

DA 23-0550

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 115

IN THE MATTER OF:

R.N.,

A Youth in Need of Care.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DN-7-21-046-YC
Honorable John W. Parker, Presiding Judge

COUNSEL OF RECORD:

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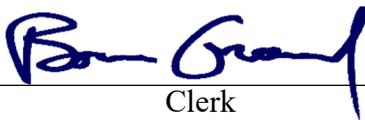
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Submitted on Briefs: May 1, 2024

Decided: May 28, 2024

Filed:


Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Appellants, Ben and Charissa Wagner (Intervenors or Wagners), appeal from the August 28, 2023 Order Dismissing Case issued by the Eighth Judicial District Court, Cascade County. Intervenors assert the District Court erred when it dismissed the child welfare case when, the child, R.N., had only been placed with birth Mother (Mother) for three months and by dismissing the case when a petition for termination and a motion for permanency and emergency placement were pending. The Department of Public Health and Human Services, Child and Family Services Division (the Department) counters the District Court erred in granting the Wagners' motion to intervene and asserts that had the District Court correctly denied the motion, Intervenors would have no standing to appeal. The Department also asserts Intervenors have no standing because they seek a remedy which neither the District Court, nor this Court, has the authority to provide.

¶2 We restate the issue on appeal as follows:

Whether the District Court erred by dismissing R.N.'s abuse and neglect case.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 The Department removed R.N. from his mother's care on April 12, 2021. R.N. was placed in foster care with the Wagners who had previously, in 2013, adopted two of Mother's other children. On May 11, 2021, R.N. was adjudicated a youth in need of care, and the Department was granted temporary legal custody. Following a dispositional hearing on September 28, 2021, the District Court ordered Mother to complete the treatment plan proposed by the Department. Thereafter, Mother did not fully engage with

the Department, and on March 14, 2022, the Department filed a Petition for Termination of Parental Rights seeking to terminate Mother's parental rights for failing to complete her court-ordered treatment plan and also asserting Mother had abandoned R.N.

¶4 After the Department filed the petition for termination, Mother began to engage with the Department and to make positive changes in her life. Various continuances were granted to permit Mother additional time to address her substance use disorder and complete her treatment plan. Mother completed inpatient treatment and was accepted into Michel's House—a residential sober living program in Billings, Montana—which allows children to live with their mothers while their mothers receive treatment and assistance. Upon her acceptance into this program, Mother filed an emergency motion seeking placement of R.N. with her at Michel's House. Despite the guardian ad litem (GAL) supporting this placement, the District Court denied it, instead ordering the Department to assist Mother with locating comparable programming for herself only. Mother returned to Great Falls and continued working with the Department and accessing various treatment services. Mother made such significant progress that on December 6, 2022, the report of the Foster Care Review Committee indicated the prior plans for adoption were no longer appropriate and reunification with Mother would be the appropriate permanency plan. The District Court's January 6, 2023 Order following its status hearing of January 3, 2023, confirmed Mother to be fully engaged in her treatment plan and doing well.

¶5 This shift in the Department's position from termination to reunification with Mother prompted the Wagners to file their motion to intervene, asserting intervention was appropriate under M. R. Civ. P. 24 and § 41-3-422(9)(b), MCA. Hearing on the

intervention motion was held May 16, 2023. Mother, the Department, and the GAL objected to the intervention. Mother asserted intervention was provided for in child welfare cases in § 41-3-422(9)(b), MCA, such that Rule 24 did not apply. Mother argued, that since the Department no longer relied on abandonment as a potential ground for termination and, in fact, indicated an intention to reunify R.N. with Mother in the near future, intervention under § 41-3-422(9)(b), MCA, was not appropriate. The GAL expressed a similar position. CPS Scofield, Mother’s CPS worker, testified the Department was not pursuing termination based on abandonment. The Department’s counsel expressed that, although there had previously been a time where Mother was not engaged, there was no way it could currently sustain a termination based on abandonment as Mother was fulfilling the terms of her treatment plan.

¶6 The District Court recognized the Department no longer relied on the theory of abandonment and was intending re-unification with Mother. The District Court considered whether the prefatory language of § 41-3-437(4), MCA—“In a case in which abandonment has been alleged by the county attorney”—created an absurd position where once the Department alleges abandonment, does that permanently dictate intervention, even when it withdraws that theory? The District Court granted the Wagners’ intervention motion in a written order on May 30, 2023, after cautioning them about the emotional difficulty they may experience and intimating the law favored the Department’s plan for reunification with Mother. The court based its decision largely on its interpretation of *In re U.A.C.*, 2022 MT 230, 410 Mont. 493, 520 P.3d 295—noting the Department had at least initially alleged

abandonment in its petition for termination. The District Court issued its written order granting intervention on May 30, 2023.

¶7 R.N. was reunified with Mother on May 31, 2023. On June 21, 2023, Wagners filed Intervenor’s Motion for Permanency Hearing and for Temporary Emergency Placement seeking an order from the court that R.N. be immediately placed in their care and that the Department be compelled to pursue termination of Mother’s parental rights or explain why it failed to do so. Both Mother and the Department filed responses objecting to the motion. The District Court did not set hearing or issue a determination on Intervenor’s motion. On August 25, 2023, the Department filed a motion to dismiss the case. On August 28, 2023, the District Court granted the Department’s motion to dismiss, issuing its Order Dismissing Case.

STANDARD OF REVIEW

¶8 Issues of justiciability, including standing, are questions of law which we review de novo. *Barrett v. State*, 2024 MT 86, ¶ 29, ___ Mont. ___, ___ P.3d ___. “We normally review a district court’s order granting or denying a motion to intervene for abuse of discretion. However, the interpretation of a statute is a question of law that we review de novo. This Court reviews a district court’s interpretation of law for correctness.” *U.A.C.*, ¶ 9 (internal citations omitted).

DISCUSSION

¶9 *Whether the District Court erred by dismissing R.N.’s abuse and neglect case.*

¶10 Standing and justiciability are threshold issues in this appeal. The Wagners brought their motion to intervene pursuant to M. R. Civ. P. 24 and § 41-3-422(9)(b), MCA. The

Department asserts the District Court misunderstood and misapplied §§ 41-3-422(9) and -437(4), MCA, in permitting the Wagners to intervene. It asserts that had the District Court correctly interpreted and applied §§ 41-3-422(9) and -437(4), MCA, it would have not permitted intervention and the Wagners would not have standing to pursue this appeal.

¶11 The Montana Rules of Civil Procedure and Evidence apply to child welfare proceedings except as modified in Title 41. Section 41-3-422(4), MCA. M. R. Civ. P. 24(a) provides for interventions of right and 24(b) provides for permissive interventions. However, as we discussed in *U.A.C.*:

§ 41-3-422(9)(b), MCA, ‘clearly modifies the circumstances under which a party may intervene in a proceeding under Title 41, chapter 3.’ *A.G.* 2020 Mont. LEXIS 518 at 6. In *A.G.* this Court instructed that § 41-3-422(9)(b), MCA, rather than Rule 24, is the standard for determining whether a district court should grant intervention in an abuse and neglect case. *A.G.*, 2020 Mont. LEXIS 518 at 5-7. We must therefore read and interpret §§ 41-3-422(9)(b) and 41-3-437(4), MCA, together as a whole.

U.A.C., ¶ 12.

¶12 Section 41-3-422(9)(b), MCA, provides:

A foster parent, preadoptive parent, or a 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. A person granted intervention pursuant to this subsection is entitled to participate in the adjudicatory hearing held pursuant to 41-3-437 and to notice and participation in subsequent proceedings held pursuant to this chapter involving the custody of the child.

The purpose of § 41-3-422(9)(b), MCA, is to “provide protection for abandoned children by allowing caretakers to participate in the proceedings as parties.” *U.A.C.*, ¶ 14. Section

41-3-437(4), MCA, provides in pertinent part, “[i]n a case in which abandonment has been alleged . . . the court shall hear offered evidence, including evidence offered by a person appearing pursuant to 41-3-422(9)(a) or (9)(b), regarding” topics related to the child’s abandonment—including how the child was placed with the caregiver and the intent of the parent(s), how the child has been cared for by the caregiver, the continuity of care provided by the caretaker, and the circumstances of the abandonment. Section 41-3-437(4), MCA.

¶13 In *U.A.C.*, the foster parents filed a motion to intervene when the Department proposed to move U.A.C. from placement with foster parents to her grandmother’s home. The district court denied intervention and the foster parents appealed. *U.A.C.*, ¶ 6. We determined that:

Title 41 mandates that persons seeking intervention must satisfy two threshold requirements before a district court may conduct a hearing to address the motion to intervene: (1) the party seeking intervention must be in one of the enumerated groups—a foster parent, a preadoptive parent, or relative of the child who has cared for a child; and (2) there must be an allegation of abandonment.

U.A.C., ¶ 14. As a threshold requirement for holding a hearing was not satisfied—there had been no allegation of abandonment as required by § 41-3-437(4), MCA—we affirmed the district court. Here, the District Court interpreted *U.A.C.* to provide that once an allegation of abandonment is made, the only remaining determination to be made is whether intervention is in the best interest of the child. The Department asserts the District Court’s interpretation of *U.A.C.* is too narrow and ignored the requirements of holding a hearing to hear evidence regarding the circumstances of abandonment. We agree.

¶14 The District Court determined that as abandonment had been alleged at the outset—although it was apparent at hearing on the intervention that the Department had withdrawn its initial abandonment theory, was no longer pursuing termination, and expressed intention to reunify R.N. with Mother—the criteria of *U.A.C.* and §§ 41-3-442(9)(b) and 41-3-437(4), MCA, had been met. The District Court did not appreciate the factual distinction that there had been no abandonment allegation in *U.A.C.* which resulted in the court’s misinterpretation of *U.A.C.* and its misapplication of § 41-3-437(4), MCA. In *U.A.C.*, as there was no allegation of abandonment, the foster parents could not intervene, the district court was not required to hold a hearing to address the motion to intervene, and we did not need to consider whether the district court held an appropriate hearing or whether the evidence presented at that hearing supported intervention.

¶15 When § 41-3-442(9)(b) and § 41-3-437(4), MCA, are read together, once an allegation of abandonment has been made and a request for intervention has been made by a foster parent, a pre-adoptive parent, or a relative of the child who is caring for or who has cared for the child, the district court must hold a hearing pursuant to § 41-3-437(4)—a -437(4) hearing—to hear evidence related to the circumstances of the alleged abandonment and the best interests of the child. Here, on May 16, 2023, the District Court convened a -437(4) intervention hearing based on the initial allegation of abandonment in which the foster parents were permitted to participate. However, the foster parents presented no evidence with regard to the abandonment circumstances outlined in § 41-3-437(4)(a)-(b)(i)-(iii), MCA, instead asserting intervention was appropriate as a “matter of equity and -- right and wrong” as their argument against “the Department being able to change its

mind midstream and take away a foster parents or -- or any third party's rights[.]” Both Mother and the Department contested the intervention. At that hearing, it was apparent the Department was no longer pursuing termination of Mother’s parental rights, but rather intended to reunify R.N. with Mother.

¶16 After the District Court permitted Wagners to intervene and the Department had placed R.N. with Mother, Wagners filed Intervenors’ Motion for Permanency Hearing and for Temporary Emergency Placement in which they sought the District Court to immediately place R.N. in their custody and to compel the Department to pursue termination of Mother’s parental rights or explain why it failed to do so. Wagners continue to seek this remedy—maintaining ongoing litigation to terminate Mother’s parental rights—on appeal asserting the District Court erred in granting the Department’s motion to dismiss the case. The Department not only asserts Wagners should have been precluded, as a matter of law, from intervening in the case, it asserts they also lack standing because this Court cannot provide them the remedy they seek. Again, we agree.

¶17 “A parent has a fundamental liberty interest to the care and custody of their child.” *U.A.C.*, ¶ 20. A foster care arrangement, however, does not trigger fundamental rights.

Foster parents enter into a contractual agreement with the Department to temporarily care for the child while the Department pursues reunification efforts with the child’s parents. Although foster parents frequently and understandably develop emotional ties with their foster child, the relationship is nonetheless rooted in an arrangement with the State and does not entitle the foster parents to a parental liberty interest.

U.A.C., ¶ 21. Wagners do not have a fundamental liberty interest in the care and custody of R.N. because Mother’s rights have not been terminated. Wagners entered into a

contractual agreement with the Department to care for R.N., so that he could eventually be reunified with Mother. This arrangement did not trigger the constitutional right to parent. *U.A.C.*, ¶ 22. Despite them being permitted to intervene, intervention did not confer any fundamental or parental rights upon them, nor did it confer upon them the ability to step into the role of prosecutor or the ability to force the Department to file for and prosecute termination of Mother's parental rights.

¶18 In, *State v. Eighth Jud. Dist. Ct.*, Nos. OP 22-0099, OP 22-0100, Order, 2022 LEXIS 353 (Apr. 19, 2022), we addressed the legal question as to who may file and prosecute a petition for termination of parental rights. In these cases, the Department petitioned for emergency protective services, temporary legal custody, and adjudication of the children as youths in need of care (YINC) when the birth mother left her children in Montana with relatives. After the Department became involved, the birth mother returned to Montana. The children were adjudicated as YINC and temporary legal custody was granted to the Department. Although the birth mother worked her treatment plan over the next year and met the conditions for reunification, her children remained opposed to reunification. The Department indicated it intended to pursue a guardianship with the children's placement, but the children's counsel advocated for termination of birth mother's parental rights. The Department maintained it could not establish termination as birth mother had met the conditions for reunification. The district court ordered the Department to petition for termination or appoint substitute counsel to do so. Substitute counsel for the Department likewise concluded there was insufficient evidence to petition for termination and advised the district court of such. The children's counsel then filed a motion to amend the initial

petition to a petition for termination, following which the district court found probable cause for the filing of a petition for termination and ordered children’s counsel to submit a proposed amended petition for termination of birth mother’s parental rights. After counsel did so, the court signed and filed the petition. The Department sought supervisory control which we accepted.

¶19 In accepting supervisory control over the district court and striking the petition to terminate birth mother’s parental rights we noted:

§ 41-3-422(2), MCA, provides the pertinent authority for petitions under Title 41, Chapter 3, MCA: ‘The county attorney, attorney general, or an attorney hired by the county shall file all petitions under this chapter.’ The District Court erred as a matter of law when it concluded that someone other than the aforementioned may file a petition to terminate parental rights[.]

State v. Eighth Jud. Dist. Ct., at 15. We determined the situation to be similar in nature to *State ex. rel. Fletcher v. Dist. Ct.*, 260 Mont. 410, 418, 859 P.2d 992, 997 (1993), where the district court abused its discretion by intruding upon the prosecutorial discretion of the Attorney General and county attorney by denying their lawful motions to dismiss criminal charges:

When they are acting lawfully and within their constitutional and statutory authority, the district court may not interfere in the prosecutorial functions of the Attorney general and the county attorney -- the executive branch -- without violating the separation of powers embodied in Article III, Section 1, of the Constitution of the State of Montana.

Fletcher v. Dist. Ct., at 418, 859 P.2d, at 997.

¶20 Similar to the exclusive authority provided to the State to file and prosecute criminal causes, only an attorney for the State—a county attorney, attorney general, or an attorney hired by the county—can initiate and prosecute a child welfare action under Title 41. When

the Department filed its motion to dismiss, it in essence, withdrew its petition for termination and neither the District Court, nor this Court, has the authority to order or compel the Department to refile and prosecute its petition for termination. Such would violate the separation of powers embodied in Article III, Section 1, of the Constitution of the State of Montana. Thus, even if Wagners could have established the right to intervene, neither the District Court, nor this Court, could grant them the remedy they seek on appeal.

CONCLUSION

¶21 The District Court did not err in granting the Department's motion to dismiss.

/S/ INGRID GUSTAFSON

We concur:

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ JIM RICE