents B.D. and J.D. respectfully appeal the decision of the Thirteenth Judicial District Court denying their Motion to Intervene as parties in the involuntary custody actions for their two foster children, P.R.S and U.A.C.

The Foster Parents moved to intervene pursuant to the statutory right granted by Mont. Code. Ann. § 41-3-422(9)(b). The trial court denied the intervention as a matter of law, holding "abandonment" within the meaning of Mont. Code Ann. § 41-3-102(1) is a prerequisite to any foster parent intervention. This denied the Foster Parents their right to protect have established a parent-child relationship with P.R.S and U.A.C. and have a constitutionally protected liberty interest in maintaining their familial relationship with the children, giving them the right to intervene to protect their interests in maintaining the parent-child relationship.

STATEMENT OF FACTS

In the late winter and early spring of 2018, P.R.S. and U.A.C. were placed with B.D. and J.D. as foster children. Motion to Intervene, pg. 1. P.R.S. was

placed with the family at age eight and U.A.C. was placed with the family at approximately 20-months-old. Id. B.D. and J.D. became P.R.S.'s and U.A.C.'s pre-adoptive foster parents. Motion to Intervene, pg. 2.

P.R.S. and U.A.C. are Indian children within the meaning of the Indian Child Welfare Act (ICWA). Id.

March 22, 2021, the Foster Parents moved to intervene as parties in P.R.S.'s and U.A.C.'s abuse and neglect case proceedings in the Thirteenth Judicial District Court. Motion to Intervene, pg. 1. As of March 22, 2021, P.R.S. was ten-years-old and U.A.C. was almost four-years-old. Motion to Intervene, pg. 2. The Foster Parents had had physical custody of both children continuously since early 2018, approximately three-years. Id.

At the time the Foster Parents moved to intervene, the parental rights of P.R.S.'s and U.A.C.'s biological parents were controlled by the Department of Public Health and Human Services, Child and Family Services Division (DPHHS-CFSD). Motion to Intervene, pg. 1. The capacity of P.R.S.'s and U.A.C.'s biological parents to care for them and engage in a parent-child relationship with them were limited by circumstances. Id. DPHHS-CFSD had temporary legal custody of both P.R.S. and U.A.C. Motion to Intervene, pg. 2.

At the time the Foster Parents moved the district court to intervene in the children's involuntary custody proceedings, DPHHS-CFSD had stated its intention to remove U.A.C. from Montana and place her with her paternal grandmother in

Virginia, a biological relative who was a stranger U.A.C. had not previously met. Id. U.A.C.'s removal from Montana would have broken up her sibling relationship with P.R.S. and imposed the trauma on U.A.C. of removing her from the stability of her family of the preceding three-years. Id.

The district court denied the Foster Parents' intervention, holding "that if a party sought to intervene under § 422(9)(b), it would occur in a case where abandonment is alleged." P.R.S. Doc. 69, U.A.C. Doc. 111.

SUMMARY OF ARGUMENT

Montana law does not require "abandonment" as a prerequisite before a petitioner may intervene pursuant to Mont. Code. Ann. § 41-3-422(9)(b). The district court erred when it denied the Foster Parent's intervention as a matter of law.

Appellant Foster Parents recognize securing reversal of the district court may be a Pyrrhic victory: upon reversal and remand, the district court retains the discretion to deny intervention. If a hearing is held where evidence of the subjects provided for in Mont. Code Ann. § 41-3-437(4) is presented, the district court retains the discretion to find intervention is not in the child's best interests and may deny the intervention. Further, if the record is sufficient for the district court to make a finding intervention is not in the child's best interests, the district court may deny the intervention without a hearing. Notwithstanding, the district court's order

was in error as a matter of law, is capable of repetition while evading review, and should be reversed.

STANDARD OF REVIEW

The district court's statutory interpretation is a question of law, which is reviewed for correctness. Rairdan v. State, 2021 MT 247, ¶ 6, 405 Mont. 467, 470, 495 P.3d 1050, 1052 (*citing* State v. Nelson, 2019 MT 62, ¶ 4, 395 Mont. 134, 437 P.3d 127; Mont. State Fund v. Simms, 2012 MT 22, ¶15, 364 Mont. 14, 270 P.3d 64; Briese v. Mont. Pub. Emps.' Ret. Bd., 2012 MT 192, ¶ 11, 366 Mont. 148, 285 P.3d 550).

ARGUMENT

Montana law provides a statutory right to pre-adoptive parents to intervene in child abuse and neglect cases. Pre-adoptive foster parents have a protected liberty interest in the children they seek to adopt. When a parent-child relationship has been established between the foster parents and the children, the foster parents have a constitutionally protected parental interest in the children.

I. Mont. Code Ann. § 41-3-437(4) grants a conditional statutory right to pre-adoptive foster parents to intervene in child abuse cases.

Appellant Foster Parents B.D. and J.D. have a conditional statutory right to

intervene in P.R.S.'s and U.A.C.'s child abuse cases.

Montana law states pre-adoptive foster parents have the right to intervene in child abuse cases. "A … pre-adoptive parent … 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." Mont. Code. Ann. § 41-3-422(9)(b).

The Montana Rules of Civil Procedure apply to child abuse and neglect proceedings. "The Montana Rules of Civil Procedure and the Montana Rules of Evidence apply except as modified in this chapter. Proceedings under a petition are not a bar to criminal prosecution." Mont. Code Ann. § 41-3-422(4).

Montana's rules of civil procedure provide for the right of permissive intervention when it has been conferred by statute. "On timely motion, the court may permit anyone to intervene who is given a conditional right to intervene by statute." Mont. R. of Civ. PRo. 24(b)(1)(A). When intervention is sought, the petition to intervene is required to state the purpose of the intervention. "A motion to intervene … must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Mont. R. of Civ. Pro. 24(c).

In A.G. v. Mont. Eighteenth Judicial Dist. Court, 2020 Mont. LEXIS 518, this Court held that "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." P.R.S. Doc. 69 and U.A.C. Doc. 111, p. 2.

In the matter now before this Court, Appellant Foster Parents B.D. and J.D. are pre-adoptive parents of both P.R.S. and U.A.C. who have cared for these children; accordingly, they may be allowed to intervene after a hearing. Mont. Code. Ann. § 41-3-422(9)(b). The right of Montana's pre-adoptive foster parents to intervene has been conditionally conferred by this statute. Mont. Code Ann. § 41-3-422(4) and Mont. R. of Civ. Pro. 24(b)(1)(A). Mont. Code Ann. § 41-3-422(9)(b) identifies the three categories of petitioners who may be granted intervenor status in a child abuse or neglect proceeding, including a preadoptive parent. Mont. Code. Ann. § 41-3-422(9)(b) and A.G. v. Mont. Eighteenth Judicial Dist. Court, 2020 Mont.LEXIS 518 at*5-*7. The pre-adoptive Foster Parents complied with their obligation to set out the claim for which their intervention was sought: to keep their family together and participate as a party in opposition to U.A.C.'s placement going from U.A.C.'s family to a biologically related stranger. Mont. R. of Civ. Pro. 24(c).

II. Mont. Code Ann. § 41-3-437(4) requires a hearing before intervention may be granted.

A party seeking to intervene in a child abuse / neglect proceeding may only be granted intervention after a hearing has been held by the district court. "A … preadoptive parent … 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." Mont. Code Ann. § 41-3-422(9)(b).

Here, the Court did not hold a hearing. Instead, the Court denied the right to a hearing, holding that "a hearing in which evidence is presented on those subjects provided for in 41-3-437(4)" necessitated allegations of abandonment as a prerequisite. P.R.S. Doc. 69 and U.A.C. Doc. 111, p. 5.

III. Abandonment is not a prerequisite to holding a hearing to determine a party's right to intervene.

The district court misinterpreted the law when it held abandonment was a prerequisite to holding a hearing on Appellant Foster Parents' petition to intervene in these proceedings.

A party seeking to intervene in a child abuse / neglect proceeding may only be granted intervention after a hearing has been held to receive evidence on specific subjects. "A … preadoptive parent … 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." Mont. Code Ann. § 41-3-422(9)(b).

Section 41-3-422(9)(b) requires reference to subjects enumerated in § 41-3-447(4). The section of Mont. Code Ann. § 41-3-437(4) directly proceeding the enumerated subjects reads, "[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…." Mont. Code Ann. § 41-3-437(4).

The subjects provided for in § 41-3-437(4) upon which Montana courts are obligated to take evidence are:

"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.

Mont. Code Ann. § 41-3-437(4).

When interpreting statutes, courts are obligated to strive to give effect to all provisions of the laws in concert with each other. "…Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Mont. Code Ann. § 1-2-101.

Upon the granting of intervenor status and being joined as a party, the party is permitted participation in all future proceedings in the matter. "A person granted intervention pursuant to this subsection is entitled…to notice and participation in subsequent proceedings held pursuant to this chapter involving the custody of the child." Mont. Code Ann. § 41-3-422(9)(b).

Further, Montana law provide the right of intervention in action "when the applicant claims an interest" in the action and "is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by existing parties." Mont. R. of Civ. P. 24(a).

In the appeal before this Court, Petitioning Intervenors B.D. and J.D. had a statutory right, as foster parents caring for P.R.S and U.A.C. to intervene in the children's involuntary custody matters. Mont Code Ann. § 41-3-422(9)(b).

When the district court denied the foster parents the right to intervene, the court misapplied § 41-3-422(9)(b), stating the language in Mont. Code. Ann. § 41-3-437(4) "in a case in which abandonment has been alleged by the county attorney," combined with Mont. Code. Ann. § 41-3-422(9)'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 first alleges abandonment. In the present matter, the county attorney had not alleged abandonment. Thus under the district court's interpretation, B.D. and J.D. could not intervene and their motion was denied.

The correct interpretation put forward by the Foster Parents is that Mont. Code. Ann. § 41-3-422(9)(b)'s language "presented on those subjects provided for in 41-4-437(4)" incorporates only the enumerated subjects of § 41-4-437(4) and not the language in § 41-3-437(4) stating "in a case in which abandonment has

been alleged by the county attorney." A plain language reading of § 41-3-422(9)(b) only requires reference to those same subjects found in § 41-3-437(4) and does not state that the entire statute of § 41-3-537(4) should be referenced. Thus, Montana law does not direct the court to first consider whether abandonment by the birth parents has been alleged before examination of the subjects in Mont. Code. Ann. § 41-3-437(4).

Montana district courts have been a split in the application of these two statutes and how they should be reach together, leading to a disparity of decisions in different Montana judicial districts regarding whether foster parents should be allowed intervention in DN matters and under what circumstances. Some trial courts have imposed as a prerequisite the allegement of abandonment by the birth parents and some courts have not.

In the Matter of K.L.N., District Court of Montana, Lake County, April 29, 2019 (DN-17-25), DPHHS-CFSD opposed foster parent intervention on the grounds abandonment must be alleged as prerequisite to examination of the subjects in § 41-3-422(9) and § 41-3-437(4). District Court Judge James A. Manley declined to adopt the interpretation advanced by DPHHS-CFSD, instead finding the subjects set forth in Mont. Code Ann. § 41-3-422(9)(b) and Mont. Code Ann. § 41-3-437(4) were to be received by the Court without abandonment being alleged.

In the Matter of J.C.T., District Court of Montana, Lake County, May 10, 2019 (DN-19-03); In the Matter of J.T., District Court of Montana, Lake County, May 10, 2019 (DN-19-04). DPHHS-CSFD did not oppose foster parent intervention, and District Court Judge Deborah K. Christopher granted intervention and party status to the foster parents without consideration of whether abandonment had been first alleged.

In the Matter of A.V., District Court of Montana, Glacier County, February 7, 2020 (DN-13-14), DPHHS-CSFD did not oppose foster parent intervention, and District Court Judge Robert G. Olson granted intervention and party status to the foster parents without consideration of whether abandonment had been first alleged.

In the Matter of S.H., District Court of Montana, Missoula County, August 15, 2017, the Native Village of Kotzebue opposed intervention by the foster parents. District Judge Leslie Halligan allowed foster parent intervention and held the subjects set forth in Mont. Code Ann. § 41-3-422(9)(b) and Mont. Code Ann. § 41-3-437(4) were to be received by the Court without consideration of whether abandonment had been alleged.

In the Matter of J.C., District Court of Montana, Missoula County (February 8, 2017), the foster parents moved to intervene and no party opposed. District Judge John W. Larson allowed intervention without consideration of whether abandonment by the birth parents was alleged.

In the Matter of B.A.S.C., District Court of Montana, Missoula County (November 29, 2016), the foster parents moved to intervene and no party opposed. District Judge John W. Larson allowed intervention without consideration of whether abandonment by the birth parents was alleged.

In the Matter of A.M.A.N., District Court of Montana, Missoula County, (November 14, 2016), the foster parents moved to intervene, and District Judge Robert L. Deschamps, III allowed intervention without consideration of whether abandonment was alleged.

Due to their familial relationship with the children, B.D. and J.D. had an interest in the involuntary custody proceedings. Mont. R. of Civ. P. 24(a). B.D. and J.D. were situated so that the disposition of the involuntary custody matter, including the placement of P.R.S. and U.A.C. outside their home, would as a practical matter impair or impede B.D. and J.D.'s abilities to protect their interests. Id. The Foster Parent's interests were not adequately represented by existing parties in the district court cases. Id. Under a plain language reading of § 41-3-422(9)(b) abandonment is not a prerequisite to intervention. Accordingly, the Foster Parents should have been allowed to intervene as parties.

IV. Intervention as a party should have been granted to Appellant Foster Parents who have established a parent-child relationship with their foster children due to their constitutionally protected liberty interest in maintaining this relationship.

An interpretation of § 41-3-422(9)(b) that does not allow intervention by foster parents in a DN action unless abandonment by the birth parents is first alleged is contrary to Montana law regarding the best interests of the child and the child's right to safe and healthy placement as well Montana law providing for the legal establishment of a parent-child relationship between the child and a non-parent when the natural parent has acted contrary to the child's best interests and the non-parent has met the factors for establishing a parent-child relationship as defined in Mont. Code. Ann. § 40-4-211.

It is the policy of the state of Montana 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 recognizes "that a child is entitled to assert the child's constitutional rights" [and] "ensure that all children have a right to a healthy and safe childhood in a permanent placement." Mont. Code Ann. §§ 41-3-101(1)(d) and (e). "In implementing the policy of this section, the child's health and safety are of paramount concern." Mont. Code Ann. §§ 41-3-101(4) and 41-3-427(1)(a).

"A parent's right to the care and custody of a child constitutes a fundamental liberty interest that fundamentally fair procedures must protect." In re T.C., 2008 MT 335, ¶ 16, 346 Mont. 200, 194 P.3d 653. "The court's primary consideration is the physical, mental, and emotional condition and needs of the child, however, and

therefore the best interests of the child are paramount and must take precedence over parental rights." Id.

The Court "should not turn a blind eye to the best interests of the children, and their constitutional rights – especially given that Article II, Section 15 of the Montana Constitution explicitly guarantees to those persons under eighteen 'all the fundamental rights of . . . Article [II] unless specifically precluded by laws which enhance the protection of such persons.'" In re J.C., 2008 MT 127, ¶ 55, 343 Mont. 30, 183 P.3d 22.

Foster parents have a constitutionally protected liberty interest in the children they seek to adopt. *See* 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); M.S. v. People, 2013 CO 35, ¶ 5, 303 P.3d 102; and A.M. v. A.C., 2013 CO 16, ¶ 20, 296 P.3d 1026 (Mar. 18, 2013). [W]here a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals." Elwell v. Byers, *supra*.

In order to establish a 'parent-child relationship' under Montana law, the intervening party "must demonstrate three elements by clear and convincing

evidence: that the natural parent engaged in conduct contrary to the child-parent relationship, that the petitioner has established a child-parent relationship as defined in § 40-4-211, MCA, and that it is in the child's best interests for the relationship to continue." § Mont. Code. Ann. § 40-4-228(2); Filpula v. Annoy, 2009 MT 363, ¶ 13, 353 Mont. 220, 220 P.3d 391; Kulstad v. Maniaci, 2009 MT 326, ¶ 70, 352 Mont. 513; 220 P.3d 595.

A "'child-parent relationship' means a relationship that:

"a) exists or did exist, in whole or in part, preceding the filing of an action under this section, in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education, and discipline;

"b) continues or existed on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child's psychological needs for a parent as well as the child's physical needs; and

"c) meets or met the child's need for continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home."

Mont. Code. Ann. § 40-4-211(6).

In cases when a non-parent seeks a parental interest in a child under 40-4-211 or visitation with a child, the provisions of a pending action under Title 41, chapter 3 applies. Mont. Code Ann. § 40-4-228(1).

Pursuant to "Montana law, caregivers are not entitled to parental rights merely by virtue of their caregiver status. …[I]n order to be awarded a parental interest under § 40-4-228, MCA, a party first must establish a child-parent relationship with the child or children." Then, a district court has "discretionary authority to determine whether [the natural parent] acted contrary to her [or his] child-parent relationship, provided that its findings are supported by substantial evidence." Filpula, ¶ 22.

In the present instance, B.D. and J.D. have been P.R.S.'s and U.A.C's exclusive care providers since the beginning of 2018. Mont Code Ann. § 41-3-437(4)(a). DPHHS-CFSD is the temporary legal custodian of P.R.S. and U.A.C. Over the three years proceeding the Motion to Intervene, the Foster Parents provided continuous care for P.R.S and U.A.C. with a permanent and stable residence, schooling, and activities outside the home. Mont Code Ann. § 41-3-437(4)(b)(ii).

P.R.S. and U.A.C. have a constitutional right to their family, including a "healthy and safe childhood in a permanent placement." Mont. Code Ann. §§ 41-3-101(1)(d) and (e). They were placed with the Foster Parents in early 2018 and have remained in the care of the Foster Parents as a potential forever-family. It is natural B.D. and J.D. hold the same place in P.R.S.'s and U.A.C.'s emotional lives, and fulfill the same socializing functions as a natural family, and their

relationship cannot be dismissed as a mere collection of unrelated individuals. Elwell v. Byers, *supra*.

It is common knowledge that removing a child from their parents' home is traumatic to the health and safety of a child. Mont. Code Ann. §§ 41-3-101(4) and 41-3-427(1)(a). The potential of removal of U.A.C. from the only family she knows and placement with strangers would have been adverse to her welfare, and her Foster Parents were the only ones situated to assert her rights and their own rights in maintaining their familial relationship with her.

There is a fundamental liberty interest that fundamentally fair procedures must protect for the Foster Parents and P.R.S. and U.A.C. In re T.C., ¶ 16. B.D. and J.D. are uniquely situated to address P.R.S's and U.A.C.'s physical, mental, and emotional condition and needs: they cared for the two children continuously since early 2018. *Id.* P.R.S and U.A.C. possess all their constitutional rights – especially given that Article II, Section 15 of the Montana Constitution explicitly guarantees to those persons under eighteen "all the fundamental rights of . . . Article [II] unless specifically precluded by laws which enhance the protection of such persons." In re J.C., ¶ 55.

Foster Parents B.D. and J.D. have a constitutionally protected liberty interest in their parental relationship with P.R.S and U.A.C. Thelen v. Catholic Soc. Servs., 691 F. Supp. 1179 (E.D. Wis. 1988); Elwell v. Byers, 699 F.3d 1208 (10th Cir.

2012); M.S. v. People, 2013 CO 35, ¶ 5, 303 P.3d 102; and A.M. v. A.C., 2013 CO 16, 296 P.3d 1026, as modified on denial of reh'g (Mar. 18, 2013).

Accordingly the district court errored in denying B.D. and J.D. the right to intervene in the involuntary custody proceedings concerning the two children. Under the circumstances presented to the court, B.D. and J.D. should have been allowed intervention.

CONCLUSION

Under Mont. Code. Ann. § 41-3-422(9)(b), the district court was required to grant Foster Parents B.D. and J.D.'s Motion to Intervene in Cause Nos. DN-19-194 & DN-18-411. Abandonment by the birth parents is not a prerequisite to foster parent intervention and DPHHS-CFSD does not have to allege abandonment by the birth parents before the Foster Parents are allowed to intervene under Mont. Code. Ann. § 41-3-422(9)(b). B.D. and J.D.'s intervention was in the children's best interests; as they have a parent-child relationship with P.R.S. and U.A.C. and were the only parties situated to protect both the children's liberty interests and their own.

Respectfully submitted this 13th day of July, 2022.

By: _____

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I hereby certify that the foregoing brief is a proportionally spaced typeface of 14 points and does not exceed 10,000 words. Excluding the Caption, Table of Contents, Table of Authorities, this Certificate of Compliance, and the Certificate of Service, this brief consists of 4,766 words, as determined by version 12.1 of Apple, Inc. application Pages.

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