

Wyoming Dependency Docket 2012

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*IN THE MATTER OF THE TERMINATION OF PARENTAL RIGHTS TO ARC and RMR
v. DEP'T OF FAMILY SERVICES, 2011 WY 119, 258 P.3d 704 (Wyo. 2011).*

REASONABLE EFFORTS TO REHABILITATE THE FAMILY AS REQUIRED BY 14-2-309(a)(iii) WERE FOUND WHERE MOTHER IS PROVIDED TWO FAMILY SERVICE PLANS WITH ASSISTANCE TO ENTER DRUG TREATMENT PROGRAMS AND WHERE SHE IS PROVIDED SERVICES SUCH AS FOSTER CARE, COUNSELING AND SUPERVISED VISITATION.

RMR and ARC, the two minor children at issue in this appeal, were put in protective custody and then placed in foster care by the Department of Family Services (DFS) after the police found them in their home unsupervised and surrounded by drugs and drug paraphernalia. Mother and RMR's father eventually stipulated to an adjudication that they neglected the children.

On May 29, 2008, the mother and DFS entered into a family service plan with a permanency goal as family reunification and required her to submit to a urinary analysis (UA) six times per week; complete a substance abuse assessment and comply with its recommendations; establish a safe and stable housing suitable for the children; find and maintain legal employment; attend parenting classes and domestic violence counseling; and attend visitation and school and medical appointments with the children.

Mother failed to adhere to the terms in the family service plan, among other things, she missed UA's and had some UAs returned as positive for illegal substances. On October 29, 2008 DFS and mother entered into a second family service plan. While the primary goal of this plan was reunification, the plan also stated a goal of guardianship or adoption. The terms of this plan were similar to the terms of the May, 2008 plan, including UA's and other substance abuse prevention tactics. And again, mother failed to meet the terms of the plan.

A review hearing was held on April 22, 2009, and as a result of the mother's failure to complete either of the two plans, the district court approved a permanency plan providing for termination of her parental rights and guardianship or adoption of the children. On August 21, 2009, the State filed petitions to terminate her parental rights to ARC and RMR. The district court terminated her parental rights after an evidentiary hearing, pursuant to Wyo. Stat. Ann. §14-2-309(a)(iii) and (v).¹

¹ (a) The parent-child legal relationship may be terminated if any one (1) or more of the following facts is established by clear and convincing evidence:

....

(iii) 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;

....

On appeal, mother challenged the sufficiency of evidence presented by DFS. The district court held that in order for a termination action under § 14-2-309(a)(iii) to be valid, DFS must show “(1) abusive treatment or neglect by the parent; (2) unsuccessful [reasonable] efforts to rehabilitate the family; and (3) the child’s health and safety would be seriously jeopardized by remaining with or returning to the parent.”

The district court found all three elements were met by a showing of clear and convincing evidence. The mother argued that DFS did not make reasonable efforts to rehabilitate her. However, DFS created two family service plans for her, and provided assistance in carrying out the terms of those plans. DFS helped her obtain a substance abuse assessment and made arrangements for her to enter an intensive outpatient drug treatment program. Further, the family service plans provided for Mother to complete parenting classes and domestic violence counseling. The plans also provided other services to the children and the mother, including: multidisciplinary team (MDT) meetings, foster care, counseling, and supervised visitation.

Mother challenged the reasonableness of DFS’s efforts by stating that DFS did not:

1. maintain the UA drug testing contract after December 2008,
2. did not tell her about the children’s school and medical appointments,
3. did not hold an MDT meeting for over a year, and
4. did not inspect her house to see the work she had done to make it suitable for the children.

The Court concluded that DFS’s efforts were reasonable. First, while the contract with the UA testing facility was up in December, 2008, no one prevented her from continuing with the UAs after the expiration date. Second, Mother had opportunities to talk with team members from the MDT but failed to appear at the scheduled hearings where she could do so. Lastly, inspection of the home is only warranted after the mother complies with the other portions of the service plan.

Next, the mother argued that DFS should have instituted a guardianship proceeding instead of terminating her parental rights. Citing Wyoming Supreme Court cases which held that under the strict scrutiny standard applicable to parental rights termination actions, the state is required to use the least intrusive means to accomplish the goal of protecting the children.

The Court held it had never determined whether guardianship was a less intrusive alternative to termination, but concluded it was unnecessary to resolve the issue in this case because it was clear that DFS did, at one point, pursue a guardianship with relatives.

(v) 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[.]

However, the Court concluded this option was not viable as the biological child of the would-be adoptive parents was unable to adapt to the foster child being in the home.

In the Interest of KC, a minor child: KC v. The State of Wyoming, 2011 WY 108, 257 P.3d 23 (Wyo. 2011).

THE TERMS OF A DISPOSITION PLACING A MINOR IN THE WYOMING GIRL'S SCHOOL WERE WITHIN WYOMING'S JUVENILE JUSTICE ACT SANCTION SCHEME, WHERE THE MINOR VIOLATED HER PROBATION AND INDICATED SHE WOULD NOT OBEY THE HOUSE RULES IF SHE WERE PLACED AT THE HEMRY HOUSE.

MINOR WAS PROHIBITED FROM ASSERTING HER FIFTH AMENDMENT RIGHT BECAUSE IT IS NOT APPLICABLE IN THE DISPOSITIONAL PHASE OF A JUVENILE PROCEEDING.

THE REQUIREMENT INCLUDED IN W.R.CR.P. RULE 11, THAT CERTAIN ADVISEMENTS MUST BE MADE WITH REGARD TO POTENTIAL PUNISHMENTS, IS INAPPLICABLE IN JUVENILE DELINQUENCY PROCEEDINGS.

KC, a minor, was adjudged delinquent after she was caught shoplifting. Pursuant to her initial disposition, she was allowed her to remain living with her grandmother and she was placed on supervised probation for 3-6mos. The probation mandated she attend school regularly, with no unexcused absences, and that she maintain a grade of C or higher in each of her classes. KC was told there would be a review hearing in 90 days and that if she kept up with her schooling she would be let off probation. She was also warned that if she did not keep up with her schooling her probation would be extended. KC violated her probation, with failing grades and multiple unexcused absences, so her probation was revoked after the state filed a petition to revoke it.

The State recommended KC be placed in the Hemry Home; however, KC stated in an MDT meeting that she would not comply with the house rules there, so the State recommended KC be placed in the Wyoming Girl's School. KC indicated she wished to stay with her grandmother, and suggested another MDT meeting would help find her proper placement. The district court held an MDT meeting was unnecessary and agreed with the State that she should be placed in the Wyoming Girl's School and set a hearing for four months out.

On appeal, KC argued four issues. First, KC alleged that the sanction imposed against her was inappropriate. Wyoming's Juvenile Justice Act (Act) delineates the sanctions available for different juvenile offenses. The Court stated that it previously held the juvenile court can deviate from the statutorily delineated sanctions in the Act if they provide a written explanation on the record. The Court held that, in the present case, there was no need for a written explanation, because ordering a child to attend the Wyoming Girl's School is a sanction available to all sanction levels under the Act. Therefore, the Court concluded that KC's placement fell within the statutorily allowable sanctions.

Second, KC argued the sanction was inappropriate because she was never told by the court that placement in the Wyoming Girl's School was a potential sanction for violating her probation.

KC relied on W.R.CR.P. RULE 11 to bolster her argument. The Court held that there is no requirement that the juvenile court must inform minors of potential sanctions. The Court held that W.R.CR.P. RULE 11 is inapplicable in juvenile delinquency proceedings.

Third, KC argued the statements she made about not being willing to follow the rules at the Henry Home should not have been used against her in determining her disposition. She argued that because she was not apprised of her right against self-incrimination, the State should not have been allowed to use that statement against her in determining her disposition; she says to do so would be a violation of her Fifth Amendment rights.

The Court stated that the right against self-incrimination does not apply at the dispositional phase of delinquency proceedings. The dispositional phase begins after the delinquency adjudication, and its purpose is to determine the corrective action to be imposed. Statements made by minors are considered because they are helpful in determining the most effective and appropriate individualized disposition. Therefore, the Court held KC's self-incrimination argument without merit.

KC further argued the juvenile court violated her due process rights by not properly advising her of the maximum penalty she could be facing if she did not remain in compliance with her probation. KC bolsters her argument citing W.R.Cr.P. 11 (Rule 11). The Court stated that Rule 11 is inconsistent with the Act in a number of ways. Foremost, delinquency adjudication does not result in a conviction of guilt; instead, it is a determination that judicial intervention is necessary for the best interest and welfare of the child and the public. Therefore, the Court held that a rule relating to criminal guilty pleas is inapplicable in juvenile delinquency proceedings. Next, the Court held that the advisement requirements included in Rule 11 were unworkable in KC's case. The Court reasoned that because juvenile delinquency proceedings have no set minimum and maximum sentences but rather, the disposition takes into account the therapeutic needs of the child, the juvenile court has broad discretion in formulating a disposition. Accordingly, the Court concluded Rule 11 is inapplicable to juvenile proceedings.

In the Interest of CG, minor child: CG v. The State of Wyoming, 2011 WY 28, 248 P.3d 186 (Wyo. 2011).

A POLICE OFFICER FORCIBLY REMOVING A MINOR FROM A VEHICLE WAS WITHIN THE OFFICER'S COMMUNITY CARETAKING DUTIES AND, AS SUCH, HIS ACTIONS WERE LEGALLY AUTHORIZED AND THE MINOR'S REFUSAL TO COOPERATE CONSTITUTED INTERFERENCE WITH A POLICE OFFICER.

A SELF-DEFENSE CLAIM WAS NOT AVAILABLE TO THE MINOR WHEN THE POLICE OFFICER DID NOT USE EXCESSIVE FORCE IN REMOVING THE MINOR FROM THE VEHICLE. CONSEQUENTLY, BY HITTING THE OFFICER IN THE ARM, THE MINOR COMMITTED THE OFFENSE OF UNLAWFUL TOUCHING.

CG was adjudged in September 2009 as a child in need of supervision (CHINS) for failing to attend school. CG was placed on probation with the conditions of attending school regularly, without any unexcused absences. On September 15th, CG missed the bus to school. Because her stepfather was ill and her mother did not have a driver's license, they called the police to help get

her to school. When Police officer Maton arrived at the house, he found CGr in her bedroom yelling at her mother.

Maton was able to convince CG to ride in the neighbor's van to school, while he followed the van in his cop car. When they arrived at school, both CG's mother and the neighbor requested CG exit the van and she refused to do so. The neighbor then requested Maton's help in removing CG from the van. Maton physically removed CG from the van, using a wristlock procedure. As he pulled her out of the car, she punched him in the arm. Maton arrested CG for assault.

The State then filed a delinquency petition in juvenile court alleging that CG had committed two criminal offenses, specifically: "that she had unlawfully touched Maton in a rude, insolent or angry manner without intentionally using sufficient physical force to cause bodily injury in violation of Wyo. Stat. Ann. § 6-2-501(g)(i) (LexisNexis 2009); and that she had unlawfully and knowingly obstructed, impeded, or interfered with Officer Maton while he was engaged in the lawful performance of his official duties, in violation of Wyo. Stat. Ann. § 6-5-204(a)."

The juvenile court found that the State had proven, beyond a reasonable doubt, that Maton was in the lawful performance of his duties; therefore, CG's refusal to exit the van constituted interference with a police officer. CG's claims of self-defense were rejected, meaning that CG's action of hitting Maton in the arm constituted unlawful touching. CG was placed on supervised probation for nine months.

CG argued on appeal that Maton was not in the lawful performance of his official duties. She claimed that because she was not committing a crime when he forcibly removed her from the vehicle, he lacked authority to physically remove her from the van. The Court concluded Maton was in the performance of his community caretaker duties when he directed CG out of the neighbor's vehicle and subsequently physically removed her. Thus, the Court held Maton was in the lawful performance of his official duties.

Next, CG argued the juvenile court erroneously rejected her self-defense claim. CG claimed that Maton used excessive force in removing her from the van and this gave rise to her right to use reasonable force to defend herself from attack. The Court held that Maton did not use excessive force and therefore CG had no legal basis for a self-defense claim.

In the Interest of RE and TE: JO v. State of Wyoming, Department of Family Services, 2011 WY 170, 267 P.3d 1092 (Wyo. 2011).

THE "BEST INTERESTS OF THE CHILDREN" ARE AT THE HEART OF A PERMANENCY DECISION; THEREFORE, THE SUPREME COURT WILL APPLY THE ABUSE OF DISCRETION STANDARD IN REVIEWING THE DISTRICT COURT'S DECISION, AND IN DOING SO THE COURT MUST EVALUATE THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE LOWER COURT'S DECISION.

WHERE THE MOTHER HAD IRREGULAR ATTENDANCE AT SCHEDULED VISITATIONS; LACKED ENGAGEMENT WITH CHILDREN; SHOWED AN INABILITY TO IMPROVE HER PARENTING SKILLS OVER 14 MONTHS OF

SUSTAINED ASSISTANCE FROM DFS; AND SUFFERED FROM MENTAL HEALTH PROBLEMS THAT WERE UNLIKELY TO RESOLVE THROUGH MEDICAL INTERVENTION WITHIN APPROPRIATE TIME FRAME; THERE WAS SUFFICIENT EVIDENCE SUPPORTING THE JUVENILE COURT'S DETERMINATION THAT REUNIFICATION WITH THE MOTHER WAS NOT IN THE BEST INTERESTS OF CHILDREN AND THAT CHANGING THE PERMANENCY GOAL FROM REUNIFICATION TO TERMINATION OF PARENTAL RIGHTS AND ADOPTION WAS PROPER.

MOTHER LACKED STANDING ON APPEAL TO ASSERT THE GRANDPARENTS' RIGHT TO FAMILIAL ASSOCIATION AS JUSTIFICATION FOR APPLYING A HIGHER EVIDENTIARY BURDEN AT THE PERMANENCY HEARING.

IN A PROCEEDING WHERE THE JUVENILE COURT ORDERED TERMINATION OF PARENTAL RIGHTS UNDER A PERMANENCY PLAN, DFS WAS REQUIRED TO PROVIDE A COMPELLING REASON FOR ESTABLISHING A PERMANENCY PLAN OTHER THAN REUNIFICATION, ADOPTION OR LEGAL GUARDIANSHIP. DFS WAS NOT REQUIRED TO PROVIDE A COMPELLING REASON FOR RECOMMENDING A PERMANENCY PLAN OF TERMINATION OR ADOPTION OVER RELATIVE GUARDIANSHIP.

J.O. is the mother of the two children at issue in this appeal, R.E. and T.E., born in 2009 and 2007, respectively. When R.E. was just three months old he was diagnosed with “failure to thrive.” Learning of this diagnosis, DFS sent a social worker and a public health nurse to visit J.O. in efforts to discuss their concerns about the children’s care. At this first meeting, the social worker and the nurse observed that R.E. was very thin and unhealthy. They requested J.O. bring R.E. into the public health clinic twice a week to be weighed. A week after this appointment, R.E. was back in the hospital with severe bronchitis. R.E. was hospitalized and the children were put in protective custody with their paternal great uncle and his wife.

On May 20, 2009, the State filed a petition for neglect and a hearing was held on June 2, 2009. At the hearing, J.O. admitted the allegations and the children were adjudicated as neglected under 14-3-402(a)(xii). The children were to continue to remain in foster care, and a plan for the well-being of the children with the ultimate goal of reunification was set. On July 9, 2009, the MDT held a meeting during which R.E. was determined to have improved. The MDT recommended the children stay in foster care, with visitations for J.O. and it requested that J.O. get a psychiatric evaluation.

The record showed that during the majority of these scheduled visitations, J.O. was frustrated, irritated, and angry. She made the DFS staff fearful and uncomfortable being alone with her. She used foul and inappropriate language directed at the DFS staff and in front of her children. On at least one occasion, the DFS worker said that J.O. did not acknowledge the presence of R.E. at the visitation; instead, she was only concerned with the well-being of T.E. Another visitation was cut short after DFS called the police because J.O. was being belligerent. After the latter incident, on July 19, 2009, an MDT meeting was held, during which time J.O.’s own attorney recommended that the visitations be cancelled.

Three months later, the Juvenile court held a permanency hearing and it was determined that J.O. was not yet ready for reunification with her children. Each of the social workers testified at the hearing stating that they were concerned for the safety of the children because of J.O.'s inability to parent. She had to be told when to feed the children, when to change their diapers, and when to pick them up when they were crying. She also had problems showing them affection; she was especially unaffectionate with R.E. They also testified that J.O. did not cooperate and heed the advice and parenting techniques they showed her and there was no indication of progress being made.

One of J.O.'s evaluating psychologists testified at the hearing and described her as having a "limited capacity at this time for assuming the roles of responsibility required for becoming a safe and effective parent." The psychologist further stated J.O. showed no accountability, had a tendency to blame others, had impaired reasoning, tended to describe her children as possessions rather than people, was emotionally vulnerable, was very reactive, had a reduced level of cognitive capacity, showed psychiatric symptoms. The most damaging of the psychologist's statements was that it was unlikely she was rehabilitatable within an appropriate time frame during which to make her children wait for her.

The juvenile court ordered "the goal be changed from reunification to termination of the parental rights for the mother of the minor children." J.O. appealed this decision, arguing the juvenile court abused its discretion; there was insufficient evidence to support a change in permanency goal; the court used the wrong evidentiary standard; and DFS failed to provide a compelling reason for recommending termination.

The Court held since the central issue in the present permanency decision involved a resolution of the "best interests of the children" the abuse of discretion standard was appropriate. In determining whether there was an abuse of discretion, the court is concerned with "the reasonableness of the district court's decision in light of the evidence presented." An abuse of discretion will be found where the findings of fact not supported by the evidence, are contrary to the evidence, or are against the great weight of the evidence.

In assessing whether the juvenile court abused its discretion in changing the permanency goal from reunification to termination and adoption, the Court concluded it must evaluate the sufficiency of the evidence to support the lower court's decision. The Court further held when evaluating the sufficiency of the evidence in a neglect proceeding, it measures the juvenile court's decision against the preponderance of the evidence standard.

J.O.'s primary contention was that the juvenile court abused its discretion when changing the permanency goal from reunification to termination and adoption, "because [the decision] was based upon her predicted behavior, rather than upon current conditions." The Court held there was sufficient evidence to support the juvenile court's determination that reunification was not in the best interests of the children, especially given the testimony at the permanency hearing relating to: (1) J.O.'s irregular attendance and lack of engagement at scheduled visitations with her children, (2) her inability to improve her parenting skills over fourteen months of sustained DFS assistance, and (3) her mental health problems that were unlikely to resolve through medical intervention. Further, J.O. chose not to testify at the permanency hearing, but conceded through counsel that she was "not able to reunify with her children at this time." Therefore, the Court concluded based upon the evidence, that the juvenile court did not abuse its discretion.

J.O. then argued that her parents had a fundamental right in a child/grandparent relationship and the permanency order impinged on that right. She averred that because the rights of extended family members are not addressed in subsequent proceedings relating to termination of parental rights, the court's determination at a permanency hearing must satisfy a higher evidentiary standard, that is to say, the clear and convincing evidence standard. However, the Court held that there is no statutory mandate requiring a higher evidentiary standard at the permanency hearing. Furthermore, the Court held that because this was an appeal from a termination of J.O.'s rights and was filed in district court, it was separate and distinct from other child protection proceedings held in juvenile court. Moreover, the Court found that because her parents were not parties to this action, J.O. lacked standing to assert her parent's right of familial association as a justification for the application of a higher evidentiary burden. Thus, the court concluded the juvenile court's findings be reviewed "under the preponderance of the evidence standard that is applicable to neglect proceedings."

Next, J.O. argued that the juvenile court's decision should be overturned because DFS "failed to provide a compelling reason for recommending a permanency plan of termination over relative guardianship," which it was required to do under Wyo. Stat. Ann. § 14-3-431(j).² The Court rejected this argument because J.O. conceded that the permanency plan was changed to "termination and adoption," and under Wyo. Stat. Ann. § 14-3-431(j), DFS is not required to provide a compelling reason for recommending a permanency plan of adoption over legal guardianship. Rather, the Court held DFS is required to provide a compelling reason for "establishing a permanency plan other than reunification, adoption or legal guardianship."

Lastly, J.O. contended that under Wyo. Stat. Ann. § 14-3-429(a)(ii), the Juvenile court was required to articulate specific findings of fact supporting its decision to change the permanency plan.³ The Court concluded that the term "disposition," as used in this statute, referred to the initial placement of a child following an adjudication of neglect and a disposition hearing. Accordingly, the Court held because the statute governs the initial disposition phase of a neglect action, it has no application to the present case. Furthermore, the Court determined the reasons for the lower court's decision to discontinue the permanency plan of reunification with J.O. were clearly set forth in the record.

² The statute provides as follows: §14-3-431(j) At the permanency hearing, the department of family services shall present to the court the efforts made to effectuate the permanency plan for the child, address the options for the child's permanent placement, examine the reasons for excluding other permanency options and set forth the proposed plan to carry out the placement decision, including specific times for achieving the permanency plan. The department of family services shall provide the court a compelling reason for establishing a permanency plan other than reunification, adoption or legal guardianship.

³ That section provides as follows: § 14-3-429 Decree where child adjudged neglected; dispositions; terms and conditions; legal custody. (a) In determining the disposition to be made under this act in regard to any child: . . . (ii) If the court does not place the child in accordance with the recommendations of the predisposition report or multidisciplinary team, the court shall enter on the record specific findings of fact relied upon to support its decision to deviate from the recommended disposition.

The Court thus affirmed the Juvenile court's order the goal of the permanency plan be changed from reunification to termination of the parental rights for the mother of the minor children.”

In the Matter of Termination of Parental Rights to: KMO, DMO, CMO, AKO, DKO, MTO, ABO, EEC, and JBO, Minor Children; HJO aka HJK v. State of Wyoming, Department of Family Services, 2012 WY 99, 280 P.3d 1203 (Wyo. 2012).

HJO is the biological mother of the nine minor children who are at issue in this termination action. PGR is the biological father of KMO, DMO, CMO and AKO, his parental rights were terminated in June, 2011. MBK is the biological father of DKO, MTO, ABO, EEO, and JBO, his parental rights were terminated in February, 2011.

The first contact that DFS had with the family was in early 1999 after receiving a referral from Nevada's child and family services about a family moving to Wyoming, whom had substantiated allegations of neglect four times between 1996-1999 (physical and mental neglect and lack of supervision). Wyoming DFS expressed concerns about education and cleanliness of the home and implemented a voluntary case plan.

The children were first taken into protective custody in May 2001 after HJO told a doctor she wanted to drive herself and her children off Casper Mountain. The district attorney filed a neglect petition and the children were put in foster homes. A case plan was eventually established which required HJO to: (1) take financial responsibility for her children (2) get assistance for the stress of raising, at that time, 6 children (3) seek employment (4) attend counseling (5) take medication. HJO admitted neglect allegations in July 2001 and her children were returned to her.

In November of 2002, the children were again placed in protective custody after the father left the children home alone with no adult supervision and the house was in disarray, while HJO was getting arrested for shoplifting at Walmart. A juvenile neglect petition was filed and the children were placed in DFS custody. This time the children were placed with a relative and eventually were placed back with the mother. The children were removed from HJO's home again in May 2003, as a result of the home being unclean and unsafe and because the children were left home alone again. After this removal, the children were placed in foster care. HJO gave birth to another child in January and, slowly, the other children were returned back to her by March 2004. DFS had an open case on HJO when it found out that she started a relationship with a registered sex offender. She was aware of the man's status as a sex offender, but apparently was in denial about his guilt. He was later charged and pled guilty to taking indecent liberties with 3 of HJO's children.

Between 2004 and 2008 HJO had custody of her children and she gave birth to four more. Several things worth noting happened in 2008: HJO was evicted from a house she was provided by Housing Alternatives Inc. because of the uncleanly, unsanitary and unsafe conditions of the home; DFS opened an investigation when it learned that the eldest was missing school to babysit the other children; DFS substantiated allegations of neglect against mom for failing to pick up child from CDC; HJO's four-year-old started a fire playing with a lighter and, for all intents and

purposes, burned down the house. The children were thus placed in protective custody for the fourth time.

Again, the parents stipulated to adjudication of the children as neglected and all 11 children were put in foster care while HJO and the two dads decided a reunification plan for mom and MBK was in the children best interests; the district court approved this plan at a dispositional hearing on October 1, 2008. Starting in October 2008, HJO was reunited with five of her children; however, by early fall 2009, conditions in the home deteriorated and the children were found to be showing up for school dirty, hungry, and late. One child broke her arm in the home and no one could provide an explanation for how the break occurred, as a result, on Oct. 30, 2009 children were put into foster care again.

Upon new investigations DFS discovered domestic violence was occurring in the home. In January 2010, a new case plan was developed which HJO failed to comply with. A permanency hearing was held in March 2010, and the district court determined HJO had not made sufficient progress on her case plan to justify continuing efforts for reunifying her with the children. In August 2010, the court ordered the permanency goal be changed to termination.

On December 7, 2010, DFS filed a petition to terminate HJO's parental rights. A three week jury trial was held and the jury returned a verdict that HJO's parental rights should be terminated. The district court entered an order terminating HJO's rights on June 6, 2011. HJO appealed.

The issues HJO raised on appeal are: (1) the sufficiency of the evidence presented by DFS to terminate (2) the appropriateness of the special verdict form submitted to the jury (3) the constitutionality of the termination statute which sets out the BOP and (4) alleged cumulative errors.

The first issue the Court discussed is whether the record contained sufficient clear and convincing evidence for the jury to find that the statutory requirements were satisfied for termination of parental rights of mother at the time of trial pursuant to 14-2-309(a)(v).⁴

The first element the Court required needed to be established in order for termination to be proper under Wyo. Stat. Ann. § 14-2-309(a)(v), requires a showing that the children have been in foster care under the responsibility of the state for the last 15 of the most recent 22 months. HJO concedes to the fact that the children were in foster care for 17 months, but she argues the only reason they were in foster care for so long was because DFS failed to file a determination petition within 60 days. The court holds that neither the CPA nor the termination statutes impose a filing deadline application for the grounds on which the petition was filed against HJO in this case. HJO points to 14-2-431(o), part of the CPA, which states, "A petition to terminate parental rights shall be filed within sixty (60) days of a judicial determination that reasonable efforts to reunify the child and parent are not required pursuant to W.S. 14-2-309(a)(vi), (b) or (c)." However, DFS did not seek termination of parental rights based on 14-2-309(a)(vi), (b) or (c), so this section does not apply here.

HJO also argues that under Wyo. Stat. Ann. § 14-3-431(m)⁵ the fifteen of the twenty-two month timeline is "tolled" if a child is placed with a relative. The Court holds this is an incorrect

⁴ See footnote 1 *supra*.

statement of the law. The Court declares this section does not preclude the State from filing a termination petition if a child is in relative care for fifteen of the most recent twenty-two months; rather, it makes filing a termination petition in that circumstance optional. Therefore, the court concludes the children were in DFS foster care for 15 of the most recent 22 months at the time of trial and thus satisfied the first element of §14-2-309(a)(v).

The second element of §14-2-309(a)(v) requires DFS to prove by clear and convincing evidence that HJO was unfit to have custody and control of her children. HJO argues DFS did not present any evidence that she was unfit *at the time of trial* but, rather, the evidence DFS offered related to her past behavior. She further avers the prior cases in which she was a party should not have been used in the determination against her, because each time the children were removed from the home they were returned to her.

The Court holds that although unfitness must be determined at the time of the trial, it does not preclude the court from examining the parent's previous unfitness. Evidence of past behavior is plainly relevant in determining current parental unfitness.

The Court concluded the evidence presented by DFS, relating to HJO's fitness, met the clear and convincing threshold. DFS provided evidence of an extensive record of neglect and unfitness. In addition, DFS provided evidence of the current situation and of what the children need in the future from their parents. The clear and convincing evidence presented included a history of dealings with DFS, expert testimony, the fact that HJO exposed her children to a sexual predator, her financial inability, her inability to provide adequate housing for the children, as well as evidence of HJO's decision to stay with abusive father. HJO argues that despite the overwhelming evidence showing her unfitness, there was evidence introduced at trial that was favorable to her. The Court held that it was not its job to reweigh the evidence; its role was to review the evidence in the light most favorable to the prevailing party and determine whether that evidence clearly and convincingly satisfied the stat elements required to support a termination of parental rights. The court concludes its discussion on unfitness stating, "evidence of numerous incidents and conditions occurring over the entire lifetimes of these nine minor children clearly and convincingly supports the jury's finding that Mother is unfit to have custody and control of them."

HJO's next argument directly relates to her first. She claims that the trial court erred by not requiring the jury to make a finding on the verdict form as to both of the required elements found in §14-2-309(a)(v) for each child and each parent separately. She further argues this error violated her right to due process. The Court concludes that the lower court did not abuse its discretion by directing the jury to make a determination on the statutory elements for the nine children as a group. The trial court's decision to instruct the jury, as such, was made after hearing arguments from all parties and reviewing the evidence adduced at trial. The decision was

⁵ (m) When a child has been placed in foster care under the responsibility of the state for fifteen (15) of the most recent twenty-two (22) months the state shall file a petition to terminate parental rights or seek to be joined as a party to the petition if a petition has been filed by another party, unless: (i) The child is in the care of a relative[.]

likewise based on the following: the fact that all parties were interested in keeping all the children together if possible; the possibility of confusion given how many children were involved as well as the nature of the evidence; there was clear and convincing evidence established at trial to show that HJO was unfit as to each of her nine children; and, jury instruction no. 12 instructed the jury to consider the mother's fitness to parent each child individually. Therefore, the Court held that HJO's due process rights were not violated, and the lower court did not abuse its discretion in instructing the jury.

The third issue HJO presents is whether her due process rights and equal protection rights were violated as a result of the use of the lower burden of proof standard of clear and convincing evidence for termination of rights instead of using the higher standard of beyond a reasonable doubt? The Court held that the United States Supreme Court has determined the use of the clear and convincing standard in termination cases is constitutionally sufficient. Wyoming determined the clear and convincing standard was appropriate in *Santosky v. Kramer*, 445 U.S. 754 and that determination still stands.

HJO's equal protection argument relates to the Federal Indian Child Welfare Act, which establishes the "beyond a reasonable doubt" standard of proof is appropriate when the state seeks to terminate an Indian parent's parental rights. HJO argues because a different standard of proof is applied to Indian parents than is applied to non-Indian parents, the use of the clear and convincing standard is a violation of her constitutional right to equal protection. The Court discussed the equal protection argument relying on the U.S. Supreme court decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 46, which deals with the tax immunity provided to Indians living on reservations in Montana. The Court in *Moe* said because these preferences are neither invidious nor racial in character the test to be applied is whether or not "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." The Court in the current matter then looked to case law in surrounding where the *Moe* test was applied. These cases have determined there is no equal protection violation. Thus, different burdens of proof in the federal ICWA and Wyoming's termination statute do not violate HJO's right to equal protection.

Lastly, HJO argues that the "termination proceedings were 'replete with errors' and that the cumulative effect of these errors denies Mother's constitutional procedural and substantive due process rights under the Wyoming and United States constitutions." HJO in "essence claims that virtually every ruling adverse to her that the district court made on the pleadings, in the hearings, and at trial was in error—motions denied, objections overruled, exhibits not allowed, and impermissible hearsay allowed. Such blanket assertions are far too vague for us to meaningfully review." The Court concludes that none of the errors are supported by legal authority or have sufficient merit to warrant further discussion.

The trial court and jury determination are affirmed.

In the Interest of: DRS, NJL and KDL, minor children; RH v. The State of Wyoming Department of Family Services, 2011 WY 128, 261 P.3d 697 (Wyo.2011).

RH is the mother of the three minor children at issue in this case, DS, NL, and KL. The children were originally taken from the home in October 2008 when the police discovered them in the

home unsupervised in the midst of cigarette butts, feces, marijuana and a dangerous un-caged snake. The district attorney filed a neglect petition and released the children back to the mother within a few days. The parents admitted the allegations of neglect and the court entered into a consent decree, to which all parties agreed, that the children were to be in RH's custody but under the protective supervision of DFS with an MDT being created to give recommendations to the court. The MDT determined terms and conditions that RH must meet and they found the consent decree should be in effect for 12 months. If RH was unable to comply with the terms the MDT created, then the state would file a motion to reinstate the action. The court suspended adjudication of the neglect admission in abeyance pursuant to the terms of the consent decree. In May 2009, the court moved to reinstate the proceedings because RH: (1) would not allow the father of NL and JL to see them (2) was not locking up the snake (3) was using sitters who were not approved by DFS (4) did not get an evaluation for her drug and alcohol addictions. The juvenile court reinstated proceedings authorizing DFS to remove the children after a finding that RH violated the consent decree and, as a result, the children were adjudged as neglected. The court set forth a permanency plan of family preservation and ordered RH to comply with 18 terms.

In May 2010, MDT and DFS reported concerns with the welfare of the children. In June the grandparents filed a stipulation for visitation which was entered by the court. The parties met with the children's therapists and agreed that it was in everyone's best interests for NL and KL to be with their grandparents for a while and that DS should be with the father for the summer. When the MDT met in July 2010, they recommended that NL and JL continue their visitation with their grandparents and that DS continue to be placed with the father. Subsequently, the state filed a motion to change custody and placement of the children to be in accordance with the MDT findings. The court then held a previously scheduled hearing where it was ordered that the children are to remain where they are for the time being. The court found that the children had been subjected to severe emotional abuse stress, that it was contrary to their best interests to be with their mother, and that the current arrangement for the children had been successful thus far; therefore, the court ordered the children to remain with their grandparents and father, respectively.

RH filed a writ of review asking the Supreme Court to look at the lower court's order. The writ was denied. After a hearing on the motion to change custody in September 2010, where the court ordered that the children were not to be returned to mother, RH appealed.

The first issue the Court discussed is one raised by the State. The State contended that RH did not have standing to raise on appeal any issue she had with the court order delivered at the July hearing. The State argued that RH is barred from appealing this order because the timely filing of a notice of appeal is jurisdictional.⁶ The Court rejected this argument partially because RH had filed a writ of certiorari and partially because the order affected a substantial right of RH.

Second, the Court discussed RH's contention that the lower court's order maintaining the children continue to be placed outside of the home violated her due process. She averred her rights were violated because she was not given the opportunity to present evidence prior to the court making its ruling. According to statute, a review hearing is required at six and twelve months from the date of the child's removal and every twelve months thereafter. At the review

⁶ W.R.A.P. 1.03

hearing, the court is charged with the duty of determining, among other things: the continuing necessity for the placement, and the appropriateness of the current placement.⁷ Hearings under the CPA are to be conducted in “an informal and orderly manner. Thus, the formalities of the proceedings themselves and the notice and opportunity to be heard in a neglect proceeding are not the same as that in a termination proceeding.”⁸ Wyoming Statute §14-3-409 establishes that on motion of any party, the juvenile court may reconsider its order regarding shelter care or conditions of release made under §14-3-409 or 414. The Court in previous cases has established the existence of this statute is enough to put individuals in neglect cases on notice that issues involving the conditions of shelter care may arise at any time. Therefore, the Court concluded RH was given notice that future hearings would occur in which the placement of the children would be at issue. RH was provided with the opportunity to present evidence at the subsequent hearing, and because she did so, any prejudice against her was eliminated. The Court held that RH was given notice and an opportunity to present evidence and that the juvenile court did not abuse its discretion in ordering the temporary placement continue.

The third issue the court disposes of is RH’s argument that the court erred by applying Wyo. Stat. Ann §14-3-429(a)(iv) instead of applying Wyo. Stat. Ann §14-3-405 in the evidentiary hearing when deciding the State’s motion to change custody. RH argued that the court should have applied §14-3-405 because it related to temporary custody. RH argued the State could not have met the higher burden of proof required in that statute.

The Court determined the plain language of §14-3-405 indicated the statute applies when taking a minor into temporary custody before any action is taken by the juvenile court, and when there exist emergency situations in which there is no opportunity for a hearing. Because the juvenile court was not holding an emergency temporary protective custody hearing on September 29-30, 2010, the statute was inapplicable.

The Court went on to hold application of §14-3-429(a)(iv) was proper because RH had already been adjudicated as neglectful, and application of this statute necessarily occurs after an adjudication of neglect or abuse.

The final issue the Court addressed RH’s assertion there was insufficient evidence to support the juvenile court’s determination that the children remain outside of the home. Wyo. Stat. Ann. §14-3-429(a)(iv) requires a showing of clear and convincing evidence. The Court held when reviewing a record for sufficient evidence to sustain a finding of neglect: it gives considerable deference to the lower court’s determinations; it examines the evidence in the light most favorable to the appellee; it assumes as true all evidence in favor of the appellee. The evidence adduced at trial must support the finding that DFS made reasonable efforts to prevent removal of the children from RH’s home, and that the best interests of the children would not be served by allowing them to remain in RH’s home.

The Court holds reasonable efforts are made on a case by case basis. RH was afforded a two-day evidentiary hearing where testimony was heard from various witnesses and RH heard and disputed the State’s evidence. The court issued a comprehensive findings of fact and conclusions of law detailing the efforts made by DFS. Those efforts included: directing RH on how to make

⁷ *HP v. State*, 2004 WY 82, ¶ 24, 93 P.3d 982, 989 (Wyo. 2004).

⁸ *HP supra* note 7, ¶ 25, 93 P.3d at 990 (Wyo. 2004).

her home safe and clean for the children; overseeing home repairs; convincing RH's mortgage company to give her time to become current on mortgage payments; putting RH in contact with a loan modification company; procuring \$1,000 to help RH get a new apartment; helping RH find a new apartment; contacting interfaith; paying for RH's substance abuse evaluation; facilitating counseling; counseling her on how to comply with the consent decree; ensuring care for the children while RH was in jail; supervising visits between RH and her children; and setting up case plans; setting up MDT meetings. The Court concluded these efforts met the standard of reasonable.

The Court held the evidence adduced in this case that RH coached her children to say they had been molested by one of the fathers, pointed to a finding that RH was acting in opposition to the best interests of the children. This coaching was specifically advised against by DFS and RH's counselors, and experts in the field of child psychology say this type of coaching is considered severe emotional stress from which the children might not recover.

The Court upheld the juvenile court's decision that the children be placed outside of the home.

In The Matter of the Termination of Parental Rights to: ZMETS, ZCJS, ZPMS, and ZKMS: DMM v. The State of Wyoming Department of Family Services, 2012 WY 68, (Wyo. 2012).

DMM is the mother of the four minor children at issue in this case. The children were first taken into protective custody in October, 2009, when the police were informed the children were playing in a motel parking lot where DMM lived and worked. Two days after the children were taken into custody, a petition alleging neglect was filed and the children were adjudicated as neglected when DMM dialed to appear at the hearing on the petition. The children have remained in relative foster care with their paternal grandparents since April, 2010.

Shortly after the children were discovered in the parking lot, DFS developed a family service plan and began efforts to reunify appellant with her children. DFS assisted DMM in the following ways: scheduling visitations between DMM and her children; supervising visitations in provided locations; and arranging substance abuse counseling for DMM and mental health counseling for the children. DMM often missed visitations with her children or was not allowed to attend the visitation sessions because she was intoxicated. While DMM could not be convinced to attend outpatient substance abuse treatment, she did eventually finish an inpatient treatment, but failed to stay sober. DMM did not show any real progress especially with regard to counseling.

Just before the children were moved into the paternal grandparent's house in Colorado, the MDT recommended that reunification efforts be stopped. A second family service plan was created and the DFS caseworker attempted to help maintain communication between DMM and her children. DMM was unable to meet the goals of this family service plan as well.

DFS filed a petition on January 26, 2011, to terminate DMM's parental rights pursuant to Wyo. Stat. Ann. §§ 14-2-309(a)(iii) and (a)(v). The petition alleged DMM neglected or abused her children, that DFS made reasonable efforts to reunify DMM with her children, and that the children's safety and health would be seriously jeopardized if the children were returned to DMM. The petition further purported that the children had been in foster care and under the

responsibility of the State for fifteen of the most recent twenty-two months, and that DMM was unfit to parent her children. A default was entered against DMM when she failed to file an answer to the petition. Eventually DMM obtained counsel and on the day the default hearing was set to occur, counsel for DMM filed a motion to set aside the entry of default.

The district court denied DMM's motion and held there was no good cause for relief. The court held it was in the children's best interests that DMM's parental rights be terminated, and that termination was proper under §§ 14-2-309(a)(iii) and (a)(v).⁹

DMM argued on appeal that there was not sufficient evidence to support the district court's holding. DMM alleged that DFS did not present clear and convincing evidence to support termination under §§ 14-2-309(a)(iii) and (a)(v). DFS countered that DMM cannot argue the sufficiency of the evidence on appeal because a default judgment was entered against her.

The Court held that DMM could appeal the decision of the lower court based on the sufficiency of the evidence. The Court provided a number of reasons supporting this conclusion. First, the Court held because DMM was permitted to take part in the default hearing, and because she was allowed to contest the sufficiency of the evidence there, she is also permitted to contest it on appeal. The lower court entered default against DMM and then it scheduled the matter for a hearing. DMM's counsel filed a motion to set aside the default, and after the hearing (during which DMM was permitted to cross examine witnesses, object to evidence, and contest the sufficiency of the evidence), the motion to set aside was denied. The Court supported this conclusion by stating that denying DMM the ability to appeal on the sufficiency of the evidence would be inconsistent with her participation at the hearing. Second, the Court held this case was procedurally similar to civil cases in which the Court has allowed a defaulted party to challenge a holding based on the sufficiency of the evidence. The Court held that allowing DMM to contest the sufficiency of the evidence would thus be consistent with its decision to do so in other procedurally similar cases. Third, the Court further held that because termination cases involve constitutionally protected fundamental rights, they demand review under strict scrutiny. The Court discussed the numerous procedural safeguards afforded in termination cases as distinguished from other cases. Because of the nature of these cases, and the sensitivity the Court must have about the rights involved, the courts have to be as informed as possible. For the forgoing reasons, the Court held DMM was permitted to raise the sufficiency of the evidence on appeal.

The juvenile court found that clear and convincing evidence established: (1) that DMM had abused or neglected her children, (2) that reasonable efforts had been put forth by DFS (3) that the children had been in foster care for 15 of the most recent 22 months, (4) that the GAL supported termination, and (5) that it is in the best interests of the children that the parental rights be terminated. The Court reviewed this evidence in the light most favorable to DFS, while assuming all of the evidence was true, and it held that there was sufficient evidence supporting the court's decision to terminate DMM's parental rights.

The Court next discussed the two elements that must be shown by clear and convincing evidence in order to uphold termination as appropriate under § 14-2-309(a)(v). First, that the children have

⁹ See *supra* note 1.

been in foster care under the State's responsibility for at least 15 of the most recent 22 months. Second, the mother must be shown to be unfit to have custody of the children.

DMM argued that the first element had not been established because when the children were placed with their grandparents they were no longer in foster care under the responsibility of the State within the statute. While the grandparent's had physical custody of the children, DFS had legal custody of the children after the children were adjudicated neglected and throughout the current proceedings. The Court held it is obvious the children have been under the responsibility of the State from the inception of the case. The Court further held that placement of the children with relatives is still within the definition of foster care. Using the common understanding of foster care the Court defined it as, "supervised care for orphaned, neglected, or delinquent children or for persons mentally ill in a substitute home or an institution on either a full-time or day-care basis."¹⁰ The Court concluded that there is no indication from this definition that the term is limited to the care of non-relatives. The Court concluded the children had been under the State's responsibility for at least 15 of the most recent 22 months.

DMM went on to argue that the evidence presented against her fitness as a parent did not meet the clear and convincing standard. The Court rejects DMM's claim that the fitness must be determined at the time of termination, holding they can look to previous behavior of unfitness. The Court considered the caseworker's testimony that DMM never went to counseling and her substance abuse treatment failed and DMM was not proactive about utilizing DFS resources to stay in contact with her children while they were placed with the grandparents in Colorado.

The Court considered evidence that DMM's battle with addictions to methamphetamine and alcohol created a barrier to reunification to the children. These Court held these addictions caused health and safety concerns. The Court indicated further concern for the children's safety and health after learning of evidence presented that the children had developed inappropriate sexual behaviors as a result of things they have witnessed sexually from being around their mother.

¹⁰ Webster's Third New International Dictionary 897 (3d ed. 2002).