IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0611

IN THE MATTER OF THE ADOPTION OF C.M.C.,

D.C. and J.C.,
Petitioners / Appellees,

and

C.S. f/k/a C.T.,
Respondent / Appellant.

On appeal from the Eighteenth Judicial District Court, Gallatin Co., Cause No. DA-19-19C, Hon. J. Brown

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APPELLANT'S REPLY BRIEF

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ARGUMENT

Appellees (D.C. and J.C.) concede on appeal that their two advanced avenues for termination are focused on unfitness due to failure to support and willful abandonment. Appellees' br.,11-16. All other references to evidence or statutory bases for termination should therefore be disregarded by this Court. D.C.'s and J.C.'s concession on appeal makes the district court's order even more problematic as it makes findings that are clearly unrelated to the scope of the proceedings.[1]

1. C.S. supported C.M.C. in the aggregate one year prior to the filing of the Petition.

D.C. and J.C. argue that C.S.'s entire history of child support payments are relevant and is able to be considered by the district court. Appellees' br., 11. D.C. and J.C. are incorrect. D.C. and J.C. state that *Matter of Adoption of R.A.S.*, 208 Mont. 438, 679 P.2d 220 (1984) is not applicable because the "statute…was…repealed" in reference to Mont. Code Ann. § 40-8-111, which is cited in *R.A.S.* Appellees' br., 13-14. Mont. Code Ann. § 40-8-111 was indeed repealed, but so was the entire Chapter that housed Adoption law in Title 40. Instead, the adoption law was transferred to a different location in the Code. *See*

[1] D.C. and J.C. reference that C.S.'s appeal was untimely. They do not support this argument other than by cursory reference. Appellees' br., 6. Under the applicable rules, M. R. App. P., C.S.'s appeal was verifiably timely as she filed a post-trial motion that was also timely. M. R. App. P. 4(5). Ultimately the district court granted the motion to alter or amend. M. R. Civ. P. 59. This appeal followed.

Mont. Code Ann. § 40-8-111; Title 42, Mont. Code Ann. Regardless, the portion of the statute that is referenced in *R.A.S.* states near identical language in the current applicable statute Mont. Code Ann. § 42-2-608. (*Compare* "(v) if it is proven to the satisfaction of the court that the father or mother, if able, has not contributed to the support of the child during a period of 1 year before the filing of a petition for adoption ..." *with* "(c) it is proven to the satisfaction of the court that the parent, if able, has not contributed to the support of the child for an aggregate period of 1 year before the filing of a petition for adoption"). Mont. Code Ann. § 40-8-111(1)(a)(v) (1995) (repealed 1997); Mont. Code Ann. § 42-2-608(1)(c) (2023).

There is no dispute that C.S. made the following payments in the one year prior to the filing of the Petition.

MONTH/ YEAR	SUPPORT AMOUNT DUE	SUPPORT AMOUNT PAID
4/18	115.00	114.98
5/18	115.00	57.49
6/18	115.00	114.98
7/18	115.00	114.98
8/18	115.00	0.00
9/18	115.00	0.00
10/18	115.00	0.00
11/18	115.00	47.54
12/18	115.00	285.24
1/19	115.00	142.62
2/19	115.00	142.62
3/19	115.00	237.79

4/19	115.00	142.62
5/19	115.00	190.16
TOTAL	1,610.00	1,591.02

Resp.'s ex. D.

The statutory requirement, which *R.A.S.* provides must be followed is that if proven to the satisfaction of the court that the financially able parent **has not contributed** in the one year pre-filing, does not state that there can be no arrears in child support, let alone the amount of $18.98, that would justify termination. *R.A.S.* 208 Mont. at 442-43, 679 P.2d at 223; Mont. Code Ann. § 42-2-608(1)(c). "In adoption cases the initial threshold requirement is statutory compliance." *R.A.S.*, 208 Mont. at 442, 679 P.2d at 222-23 (citing *In the Matter of the Adoption of Smigaj*, 171 Mont. 537, 560 P.2d 141 (1977)). Regardless, even if D.C. and J.C. were correct that the totality of the circumstances of payment was relevant, then as in *R.A.S.* where the terminated father failed to pay support one year prior up until and through the time of the trial[2], C.S. engaged in the opposite behavior and was current on child support at the time of the trial, despite demonstrated financial difficulties. *R.A.S.*, 208 Mont. at 442-43, 679 P.2d at 223; Appellant's br., 9-10. Moreover, *R.A.S.* makes clear that the aggregate period of one year pre-filing

[2] The terminated father is also unlike C.S. in that he admitted that he had the ability to pay and failed to pay. *R.A.S.*, 208 Mont. 442, 679 P.2d 223. Here, C.S. admitted that while she was in arrears that was well before the filing of the Petition she was **unable** to pay due to a debilitating auto accident. Appellant's br., 9. Once she was able to return to work, she began resuming payments as she was able and was nearly current one year prior to the filing of the Petition. *Id.*

should be reviewed as whether or not the obligor made paying "during" or "throughout the course of; throughout the continuance; in the time of," which C.S. made payments throughout the course of the year prior to when the Petition was filed. Appellant's br., 9-10.

Finally, D.C. and J.C. argue that "[C.S.] provided no evidence, other than her testimony, that her injuries [from her auto accident] prevented her from working." Appellees' br., 13. Both C.S. and her wife Christy testified that the auto accident was debilitating and left C.S. unable to work. Appellant's br., 9. In addition to C.S.'s own testimony, Christy testified that they had lost their only vehicle and physically C.S. was unable to work. Hrg. trans. 258:7–16. Regardless, the burden is on the petitioners, D.C. and J.C., to provide by clear and convincing evidence that C.S. *was* able to work and failed to pay, not the opposite. *R.A.S.*, 208 Mont. at 442, 679 P.2d at 223; *In re K.L.*, 2014 MT 28, ¶ 14, 373 Mont. 421, 318 P.3d 691. D.C. and J.C. presented no evidence whatsoever that C.S. *was* able to make payments of child support and failed to do so. C.S. not only did pay child support for an aggregate of one year prior to the Petition's filing, but she also provided context for her lapse in payment that was the period that should not be reviewed by statute. D.C.'s and J.C.'s arguments fail in whole both under the totality of the circumstances and for failure to meet their required burden of proof.

2. D.C. and J.C. failed to meet their burden of proof that C.S.'s parental rights were able to be terminated due to unfitness.

D.C. and J.C. concede that the breadth of "unfitness" is limited in scope. Appellees' br., 11. On appeal, aside from failure to support, D.C. and J.C. argue that C.S. "failed to maintain a relationship" with the child, which is not the threshold required in the law. Appellees' br., 14-15. Instead, willful abandonment has statutory criteria that must be met. Mont. Code Ann. §§ 42-2-608, 41-3-102. Unlike in *In re Adoption of K.P.M.*, 2009 MT 31, 349 Mont. 170, 201 P.3d 833 cited by D.C. and J.C., the parties here did not have a temporary custodial arrangement. Instead, the parties had entered into a written parenting plan that described the rights of the parties. It was established that C.S. consistently attempted to exercise her rights and those rights were frustrated by D.C. and J.C. Appellant's br., 7-9. D.C.'s and J.C.'s claim in their brief that C.S. "made no legal efforts to assert her rights" is patently contradicted by their own testimony at trial. *Id*. Similarly, D.C.'s and J.C.'s claim that C.S.'s "phone numbers frequently changed" and is directly refuted by J.C.'s testimony. Specifically, she stated that it was "fair" that C.S. changed her number once during the relevant time period, and that since 2018 her phone number was the same. Hrg. trans. 75:7–19. C.S. testified that her number has been the same since at least April 2018. *Id*., 195:15–23.

Again, the burden of proof is by clear and convincing evidence that one of the statutory requirements of abandonment was met. Mont. Code Ann. § 41-3-102; *K.L.*, ¶ 14. Moreover, the failure to seek legal remedy to regain custody does not equate to willful abandonment. *In re Matter of Adoption of S.P.M.*, 266 Mont. 269, 273-74, 880 P.2d 297, 299 (1994). D.C. and J.C. failed to meet the statutory threshold by any evidence let alone clear and convincing evidence.

3. The aggregate errors contained in the Decree demonstrate that the proposed order was not sufficiently comprehensive to provide a basis for the decision.

While adoption of a proposed order is not per se error, *Wurl v. Polson School Dist. No. 23*, 2006 MT 8, ¶ 29, 330 Mont. 282, 127 P.3d 436, the practice is discouraged, and a proposed order must be sufficiently comprehensive and pertinent to the issues to provide a basis for the decision. Here, the proposed order signed by the district court is riddled with issues. Whether misstatements of fact or law or both, the proposed order demonstrates that it is not reflective of the actual testimony and oral rulings of the district court at trial.

CONCLUSION

For the foregoing reasons, C.S. reiterates her request that this Court reverse the Decree that terminates her parental rights. Again, C.S. expresses concern that a remand for further proceedings will only delay the relief in this matter; the docket shows significant delay in the issuance of the order after trial (over two years).

The pending motions that were not ruled upon must be deemed denied and the matter must be closed with a reversal of the Decree, so that she may take whatever action necessary to reestablish her parenting time and rights as a parent while the child is in minority. With a birthdate of April 2007 the child will become emancipated April 2025—in one year.

DATED this 1st day of April, 2024.

/s/ Andrea Collins
Andrea Collins
Attorney for C.S.

CERTIFICATE OF COMPLIANCE

I, the undersigned, hereby certify that pursuant to M. R. App. P. 11 and 16 this document is printed with proportionally spaced Times New Roman typeface of 14 points, double spaced, and the word count calculated by Microsoft Word is not more than 5,000 words.

/s/ Andrea Collins
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CERTIFICATE OF SERVICE

I, ANDREA COLLINS, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-02-2024:

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