DA 22-0287

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 83

IN RE THE MATTER OF THE GUARDIANSHIP OF:

L.R.T.S. and A.M.T.S.,

DAVID MARK SAMMONS,

Petitioner and Appellee,

v.

ECHO RENE SIMS,

Respondent and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause Nos. BDG-2019-22, BDG-2019-23
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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Submitted on Briefs: March 29, 2023

Decided: May 16, 2023

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Echo Rene Sims (Sims) appeals from an Order issued on April 26, 2022, by the First Judicial District Court in Cause No. BDG-2019-22 granting guardianship over L.R.T.S. (L.S.) to David Sammons (Sammons) and from an Order issued on April 26, 2022, by the First Judicial District Court in Cause No. BDG-2019-23 granting guardianship over A.M.T.S. (A.S.) to Sammons. We affirm.

¶2 We restate the issue on appeal as follows:

> *Did the District Court err by granting Sammons's petition for temporary guardianship of L.S. and A.S. based on its conclusion that Sim's parental rights were limited by circumstances?*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Sims is the natural mother of L.S. and A.S. The natural father of both children, Jim, resides in Texas. He has little to no contact with the children, but, according to Sims, provides weekly financial support for their upbringing.

¶4 As of April 26, 2022, L.S. was eleven years old and A.S. was six years old; both resided with their maternal grandfather Sammons and his wife (the grandmother of the children), Michaella, in Helena. At that time, Sims lived in Kalispell.

¶5 On May 6, 2019, Sammons and Michaella filed a Petition for Guardianship of a Minor Child, L.S. Sims and Jim consented to the temporary appointment of Sammons and Michaella. On June 11, 2019, the District Court issued an Order appointing Sammons and Michaella as temporary guardians of L.S.

¶6 On July 19, 2019, Sims filed a Motion for Termination of Guardianship. On August 26, 2019, the District Court denied that motion. On January 6, 2021, the court denied a second Motion for Termination of Guardianship filed by Sims. Both denials were based, in part, on concerns that Sims was unable to care for the children due to mental illness.

¶7 On June 8, 2021, Sammons filed an Unopposed Request to Terminate Guardianship following his observation that Sims had been making progress in her mental health. On June 9, 2021, the District Court issued an Order terminating that guardianship.

¶8 L.S. is autistic and participated in the Intermountain day program through the school. Prior to June 9, 2021, Sims removed L.S. from school and reenrolled L.S. in another. Sometime after June 9, 2021, Sims stopped L.S.'s medication regimen because she disagreed with a prior doctor's diagnosis. She testified that she consulted with L.S.'s doctor prior to the stopping the regimen. L.S.'s doctor did not recall any such consultation and testified that Sims was supposed to schedule a visit for L.S. in the spring of 2021 but never did so.

¶9 Sims failed to manage L.S.'s speech therapy. After June 9, 2021, she did not take L.S. to two consecutive appointments and did not respond to inquiries from the therapist. L.S.'s speech therapy was terminated prior to L.S. reaching therapy goals.

¶10 Sims also failed to manage L.S.'s occupational therapy. After June 9, 2021, Sims prematurely ended L.S.'s treatment without explanation.

¶11 Sometime in early 2022, Sims prematurely terminated A.S.'s occupational therapy. Sims contends that she ended this treatment because A.S.'s therapist was leaving that practice and the facility could not accommodate the needs and schedules of A.S. and L.S.

Michaella testified that the facility confirmed to her that it had no such lack of capacity or availability and that A.S.'s therapy was expected to resume soon.

¶12 Sims also ended A.S.'s counseling sessions because she regarded them as unnecessary and had a long-standing dispute with A.S.'s counselor.

¶13 While in Sims's care, L.S. and A.S. missed at least 30 days of school. Sims blames L.S.'s absences on illness and L.S.'s occasional desire to "reset" by missing school. Sims alleges that COVID exposure and other health issues caused A.S.'s absences; witnesses from the school had no knowledge of such issues.

¶14 School witnesses testified to frequent complaints by Sims about L.S.'s and A.S.'s respective teachers. The educators reported that they did not understand the complaints, and that they believed they had addressed her concerns. Sims disagreed with their assessment. She told Sammons that she planned to homeschool the children.

¶15 Since February 10, 2022, while under the care of Sammons, A.S.'s school attendance has increased and A.S.'s academic performance has greatly improved; and, L.S. has returned to and made progress in school, occupational therapy, and speech therapy. L.S. has also resumed taking medications.

¶16 On February 10, 2022, Sims had a domestic dispute with Michaella that culminated in Sims being arrested. Michaella testified that Sims attacked her to prevent Michaella from putting a bag of personal possessions belonging to Sammons, Michaella, L.S. and A.S. outside. Sims called 911 during the incident. A dispatch text to East Helena first responders stated that Sims alleged Michaella was hitting her and the children. According to Sims, Michaella ripped Sims's garbage bags open and Sims tried to stop her.

¶17 L.S. and A.S. were present during the incident; A.S. attempted to intervene.

¶18 Law enforcement accessed cameras inside of Sammons's residence that recorded the incident. Following that review of the footage, Sims was arrested and charged with Partner or Family Member Assault.

¶19 On February 10, 2022, Sammons and Michaella filed an Emergency Petition for Guardianship—supported by affidavit. The District Court granted that petition on the same day.

¶20 While Sims and the children lived with Sammons, she received financial support from Sammons. Sims alleges that she is now self-supportive and has adequate housing for her and her children in Kalispell. Sims and Sammons appear to have the ability to communicate about the welfare of her children. However, Sims and Michaella have a dysfunctional and fragile dynamic.

¶21 On April 12, 2022, the District Court held a Guardianship Hearing.[1] The court determined that Sammons and Michaella offered credible testimony. The court noted that Sammons and Michaella do a "wonderful job" caring for L.S. and A.S. and provide for their needs and welfare in a loving, safe, and stable home. However, the court noted its concerns with Michaella's conduct on February 10, 2022, during the incident with Sims.

[1] The briefs filed by Sims and Sammons explicitly define this dispute as one over a grant of temporary guardianship. Likewise, the Proposed Findings of Fact and Conclusions of Law submitted by Sammons and Michaella to the District Court on April 25, 2022, stated they petitioned the court for "appointment as *temporary* guardians of L.R.T.S,"—that petition was the subject of the court's April 27, 2022 Order. (Emphasis added.) Yet, the Dissent relies on case law pertaining to permanent guardianships and claims, without citation, that the analysis of temporary and permanent guardianships "does not change." *See* Dissent, ¶ 50.

Those concerns combined with the fractured relationship between Michaella and Sims and the ongoing criminal proceedings related to their altercation led to the court's conclusion that L.S.'s and A.S.'s welfare and best interests would be better served if Sammons was appointed as their respective sole guardian. On April 26, 2022, the court granted Sammons's guardianship petitions as to L.S. and A.S. and denied Michaella's corresponding petitions.

¶22 The District Court concluded that Jim could not serve the best interests and welfare of his children because of circumstantial limitations on his ability to do so resulting from his years-long absence from their lives.

¶23 The District Court determined that Sims's testimony as to her actions after June 9, 2021, and on February 10, 2022, was not credible. The court concluded that Sammons established by a preponderance of the evidence that Sims's ability to serve the best interests and welfare of L.S. and A.S. was limited by circumstances as demonstrated by her conduct after June 9, 2021.

¶24 The court decided that it would be in the best interests of the children to stay together. The court permitted Sims to have continuous and systematic contact with her children through communication at specific times and via specific platforms.

STANDARD OF REVIEW

¶25 We review a district court's conclusions of law related to the appointment of a guardian to determine if they are correct. Subject to statutory restrictions, selection of a person to be appointed guardian is a matter committed largely to the discretion of the appointing court, and an appellate court will interfere with exercise of this discretion only

in case of clear abuse. *In re Co-Guardianship of D.A.*, 2004 MT 302, ¶ 11, 323 Mont. 442, 100 P.3d 650.

DISCUSSION

¶26 *Issue: Did the District Court err by granting Sammons's petition for temporary guardianship of L.S. and A.S. based on its conclusion that Sim's parental rights were limited by circumstances?*

¶27 Sims contends that the District Court incorrectly applied the "best interest" standards set forth by §§ 40-4-212 and -291, MCA, and the standards set forth by § 40-4-228, MCA, for appointing a temporary guardian. Sims also argues that the court erred in concluding that circumstances have limited her constitutional right to parent her children.

¶28 Sammons counters that the evidence supported the District Court's findings of fact and that the court issued correct conclusions of law. Sammons asserts that Sims did not have her constitutional rights infringed because the court afforded Sims the opportunity to terminate the guardianship upon a change in her circumstances. Finally, Sammons challenges Sims's ability to contest the correctness of the court's application of the aforementioned standards because she failed to raise those issues below.

¶29 This Court has consistently held that it will not consider issues raised for the first time on appeal. In order to preserve a claim or objection for appeal, an appellant must first raise that specific claim or objection in the district court. *In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38. Sims failed to preserve her first two arguments. Accordingly, this Court only considers Sims's argument that the District Court erred in finding that her parental rights have been limited by circumstances.

¶30 The merits of Sims's argument on appeal hinges on the meaning and applicability of two sections of Title 72, chapter 5, MCA, governing court appointment of a guardian of a minor. The first section, § 72-5-225(2), MCA, in relevant part, sets forth the following:

> Upon hearing, the court shall make the appointment if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of 72-5-222 have been met, and the welfare and best interests of the minor, including the need for continuity of care, will be served by the requested appointment.

The second section, § 72-5-222, MCA, in relevant part, provides that "(1) The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or if parental rights have been suspended or limited by circumstances or prior court order."

¶31 Neither party alleges that the District Court erred in finding that a qualified person sought appointment, that venue was proper, and that the required notices had been given. It follows that whether the court complied with § 72-5-225(2), MCA, turns on whether the court adhered to the requirements of § 72-5-222(1), MCA.

¶32 The District Court relied on its years-long experience with this matter to conclude that Sims's ability to safely parent L.S. and A.S. and serve their respective best interests and welfare was limited by circumstances as demonstrated by her conduct after June 9, 2021. The court thoroughly reviewed Sims's habit of prematurely terminating medical and mental care for her children, her failure to ensure they attended school and progressed academically, her fractured relationship with other family members, and her ongoing effort to properly treat her own mental health issues. The court identified these numerous and serious circumstances as limitations on Sims's ability to parent her children.

¶33 The correctness of the District Court's decision depends on the definition of "limited by circumstances" under § 72-5-222(1), MCA. Because the statute does not define the term, this Court will look to legislative intent, and give effect to the legislative will. *See Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. This analysis should not lead to absurd results if a reasonable interpretation can avoid it. We must harmonize statutes relating to the same subject, as much as possible, giving effect to each. *Mont. Sports Shooting Ass'n*, ¶ 11. We must presume that the Legislature would not pass useless or meaningless legislation. *Mont. Sports Shooting Ass'n*, ¶ 16.[2]

¶34 The Montana Legislature intended "limited circumstances" to apply to a broad range of conduct suggestive of a reduced ability of a parent to exercise their parental rights. By a unanimous vote, the 1999 Legislature amended § 72-5-222(1), MCA, by inserting the following bolded language: "The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or **if parental rights have been** suspended **or limited** by circumstances or prior court order." 1999 Mont. Laws ch. 290, § 6. As signaled by the enacting legislation's synopsis, legislators intended this language to "clarify[] the circumstances in which a guardian of a minor may be appointed." 1999 Mont. Laws ch. 290, § 6.

¶35 Three years before the Montana Legislature *expanded* the circumstances that would justify the appointment of a guardian, this Court in *In re Guardianship of D.T.N.*, 275 Mont.

[2] The Dissent cites an alternative canon of interpretation that, if applied, would violate this Court's presumption by rendering the Legislature amendment to § 72-5-222(1), MCA, an idle act. Dissent, ¶ 47; *see infra* ¶ 38.

480, 914 P.2d 579 (1996), looked to the Supreme Court of Idaho for guidance on when parental rights would be "suspended by circumstances." *D.T.N.*, 914 P.2d at 582-83 (analyzing *In re Copenhaver*, 865 P.2d 979 (Idaho 1993)). The Supreme Court of Idaho, interpreting similar statutory language, determined that parental rights would no longer be "suspended by circumstances" when the natural parent appeared in the guardianship proceeding, objected to the guardianship, made it clear that she no longer desired to leave the children and that she was willing and capable of caring for them, and made her whereabouts known. *D.T.N.*, 914 P.2d at 583 (referring to *Copenhaver*, 865 P.2d at 984-85).

¶36 In the immediate aftermath of this Court's decision in *D.T.N.,* the 1999 Legislature's decision to expand the circumstances under which parental rights could be infringed in a way that justified the appointment of a guardian likely suggests that "limited circumstances" refers to more than just a parent's willingness to and capacity for caring for their children. *See American Linen Supply Co. v. Dep't of Revenue*, 189 Mont. 542, 545, 617 P.2d 131, 133 (1980) (citing § 1-3-232, MCA, in support of the Court's conclusion that an "interpretation [of a statute] that gives effect [to the Legislature's intention] is always preferred over an interpretation that makes the statute void or treats the statute as mere surplusage.") Here, the District Court identified numerous and serious circumstances that limited Sims's capacity to care for her children and, therefore, her parental rights.

¶37 The Dissent emphasizes this Court's pre-1999 case law over the amendments made by the 1999 Legislature in evaluating the District Court's actions. *See generally* Dissent. This emphasis directly conflicts with this Court's long-held presumption that the

Legislature intended to make some changes in existing law by enacting an amendment or new law. *See Cantwell v. Geiger*, 228 Mont. 330, 333-34, 742 P.2d 468, 470 (1987). The Legislature undisputedly altered the language of § 72-5-222(1), MCA, in its 1999 amendment. The Dissent negates that action and undermines the Legislature's will by insisting that our pre-1999 case law on § 72-5-222(1), MCA, was unaffected by the Legislature's change to the statutory language. *See* Dissent, ¶ 41.

¶38 We conclude that the District Court order satisfied the requirements of §§ 72-5-222(1) and -225, MCA. The court thoroughly reviewed the record to conclude that Sims had a diminished capacity to care for L.S. and A.S. and, as a result, had her parental rights limited by circumstances. The court's thorough review of the record leaves no basis for the conclusion that it acted arbitrarily, without conscientious judgment, or in excess of the bounds of reason.

CONCLUSION

¶39 The District Court did not abuse its discretion by appointing temporary guardianship of L.S. and A.S. to Sammons.

¶40 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon, dissenting.

¶41 In my opinion, the 1999 Montana Legislature's amendment to § 72-5-222(1), MCA, allowing for appointment of a guardian when a parent's rights have been "limited by circumstances," is neither inconsistent with nor displaces our well-reasoned precedent that establishes the right of the natural parent prevails until a showing of a forfeiture of that right. This forfeiture can result only where the parent's conduct does not meet the minimum standards of the child abuse, neglect, and dependency statutes, or where there has been willful abandonment or willful nonsupport. Accordingly, I dissent.

¶42 The right of a parent to the care, custody, and control of their child is a fundamental constitutional right. *In re Guardianship of Aschenbrenner*, 182 Mont. 540, 544, 597 P.2d 1156, 1160 (1979); *see also In re A.R.A.*, 277 Mont. 66, 70, 919 P.2d 388, 391 (1996). This Court has recognized that there are few invasions "into the privacy of the individual that are more extreme than that of depriving a natural parent of the custody of his children." *In re Guardianship of Doney,* 174 Mont. 282, 285, 570 P.2d 575, 577 (1977). Consequently, the legislature has carefully enunciated the proper procedures and standards the State must adhere to and the findings a district court must make before custody of a child may legally be taken from a natural parent. *Fischer v. Fischer*, 2007 MT 101, ¶ 24, 337 Mont. 122, 157 P.3d 682. "Only then will the fundamental rights and relationship existing between parent and child be fully realized or, when necessary, properly severed." *In re Aschenbrenner*, 182 Mont. at 553, 597 P.2d at 1164.

¶43 In *In re Aschenbrenner*, the mother appealed the grant of permanent guardianship to the paternal grandparents when there was no court order suspending her rights. This

Court analyzed whether the mother's rights were "suspended by circumstances." *In re Aschenbrenner*, 182 Mont. at 546, 551, 597 P.2d at 1160, 1163. The only evidence of the mother abandoning her parental rights was that she left her children with their grandparents for three weeks. *In re Aschenbrenner*, 182 Mont. at 547, 597 P.2d at 1161. Accordingly, this Court determined a temporary event and a single witness's testimony that the mother was unfit to parent was insufficient to demonstrate the mother's rights were suspended by circumstances. *In re Aschenbrenner*, 182 Mont. at 550-51, 597 P.2d at 1163. The Court noted "this was a guardianship proceeding instituted by the paternal grandparents, not a proceeding instituted to have the children declared dependent and neglected, as it must be" under the dependency and neglect statutes. *In re Aschenbrenner*, 182 Mont. at 550, 597 P.2d at 1163. Further, we held that whether the grandparents were better suited to provide a healthier environment for the children was irrelevant, because the mother had a fundamental constitutional right to the custody of her children that could not be interfered with by the State. *In re Aschenbrenner*, 182 Mont. at 549, 597 P.2d at 1162.

¶44 Again, in 1996, this Court considered the meaning of the phrase "suspended by circumstances" in *In re Guardianship of D.T.N.*, 275 Mont. 480, 914 P.2d 579 (1996). In *In re D.T.N.*, the child's natural mother temporarily relinquished physical custody and consented to the grandparents' temporary guardianship. The mother withdrew her consent when the grandparents sought permanent guardianship. Following a hearing, the district court found the child had been abused and neglected while in the mother's care; that the mother had failed to "demonstrate an intent to resume custody or to provide for the child's care"; and that the child's best interests would be better served by permanent guardianship.

In re D.T.N., 275 Mont. at 482, 914 P.2d at 580. On appeal, this Court's analysis hinged on the guardianship statutes—specifically, §§ 72-5-222(1) and 72-5-225(2), MCA. We held the district court ignored the requirements of § 72-5-222(1), MCA, because it failed to specifically determine whether the mother's parental rights were terminated or suspended. This Court reasoned that the mother had not voluntarily relinquished her rights because she had "appeared in [the] action, [withdrawn] her consent to the temporary guardianship, and filed a petition to terminate the temporary guardianship." *In re D.T.N.*, 275 Mont. at 488, 914 P.2d at 583-84. For these reasons, we reversed the district court's award of guardianship to the grandparents because the mother's parental rights were not suspended by circumstance. *In re D.T.N.*, 275 Mont. at 488, 914 P.2d at 584.

¶45 This Court's analysis in *In re D.T.N.* was informed by the Idaho Supreme Court's reasoning in *Copenhaver v. Celeya*, 865 P.2d 979 (Idaho 1994). In *Copenhaver*, the trial court awarded permanent guardianship of two children who had been left in the care and custody of the petitioners. The petitioners alleged that the natural mother's rights had been "suspended by circumstances" because the mother was residing in Arizona at the time, had little contact with her children, and demonstrated an inadequate level of maternal care, including alcohol and drug abuse. The mother appealed the permanent guardianship. *Copenhaver*, 865 P.2d at 984. The Supreme Court of Idaho determined "the application for appointment of a guardian of a minor is a statutory proceeding which must proceed based on statutory terms, and not based on principles of equity." *Copenhaver*, 865 P.2d at 983. The Idaho Supreme Court concluded the threshold inquiry—before the court could reach a best interests analysis—is whether the natural parent's right to custody had been

suspended by circumstances. *Copenhaver*, 865 P.2d at 983-84. After reviewing decisions from other jurisdictions interpreting "suspended by circumstances," the Idaho Supreme Court concluded that the natural mother's parental rights were no longer suspended by circumstances when she "appeared in the guardianship proceeding, objected to the guardianship, made it clear that she no longer desired to leave the children and that she was willing and capable of caring for the children, and made her whereabouts known." *Copenhaver*, 865 P.2d at 984-85; *In re D.T.N.*, 275 Mont. at 482, 914 P.2d at 583. Notably, the Idaho Supreme Court determined the children's living situation, school enrollment, financial support, and mother's contact with her children were not relevant. *Copenhaver*, 865 P.2d at 984-85; *In re D.T.N.*, 275 Mont. at 482, 914 P.2d at 583.

¶46 In *Doney*, the father was married to the children's mother when the mother died in a car accident. The father needed time to grieve and signed guardianship papers giving the guardian, his sister-in-law, custody for two months for purposes of health care authorization. Four months after the wife's death, the father returned but his sister-in-law refused to return the children. The Court held that "[a] judicial hearing and finding of dependency and neglect [under the dependency and neglect statutes], or a judicial finding of willful abandonment or willful nonsupport . . . are the exclusive means by which a natural parent may be involuntarily deprived of custody of his children." *Doney*, 174 Mont. at 286, 570 P.2d at 577. The "careful protection of parental rights is not merely a matter of legislative grace, but is constitutionally required." *Doney*, 174 Mont. at 286, 570 P.2d at 577 (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972)).

¶47 In 1999, the Montana Legislature amended the guardianship statute applicable to this case: "The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or if parental rights have been suspended *or limited* by circumstances or prior court order." Section 72-5-222(1), MCA (emphasis added). In addition to the "suspended by circumstances" language, this amendment provides the phrase "limited by circumstances." The Court holds that this "suggests" that "'limited circumstances' must refer to more than just a parent's willingness to and capacity for caring for their children." Opinion, ¶ 36. However, the Court exceeds the boundaries of statutory construction and adds an interpretation to the guardianship statute which is both inconsistent with the fundamental constitutional right of a parent to custody of their child and with a large body of this Court's precedent interpreting that right. Not every legislative change to a statute, particularly one as innocuous as adding the word "limited," is meant to usher in a complete overhaul of court precedent and displace other statutory schemes providing a process for the State's interference with parental rights. We may not "construe a statute to insert what has been omitted or to omit what has been inserted . . . ." Section 1-2-101, MCA. While the Court tethers its reasoning to the legislation's *synopsis* without further explanation, the Court actually inserts expansive language into the statute based on equitable principles and an inapplicable best interests analysis. Opinion, ¶ 34.

¶48 The 1999 Montana Legislature made major amendments to the *nonparental* statutes to recognize a child's constitutional rights in nonparental proceedings. A nonparent now has standing to seek a parenting interest of a minor child if the person has established a child-parent relationship. Sections 40-4-211, -228, MCA. But that expansive statutory

overhaul does not trickle over to the guardianship statutes in the Uniform Probate Code and cannot be understood as a basis to interfere with a parent's fundamental constitutional right to care for a child and this Court's long established jurisprudence interpretating that right.

¶49 Our decision in *In re D.T.N.* expressly noted that the application for appointment of a guardian of a minor is a statutory proceeding and not one based on "principles of equity." *See In re D.T.N.*, 275 Mont. at 481, 914 P.2d at 582 (quoting *Copenhaver*, 865 P.2d at 983). The Court skips this statutory requirement and threshold question of determining whether Sims's parental rights have been suspended or limited by circumstances and, instead, addresses the best interests of L.S. and A.S.—a process specifically disapproved of by our case law. Outside of the statutorily prescribed procedures of a dependency and neglect proceeding—which are designed to protect due process and ensure the fundamental right to parent is limited only when minimal standards are not met—the Court, with even less process, concludes that Sims' bad conduct is a basis for interfering with her fundamental right. In my view, the 1999 amendment to the guardianship statute by adding "limited" was not intended to uproot these fundamental and basic principles. The Court's reasoning allows any third party to pursue a guardianship outside of a Title 41 proceeding or in the absence of evidence the child has in some way been abandoned.

¶50 Like the mother in *In re Aschenbrenner*, Sims left L.S. and A.S. for a temporary time that is insufficient to demonstrate Sims's rights were suspended or limited by circumstances. Like the mother in *In re D.T.N.*, Sims appeared in this action during the guardianship hearing and disputed the temporary guardianship, indicating she was willing

and capable of caring for the children. The evidence that Sims—while having custody of the children—removed L.S. from school and reenrolled him in another school; that she stopped L.S.'s medical regimen against a doctor's diagnosis; and that she failed to take L.S. to speech, occupational, and counseling therapy is irrelevant to a finding that her parenting has been "limited by circumstance." While useful in an equitable best interests analysis, this evidence does not inform a "limited by circumstances" analysis. While *In re Aschenbrenner* and *In re D.T.N.* involved permanent guardianships, and the dispute here is based on a temporary guardianship, the analysis does not change. A temporary guardianship imposed when a parent objects is still an interference with their constitutional right to parent. *See Doney*, 174 Mont. at 285, 570 P.2d at 577 (showing that the fundamental right to parent remains tantamount regardless of whether the guardianship is temporary or permanent).

¶51 In my opinion, the guardianship provisions, even with the 1999 amendment of "limited by circumstance," were never intended to serve as a substitute for the custody provisions of the Marriage and Divorce Act, nor the prescribed and demanding procedures established in dependency and neglect proceedings. The power of the court to appoint a temporary or permanent guardian must be limited and the court has no power to appoint a guardian at all if the minor has a parent entitled to his custody or a guardian appointed by the will of a parent who is willing to act.

¶52 I respectfully dissent.

/S/ LAURIE McKINNON