

IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 25-0120

IN RE THE ADOPTION OF: A.K.M. and R.J.M, Minor Children,
B.J.R. and T.E.R.,

Petitioners/Appellees,

and

M.M.M.,

Respondent,

and

A.F.M.,

Respondent and Appellant.

APPELLEES' RESPONSE BRIEF

On Appeal from the Montana Twentieth Judicial District
Lake County Cause Nos. DA-2024-4 and DA 2024-5
Honorable Judge John Mercer, Presiding

APPEARANCES:

Laura M. Reed
P.O. Box 17437
Missoula, MT 59808
laurareedlawmt@gmail.com

Attorneys for Appellants

Emily von Jentzen
KAUFMAN VIDAL HILEMAN ELLINGSON PC
22 Second Avenue West, Suite 4000
Kalispell, MT 59901
(406)755-5700
emily@kvhlaw.com

Attorney for Appellees

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STATEMENT OF THE ISSUE

Is a parent who was personally served with notice of adoption proceedings (which included a request to terminate the parent's parental rights) but failed to make any appearances or file any objection with the Court entitled to court-appointed counsel?

STATEMENT OF THE CASE

The children subject to these proceedings are A.K.M., age 6, and R.J.M., age 7. (Doc. 15, ¶3.) B.J.R. and T.E.R. are the children's maternal grandfather and step-grandmother. (*Id.* at ¶ 2.)

R.J.M. has been the subject of dependent neglect proceedings from December of 2017 through April of 2023. (Doc. 15, ¶¶ 3, 4, 6; Doc. 13.) A.K.M. has been the subject of dependent neglect proceedings from May 2020 through April 2023. (*Id.*) The last of the dependent neglect proceedings was resolved in 2023, with B.J.R. and T.E.R. being granted guardianship of the children. (*Id.*) Mother appealed the order granting guardianship (Father did not), *see* Montana Supreme Court Cause No. DA 23-0263; however, Mother's appellate counsel determined she was unable to find any nonfrivolous issues to raise on appeal, filed an Anders brief, and the appeal was dismissed. (DA 23-0263 Order, 11/14/2023.)

At the time of the guardianship hearing, Mother had been out of jail, and Father was incarcerated in the Helena Pre-Release, anticipating conditional release

the next month. (Doc. 1, ¶ 3, Ex. A¹, ¶¶ 9, 21.) Over the course of the next year, both parents returned to criminal activity and were incarcerated. (Doc. 1, ¶¶ 4, 5; Doc. 15, ¶ 4.)

In March of 2024, B.J.R. and T.E.R. filed a combined Petition for Termination of Parental Rights and Adoption concerning both children. (Doc. 1.) At that time, Father was in custody following an October 17, 2023, arrest for Felony Burglary and two counts of Felony Criminal Possession of Dangerous Drugs. (Doc. 1, ¶ 5.) Father’s probation had been revoked, and he was pending trial on the new charges. (*Id.*) Mother was also in custody on pending charges of Felony Criminal Possession of Dangerous Drugs, Felony Criminal Possession of Drugs with Intent to Distribute, Felony Theft, and Misdemeanor Criminal Possession of Drug Paraphernalia. (*Id.* at ¶ 4.) Mother had been in custody since a November 27, 2023, arrest for a probation violation and citation for Felony Criminal Possession of Dangerous Drugs. (*Id.*)

¹ This document, the 2023.04.10 Decree of Guardianship in Lewis and Clark County Cause Nos. DN-21-64 and DN-21-65, was also the subject of the appeal in Montana Supreme Court Cause No. DA 23-0263. Additionally, this document was attached to the Motion for Judicial Notice (Doc. 13) and the district court later took judicial notice of this document, along with all other dependency pleadings. (Doc. 14. 2010-2018.) Father states Father’s “role” in subsequent allegations and interventions by the Department was “unclear.” (App. Br., 2.) The record is clear: Father was criminally convicted for his role in the children’s May 2020 removal and subsequently spent the entire 3-year duration of the last dependency matter incarcerated. (Doc. 1., Ex. A; Doc. 15; Doc. 13; Doc. 14.) Father had counsel and a treatment plan throughout all of the dependency proceedings concerning his children. (Docs. 13, 14.)

Father was personally served with a Summons and the Petition for Termination of Parental Rights and Adoption on March 28, 2024, in the Montana State Prison at Deer Lodge. (Doc. 2.) Father made no appearances in the matter, did not contact the Court, and failed to enter any response or objection to the Petition. Accordingly, Father's default was entered on May 20, 2024. (Doc. 9.) A hearing on the termination of Father's parental rights was set for July 25, 2024. (Doc. 11.) Father was mailed a copy of the Order Setting Hearing. (*Id.*) Father did not appear, nor did he make contact with the Court or file any objection with the Court. Father did not appear at the hearing. (Doc. 12.) Father's parental rights were terminated on July 25, 2024. (*Id.*) The Court issued written findings and an order terminating parental rights on September 12, 2024. (Doc. 15.)

Mother requested numerous continuances and actively challenged the termination of her parental rights. (Docs. 5, 6, 18, 19, 22, 24, 27.) The matter concerning Mother remains pending at the district court. (Doc. 59.)

Father never filed any Notice of Appeal in District Court, yet on February 13, 2025 filed a Notice of Appeal. An Order granting Father's Out of Time Appeal was granted on February 25, 2025. Father filed his opening brief on June 20, 2025. This Response follows.

STATEMENT OF FACTS

R.J.M. was born in November of 2017, exposed to heroin, meth, and marijuana in utero. (Doc. 15, ¶ 3.) R.J.M. was the subject of three dependent

neglect proceedings between November 2017 and April 2023. (Doc. 15, ¶¶ 2, 3, 4, 6; Doc. 13, Doc. 14.) The Department placed R.J.M. with B.J.R. and T.E.R. by the Department of Child and Family Services on four occasions (December 17, 2017-March 10, 2018; September 19, 2018 through late December 2018; from May 12, 2020 to June 2022; and January 3, 2023 to present.) (*Id.*), R.J.M. remains in the care of B.J.R. and T.E.R. and is thriving. (Docs. 1, 15.)

A.K.M. was born in March of 2019. (Doc. 15, ¶ 3.) A.K.M. was born while her brother R.J.M. was subject to an active dependency case in Butte-Silver Bow County; however, A.K.M. was not removed from her parents' care during that action. (Doc. 1, ¶¶ 3, 4; Doc. 13; Doc 14.) A.K.M. was later the subject of two dependent neglect proceedings from May 2020 through April 2023. (*Id.*) The Department placed A.K.M. with B.J.R. and T.E.R. on two occasions (May 12, 2020 to June 2022 and January 3, 2023 to present.) (*Id.*) A.K.M. remains in the care of B.J.R. and T.E.R. and is thriving. (Docs. 1, 15.)

The most recent dependent neglect matter was initiated after the children were found in a hotel room rented by Mother and Father, which contained a substantial amount and array of drugs and drug paraphernalia, which were accessible to the children. (Doc. 1, Ex. A, ¶5; Doc. 13, Doc. 14.) The parents were arrested, and the children were removed. (*Id.*) R.J.M. tested positive for methamphetamine in a subsequent hair follicle test. (*Id.* at ¶ 6.) On November 11,

2020, Father was provided a treatment plan in the most recent dependent neglect matters concerning his children. (*Id.* at ¶ 4.)

Mother pled guilty on January 7, 2021 to Criminal Child Endangerment for her actions resulting in the removal of the children. (*Id.* at ¶ 7.) Mother also pled guilty on that same date to Accountability for Criminal Endangerment (a separate case which resulted from an assault on a female inmate at the Lewis and Clark County Detention Center). (*Id.*) Mother received concurrent seven-year suspended sentences for both convictions. (*Id.*)

Father pled guilty on September 24, 2020 to Criminal Possession with Intent to Distribute (heroin) and Criminal Possession of Dangerous Drugs (LSD). (*Id.* at ¶ 8.) For the distribution charge, he received a twenty-year sentence to the Department of Corrections with fifteen years suspended, and for the possession charge, he received a five-year suspended sentence. (*Id.*) All Father's sentences run concurrently. (*Id.*)

Mother was incarcerated for a portion of the most recent dependency matter, while Father remained incarcerated for the duration of the matter. (*Id.* at ¶ 9.)

Mother had sufficiently completed her treatment plan such that a trial home visit began. (*Id.* at ¶ 11.) The children began transitioning to Mother's care in May of 2022. (*Id.*) Mother had been residing in the YWCA when the children were transitioned to her care, but after she was caught sneaking a known felon into the

YWCA in violation of the rules, Mother lost her housing. (*Id.* at ¶ 12.) Mother and the children lived in a motel for a few weeks until she was able to move into subsidized housing. (*Id.* at ¶ 13.)

Mother left the children with B.J.R. and T.E.R. over the New Year’s holiday and traveled to Bozeman with two individuals known to the Department to have safety concerns. (*Id.* at ¶ 14.) The Department had ceased drug testing Mother as they prepared to withdraw oversight in light of their pending request to have the case dismissed. (*Id.* at ¶ 16.) On January 1, 2023, Mother used a variety of drugs in Bozeman, including methamphetamine, cocaine, alcohol, and fentanyl. (*Id.* at ¶ 17.) Mother overdosed on fentanyl and had to be revived with Narcan. (*Id.*) Following this event, the Department petitioned for guardianship, and a contested hearing was held. (*Id.*)

In its order granting the guardianship, the Lewis and Clark County Court emphasized,

“father has been incarcerated for nearly three years and he has been unable to parent during that time. Even if father successfully discharges to the community in May 2023, he will then need to establish and maintain safe housing, demonstrate sobriety while not incarcerated, and complete a Phase 2 treatment plan. [The Department] believes this would take a year or longer.”

(*Id.* at ¶ 21.)

The Court further concluded in the Order in each child’s case,

“this young child needs a consistent, stable home. Despite [the Department’s] efforts, mother’s treatment plan has not been successful. Father could not complete a plan meeting the goal of stable parenting because he has committed crimes resulting in lengthy incarceration.”

(Id. at ¶ 28.)

Upon being granted guardianship of the child, B.J.R. and T.E.R. offered both parents to have in-person visitation with the child once a month, which was set to occur through a third-party visitation provider (Berni McDonald at Yellowstone Boys and Girls Ranch in Kalispell). (Doc. 15, ¶ 6.) Father never set up services with YBGR for any visitation arrangements. *(Id.)* Father has not seen the children since March 2023. *(Id.)*

From April 2023 until the filing of the Adoption Petition, B.J.R. and T.E.R. gave both parents the opportunity to contact the child for video calls on a bi-weekly schedule. *(Id. at ¶ 7.)* Father called six times between April 15 and November 1, 2023 (less than 50% of the time). *(Id.)*

In March of 2024, B.J.R. and T.E.R. filed a combined Petition for Termination of Parental Rights and Adoption concerning both children. (Doc. 1.) At that time, Father was in custody following an October 17, 2023, arrest for Felony Burglary and two counts of Felony Criminal Possession of Dangerous Drugs. *(Id. at ¶ 5.)* Father’s probation had been revoked, and he was pending trial on the new charges. *(Id.)* Mother was also in custody on pending charges of Felony Criminal Possession of Dangerous Drugs, Felony Criminal Possession of Drugs

with Intent to Distribute, Felony Theft, and Misdemeanor Criminal Possession of Drug Paraphernalia. (*Id.* at ¶ 4.) Mother had been in custody since a November 27, 2023, arrest for a probation violation and citation for Felony Criminal Possession of Dangerous Drugs. (*Id.*)

Father was personally served with a Summons and the Petition for Termination of Parental Rights and Adoption on March 28, 2024, in the Montana State Prison at Deer Lodge. (Doc. 2.) Father made no appearances in the matter, did not contact the Court, and failed to enter any response or objection to the Petition. Accordingly, Father's default was entered on May 20, 2024. (Doc. 9.) A hearing on the termination of Father's parental rights was set for July 25, 2024. (Doc. 11.) Father was mailed a copy of the Order Setting Hearing. (*Id.*) Father did not appear, nor did he make contact with the Court or file any objection with the Court. Father did not appear at the hearing. (Doc. 12.) Father's parental rights were terminated on July 25, 2024. (Docs. 12, 15.) The Court issued written findings and an order terminating parental rights on September 12, 2024. (Doc. 15.)

Father never filed a Notice of Appeal in the District Court, yet on February 13, 2025, roughly 11 months after he was first served with notice of the Adoption proceedings, Father filed a Petition for Out-of-Time Appeal with this Court. Father asserted in his Petition that he had "improperly filed a timely Notice of Appeal," which the record reflects is not accurate as no notice was ever filed with the

District Court. Father further asserts in his Petition that he “failed to file the Notice of Appeal,” stating the reason that he “had no attorney and did not know my rights on this matter.” Father also claimed in his certificate of service that a copy was mailed to the undersigned’s office. No copy was supplied to this office, and the first notice of this appeal the undersigned or B.J.R. and T.E.R. received was the Order Granting Father’s Out of Time Appeal.

SUMMARY OF THE ARGUMENT

Father’s constitutional rights were not violated when the district court terminated his parental rights. While Father was incarcerated, he was personally served with notice of the proceedings and later mailed a copy of the Order Setting Hearing concerning termination of his parental rights. (Docs. 2, 11.) Father failed to file any pleadings, contact the court, or otherwise provide any indication of any objection to the relief sought. Father was afforded due process and failed to participate in the proceedings.

Father relies on two primary cases to support his equal protection claim that a failure to be supplied court-appointed counsel demands an automatic reversal and remand, *In re A.W.S. and K.R.S.*², 2014 MT 322, 377 Mont. 234, 339 P.3d 414 and *In re A.S.A.*, 258 Mont. 194, 852 P.2d 127(1993). Father’s situation is distinguishable from both of these cases, primarily because the parents seeking to

² Father refers to this case as “*In re A.W.S. v. A.W.*”

assert their constitutional right to counsel in *A.W.S.* and *A.S.A* both appeared and participated in the proceedings. Here, Father ignored the proceedings entirely for nearly 11 months after being personally served the Petition and Summons in this matter. Accordingly, Father's failure to make any attempt to participate in the proceedings or communicate with the Court resulted in absolutely no opportunity for the Court to advise Father of any rights relative to the proceedings.

This Court has held "some indication must be given to the court that [a parent] wishes counsel to be appointed *because [they are] indigent or financially unable to secure representation* in an involuntary termination proceeding." (*In re J.W.M.*, 2015 MT 231, ¶ 25, 380 Mont. 282, 354 P.3d 626 (emphasis added).)

There is not a single case where a reversal of a district court decision terminating parental rights in a private adoption proceeding occurred when the parent had filed nothing and made no appearance.

Additionally, under the harmless error doctrine, even if the Court were to fault the court for failing to appoint counsel for an absent litigant, the result here would have been the same had Father had counsel. Father was incarcerated at the time of the termination of his parental rights, as he had been for many of the years since the children had been born. (Doc. 1, ¶¶ 3, 5, Ex. A³, ¶¶ 9, 21.) Father had

³ This document, the 2023.04.10 Decree of Guardianship in Lewis and Clark County Cause Nos. DN-21-64 and DN-21-65, was also the subject of the appeal in Montana Supreme Court Cause No. DA 23-0263. Additionally, this document was attached to the Motion for Judicial Notice (Doc. 13) and the district court later took

chosen to exercise minimal phone contact with the children and continually placed drugs and criminal activity above his children's needs. (Doc. 15, ¶¶ 6, 7.) Given the substantial history of Father's criminal activity, drug activity, Father's documented abuse/neglect of his children, and his unavailability to parent for large periods of time as a result, the children's right to a stable and loving home should supersede Father's right to parent.

STANDARD OF REVIEW

This Court reviews a district court's decision to terminate parental rights for an abuse of discretion. (*In re J.W.M.*, 2015 MT 231, ¶ 11.) An abuse of discretion occurs when a district court acts arbitrarily without conscientious judgment or exceeds the bounds of reason." (*Id.*, citing *In re J.C.*, 2008 MT 127, ¶¶ 33, 343 Mont. 30, 183 P.3d 22.)

"Whether a person has been denied his or her right to due process is a question of constitutional law, for which this Court's review is plenary." (*In re A.S.*, 2004 MT 62, ¶ 9, 320 Mont. 268, 87 P.3d 408.)

judicial notice of this document, along with all other dependency pleadings. (Doc. 14. 2010-2018.) Father states Father's "role" in subsequent allegations and interventions by the Department was "unclear." (App. Br., 2.) The record is clear: Father was criminally convicted for his role in the children's May 2020 removal and subsequently spent the entire 3-year duration of the last dependency matter incarcerated. (Doc. 1., Ex. A; Doc. 15; Doc. 13; Doc. 14.) Father had counsel and a treatment plan throughout all of the dependency proceedings concerning his children. (Docs. 13, 14.)

ARGUMENT

I. FATHER WAS AFFORDED DUE PROCESS AND EQUAL PROTECTION

a. Father was afforded due process and knowingly failed to participate in the proceedings.

Father correctly asserts that “key components of a fair proceeding are notice and an opportunity to be heard.” (App. Br., 15, citing *In re C.J.* 2010 MT 179, ¶ 27, 357 Mont. 219, 237 P.3d 1282.) Father had both; he was personally served with notice of the proceedings and then also mailed notice of the hearing on termination of his parental rights. (Docs. 2, 11.) Father further asserts, “the record should demonstrate that the parent had notice of the termination proceeding and was given an opportunity to be heard.” (App. Br., 15.) Father falsely states, “the record does not demonstrate that Father even had notice of the proceedings.” (App. Br. 11.) Again, the record establishes Father had every opportunity to participate in the proceedings; he was personally served and was provided notice of the termination hearing. (Docs. 2, 11.) Father’s request for an out-of-time appeal raised no issues of any lack of notice. Without any citation to the record, Father sets forth as fact “unreliability and delays of the prison mail system,” seemingly to raise a claim that he did not receive the mailed notice of the termination hearing, a fact which is not established anywhere in the record. (App. Br. 3.) This Court may not rely on facts outside of the record in resolving an issue before it. (*Huffine v. Boylan*, 239 Mont.

515, 517, 782 P.2d 77, 78 (1989.) State law presumes that a letter mailed in the ordinary course of business has been received. (Mont. Code Ann. § 26-1-602(20, 24).)

Father fails to explain, after having notice of the proceedings personally served upon him, why he failed to make *any* effort to participate. Rather, Father seems to assert that, although he made no appearance and made no attempts to contact the Court in any fashion, the Court should have assumed indigency and appointed him counsel without any request by Father at all. (App. Br. 11-13.) Under Montana law, litigants have a duty to monitor litigation, and thus, while default judgments are not favored, default judgments are proper upon facts establishing careless conduct or willful ignorance. (M. R. Civ. P. 55; *Caplis v. Caplis*, 91 P.3d 1282, 321 Mont. 450 (2004).) The record is void of any action by Father requesting that the default be set aside by the District Court.

There is no requirement that the Summons contain any language related to an indigent person's right to counsel in private adoption matters. A summons must contain:

- i. The name of the court and the parties;
- ii. be directed to the [respondent];
- iii. state the name and address of the [petitioner's] attorney or - if unrepresented - of the [petitioner];
- iv. state the time within which the [respondent] must appear and defend;
- v. notify the [respondent] that a failure to appear and defend will result in a default judgment against the [respondent] for the relief demanded in the [petition.];

- vi. be signed by the clerk and
- vii. bear the court's seal.

(M. R. Civ. P. 4(c)(2)(A).) The Summons in this matter complied with the Rules of Civil Procedure. “In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted.” (Mont. Code Ann. § 1-11-103(5).) Father’s argument that the District Court should have somehow “informed” Father of his right to counsel despite Father making no appearances in the matter whatsoever is simply not supported by law.

In all cases cited by Father concerning a reversal for failure to appoint counsel, *every* parent had appeared and participated in the district court proceedings to some degree. (*In re A.S.A.*, 258 Mont. 194, parent appeared at termination hearing and requested counsel; *In re A.W.S. and K.R.S.*, 2014 MT 322, parent appeared at hearing, testified, and stated she didn’t have money to hire an attorney; *Matter of Adoption of L.F.R.*, 2019 MT 2, 394 Mont. 61, 432 P.3d 1030, parent appeared at the hearing and objected to the proceedings.) Father simply cannot effectively argue that he was denied notice or an opportunity to participate when he wholly ignored the proceedings entirely until 11 months after he had been personally served. The record surely establishes that, through Father’s various criminal proceedings and years of dependency proceedings, he was no stranger to the court process. (Docs. 1, 13, 14, 15.)

b. Father's right to equal protection was not violated.

The Montana Code Annotated contains no *statutory right* to appointment of counsel in private adoption proceedings that involve an involuntary termination of parental rights. Mont. Code Ann. § 47-1-104(4)(a)(ix) provides that a court *may* provide assistance of counsel at public expense due to indigency for a parent, guardian or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant to 41-3-422 (abuse or neglect proceedings) and as required under the federal Indian Child Welfare Act 41-3-1316 (abuse or neglect proceedings under the Indian Child Welfare Act), as provided in 41-3-425 (abuse and neglect proceedings). The right to counsel in *dependency proceedings* was summarized in the *Matter of M.V.R.* as follows:

In 2004, when we decided *In re A.S.*, the right to counsel had not attached to all stages of termination proceedings. *In re A.S. (2004)*. “In 2005, the Montana Legislature granted indigent parents a statutory right to appoint counsel in all abuse and neglect proceedings involving any petition filed pursuant to § 41-3-422, MCA.” *In re J.J.L.*, 2010 MT 4, ¶ 16, 355 Mont. 23, 223 P.3d 921. Specifically, § 41-3-425(1), MCA, gives any party involved in a petition under § 41-3-422, MCA, the right to counsel in all proceedings. Section 41-3-425(a)(1), MCA. The court is required to “immediately appoint the office of state public defender to assign counsel for any indigent parent” so long as that parent qualifies pursuant to § 47-1-111(2), MCA. Section 41-3-425, MCA.

(*Matter of M.V.R.*, 2016 MT 309, 385 Mont. 448, 384 P.3d 1058, ¶ 45.)

In 2014, the Montana Supreme Court extended the statutory right for appointed counsel to *indigent parents* in private actions brought under the

Adoption Act. (*In re AWS and KRS*, 2014 MT 322, ¶¶ 26, 27.). The Court specifically held that the manner of appointment of counsel is up to the district court’s discretion. (*Id.*) This Court determined that the mother’s statement to the court that she was only representing herself because she did not have the funds to obtain counsel was sufficient language to trigger a request for counsel. (*Id.* at ¶ 23.) This Court then determined “an indigent parent at risk of losing parental rights as part of an adoption proceeding initiated by a private party was entitled to counsel just as was an indigent parent at risk of losing parental rights in an abuse and neglect proceeding initiated by the State. (*Id.* at ¶ 23.) *AWS and KRS* was remanded by the Montana Supreme Court to determine if the parent was financially eligible for public defender services based upon indigency. (*Id.*)⁴

Father fails to acknowledge that in a case the following year, the Montana Supreme Court held “some indication must be given to the court that [a parent] wishes counsel to be appointed ***because [they are] indigent or financially unable to secure representation*** in an involuntary termination proceeding.” (*In re J.W.M.*, 2015 MT 231, ¶ 25 (emphasis added).) Where the Court found a parent made no

⁴ The matter returned to the Montana Supreme Court. After the matter was remanded and OPD was appointed for the Mother, OPD moved to have the appointment vacated, claiming that the Montana Public Defender Act did not authorize OPD to represent parties in actions filed under the Montana Adoption Act. (*In re A.W.S. and K.R.S.*, 2016 MT 194, ¶ 4, 384 Mont. 278, 377 P.3d 1201.) OPD’s motion was denied; the hearing proceeded with Mother represented by OPD counsel, Mother’s parental rights were terminated and affirmed on appeal. (*Id.* at ¶¶4, 7, 39.)

such indication of indigency, there was found to be no error in a court proceeding with the absence of counsel. (*Id.*) Similar facts are presented here. Father made no efforts to contact the district court or otherwise appear. Father made no statements no statements of indigency. The record is void of *any* evidence of indigency.⁵

While Father wishes this Court to *assume* indigency based upon incarceration (App. Br., 11), to do so would be wholly inappropriate. Inmates incarcerated in Montana can earn a wage for working while incarcerated, thus incarceration is not a per se indication of indigency. (State of Montana Department of Corrections Policy Doc. 5.1.1.) There is absolutely no authority to support the assertion that Father should have been appointed publicly funded counsel in these proceedings *when the matter was opened*-there must be a determination of indigency, and caselaw supports that a parent must give the court some indication of indigency before a court is faulted for the failure to appoint publicly funded counsel. (*In re J.W.M.*, 2015 MT 231, ¶ 25.) It is also notable in *AWS* that the Court held that the mother had “preserved the issue when she explained that she represented herself only because she did not have the money to employ an attorney.” (*In re AWS and*

⁵ The district court conducted no analysis into Mother’s purported status as indigent, even after judicial review of Mother’s eligibility for OPD Services was requested, as Mother was working earning \$16 an hour in regular wages and \$24 an hour overtime. (Doc. 26, January 3, 2025 Tr., 184:8-17.) Had Father participated in the proceedings and given *any* indication he was indigent or requested appointed counsel, the Court would have appointed him counsel.

KRS, 2014 MT 322, ¶ 21.) Father did not request that counsel be appointed or make any representations to the court of indigency.

The requirement that a parent make *some indication* to the Court that a parent requests appointed counsel on the basis of indigency has also been applied to circumstances wherein a parent was without counsel after terminating prior counsel. (*M.V.R.*, at ¶¶ 44-52. Where a Mother had court-appointed counsel, fired court-appointed counsel, hired private counsel, and private counsel subsequently withdrew, the Court did not fault the district court for proceeding to termination and instead emphasized the Mother needed to indicate to the district court she needed another court-appointed counsel and follow through to engage another public defender.)

In 2019 this Court further clarified earlier rulings by holding that a parent in termination proceedings cannot waive their right to counsel by mere silence having received no notice of the right to counsel. (*Matter of Adoption of L.F.R.*, 2019 MT 2, 432 P.3d 1030.) Father asserts that his circumstances are most alike the father in *L.F.R.* (Opening Brief, 12.) However, one very critical difference distinguishes *L.F.R.* from the matter at hand, the parent in *L.F.R.* actually participated in the proceedings after being served notice and was before the district court with opportunity for the Court to advise him of his rights to counsel. (*L.F.R.* at ¶ 3.) Significantly, the *L.F.R.* decision does not overrule *J.W.M.*, in fact, this Court

emphasized in its clarifying holding that “waiver can arise from a respondent’s actions with regard to the right.” (*L.F.R.* at ¶ 16., citing *J.W.M.*, at ¶¶ 24-25.) The Court in *L.F.R.* further reasoned, “We look at the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused, to determine an effective waiver” and “the determination that a parent’s waiver of counsel in a termination proceeding is voluntary and intelligent can be based on the surrounding circumstances of the case rather than applying more stringent criminal proceedings.” (internal citations removed) (*L.F.R.* at ¶16.) Here, by demonstrating complete and total apathy concerning the proceedings, Father gave the Court no opportunity to notify him of any rights to appointed counsel if indigent. This Court has stated numerous times that the Court will not fault a district court where it was not given an opportunity to correct itself. (*In re B.I.*, 2009 MT 350, 353 Mont. 183, 218 P.3d 1235, ¶4.) The district court should not be faulted for failing to communicate rights to a litigant who made no attempt to appear or otherwise engage in the legal process. Father claims the district Court had “opportunity to correct its error” with respect to Father on September 12, 2024 (the day the Order terminating Father’s rights was signed) because the Court then, “became aware of the issue of the indigent parents’ right to counsel.” (App. Br., 13.) Father ignores the fact that his rights were terminated well before that time, on July 25, 2024, the Court simply had not signed the written order. (Doc. 12.)

Additionally, the court followed the law concerning Mother’s right to counsel, which does not require some “automatic” appointment of counsel to all parents in private adoption proceedings where termination of parental rights is requested, as Father alleges. Rather, Mother proceeded *pro se* for the time period up until October 10, 2024, when the Court appointed OPD. (Doc. 20.) Mother represented to the Court multiple times in earlier proceedings that she was seeking private counsel. (Tr. July 25, 2024, 7:23-25.; Tr. Sept. 12, 2024 hrg, 20, 21.) The failure of private counsel sought to take on a parent’s case does not entitle a parent to publicly funded counsel where indigency has not been established. Ultimately, Mother actually did not make the request for the Court to appoint counsel herself; instead, OPD emailed the Court directly and requested that counsel be appointed. (Doc. 23, 6.) Once the issue of indigency was raised and counsel was requested to be appointed, the Court appointed OPD to represent Mother. (Doc. 20.) Father had the exact same opportunity to participate in the Court proceedings that Mother did, and had he appeared and requested counsel or demonstrated indigency, he would have been appointed counsel as well.

II. FATHER HAS MADE NO SHOWING THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT HAD HE HAD COUNSEL

Notably, Father’s appeal does not challenge any of the Court’s findings or the underlying facts upon which the Court relied in its decision to terminate

parental rights. Father argues that the termination of his parental rights should be reversed solely due to his lack of counsel.

Father supposes that the outcome would have differed had he been appointed counsel. Father offers a lengthy factual recitation and comparison of his situation to that of the children's mother in this matter. (App. Br., 5-8, 17.) These comparisons are irrelevant to the issue of whether or not the district court erred in terminating *Father's* parental rights. Further, the Court has neither granted nor denied the petition to terminate parental rights as it relates to Mother. (Doc. 53.) Additionally, Father's parental rights are a separate and distinct issues from Mother's parental rights. (*In re T.S.*, 2013 MT 274, ¶ 29, 372 Mont. 79, 310 P.3d 538, "father and mother's parental rights are separate and distinct matters, and the district court may determine that terminating Father's rights is in the children's best interests without factoring the mother's situation into the equation".) Just as Father's circumstances differ and are distinguishable from the cases showing a reversible error for the court's failing to appoint counsel, Father's circumstances also differ from Mother's in the case at hand. Mother, after being served, promptly appeared and filed her opposition to the proceedings. (Docs. 5, 6) Father ignored the proceedings. Mother then appeared (either in person or virtually at every court proceeding). (Docs. 12, 16, 45, 59.) Father received notice of the proceedings and

the hearing scheduled to address his parental rights, and made no attempt to participate. (Docs. 2, 11.)

In a subsequent reply brief, Father may allege that his incarceration prevented him from taking the same actions Mother took concerning involvement in court proceedings. However, Mother was incarcerated for the first five months of these proceedings. (Doc. 16.) Yet Mother still managed to file a response/affidavit, request continuances, seek private counsel, attend hearings virtually, and ultimately request appointed counsel when she could not locate private counsel. (Docs. 5, 6, 12, 16, 18, 19, 22; Tr. September 12, 2024 hrg, 20.) The Court freely and liberally granted participation via video conferencing to any party, counsel, or witnesses. (Docs. 12, 16, 30, 31, 45, 51, 59.) Had Father wished to participate via video conferencing, he would have been permitted to appear in that manner.

Father also suggests that this court should consider the possibility that Father would be eligible for parole in the near future. (App. Br., 17, FN1.) As cited above, this Court may not rely on facts outside of the record in resolving an issue before it. (*Huffine v. Boylan*, 239 Mont. 515, 517, 782 P.2d 77, 78 (1989.) M. R. App. P. 8 sets forth, “Except as otherwise provided in these rules, the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court

shall constitute the record in appeal in all cases.” Speculation as to whether Father may or may not be eligible for parole is irrelevant to the issues raised in this appeal.

Father, being represented by counsel, would not have changed the facts. Father had ample opportunity to reach out to the Court and object to the Petition or inquire about his options relative to seeking counsel. The evidence of Father’s history of criminal activity and abuse/neglect of his children is overwhelming. Further, Father showed little interest in maintaining contact with the children after the appointment of guardians concluded the most recent dependent neglect matter in 2023. (Doc. 1, Doc. 15.) This Court has held that the harmless error doctrine should be applied in parental termination cases only in the rarest of occasions and with great caution. (*In re JC*, 2008 MT 127, ¶ 35, 343 Mont. 30, 183 P.3d 22, overruled on other grounds.) If the Court determines it to be error for a district court to terminate parental rights of a parent who makes no appearances before the Court, files no pleadings in the matter (either objecting or requesting assistance in obtaining counsel), the harmless error doctrine should be applied. The lengthy history here suggests the existence of counsel would not have impacted the ultimate outcome so far as Father’s parental rights are concerned. As this Court has stated time and time again in Dependency matters, “we do not have a crystal ball to look into, so our determination of a person’s ability to parent their child

must, to some extent, be based on that person's past conduct." (*In re S.M.*, 2001 MT 11, ¶ 51, 304 Mont. 102, 19 P.3d 213.) "A child's need for a stable and loving home supersedes a parent's right to parent the child." (*In re A.T.*, 2006 MT 35, ¶ 20, 331 Mont. 155, 130 P.3d 1249.)

If due process and equal protection afford biological parents the same constitutional rights in private adoptions where termination of parental rights is at issue as they have in dependency proceedings, the same should apply to the rights of children. As this Court has emphasized in dependency proceedings time and time again,

- "The best interests of the children are of paramount concern in a parental rights termination proceeding and take precedence over parental rights." (*In re T.S.*, 2013 MT 274, ¶ 30, citing *In re Custody & Parental rights of D.A.*, 2008 MT 247, ¶ 21, 344 Mont. 513, 189 P.3d 631.)
- "If a district court finds the statutory criteria supporting termination...no limitation requires the district court to consider other options prior to terminating parental rights." (*In re T.S.*, 2013 MT 274, ¶ 30, citing *In re E.A.T.*, 1999 MT 281, ¶ 33, 296 Mont. 535, 989 P.2d 860.)

- “Most importantly, children need not be left to twist in the wind when their parents fail to give priority to their stability and permanency.” (*In re T.S.*, 2013 MT 24, ¶ 30, citing *In re A.D.B.*, 2013 MT 167, ¶ 80, 370 Mont. 422, 305 P.3d 739.)

Father has demonstrated a consistent failure to give priority to A.K.M. and R.J.M.’s stability and permanency, and these two young children should not continue to be left to “twist in the wind.”

CONCLUSION

For the above-stated reasons, T.E.R. and B.J.R. request that this Court affirm the district court’s termination of Father’s parental rights.

DATED: July 21, 2025.

KAUFMAN VIDAL HILEMAN ELLINGSON PC

By: 15/ Emily von Jentzen
Emily von Jentzen
Attorney for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that Appellees' Response Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding the Certificate of Service and the Certificate of Compliance.

KAUFMAN VIDAL HILEMAN ELLINGSON PC

By: 15/ Emily von Jentzen
Emily von Jentzen
Attorney for Appellees

CERTIFICATE OF SERVICE

I, Emily A. Von Jentzen, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-21-2025:

Lindsey Pilecki Jubain (Attorney)
P.O. Box 513
Columbia Falls MT 59912
Representing: M. M. M.
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: A. F. M.
Service Method: eService

Laura Marie Reed (Attorney)
P.O. Box 17437
Missoula MT 59808
Representing: A. F. M.
Service Method: eService

Electronically Signed By: Emily A. Von Jentzen
Dated: 07-21-2025