IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0120

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.

REPLY BRIEF OF APPELLANT

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

APPEARANCES:

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Appellant respectfully submits this Reply to Appellee's *Response*.

I. THIS COURT SHOULD REVERSE THE ORDER TERMINATING FATHER'S PARENTAL RIGHTS BECAUSE FATHER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION.

Counsel for the Petitioners, guardians B.J.R. and T.E.R., argues in her *Response* that Father's constitutional right to Equal Protection was not violated despite the district court's failure to appoint him counsel for the termination proceedings. She asks this Court to disregard its holding in *In re A.W.S. v. A.W.,* 2014 MT 322, ¶ 26, 377 Mont. 234, 339 P.3d 414.

Ms. Von Jentzen argues that Father's case is distinguishable from *A.W.S.* because the parent in that case appeared in court, participated in the proceedings, and indicated she needed counsel. Ms. Von Jentzen contends that Father could have appeared after he was personally served with the petition and that he was responsible for the court's failure to appoint him counsel because he failed to make any attempt to participate in the proceedings. "Father's various criminal proceedings and years of dependency proceedings," she asserts, show that "he was no stranger to the court process." *Response* at 14, 19.

This Court should reject her argument. Father was incarcerated in Montana State Prison throughout the proceedings and it was physically impossible for him to appear in court. Nor could he appear by video without assistance from the district court, an attorney, or prison staff, at a minimum. The petition that he was served did not inform him that he could have the opportunity to appear via video from prison. D.C. Doc. 1.

With respect to Father's past experience in the legal system, this Court rejected a similar argument in *A.W.S.*, noting that the mother's "ability to obtain legal services through the public defender's office in unrelated cases has no bearing on the question posed here." *A.W.S.*, ¶20.

Counsel for Petitioners maintains that Father should have given "some indication to the court that [he wanted] counsel appointed because he was indigent or financially unable to secure representation," citing *In re J.W.M.*, 2015 MT 231, 380 Mont. 282, 354 P.3d 626. *Response* at 10. But the facts in *J.W.M.* are quite different. The father in *J.W.M.* was represented by counsel throughout much of the termination proceedings, until his counsel withdrew. The father in that

case was able to appear in court and was given notice that he could have counsel appointed for him. He failed to request counsel and this Court refused to reverse the termination order. Here, by contrast, Father was never represented by counsel, was never given notice that he could have counsel appointed for him, and was physically unable to appear in court because he was imprisoned.

It is also important that the petition that was served on Father did not inform him that he could have counsel appointed for him if he were indigent. *See* D.C. Doc. 1. Counsel for Petitioners argues that her petition to terminate Father's parental rights was sufficient and that she was not required to inform him that he had could have counsel appointed for him if he were indigent. *Response* at 13.

But this Court has held that indigent parents in Adoption Act cases have an Equal Protection right to be treated similarly to indigent parent whose rights are at risk under Title 41—specifically, in having a right to counsel in termination proceedings. *A.W.S.*, ¶ 26. This right is not meaningful if the parent is not made aware of it. Title 41 requires that the petitions filed by the State in abuse and neglect proceedings inform the parent of their right to counsel if they are indigent.

MCA § 41-3-422 provides:

> **(13)** Service of a petition under this section must be accompanied by a written notice advising the child's parent, guardian, or other person having physical or legal custody of the child of the:
>
> **(a)** right, pursuant to 41-3-425, to appointment or assignment of counsel if the person is indigent or if appointment or assignment of counsel is required under the federal Indian Child Welfare Act, if applicable;
>
> **(b)** right to contest the allegations in the petition; and
>
> **(c)** timelines for hearings and determinations required under this chapter.

Here, Father was never informed of his right to counsel, either by Petitioners or by the district court. In *A.W.S.*, this Court asked "[I]s there a compelling reason why counsel is provided to an indigent parent facing the involuntary termination of her parental rights in abuse and neglect proceedings, but not when such proceedings are commenced under the Adoption Act?" A similar question could be asked here. Is there a compelling reason why notice of the right to counsel for indigent parents is required under Title 41, but not under the Adoption Act?

The answer is no. Father's right to Equal Protection required the district court to appoint him counsel because he was indigent, and it also required the court to notify him of this right.

Counsel for Petitioners also maintains, unreasonably, that the fact that Father was incarcerated does not prove that he was indigent. *Response* at 17. Certainly, the fact that he was incarcerated suggests it was more likely than not that he was indigent. Ms. Von Jentzen incorrectly places the burden of proof on Father, suggesting Father must prove all facts demonstrating that his rights were violated. On the contrary, Montana law provides that the burden of proof that the proceedings were fair lies with the State, exercising its power through the district court when it terminates a parent's rights. *See A.W.S.*, ¶17, citing *Snetsinger v. Montana Univ. System*, 2004 MT 390, ¶17, 325 Mont. 148, 104 P. 3d 445. Moreover, orders to terminate parental rights under the Adoption Act must be supported by clear and convincing evidence, which must be offered by the petitioner. *In re Adoption of K.P.M.*, 2009 MT 31, ¶ 10, 349 Mont. 170, 201 P.3d 833.

Petitioners' argument – that Father's Equal Protection right was not violated – is unavailing. Father's case falls squarely under this

Court's precedent in *A.W.S.* He had an Equal Protection right to be represented by counsel in this termination proceeding, and the district court violated that right by failing to appoint counsel for him.

II. THIS COURT SHOULD ALSO REVERSE THE TERMINATION ORDER BECAUSE FATHER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.

Counsel for Petitioners argues in her *Response* that Father was afforded Due Process. She maintains that Due Process is fully satisfied by the parent being afforded "notice and an opportunity to be heard." *Response* at 12. According to Ms. Von Jentzen, this minimal Due Process requirement was satisfied by Father being served with the petition to terminate his rights. *Id.* Father was not served with the order setting the termination hearing. *See* D.C. Doc. 11 (district court order setting hearing which was cc'd to Father).

Petitioner argues that Father was given notice of the hearing because the court's order setting the termination hearing, which was not served on Father, was cc'd to Father and therefore presumably mailed to him at the prison. "State law presumes that a letter mailed in the ordinary course of business has been received." *Response* at 12-13, citing MCA § 26-1-602 (20, 24).

Counsel for Petitioners fails to mention, however, that the statutory provisions in Title 42, Montana's Adoption Act, require that notice of a hearing on a petition for termination for parental rights "must be served" on the parents in such a proceeding.

MCA § 42-2-605(1) provides:

> Notice of a hearing to be held on the petition for termination of parental rights must be served in any manner appropriate under the Montana Rules of Civil Procedure or in any manner that the court may direct on…
>
> (d) a person who is recorded on the child's birth certificate as the child's father…

MCA § 42-2-605 (2) further provides that "The notice of hearing must inform the putative or presumed father or other parent that failure to appear at the hearing constitutes a waiver of the individual's interest in custody of the child and will result in the court's termination of the individual's rights to the child." Finally, proof of service of the notice of the hearing on the petition must be filed with the district court. A notarized acknowledgment of service by the party to be served is proof of personal service. MCA §42-2-605(3). If no proof of service is provided, and the Father does not appear at the termination hearing,

then the district court "shall adjourn the proceedings until that person is served with a notice of hearing." MCA § 42-2-605(4).

Here, the Petitioners and the district court fell far short of the statutory procedures required by the Adoption Act. Neither the petition that was served on Father, nor the court's mailed order setting the hearing date, informed him that failure to appear at the hearing would "constitute a waiver of the individual's interest in custody of the child and would result in the court's termination of the [his] rights to the child." *See* D.C. Doc. 1, D.C. Doc. 11. The district court did not require proof of service of the notice of the hearing and did not adjourn the proceedings, in violation of MCA § 42-2-605.

Not only was the notice deficient, but it failed to inform Father that he could have the opportunity to be heard. In short, the minimal requirements of Due Process were not met.

Ms. Von Jentzen's *Response* also overlooks the broader requirements of Due Process, which encompass far more than notice and an opportunity to be heard. This Court has explained that "when the State seeks to terminate a parent's interest in the care and custody of his or her child, the guiding due process principle requires that the

parent not be placed at an unfair disadvantage during the termination proceedings." *In re A.S.*, 2004 MT 62, ¶ 12, 320 Mont. 268, 87 P.3d 408.

Due Process requires that the parent be given an opportunity to scrutinize the evidence offered against him, to cross-examine witnesses against him, and to offer evidence on his own behalf. Here, Father was afforded none of these opportunities. The district court did not even require Petitioners to present evidence in support of their petition for termination. It simply accepted the allegations at face value, without sworn testimony and without admitting exhibits into evidence. 7/25/24 Tr. at 9. Father's right to Due Process was violated.

III. THIS COURT SHOULD REJECT APPELLANT'S ARGUMENT THAT THE FAILURE TO APPOINT FATHER COUNSEL WAS HARMLESS ERROR.

Petitioner argues that even if the district court was constitutionally required to appoint Father counsel for the termination proceedings, the failure to do so was harmless error because Father would have had his rights terminated anyway. *Response* at 20.

Petitioner offers this argument despite conceding that this Court has explained that the "harmless error" doctrine should be applied in parental termination cases only "on the rarest of occasions and with

great caution." *In re J.C.*, 2008 MT 127, ¶ 35, 343, Mont. 30, 183 P. 3d 22. *J.C.* is not on point because the parents in that case were represented by counsel throughout the termination proceedings. (The error was the district court failing to issue an adjudication order. This Court found that error harmless, in part because the parents were represented by counsel throughout the proceedings. *J.C.*, ¶ 47.)

Petitioner also argues that this Court should not consider whether Father was eligible for parole in the near future. *Response* at 22-23. But an incarcerated parent's eligibility for parole is highly relevant information in termination proceedings. Father was not given an opportunity to offer this information to the court.

In any case, publicly available information indicates that Father has already been paroled as of July, 2025. Father asks this court to take judicial notice of the information on the Montana DOC inmate locator website, which indicates that Father was paroled on July 9, 2025. *See* https://offendersearch.mt.gov/conweb/.

Petitioner's own recited facts also confirm that Father was due to be paroled. She notes that Father was sentenced in 2020 to a 20-year, 15-suspended sentence for drug distribution. *Response* at 5. Thus,

according to Petitioner's facts, Father had completely served the five-year incarceration portion of his sentence by 2025, and was required to be paroled in 2025.

Petitioner argues that it was harmless error to terminate Father's rights because the best interests of the children always outweigh the procedural requirements of termination proceedings. But a key feature of this case that Petitioner fails to consider is that the children in this case had already been placed with guardians (the Petitioners). Thus, her arguments and citations about the best interests of the children and their need for permanency were no longer relevant. *Response* at 24. The Petitioners already had custody of the children and control over the children's safety. The district court made this point when it decided to order a report by the Guardian Ad Litem rather than terminating Mother's parental rights. *See* D.C. Doc. 47 at 1, noting "the Petitioners do not need [Mother's] parental rights terminated in order to control the extent and circumstances of [Mother's] visitation and her interaction with [A.K.M.] and [R.K.M.] as Petitioners' counsel pointed out, they currently have that authority, as Court appointed Guardians."

Petitioners apparently wished to terminate Father's (and Mother's) parental rights so that they could adopt the children and remove any possibility of the parents ever having the ability to contact their children in the future. The district court in Helena had already determined that guardianship was the best possible outcome for the children. Not satisfied with this result, Petitioners sought to terminate Father's rights in a different district court in Montana.

It was not harmless error for the Lake County district court to terminate Father's parental rights. In doing so, the court took away from Father his remaining limited rights to visitation with his children, rights that he still had under the Lewis and Clark County district court's guardianship order.

CONCLUSION

For all of the above reasons, the order terminating Father's parental rights should be reversed and this case remanded for new proceedings, starting with the point at which Father was served with the petition to terminate his rights.

Respectfully submitted this 30th day of July, 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 5000, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Laura Reed
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I, Laura Marie Reed, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 07-30-2025:

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