

No. DA 25-0120

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**IN RE THE ADOPTION OF A.K.M. and R.J.M.,  
Minor Children,  
B.J.R. and T.E.R.,  
Petitioners and Appellees,  
and M.M.M. and A.F.M.,  
Respondents and Appellants.**

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**OPENING BRIEF OF APPELLANT**

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On Appeal from the Montana Twentieth Judicial District Court,  
Lake County, the Honorable John Mercer, Presiding

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## **STATEMENT OF THE ISSUE**

The guardians of A.K.M. and R.J.M. petitioned to terminate Father's parental rights under the Adoption Act, MCA §42-2-607. The district court did not appoint counsel for Father even though he was incarcerated, indigent, did not appear at the proceedings, and did not waive his right to counsel. Did the court err by terminating Father's parental rights in violation of his right to Equal Protection and his right to Due Process?

## **STATEMENT OF THE CASE AND FACTS**

Father, A.F.M., appeals an Order from the Twentieth Judicial District Court terminating his parental rights to A.K.M., who was four years old at the time of the petition being filed, and R.J.M., who was six years old.

On March 20, 2024, B.J.R. and T.E.R., guardians of A.K.M. and R.J.M., filed a combined petition for adoption and petition to terminate the parental rights of A.F.M., Father, and M.M.M., Mother. D.C. Doc. 1.

Father was imprisoned in Montana State Prison at the time the petition was filed. He was served with the petition on March 29, 2024,

according to a Sheriff's Return of Personal Service submitted by Emily Von Jentzen, counsel for petitioners. D.C. Doc. 2.

Father did not respond to the petition. On May 16, 2024, Ms. Von Jentzen filed a Request for Entry of Default, noting that the time had expired for responding to a civil action under the Montana Rules of Civil Procedure. D.C. Doc. 7.

On May 22, 2024, the district court entered a default judgment against Father. D.C. Doc. 9.

The petition alleged that Father had “a lengthy history of substance abuse issues” and noted that he had been convicted of three drug-related crimes. It stated he was currently incarcerated in Montana State Prison. D.C. Doc. 1 at 4. According to the petition, Father had completed Department services when a dependency and neglect petition had been filed in Lewis and Clark County. This earlier case had only concerned R.J.M., because A.K.M. had not yet been born. *Id.* The case was dismissed because Father had successfully completed his treatment plan and further intervention was not required. *Id.* After dismissal, it was unclear from the petition what Father's role was in subsequent allegations and subsequent interventions by the Department. It was not

clear whether he had been subject to further Departmental intervention or was incarcerated at the time. *Id.*

Maternal grandfather B.J.R. and his wife T.E.R. had been granted guardianship of the children by the Lewis and Clark district court in October, 2023. *Id.* at 2.

According to the petition, Father had been given an opportunity to arrange visitation, but had not followed through. He had only spoken with the children by video call for 50% of calls that had been arranged, the petition alleged. *Id.* at 6.

After counsel for petitioners filed a motion to set a hearing to terminate Father's parental rights, on May 30, 2024, the district court issued an order on June 12, 2024, setting a hearing. D.C. Doc. 11. The order was cc'd to Father, but there is no evidence in the record that Father was served with the order. Thus there is no evidence that Father was even given notice of the termination hearing, given the unreliability and delays of the prison mail system.

On July 25, 2024, the district court held a hearing on the petition to terminate Father's parental rights. Father was not present at the



hearing. He was not represented by counsel at the termination hearing nor throughout the proceedings. D.C. Doc. 12.

At the termination hearing, counsel for petitioners presented no witnesses or evidence in support of the allegations in the petition for termination of Father's rights. The district court stated it would adopt the allegations of the petition as presented by the petitioners. 7/25/24 Tr. at 9. "But the Court does find that the father's rights should be terminated for the reasons set forth in the petition." *Id.* at 10.

On September 12, 2024, the district court issued an order terminating Father's parental rights. D.C. Doc. 15, attached as App. A. and App. B (for A.K.M. and R.J.M., respectively). The order's findings of fact recited the petition's allegations verbatim. *Id.* at 2. The court concluded that Father's parental rights should be terminated because he had lost custody of the children under a previous judicial determination. *Id.* at 3. Additionally, the court reasoned that termination of parental rights was in the best interests of the children because placing them in Father's legal and physical custody would pose a risk of substantial harm to the physical and psychological well-being of the children. *Id.*

On February 13, 2025, Father filed an out-of-time appeal of the termination of his parental rights with respect to A.K.M., informing this Court that he had not known he had a right to an attorney. ROA DA 25-0120, Doc. 1. On February 24, 2025, this Court granted the out of time appeal, noting that Montana Rule of Appellate Procedure 4(6) permits out of time appeals “in the infrequent harsh case or in extraordinary circumstances amounting to a gross miscarriage of justice.” ROA for DA 25-0120, Doc. 2. Father separately filed an out-of-time appeal for R.J.M. on March 11, 2025, which was also granted by this Court on April 8, 2025.

The case against Mother proceeded differently, primarily because the district court did eventually appoint counsel for her. Mother responded to the initial petition by submitting a handwritten response and affidavit. She asked for a nine-month extension, stating that she needed more time to acquire counsel and to demonstrate stability, sobriety and responsibility to the court. D.C. Doc. 5.

Mother was present at the July, 2024 hearing to terminate Father’s parental rights and requested that the hearing be continued to September, 2024 with respect to her. D.C. Doc. 12. On September 4,

2024, counsel for the guardians/petitioners filed a motion requesting that the court take judicial notice of documents from Mother's prior criminal proceedings in various counties and prior dependency and neglect proceedings. D.C. Doc. 13. These documents were submitted after the district court stated in court at the July hearing that he would terminate Father's parental rights. 7/25/24 Tr. at 9.

At the hearing on September 12, 2024, Mother represented herself and tried to cross-examine the guardians. The district court became concerned about Mother not being represented by counsel. D.C. Doc. 16; 9/12/24 Tr. at 23-24, 30.

Mother filed a motion to terminate the guardianship before the next hearing. D.C. Doc. 18. She also wrote to the district court explaining that she had requested assistance from fourteen law firms and believed that termination of her rights and adoption would end her relationship with her children. D.C. Doc. 22.

The district court appointed the office of the public defender to represent Mother on October 10, 2024. D.C. Doc. 20. Mother's counsel filed a motion to terminate the guardianship in Lewis and Clark County D.C. Doc. 26, Ex. A. She also filed a motion to continue the November

termination hearing until counsel could adequately prepare for the case. D.C. Doc. 24.

On December 4, 2024, the Lewis and Clark County district court denied Mother's motion to terminate the guardianship. Counsel for the petitioners in the adoption case filed a copy with the Lake County district court. D.C. Doc. 25.

On January 3, 2025, the Lake County district court conducted a hearing on the petition to terminate Mother's parental rights. Mother's counsel cross-examined the petitioner's witnesses and presented several witnesses to testify on mother's behalf. *See generally* 1/3/25 Hrg. Tr. The district court decided not to terminate Mother's parental rights and stated it wanted to give Mother more time to prove herself. D.C. Doc. 46. The court appointed a guardian ad litem and asked for a report in four months. D.C. Doc. 46. The court also issued a supplemental order stating that it was not necessary to terminate Mother's parental rights in order for the guardians to control visitation and Mother's interaction with the children. D.C. Doc. 47.

In March, 2024, the guardian ad litem submitted a report to the court recommending that Mother's parental rights not be terminated. D.C. Doc. 56.

On April 3, 2024, the court held a hearing on the petition and decided not to dismiss the petition to terminate Mother's rights, nor to grant the petition. D.C. Doc. 59.

### **SUMMARY OF THE ARGUMENTS**

Father's constitutional rights to Equal Protection and to Due Process were violated when the district court terminated his parental rights without appointing an attorney for him. Father was incarcerated, indigent, and did not waive his right to counsel. Father did not appear for the proceedings, which were unfair because he had no attorney to cross-examine witnesses against him or present evidence on his behalf. Termination of his parental rights under these circumstances was unconstitutional and resulted in substantial injustice.

### **STANDARD OF REVIEW**

This Court's review of constitutional questions is plenary. *A.W.S. v. A.W.*, 2014 MT 322, ¶ 10, 377 Mont. 234, 339 P.3d 414. The Court reviews a district court's termination of parental rights for an abuse of

discretion. *In re T.N.-S.*, 2015 MT 117, ¶16, 379 Mont. 60, 347 P.3d 1263. A district court abuses its discretion when it “acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice.” *In re R.M.T.*, 2011 MT 164, ¶26, 361 Mont. 159, 256 P.3d 935.

## **ARGUMENT**

### **I. FATHER WAS DENIED HIS RIGHT TO EQUAL PROTECTION WHEN THE DISTRICT COURT DID NOT APPOINT HIM A LAWYER.**

This case closely resembles *A.W.S. v. A.W.*, in which this Court held that the Montana Constitution’s right to Equal Protection requires that counsel be appointed for indigent parents in termination proceedings brought under the Adoption Act. *A.W.S. v. A.W.*, 2014 MT 322, 377 Mont. 234, 339 P.3d 414.

#### **A. Montana’s Equal Protection right guarantees that indigent parents who may lose their parental rights under an Adoption Act petition are entitled to a lawyer.**

As this Court explained in *A.W.S.*, the Montana Constitution guarantees that no person shall be denied equal protection of the laws. Mont. Const. art. II, § 4. The Equal Protection Clauses in the Fourteenth Amendment of the U.S. Constitution, and in Article II,

section 4 of the Montana Constitution embody a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner. Montana’s Equal Protection Clause provides even more individual protection than the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *A.W.S.*, ¶11.

In *A.W.S.*, this Court conducted an equal protection analysis, comparing indigent parents in cases brought by the State under Title 41 of the Montana Code to indigent parents in cases brought by private parties under the Adoption Act. The first class of parents has a statutory right to counsel. *A.W.S.*, ¶13. By contrast, there is no explicit statutory right to counsel for indigent parents whose parental rights may be terminated under the Adoption Act. *Id.* ¶14. Both sets of parents are similarly situated, however, because both are at risk of having their fundamental right to parent taken from them. *Id.* ¶15. Strict scrutiny applies because fundamental rights are affected. *Id.* ¶16. Applying strict scrutiny to the Adoption Act, this Court determined that “the differences between the involuntary termination provisions in the abuse and neglect statutes and in the Adoption Act are not narrowly tailored to serve a compelling government interest.” *Id.* ¶23. This Court

held that “Montana’s right to equal protection requires that counsel be appointed for indigent parents in termination proceedings brought under the Adoption Act.” *Id.*, ¶26.

**B. Father’s Equal Protection right was violated because the district court did not appoint a lawyer for him in proceedings to terminate his parental rights.**

Here, Father was incarcerated and thus indigent at the time the petition to terminate his rights was filed under the Adoption Act. He remained unrepresented throughout the entire proceedings that were directed at terminating his parental rights. Had the State brought this petition to terminate his parental rights under the abuse and neglect statutes, Father would have automatically had counsel appointed for him throughout the proceedings. Failure to appoint counsel for him would have resulted in reversal of the termination of his rights. This Court has held that failure to appoint counsel, or even to have ineffective counsel, in termination proceedings under Title 41, is reversible error. “Fundamental fairness requires that a parent be represented by counsel at proceedings to terminate parental rights.” *In re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, 87 P.3d 408, citing *In re*



*Custody of M.W.*, 2001 MT 78, ¶ 25, 305 Mont. 80, 23 P.3d 206; *In re A.F.-C.*, 2001 MT 283, ¶ 42, 307 Mont. 258, 37 P.3d 724.

This Court has further held that parents who lose their rights in Adoption Act cases cannot waive their right to counsel by mere silence. The facts of this case resemble those of *In re L.F.R.*, 2019 MT 2, 394 Mont. 61,432 P.3d 1030. The district court in that case failed to advise the father of his right to counsel, even though he did appear at the proceeding to terminate his rights. This Court concluded that in such circumstances, a parent cannot waive the right to counsel by mere silence. *L.F.R.*, ¶12. This Court explained that “generally, waiver of the right to counsel requires a knowing and voluntary waiver.” See §46-8-102, MCA (a criminal defendant may waive the right to counsel “knowingly, voluntarily, and intelligently”); see also *City of Missoula v. Fogarty*, 2013 MT 254, ¶ 12, 371 Mont. 513, 309 P.3d 10 (the court should make inquiry of the defendant “to the extent it deems necessary to ensure that the defendant's waiver of counsel is voluntary, knowing, and intelligent.”)

Here, there is nothing in the record suggesting that Father somehow waived his right to counsel or was not indigent despite being

incarcerated in prison. Instead, as in *L.F.R.*, there is no evidence that Father was ever informed that if he wanted counsel, he had a right to be appointed counsel. The only document that was served to Father was the petition filed by the guardians. It does not inform Father of his right to an attorney. *See* D.C. Doc. 1.

In fact, the only evidence that is in the record on this question demonstrates that Father was unaware that he had the right to counsel. In Father's Petition for Out-of-Time appeal, he indicated that he failed to file a timely notice of appeal "because he had no attorney and did not know his rights on this matter." *See* ROA for this case, DA 25-0120, Doc. 1, February 13, 2025 Petition for Out-of-Time Appeal.

Finally, the district court became aware of the issue of the indigent parents' right to counsel around the same time it issued the order terminating father's parental rights. *See* 9/12/24 Tr. at 23-24, 30. Mother raised the issue of her need for counsel and then the court appointed counsel for her. The district court had knowledge and the opportunity to correct its error with respect to Father.

**II. FATHER WAS ALSO DENIED HIS RIGHT TO DUE PROCESS WHEN THE DISTRICT COURT DID NOT APPOINT A LAWYER FOR HIM AND THEN TERMINATED HIS PARENTAL RIGHTS.**

This Court also stated in *A.W.S.* that failure to appoint counsel for indigent parents in Adoption Act proceedings would call into question the constitutionality of those proceedings, though it did not reach the issue of whether the parent's right to Due Process would be violated. *A.W.S.*, ¶ 25.

**A. Parents have a fundamental right to Due Process in dependency and neglect proceedings.**

A natural parent's right to care and custody of a child is a fundamental liberty interest which courts must protect with fundamentally fair procedures at all stages of the proceedings for the termination of parental rights. *In re T.C. and W.C.*, 2001 MT 264, ¶ 22, 307 Mont. 244, 37 P.3d 70; *In re A.F.-C.*, 2001 MT 283, ¶ 31, 237 Mont. 358, 37 P.3d 724.

Accordingly, procedures employed to terminate the relationship between a parent and child must meet the requisites of the Due Process Clause of the Fourteenth Amendment. *Lassiter v. Dept. of Social*

*Services*, 425 U.S. 18, 24-32 (1981). Montana’s Constitution provides the right to Due Process in Article II, section 17.

Denying the right to counsel in state-initiated termination proceedings would call into question the constitutionality of those proceedings. *In re S.A.J.B.*, 679 N.W.2d 645, 651 (Iowa, 2004) (citing *Lassiter*, 452 U.S. at 31-32). There is a “substantial risk of an unfair procedure and outcome” in proceedings brought to terminate parental rights. *In re A.S.A.*, 258 Mont. 194, 198, 852 P.2d 127, 129-30 (1993) (holding that failure to appoint counsel for an indigent parent in a child abuse and neglect proceeding violated the parent’s right to Due Process under Montana Constitution Article II, § 17).

“Key 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 record should demonstrate that the parent had notice of the termination proceeding and was given an opportunity to be heard.

In *A.W.S.*, this Court observed:

Without representation, a parent would not have an equal opportunity to present evidence and scrutinize the State’s evidence. The potential for unfairness is especially likely when an indigent

parent is involved. Indigent parents often have a limited education and are unfamiliar with legal proceedings. If an indigent parent is unrepresented at the termination proceedings, the risk is substantial that the parent will lose her child due to intimidation, inarticulateness, or confusion.

*A.W.S.*, ¶ 25., *citing In re A.S.A.*, 258 Mont. at 198, 852 P.2d at 129; *see also In re Declaring A.N.W.*, 2006 MT 42, ¶ 34, 331 Mont. 208, 130 P.3d 619.

This Court further explained that “the risk of an unfair decision is equally significant to parent and child in both public and private proceedings.” *A.W.S.*, ¶ 25.

**B. Because Father had no lawyer, the termination proceedings were unfair and he was deprived of Due Process.**

Here, the proceedings to terminate Father’s parental rights were patently unfair. The record does not demonstrate that Father even had notice of the proceeding, let alone an opportunity to be heard. This is a violation of the most minimal requirements for Due Process. Moreover, because he had no counsel, Father had no opportunity to challenge any of the allegations against him. Counsel representing the guardians were not even required to submit any evidence in support of the allegations.

Father did not have an attorney, who could have cross-examined any witnesses, put on any evidence on his behalf, discussed his past relationship with the children, or presented information regarding his eligibility for parole. (Father was sentenced to a 20-year, partially suspended, sentence for drug distribution in March, 2021, and appears to be eligible for parole in the near future.<sup>1</sup>) In any case, no information was presented regarding Father's eligibility for parole. Because Father had no attorney, the district court accepted the allegations of the petition at face value.

The way in which Father was treated by the court seems particularly unjust when compared with the way Mother was treated. Mother was appointed counsel a month after the district court issued the order terminating Father's parental rights. Mother's counsel cross-examined the witnesses against her, called witnesses who testified that Mother had a close relationship with the children, and elicited testimony from Mother that if her rights were terminated, the

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<sup>1</sup> See Montana Department of Corrections Inmate Search website, available at <https://offendersearch.mt.gov/conweb/>.

guardians would never allow her to see her children again. Because of her attorney's advocacy, Mother's parental rights were not terminated.

### **CONCLUSION**

For all of the above reasons, Father respectfully requests this Court reverse the order of the district court terminating his parental rights and remand for further proceedings. Proceedings should be restarted at the point in which Father was served with the petition for termination and Father should be appointed an attorney immediately.

Respectfully submitted this 20<sup>th</sup> day of June, 2025.

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By: /s/ Laura Reed  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is less than 10,000, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/    Laura Reed  
         Laura Reed



## **APPENDIX**

Order Terminating Parental Rights to A.K.M. ....App. A

Order Terminating Parental Rights to R.J.M.....App. B

## **CERTIFICATE OF SERVICE**

I, Laura Marie Reed, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-20-2025:

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