

## **Wyoming Dependency Docket 2009**

by Robert Drost and Toni Britton, Wyoming GAL Program Externs, Summer 2009

### **ABUSE AND NEGLECT PROCEEDINGS**

- **EVIDENCE: THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THE PRODUCTION OF EXCULPATORY EVIDENCE ONE DAY BEFORE TRIAL AND DID NOT VIOLATE FATHER'S DUE PROCESS IN REFUSING TO DISMISS THE CASE**

*IN THE INTEREST OF MM: MM v. THE STATE OF WYOMING, DEPARTMENT OF FAMILY SERVICES, 2009 WY 28, 202 P.3d 409 (Wyo. 2008).*

Father appealed the District Court of Park County's denial of his motion to dismiss the State's Abuse Petition, alleging the State violated the Wyoming Rules of Procedure for Juvenile Courts and the Mother and Father's rights to due process were violated because the State failed to timely disclose exculpatory evidence to Mother and Father. The Wyoming Supreme Court upheld the district court's decision.

On October 12, 2007, MM was taken into protective custody by a Cody Police Department Detective after a report by MM's daycare provider of alleged sexual abuse. An emergency room physical and a pediatrician examined the child and the pediatrician found a "red flag" for abuse. The State subsequently filed a petition alleging child abuse in Juvenile Court. Mother and Father denied the allegations and a trial was scheduled for February 7 and 8, 2008.

A few days before trial, Mother's attorney received a police report which referred to a telephone conversation between the State and Kempe Children's Center (hereinafter "Kempe Center") in Colorado. The conversation was recorded by the State and the police report noted that the Kempe Center doctor reviewed the child's medical records and photographs, and concluded he could not see any injury to the child. The state had not previously given the taped conversation to the parents because it believed the tape was attorney-work product.

Mother and Father filed a motion to dismiss the petition on the basis that the recording included exculpatory evidence which the State failed to disclose in a timely manner. The motion was denied, however the juvenile court ordered the evidence be produced to the parents. The state produced the recording to the parents one day before trial and it was admitted into evidence at the trial. The entire conversation was played for the jury. The jury nonetheless found the child to be abused and adjudicated Mother and Father.

The issue before the Supreme Court was whether the Juvenile Court erred by refusing to dismiss the case for the State's failure to timely disclose exculpatory evidence. Father first claims the

State violated Rule 3 of the Wyoming Rules of Procedure for Juvenile Courts. The Court discussed this Rule at length and found the juvenile court has broad discretion in determining the appropriate remedy when the State violates its discovery requirements pursuant to Rule 3(f).<sup>1</sup> In this case, the juvenile court ordered the State to disclose the evidence to the Father's attorney. Father argued that since the evidence was produced one day before trial, he did not have time to make beneficial use as required by Rule 3(j).<sup>2</sup> The Court concluded that since a continuance was not even requested, it was not an abuse of discretion for the juvenile court to impose the remedy that the evidence be produced for trial.

Father also claimed his constitutional rights were violated when the State withheld the exculpatory evidence. The Court decided the prevailing case in this situation was *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.d.2d 215 (1963). *Brady* articulates certain principles for criminal cases. The Court assumed that *Brady* applied to this case without deciding if *Brady* applies to civil child abuse/neglect proceedings. *Brady* states "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Three elements must be met in order to establish a violation of *Brady*: 1) the prosecution suppressed evidence, 2) the evidence was favorable to the defense, and 3) the evidence was material because it is reasonably probable that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*

The Court previously held in *Thomas v. State*, 2006 WY 34 ¶ 16, 131 P.3d 348, 353 (Wyo. 2006) that even evidence handed over during the second or third day of trial does not constitute an improper suppression. In this case, the evidence could not be improperly suppressed since it was handed over before trial. The Court also held that the exculpatory evidence was unreliable and therefore immaterial. The doctor from Kempe Children's Center who viewed the photographs taken by the hospital did not physically examine the child. Since the doctor's opinion was limited to the review of photographs and medical records, his opinion is subject to criticism because he did not physically examine the child. The Court concluded the recorded conversation does not give a reasonable probability that had the evidence been disclosed to the defense in a

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<sup>1</sup> W.R.P.J.C. Rule 3 (f) states, in part:

Procedure for Discovery, Time. If, at any time during the proceedings, it is brought to the attention of the court that a party has failed to comply with this Rule or an order issued under this Rule, the court may:

- (1) Order such party to permit the discovery of the matters not previously disclosed;
- (2) Strike the testimony to which the undisclosed matter relates;
- (3) Grant a reasonable continuance;
- (4) Prohibit the party from introducing in evidence the matter not disclosed;
- (5) Grant a mistrial; or
- (6) Enter such other order as may be appropriate under the circumstances.

<sup>2</sup> W.R.P.J.C. Rule 3 (j) states:

Timely Disclosure Required. All matters and information to which a party is entitled must be disclosed in time to permit its beneficial use.

timelier manner, the result of the proceeding would have been different. Thus, Father's constitutional due process rights were not violated and the juvenile court did not err in denying Father's motion to dismiss.

- **REASONABLE EFFORTS: THE STATE MAY DISCONTINUE REUNIFICATION EFFORTS SO LONG AS THE STATE PROVES BY A PREPONDERRANCE OF THE EVIDENCE THAT SUCH EFFORTS WOULD BE FUTILE**

*IN THE INTEREST OF NDP v. STATE OF WYOMING DEPARTMENT OF FAMILY SERVICES*, 2009 WY 28, 2009 WL 15131560 (Wyo. 2009).

Mother appealed the District Court of Natrona County's disposition order following a petition of child neglect, allowing the Department of Family Services (DFS) to proceed with establishing a family guardianship for the minor children. The Wyoming Supreme Court upheld the district court's decision.

Mother has four children: NDP, JAP, ANP, and ICP. On April 19, 2007, the State took custody of the four children after Mother was arrested for violating her probation by testing positive for methamphetamine use. The State filed a petition alleging the children were neglected, and the children were placed in foster care with their maternal aunt. DFS then wrote a case plan on May 22, 2007 detailing a permanency goal of family reunification. The plan required Mother to attend substance abuse treatment and tend to her mental health needs by completing a psychological evaluation, as well as following all treatment recommendations. A concurrent goal of relative placement and/or guardianship was put in place on June 20, 2007. A consent decree was ordered on July 20, 2007 holding the neglect petition in abeyance pending Mother's compliance. The consent decree required Mother to complete substance abuse treatment and undergo a psychological evaluation.

After Mother failed to complete her substance abuse treatment, the State filed a motion to reinstate the original neglect petition. The juvenile court held a disposition hearing on May 20, 2008, ruling the State made reasonable efforts to reunite Mother and her children but those efforts failed and ordering DFS to proceed with establishing a family guardianship of the children.

The Court addressed two issues: 1) whether the juvenile court was required to state the standard of proof and 2) whether the State's evidence was sufficient to support the juvenile court's ruling that further reunification efforts were not necessary. With respect to the first issue, the Court noted that it's well established the standard of proof in a neglect proceeding is a preponderance of the evidence. *AA v. Wyo. Dep't of Family Services. (In re HP)* 2004 WY 82 ¶ 25, 93 P.3d 982, 989 (Wyo. 2004). Mother did not provide any statute or case law requiring the juvenile court to explicitly state the standard of proof. Also, the juvenile court advised Mother that the State had

the burden of proving its allegations by a preponderance of the evidence at her initial hearing and also during her hearing where the consent decree was issued. Since this showed Mother was not prejudiced by the juvenile court's failure to state the standard of proof, the Court held the district court did not err in failing to state specifically the standard of proof.

The Court addressed the second issue by first detailing Wyo. Stat. Ann. § 14-3-440,<sup>3</sup> requiring reasonable efforts to reunify the family. Mother claims the juvenile court violated the statute by not ordering additional reunification efforts. This was not sufficient because the circumstances surrounding Mother's initial arrest alone indicates substance abuse treatment was appropriate. Mother agreed to substance abuse treatment through the consent decree and reunification was conditioned upon Mother completing the treatment. Mother's only evidence that substance abuse treatment was inappropriate came from an ASI which concluded that since Mother was abstinent for nine months, she did not need treatment. This evidence was not persuasive and was inconsistent with the psychological evaluation. The doctor who made the ASI even stated that due to Mother's substantial history of alcohol and substance abuse, she would be best served by outpatient substance abuse services.

Mother also argued that substance abuse treatment was impossible to complete due to her psychological issues and she was not given adequate opportunities to address those issues. The Court held that evidence from DFS requiring a psychological evaluation during the earliest case plan showed she was given adequate opportunity to address those issues.

The Court went on to note that DFS advised Mother consistently that a permanency hearing would occur within one year of the children's placement outside the family home. DFS also advised Mother that a concurrent permanency plan of family guardianship was being developed and pursued. The State properly proved by a preponderance of the evidence that continued efforts to reunite the children with Mother was futile and inconsistent with the permanency plan of placing the children in a long-term guardianship.

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<sup>3</sup> Wyo. Stat. Ann. § 14-3-440 states in part:

- (a) Except as provided in W.S. 14-2-309(b) or (c), reasonable efforts shall be made to preserve and reunify the family:
  - (i) Prior to placement of the child outside the home, to prevent or eliminate the need for removing the child from the child's home; and
  - (ii) To make it possible for the child to safely return to the child's home.