

WYOMING DEPENDENCY DOCKET 2008

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ADOPTION

- **WHEN CONSIDERING A PETITION FOR ADOPTION, THE DISTRICT COURT MAY FIND THAT THE BEST INTERESTS OF THE CHILD ARE VALID GROUNDS FOR DENIAL, EVEN IF THE STATUTORY FACTORS HAVE BEEN MET**

IN THE MATTER OF THE TERMINATION OF PARENTAL RIGHTS TO CW AND CW: LJC v. HMW and IN THE MATTER OF THE ADOPTION OF CW AND CW: TLC AND LJC v. HMW, 2008 WY 50, 182 P.3d 501 (Wyo. 2008).

Mother and Husband (not the putative father) appealed the District Court of Uinta County's denial of their petition for adoption and the denial of Mother's petition to terminate Father's (biological father) parental rights. The Wyoming Supreme Court upheld the district court's decisions.

Mother and Father are the biological parents of the children born in 1998 and 2000, respectively. The relationship between Mother and Father ended in 2002 and Father had limited contact with the children after 2003, when Mother and Husband married. In 2005, Father filed a petition to establish paternity of the two children and asked the court to establish a visitation schedule and child support payment obligations. Mother and Husband argued that Father's failure to pay child support, despite the lack of a court order, provided grounds to approve an adoption without his consent.

(1) Petition for Adoption Denied. In upholding the district court's ruling that Father had not willfully failed to make child support payments or bring them current, the supreme court turned to Wyo. Stat. Ann. § 1-22-110(a)(iv) (LexisNexis 2007), which provides:

The adoption of a child *may* be ordered without the written consent of a parent if: [...] the nonconsenting parent (iv) willfully failed to contribute to the support of the child for a period of one year immediately prior to the filing of the petition to adopt and has failed to bring the support obligation current within sixty days after service of the petition to adopt (emphasis added).

According to the supreme court's opinion, a requisite for determining whether a parent has brought support obligations current is the establishment of the amount of that obligation. Father never received notification of the amount owed. Furthermore, in his petition to establish paternity, Father requested visitation and child support payment schedules. The supreme court reaffirmed the duty of every parent to contribute to the support of his or her child, with or without a court order; however, the statutory use of the word "may" was held to grant permissive

authority to the courts. The district court had the authority to deny the petition for adoption if it was able to establish other grounds for denial. In the present case, the district court found that the best interests of the children were sufficient grounds for denial of the petition for adoption, even though two of the statutory factors had been met. Wyo. Stat. Ann. § 1-22-108(c)(iv) (LexisNexis 2007) states:

The court shall hear the evidence in support of the petition to adopt and in support of the objection to the petition and shall then determine whether:

(iv) The best interests and welfare of the child will be served by granting the putative father's claim to paternity or by allowing the petition to adopt.

The supreme court held that the district court properly found that Mother and Husband did not establish by clear and convincing evidence that the adoption would be in the best interests of the children based on the potential severance of the financial support from Father and the denial of a potential relationship between the children and Father. Furthermore, the district court found that the children's relationship with Mother's Husband will not cease as a result of the denial of the petition for adoption. Consequently, the court affirmed the district court's decision not to terminate Father's parental rights based on the finding that Mother was not prejudiced by this denial in light of the district court's denial of the adoption.

ADOPTION- NO CONSENT

- **WILFULLY FAILING TO PAY SEVENTY PERCENT OF CHILD SUPPORT OBLIGATIONS AND FAILING TO BRING CHILD SUPPORT OBLIGATIONS CURRENT WITHIN SIXTY DAYS AFTER SERVICE OF AN ADOPTION PETITION CONSTITUTES A WAIVER OF CONSENT TO AN ADOPTION**

IN THE MATTER OF THE ADOPTION OF JRH: MJH v. AV AND DV, 2006 WY 89, 138 P.3d 683 (Wyo. 2006).

Father appealed the District Court of Johnson County's order granting the adoption of his biological daughter without his consent. Father argued that the evidence did not prove that his failure to meet his child support obligations was willful and his status of incarceration prevented payment. Mother and Adoptive Father requested dismissal of the appeal on the basis of Father's failure to meet the timely notice requirement for appeal.

Mother and Father were not married when their daughter was born in 1999. One year later, an order for child support was granted and paternity was established. Father was subsequently incarcerated for a criminal offense and was at the Adult Community Corrections facility in Cheyenne when Mother filed the petition for adoption. Upon a request for a reduction in child support obligations in 2004, Father was required to pay more, as a result of additional income earned. From 2001 to 2004, Father paid only sixteen percent of his child support obligation and

had not seen his daughter since 2002. Upon the filing of the petition, Father ceased making any payments on his arrearages. Father subsequently filed an objection to the petition for adoption. The district court held that Father's consent was not required pursuant to Wyo. Stat. Ann. § 1-22-100(a)(ix)¹ because Father had willfully failed to pay at least seventy percent of the child support obligation and failed to bring the support obligation current within sixty days after service of the petition to adopt.

In addressing the timeliness of Father's appeal, the supreme court cited W.R.A.P. 2.01 and held, "an appeal is timely if it is filed with the clerk of the district court within thirty days of the entry of the 'appealable order.'" *In the Matter of the Adoption of JRH: MJH v. AV and DV*, 2006 WY 89, ¶9, 138 P.3d 683, 685 (Wyo. 2006). The supreme court did not make a determination as to whether the Findings and Conclusions constituted an "appealable order" under W.R.A.P. 1.05; however, the court concluded that Father filed a timely notice of appeal within thirty days of the issuance of the Decree of Adoption. Chief Justice Voigt and Justice Golden filed a concurring opinion in the result of the case and stated the appeal should have been dismissed as untimely because Father should have appealed from the Findings and Conclusions Regarding Adoption Without Consent. The concurring opinion identified a bifurcated process and stated that Father's involvement in the proceedings ceased when the district court determined that the adoption could proceed without his consent.

Adoption decrees are reviewed by the abuse of discretion standard. Parental consent is not required to grant an adoption if all of the statutory elements of Wyo. Stat. Ann. § 1-22-110 are met. Only the question of a willful failure to pay was examined by the supreme court in this case. Father argued that his status of incarceration was the only reason for his failure to pay child support. The supreme court distinguished the facts of the case at issue from *In re Adoption of TLC*, 2002 WY 76, 46 P.3d 863 (Wyo. 2002), in which the district court found that a willful failure to pay arose from the conduct that resulted in father's incarceration. In the present case, the district court did not hold that Father's incarceration was the only reason for his willfulness to avoid paying child support. Furthermore, the court emphasized, "incarceration does not provide total justification for nonpayment of child support" *In the Matter of the Adoption of JRH: MJH v. AV and DV*, 2006 WY 89, ¶17 (Wyo. 2006) (citing *TLC*, 2002 WY 76, ¶36, 46 P.3d at 875 (Wyo. 2002)). Financial ability to pay is considered by the court when determining whether a parent has upheld his or her child support obligations. Father did not provide a sufficient record for the court to review and did not introduce a record of the consent

¹ Wyo. Stat. Ann. § 1-22-110 (a)(ix) (LexisNexis 2003) states:

(a) [...] the adoption of a child may be ordered without the written consent of a parent or the putative father if [...] the court finds that the putative father or the nonconsenting parent or parents have: (ix) willfully failed to pay a total dollar amount of at least seventy percent (70%) of the court ordered support for a period of two (2) years or more and has failed to bring the support obligation one hundred percent (100%) current within sixty (60) days after service of the petition to adopt.

determination hearing. Consequently, the supreme court did not find any error in the decision of the district court and affirmed the adoption without Father's consent.

GUARDIANSHIP

- **IN AN INVOLUNTARY GUARDIANSHIP PROCEEDING, A FINDING OF PARENTAL UNFITNESS MUST BE MADE PRIOR TO DETERMINING THE CHILD'S BEST INTERESTS**

IN THE MATTER OF THE GUARDIANSHIP OF MEO: KO v. LDH AND BJH AND THE STATE OF WYOMING, 2006 WY 87, 138 P.3d 1145 (Wyo. 2006).

Mother appealed the appointment of temporary and permanent guardianship of MEO to Grandparents. Basis for the appeal was a failure to provide notice and an opportunity to be heard in the temporary guardianship proceedings and a failure by the district court to find Mother an unfit parent and applying only a best interests of the child standard for determining necessity of guardianship. Supreme court reversed the district court's appointment of Grandparents as MEO's guardians and remanded the case to the district court.

MEO was born in 1988. On September 10, 2004, MEO's maternal grandparents (Grandparents) filed petitions for temporary and permanent guardianship status. Out of concern for the welfare of MEO, Grandparents contacted the Laramie police and reported MEO as an abandoned child. Mother arranged for MEO to stay with a friend while Mother was in Rhode Island for an extended stay. The police released MEO to Mother following an investigation.

No hearing was requested nor scheduled for the motion for the temporary appointment of guardianship status and Mother denied receipt of any temporary guardianship documents. Grandparents received temporary guardianship of MEO on September 13, 2004, through a court order and Mother was not aware of the order until Grandparents arrived at her home on September 15, 2004, to take custody of MEO. Mother filed a notice of appearance; received a GAL appointment for MEO; and filed a motion for an immediate hearing to terminate the temporary guardianship, but the court denied the motion in October 2004. Mother challenged the procedural aspect of the temporary guardianship determination based on lack of notice and false allegations in the petition and her motion to dissolve the temporary guardianship was denied in November 2004.

Mother did not present her case during the first hearing on permanent guardianship due to time limitations. A second hearing was scheduled for December 23, 2004. After the first hearing, Mother filed a notice of appeal relating to the temporary guardianship, causing the district court to find that it had lost jurisdiction and to vacate the second permanent guardianship hearing.

Upon a writ of review, the supreme court reversed the order to vacate and cited a distinction between temporary and permanent guardianship proceedings. In March 2005, the district court decided that MEO's best interests warranted a permanent guardianship, yet found that Mother was a fit parent.

In its analysis of the issue relating to the temporary guardianship appeal, the supreme court immediately ruled out the relevance of emergency *ex parte* guardianship procedures under Wyo. Stat. Ann. § 3-2-302(b) (LexisNexis 2005) to the case at issue. The supreme court also dismissed Grandparents' argument that Mother's appeal to the temporary guardianship was moot as a result of the impact of the conditions of the temporary guardianship upon the permanent guardianship decision. The appointment of Grandparents as temporary guardians of MEO before providing Mother notice² and an opportunity to be heard,³ pursuant to statutory requirements, constituted error by the district court.

With respect to the necessity of the appointment of permanent guardianship for MEO, the district court determined that the court may consider either the fitness of the parent or the best interests of the child. This conclusion was rejected by the supreme court based on an analysis of statutory⁴ and constitutional due process requirements. Older Wyoming cases were applied by the district court and the supreme acknowledged that these cases do not address a parent's fundamental rights. A parent's rights are not upheld when the best interests standard is used as the sole justification for affecting the family unit. Accordingly, the supreme court held that a best interests determination is required only when a necessity of guardianship has been established by the determination of the parent's unfitness.

JURISDICTION

- **THE 90 DAY STATUTORY REQUIREMENT FOR AN ADJUDICATORY HEARING DOES NOT RESULT IN THE TERMINATION OF SUBJECT MATTER JURISDICTION BY THE JUVENILE COURT**

IN THE INTEREST OF DSB: JA v. STATE OF WYOMING DEPARTMENT OF FAMILY SERVICES, 2008 WY 15, 176 P.3d 633 (Wyo. 2008).

² Wyo. Stat. Ann. § 3-2-102 (LexisNexis 2003) states, in part:

(a) Notice of filing of a petition for appointment of an involuntary guardianship shall be served on the proposed ward, his custodian and the proposed guardian.

(d) Notice shall be given in accordance with Wyoming Rules of Civil Procedure and as ordered by the court.

³ Wyo. Stat. Ann. § 3-2-106 (LexisNexis 2003) states, in part:

(a) Upon the filing of a petition for a temporary guardian and after a hearing the court may appoint a temporary guardian subject to any notice and conditions the court prescribes.

⁴ Wyo. Stat. Ann. § 3-2-104 (LexisNexis 2003).

Appeal from the Natrona County Juvenile Court's ruling that Mother neglected her minor son. The issue was whether the juvenile court lost subject matter jurisdiction when the adjudicatory hearing was not held within 90 days after the original petition was filed, as required by statute.

DFS filed a petition on October 16, 2006, and was awarded legal and physical custody of the child at the shelter care hearing that same day, which Mother attended. Mother did not appear at the initial hearing on November 3, 2006. Another initial hearing was scheduled for November 26, 2006, and Mother denied the allegations at this hearing. An adjudicatory hearing was then scheduled for January 31, 2007, 105 days after the filing of the petition. Upon Mother's motion to dismiss the neglect action, the juvenile court dismissed the original petition without prejudice, allowing DFS to re-file the case. After the juvenile court found neglect of the child in the second case, Mother filed a notice of appeal challenging the juvenile court's order following the initial and adjudicatory hearing in the first case. She did not expressly indicate an appeal of the first order, but she attached the order dismissing the first case.

Failure to file a notice of appeal of the first order dismissing the case did not affect Mother's second appeal, for the Wyoming Supreme Court found that it was properly joined in the second case and subject matter jurisdiction was not interrupted. The supreme court found the requirements of the Child Protection Act, that "in no case shall the court hold the adjudicatory hearing more than ninety (90) days after the date the petition is filed," to be plain and unambiguous. Wyo. Stat. Ann. §§ 14-3-426 (LexisNexis 2007). No remedy for a violation of the statute is stated in the Act, nor does the statute expressly indicate subject matter jurisdiction over the alleged incident will be lost if an adjudicatory hearing is not held within 90 days.

The supreme court also found that the statute does not preclude dismissal of a petition without prejudice and the opportunity to re-file. In seeking to uphold the responsibility of the parties to adhere to statutory deadlines and inform the court of any violations, the juvenile court sought to encourage DFS to re-file petitions and discourage parents from delaying the proceedings for the purpose of a dismissal. In affirming the juvenile court's decision, the supreme court held the juvenile court did not lose jurisdiction to consider the neglect petition. The supreme court also held that the remedy for a hearing set beyond the 90-day limit was a motion to the juvenile court to hold it within the 90 days and if the court denied that motion, it could then be brought as a writ to the supreme court. This remedy was outlined in *DB v. State of Wyo. Dep't of Family Servs.* (*In re MFB*), 860 P.2d 1140, 1150 (Wyo. 1993).

TERMINATION OF PARENTAL RIGHTS

- **EVIDENCE: ABUSE AND NEGLECT ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE OF MOTHER'S CONDUCT; DFS IS NOT REQUIRED TO PROVIDE TRANSPORTATION TO A PARENT AFTER THE TERMINATION PHASE OF THE PROCEEDINGS HAS COMMENCED**

IN THE MATTER OF THE TERMINATION OF PARENTAL RIGHTS TO CS: LS a/k/a LA v. JOHNSON COUNTY DEPARTMENT OF FAMILY SERVICES, IN THE MATTER OF THE TERMINATION OF PARENTAL RIGHTS TO TS: LS a/k/a LA v. JOHNSON COUNTY DEPARTMENT OF FAMILY SERVICES, 2006 WY 130, 143 P.3d 918 (Wyo. 2006).

Appeal of jury verdict terminating Mother's parental rights to her two minor children on the basis of a lack of clear and convincing evidence of abuse and neglect and a denial of due process by a DFS employee's failure to provide transportation to the termination hearing.

Mother's children, age 3 and age 8 months, were taken into protective custody after DFS investigated a report by Mother's father of physical abuse and neglect by Mother. Mother agreed to develop a case plan for reunification and to leave the children in foster care. Mother did not comply with the requirements of the case plan; she moved seventeen times in one year, failed to maintain employment, did not pay child support and did not attend over 50% of the scheduled visitations with her children. DFS subsequently filed a petition for the termination of Mother's parental rights. The day before the trial was scheduled Mother contacted a DFS employee to request a ride from Sheridan to the trial in Buffalo. Citing safety concerns, DFS informed Mother later that day that DFS would not be able to provide transportation. Unable to arrange alternative transportation, Mother did not attend the first day of the trial, the jury was not informed as to the reason for her absence and a continuance was not requested. Mother was given an opportunity to explain to the jury her reason for being absent because she was present for the second and third days of trial. The jury returned a verdict in favor of the termination of Mother's parental rights under Wyo. Stat. Ann. §§ 14-2-309(a)(iii)⁵ and (v)⁶.

Applying the strict scrutiny standard of proof, the supreme court held that the statutory definitions of "abuse"⁷ and "neglect"⁸ were satisfied by the evidence presented at trial. Testimony that Mother would place her eight month old in a sleeping bag and tie it up when the child was crying and that she would pinch the fingers of the three year old child as a form of punishment support a reasonable jury's finding that this conduct met the statutory definition of abuse. Evidence of inadequate nutritional care of the children and Mother's refusal to seek or

⁵ Wyo. Stat. Ann. § 14-2-309(a)(iii) (LexisNexis 2007) states:

The child has been abused or neglected by the parent and reasonable efforts by an authorized agency or mental health professional have been unsuccessful in rehabilitating the family or the family has refused rehabilitative treatment, and it is shown that the child's health and safety would be seriously jeopardized by remaining with or returning to the parent.

⁶ Wyo. Stat. Ann. § 14-2-309(a)(v) (LexisNexis 2007) states:

The child has been in foster care under the responsibility of the state of Wyoming for fifteen (15) of the most recent twenty-two (22) months, and a showing that the parent is unfit to have custody and control of the child.

⁷ Wyo. Stat. Ann. § 14-2-308(a)(i) (LexisNexis 2005).

⁸ Wyo. Stat. Ann. § 14-2-308(a)(vi) (LexisNexis 2005).

permit medical care for her children was held to support the statutory definition of neglect. In its review, the supreme court emphasized its mandate to consider the evidence in its entirety and found clear and convincing evidence to support the findings of abuse and neglect. Under Wyo. Stat. Ann. § 14-2-309(a)(v), Mother argued that the time in which the children were in foster care should not have begun to run because there was no justification for their initial placement into foster care. The court immediately dismissed this proposal because Mother did not provide any authority in support of her argument and because the court addressed the abuse and neglect issue.

In addressing the due process question relating to DFS refusing to transport Mother to the termination proceedings, Mother failed to cite an authority requiring DFS to provide transportation once the termination proceedings have begun. The supreme court observed that Mother never sought a continuance and she was able to explain her absence to the jury, preserving her due process rights. As a result, the court held that even if DFS did incur an obligation to provide transportation, Mother did not establish prejudice and the error was harmless.

- **RELATIVE PLACEMENT: DFS’S DECISION TO NOT PLACE CHILDREN WITH GRANDMOTHER WAS NOT IN VIOLATION OF THE *FAMILY SERVICES MANUAL* AND DFS TOOK REASONABLE STEPS TO INSTITUTE A FAMILY PLACEMENT**

IN THE MATTER OF THE PARENTAL RIGHTS TO DH, AP, AND JK: KH v. WYOMING DEPARTMENT OF FAMILY SERVICES, 2007 WY 196, 173 P.3d 365 (Wyo. 2007).

Mother has three children; DH, AP and JK, each having a different father. The District Court of Platte County terminated Mother’s parental rights under Wyo. Stat. Ann. §§ 14-2-309(a)(iii)⁹ and (a)(v)¹⁰ (LexisNexis 2007). Mother did not dispute that the district court’s findings were supported by clear and convincing evidence. Mother appealed based on the assertion that DFS did not comply with the section of its *Family Services Manual*, encouraging DFS employees to place children with family members rather than in non-relative foster homes. When DFS refused to place her children with Grandmother (Mother’s mother), Mother argued that the termination of her parental rights was invalidated because DFS failed to comply with its own policies.

⁹ *Supra*, note 5.

¹⁰ *Supra*, note 6.

Mother's efforts to meet the requirements of the family reunification plan were inconsistent and unsuccessful. Mother submitted the names of four relatives to DFS for family placement and one of the names was Grandmother, who lived in Alabama with her boyfriend. The Interstate Compact on the Placement of Children (ICPC) report showed outstanding warrants for Grandmother's arrest in several states and Grandmother's boyfriend had a conviction of a sexual offense involving a child. Grandmother also provided a false address and failed to meet with the Alabama caseworker. At the time of the trial, Grandmother moved to Mississippi and was no longer living with the boyfriend.

In the appeal decision, the Wyoming Supreme Court distinguished Mother's case from *MB v. Dep't of Fam. Svcs.*, 933 P.2d 1126 (Wyo.1997), in which DFS's violations of its own rules was determined to affect a parent's fundamental right to avoid termination. The Court noted that the case plan in *MB* provided end goals, but did not require any tasks to meet those goals. *MB* did not receive notification that failure to comply with the plan would result in the termination of her parental rights.

Comparing *MB* to the facts of the present case, the supreme court found that Mother did not dispute that she was familiar with her case plan and indicated adequate knowledge and notification of its requirements; including parenting classes, substance abuse treatment and regular employment. Further, the supreme court found that the case plan required Mother to have regular visits with the children and her relationship with her children did not suffer as a result of placement decisions. DFS conducted an initial home placement evaluation and the results indicated that Grandmother's home was not suitable for placement, based on the criminal histories of Grandmother and her boyfriend, and their unwillingness to cooperate. The supreme court concluded that DFS did not violate its rules or policies by refusing to place the children in Grandmother's household. This decision was justified, based on the obvious risks to the children's well being. Finally, DFS was not statutorily obligated to conduct an evaluation of Grandmother's Mississippi home prior to the commencement of the termination proceedings because the children had already been in foster care for 15 of the previous 22 months, pursuant to Wyo. Rev. Stat. Ann. §§ 14-2-309(a)(v),¹¹ 14-2-310, 14-3-431(m).

- **GUARDIAN AD LITEM: IN A PARENTAL RIGHTS TERMINATION ACTION, DISTRICT COURTS MUST EITHER APPOINT A GAL TO REPRESENT THE CHILD, OR MAKE A FINDING THAT NO GAL IS NECESSARY BECAUSE THE CHILD'S BEST INTERESTS ARE ADEQUATELY REPRESENTED BY ANOTHER PARTY TO THE ACTION**

IN THE INTEREST OF MN, S(e)N, S(h)N: LM, v. LARAMIE COUNTY DEPARTMENT OF FAMILY SERVICES, 2007 WY 189, 171 P.3d 1077 (Wyo. 2007).

¹¹ *Supra*, note 6.

A termination of parental rights action was challenged on the basis that no guardian *ad litem* was appointed to represent appellant's children. Other issues were appealed; however, the supreme court found this issue to be dispositive. The supreme court reversed and remanded the case to the district court. Wyo. Stat. Ann. § 14-2-312 (LexisNexis 2007) requires:

After the petition [for termination of parental rights] has been filed, the court *shall* appoint a guardian ad litem to represent the child *unless* the court finds the interests of the child will be represented adequately by the petitioner or another party to the action and are not adverse to that party... (emphasis added).

In its application of the rules of statutory construction, the supreme court concluded:

Wyo. Stat. Ann. § 14-2-312 is an unambiguous mandatory statute that requires the district court in a parental rights termination action either to appoint a guardian *ad litem* to represent the involved child or children, or to make a finding that no guardian *ad litem* is necessary because the petitioner or another party to the action will adequately represent the interests of the child or children, and the interests of the child or children are not adverse to that party.” *In the Interest of MN, S(e)N: LM, v. Laramie County Department of Family Services*, 2007 WY 189, ¶8, 171 P.3d 1077, 1081 (Wyo. 2007).

- **INCARCERATION: STATE FAILED TO MEET ITS BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THAT DFS MADE REASONABLE EFFORTS TOWARD REUNIFICATION AND THAT MOTHER WAS UNFIT FOR CUSTODY**

IN THE INTEREST OF FM: BA v. LARAMIE COUNTY DEPARTMENT OF FAMILY SERVICES, 2007 WY 128, 163 P.3d 844 (Wyo. 2007).

Mother appealed the district court's decision to terminate her parental rights to FM, her biological son. Grounds for the appeal included a failure to appoint a GAL to represent FM in the termination proceedings and the sufficiency of the evidence in support of the termination decision. Equating the family law termination of parental rights to the criminal law death penalty, the supreme court reversed the district court's decision to terminate Mother's parental rights and remanded the case to the district court with instructions to dismiss the petition.

FM is the son of Mother and FM's father is deceased. In 2002, FM was taken into protective custody along with two half sisters following a welfare check of Mother's home by a sheriff's deputy. In addition to the children being alone and without a lot of food in the house, the deputy found traces of methamphetamine use. FM was with his grandmother at the time of the deputy's visit; however, he was taken in to protective custody at the time and was subsequently placed

with his paternal aunt and her family. Mother did not successfully comply with the 2002 case plan and was convicted of delivery and conspiracy to deliver methamphetamine. While on probation, Mother left the jurisdiction and upon her return, she was incarcerated for three to six years. DFS developed a second case plan in 2005, stating a permanency plan for the adoption of FM and a voluntary relinquishment of Mother's parental rights. The trial for the termination of Mother's parental rights was held in 2006, while Mother was still incarcerated.

On appeal, the supreme court considered the following issues: (1) the sufficiency of the evidence supporting the termination decision and (2) whether the lack of a GAL appointment to represent the child constituted error. With respect to the first issue, the supreme court applied Wyo. Stat. Ann. § 14-2-309(a)(iii)¹² and found that the second element, the reasonable efforts by DFS toward reunification, was not proven by clear and convincing evidence. The tasks stated in the case plans were sufficient; however, the tasks were overshadowed by insufficient evidence of DFS's reasonable efforts and services toward family reunification. The supreme court acknowledged the fact that Mother was incarcerated; however, it noted that DFS did not present any evidence that DFS took steps to facilitate communication between Mother and FM.¹³

Turning to Wyo. Stat. Ann. § 14-2-309(a)(v),¹⁴ the supreme court affirmed that FM was in foster care for 15 of the previous 22 months before the termination petition was filed; however, the court examined whether clear and convincing evidence was presented that Mother was unfit to have custody and control of FM at the time of trial. By relying exclusively on Mother's status of incarceration and history and failing to consider Mother's present efforts toward reunification, the district court improperly decided the question of fitness. Also, the State did not establish grounds for termination of Mother's parental rights by clear and convincing evidence. The evidence presented only addressed the best interests of the child and failed to address Mother's interests and fitness to parent. In addressing the second issue, the supreme court emphasized the statutory mandate that a GAL must be appointed in every termination case or the court must present findings consistent with the statutory exception that the child's interests will be adequately represented.

○ **GUARDIAN AD LITEM: A GAL MAY BE PERMITTED TO TESTIFY AS A LAY WITNESS AT THE TERMINATION OF PARENTAL RIGHTS HEARING IF THE GAL WAS NOT TESTIFYING IN A REPRESENTATIVE CAPACITY**

*IN THE INTEREST OF LL, AL, ML, AND NC: ML, v. LARAMIE COUNTY
DEPARTMENT OF FAMILY SERVICES, 2007 WY 92, 159 P.3d 499 (Wyo. 2007).*

¹² *Supra*, note 5.

¹³ In footnote 3 of the opinion, the supreme court cited *In re HP*, 2004 WY 82, ¶ 26, 93 P.3d 982, 990 (Wyo. 2004), as an example of sufficient evidence of DFS's reasonable efforts.

¹⁴ *Supra*, note 6.

On appeal, the supreme court upheld the district court's decision to allow a GAL from previous neglect cases involving Mother to testify at Mother's termination of parental rights hearing when the witness was testifying in a lay witness capacity and not a representative capacity. The supreme court also upheld the district court's finding that the termination of Mother's parental rights was supported by clear and convincing evidence pursuant to Wyo. Stat. Ann. § 14-2-309(a)(v). The children were in custody for more than 15 of the 22 months prior to the proceeding hearing and Mother was deemed unfit to parent.

In three separate adjudications of abuse and neglect from 2001 to 2005, John Frentheway acted as the GAL for Mother's children. DFS filed a termination of parental rights action in 2006 and the hearings were held in April of that year. DFS summoned testimony from Mr. Frentheway regarding his involvement with Mother and the children. At the conclusion of the hearings, Mother's parental rights were terminated. The supreme court acknowledged the GAL rules described in *Pace v. Pace*, 2001 WY 43, ¶ 26, 22 P.3d 861, 870 (Wyo. 2001); however, the court held that Mr. Frentheway was not operating in the capacity of a GAL and had no responsibilities to the children or the court beyond providing truthful testimony. As a lay witness, Mr. Frentheway's testimony concerning the emotional and psychological effects of visitation upon the children as a result of continued visits with Mother was deemed admissible by the supreme court. Firsthand knowledge of the issue from his previous experiences with the family enabled him to testify within W.R.E. 701¹⁵ and contributed to a greater understanding of the facts at issue. In its dismissal of a single matter doctrine, the supreme court recognized the ability of a GAL to act without the legal status of a GAL in subsequent cases that are closely related to the original case.¹⁶ In response to Mother's argument that unfair prejudice resulted from Mr. Frentheway's testimony, the supreme court found no error in the testimony nor any error in Mother's inability to refute the testimony.¹⁷ Based on the court's opinion, no ethical violation was committed because Mr. Frentheway did not act as a GAL and a factual witness in the same proceeding.

- **MANIFEST BEST INTEREST: TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND THE PARENTAL RIGHTS WERE OUTWEIGHED BY THE CHILDREN'S RIGHT TO PERMANENCY**

¹⁵ W.R.E. 701 states:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

¹⁶ See, e.g., *Cabinet for Human Resources v. S.R.J.*, 706 S.W.2d 431 (Ky.Ct.App. 1986) (overruled on other grounds by *Guffey v. Cann*, 766 S.W.2d 55 (Ky. 1989)).

¹⁷ Mother did not bring a W.R.E. 403 argument regarding the prejudicial effect versus probative value of the testimony and the court refused to introduce the argument.

*IN THE MATTER OF THE PARENTAL RIGHTS TO: AD, DD, AND KD, CL v.
WYOMING DEPARTMENT OF FAMILY SERVICES, 2007 WY 23, 151 P.3d 1102
(Wyo. 2007).*

Mother's parental rights were terminated under Wyo. Stat. Ann. §14-2-309(a)(iii)¹⁸ and (v)¹⁹. Mother's appeal addressed the third element of Wyo. Stat. Ann. §14-2-309(a)(iii) and argued that there was insufficient evidence to support the conclusion that the children's health and safety would be seriously jeopardized by remaining with or returning to the parent. With respect to Wyo. Stat. Ann. §14-2-309(a)(v), Mother challenged the sufficiency of the evidence indicating Mother was unfit to have custody and control of the children. Substantial compliance with the case plan was Mother's primary argument on appeal.

DD, KD and AD are the biological children of Mother and Father. DFS's involvement with the family began when the oldest child was an infant. The children were removed in 2003 based on allegations of neglect due to unsafe and filthy conditions in the home and abuse by Father. Following an unsuccessful trial home placement and attempt at reunification, DFS maintained custody of the children. Father's imprisonment, Mother's hostility toward the DFS caseworker, inconsistent employment, and a failure to comply with DFS requirements prompted DFS to file a petition to terminate Mother's and Father's parental rights in July 2004.

At the hearing, Father's rights were terminated; however, the district court found that Mother had maintained employment and had found a suitable home for the children. DFS was given six months to work toward family reunification and gave Mother one final chance to meet the requirements. A case plan was created in June 2005. The case plan required Mother to maintain full-time employment and establish a safe and stable home environment. In the six-month period between hearings, Mother switched jobs once and lived in three different residences. Mother's parental rights were terminated by the district court in consideration of permanency and the time the children had been living in foster care. In support of its decision, the district court found that the family's history and evidence presented at the hearings established that Mother was not prepared to provide the structure and stability the children needed and three years of attempted reunification was sufficient.

Citing the district court's proper consideration of the entire history of the family and a failed attempt by Mother to meet the overall objectives of the case plan, the supreme court affirmed the termination of Mother's parental rights. The supreme court emphasized the need to distinguish the case plan tasks from the case plan objectives. The court stated, "the tasks were meant to provide her with tools to help her obtain the ultimate goal; however, the objective would not

¹⁸ *Supra*, note 5.

¹⁹ *Supra*, note 6.

necessarily be accomplished by rote completion of the tasks,” and a qualitative assessment is required. *In the Matter of the Parental Rights to: AD, DD, and KD, CL v. Wyoming Department of Family Services*, 2007 WY 23, ¶28, 151 P.3d 1102, 1109 (Wyo. 2007). The supreme court concluded that DFS is required to make permanency decisions with a reasonable amount of time pursuant to the mandates of federal welfare fund regulations and Wyo. Stat. Ann. §§ 14-2-309(a)(v) and 14-3-431(m). The children’s rights to a permanent, safe and stable home environment were found to outweigh the parent’s rights in the present case.

Justice Hill and Justice Golden dissented, based on a lack of clear and convincing evidence to support the termination of Mother’s parental rights. The dissent held that Mother’s efforts were as successful as could have been expected and DFS and the district court grasped onto a thread of failure when deciding to terminate Mother’s parental rights.