

LAW LIBRARY LETTER – *In re JW* Summary

Case Name: LW v. The State of Wyoming Department of Family Services

Citation: 2010 WY 28

Docket Number: S-09-0049

Appeal from the District Court of Natrona County, Honorable Scott W. Skavdahl, Judge

Representing Appellant (Respondent): Jamie M. Woolsey, Casper, Wyoming.

Representing Appellee (Petitioner): Bruce A. Salzburg, Attorney General; Robin Sessions Cooley, Deputy Attorney General; Jill E. Kucera, Senior Assistant Attorney General; and Susan K. Stipe, Senior Assistant Attorney General.

Representing Guardian ad Litem: Lori Gorseth, Casper, Wyoming.

Date of Decision: March 18, 2010

Facts: The principal effect of the order at issue here was to permanently place the children with foster parents, who had cared for the children for over one year, with the further intent that Mother's parental rights be terminated and the children adopted by the foster parents. A secondary effect was to eliminate Mother's brother and his wife, who we will refer to as Uncle and Aunt, as the alternative, "kinship" placement for the children as provided for under Wyo. Stat. § 14-3-208(a)(iii) (2009), as well as applicable federal statutes and rules and regulations of DFS.

Issues: Whether a parent whose children are in the custody of the Department of Family Services has standing to argue that the familial rights of her brother and sister-in-law have been violated by the court's permanency plan of adoption by the children's foster parents. Whether the court properly considered the best interests of the minor children when conducting a permanency hearing that resulted in an order placing the minor children outside the home despite a clear Department of Family Services Policy and Supreme Court preference that makes relative [kinship/family] placement a priority.

Holdings: Standing to sue requires a legally protectible and tangible interest at stake in the litigation. The phrase tangible interest has been equated with the phrase personal stake in the outcome. The person alleging standing must show a perceptible, rather than a speculative harm from the action; a remote possibility of injury is not sufficient to confer standing. Insofar as this appeal is concerned, Mother is on the brink of having her parental rights terminated, but that has

not been accomplished yet. Wyo. Stat. Ann. § 14-3-402(a)(xvi) (2009) provides:

§ 14-3-402. Definitions.

....

(xvi) "Residual parental rights and duties" means those rights and duties remaining with the parents after legal custody, guardianship of the person or both have been vested in another person, agency or institution. Residual parental rights and duties include but are not limited to:

- (A) The duty to support and provide necessities of life;
- (B) The right to consent to adoption;
- (C) The right to reasonable visitation unless restricted or prohibited by court order;
- (D) The right to determine the minor's religious affiliation; and
- (E) The right to petition on behalf of the minor.

Thus, Mother has standing in this appeal.

By law, relative/kinship families are the placement of preference for children. The Wyoming Program Improvement Plan makes relative and kinship placements high priority for children placed in out of home care. DFS shall consider relative/kinship families as the placement of preference. DFS is required to make a diligent search for such kinship placements. Relative and kinship placements are less restrictive and therefore preferable to other types of out-of-home care. A DFS caseworker is responsible for conducting an ongoing diligent search for relatives and kin for any child in DFS custody until permanency is achieved. DFS shall consider relative/kinship families as both temporary and permanent resources for children who are unable to live safely with a parent. DFS recognizes that relative/kinship families are important to a child's sense of identity, belonging, and long term connections.(The Family Services Manual, Chapter 7 Section B (RELATIVE/KINSHIP CARE AND DILIGENT SEARCH) (2008)).

The State and the GAL characterize the kinship care policies articulated by the Social Security Act and DFS as merely precatory, i.e., they are "recommended" and should be "considered." In this case the GAL and DFS claim that they did consider them and determined that they were not feasible because of the geography separating Casper, Wyoming, and Miles City, Montana. The court is unable to accept these characterizations given the high stakes in play here. Tools, resources, and an Interstate Compact on the Placement of Children are available to achieve just the result that was "preferred." The district court concluded that the outcome of this case was fixed early on in the proceedings when Mother chose to do her "reunification" work in Casper, during which time the children were placed with the Foster Parents. By the time that concluded in failure, the district court found that it was too late to go back and consider the kinship placement. The court is unable to agree with those conclusions, although it should be emphasized that the district court was remarkably professional, thorough, and patient in creating a complete

record, despite the resistance to the flow of information shown by the GAL and DFS, and other factors.

In the present action, when an Interstate Compact on the Placement of Children study was done, Uncle and Aunt were given extremely high marks for their ability to take in Mother's children. Based on the authority and, as a matter of ageless tradition, as a matter of federal law, and as a matter of Wyoming law, there exists a compelling preference that what is "best" for a child in circumstances such as those presented here, is placement with nuclear or extended family members.

The order of the district court is reversed and this matter is remanded to the district court with instructions that the children be placed with their Uncle and Aunt, this to be accomplished with all deliberate speed consistent with the children's well-being/best interests and under the supervision of qualified professionals in both Wyoming and Montana, the costs of that process to be borne by DFS and Natrona County.

J. Hill delivered the opinion for the court.

J. Golden filed a dissenting opinion in which J. Burke joined. Mother has no standing to bring the issues in this appeal. At this stage of the proceedings, there will be no further attempts to reunify Mother with the children. As the majority opinion informs us, termination of Mother's parental rights is a given. Under the circumstances, Mother has no legally cognizable personal stake in the outcome of the determination of the permanency goal for the children. It is true that, until terminated, Mother retains residual parental rights, but these rights do not include a right to determine the permanent placement of the children. Certainly, it is appropriate for Mother to have a voice in the proceedings below as to her preference for permanent placement, but that is a far different concept from legal standing to bring this appeal. Further, the issues Mother presents are couched in terms of the constitutional right to familial association. Her right to familial association is not at issue in this appeal. Rather, practically, it is Uncle and Aunt's right, if any, that is at issue. Mother has no standing to present arguments on behalf of Uncle and Aunt.

Pursuant to statutory mandates, the juvenile court held a hearing to determine which placement would be in the best interests of the children. The juvenile court took great pains to ensure everyone was able to speak his piece. After the hearing, the juvenile court issued a thorough and very thoughtful order. The possibility of permanent placement with Uncle and Aunt was given full consideration. In the end, however, the juvenile court determined that the permanency plan goal should be placement of the children with Foster Parents for adoption. In doing so, the juvenile court determined all the factors did not weigh equally between the two placements. Of special concern was the age of Son. Son's young age brings into play very real psychological attachment issues. The juvenile court determined removing Son from Foster Parents would not

be in his best interest. Daughter also benefitted from the stability she had found in her life with Foster Parents. Whether this Court would make the same decision in the first instance is not the question. There is nothing in the record evidence that leads to the conclusion that the juvenile court erred in this matter.

Finally, the majority opinion goes too far in outright ordering placement of the children with Uncle and Aunt. At issue in this appeal is the goal of the permanency plan. This is only the beginning of the process. Much remains to be accomplished before permanent placement of the children with Uncle and Aunt becomes a reality, not least of which is the termination of Mother's parental rights. In the meantime, circumstances may change. The juvenile court, the MDT, and the DFS should retain the flexibility to continue to protect the best interests of the children throughout the process.

J. Burke filed a dissenting opinion in which J. Golden joined. The majority opinion fails to identify or apply any standard of review. The proper standard of review is abuse of discretion. Had the majority recognized and applied this standard, it could not have concluded that reversal was warranted. The juvenile court's analysis cannot be faulted. There clearly was no abuse of discretion. The children are flourishing in their current environment. There is no legal or factual justification for this further disruption of their lives. The decision should be affirmed.