IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 11-0227

IN THE MATTER OF

J.W.C., L.W.C., K.W.C., and C.W.C.,

Youths in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Ingrid Gustafson, Presiding

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2. Did the district court err when it appointed an attorney to serve as both guardian ad litem and counsel for the youths and subsequently denied the mother's request, made at the termination hearing, for appointment of separate counsel for the children?

3. Did the attorney for the mother provide adequate representation during the adjudication hearing?

STATEMENT OF THE CASE AND THE FACTS

S.W.C. (the mother) appeals from the district court's order terminating her parental rights to J.W.C., L.W.C., K.W.C., and C.W.C. (the children). The four cases have been consolidated for this appeal, and the citations below refer to the documents in J.W.C.'s district court file.

On September 8, 2009, the Montana Department of Public Health and Human Services (the Department) filed a petition for emergency protective services, adjudication as youths in need of care, and temporary legal custody of the children. (D.C. Doc. 2.) The petition was supported by the affidavit (D.C. Doc. 1) of Crystal Wolff, the Department's child protection specialist (CPS), who reported

that on August 26, 2009, the Department learned that the father of the children had been incarcerated and that the mother had no money, food, or shelter for herself and the children. According to the affidavit, the mother voluntarily agreed to the temporary placement of the children in foster care while she looked for housing for the family. Two days later the mother obtained a room at the Gateway House, a battered women's shelter in Billings, and by August 31 all of the children had been returned to the mother's custody at the shelter.

According to CPS Wolff's affidavit, on September 3, 2009, the mother was taken to the emergency room of a Billings hospital after reportedly taking pills and making suicide threats. Pills and drug paraphernalia, including syringes and spoons with apparent drug residue, were found in the mother's room. Law enforcement was contacted, and the mother was arrested on a prior warrant. The children were returned to foster care.

Because the mother, the father, and the children are members of the Assiniboine and Sioux Tribes of the Fort Peck Reservation (Tribes), notice of the involuntary child custody proceedings was sent to the Bureau of Indian Affairs and to the Tribes under the provisions of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1912. (D.C. Doc. 4.) Attorney Judy A. Williams was appointed to serve as guardian ad litem (GAL) and as attorney for the children. (D.C. Doc. 6.)

Attorney Anne-Marie Simeon was assigned by the Office of the State Public Defender to represent the mother in the proceedings. (D.C. Doc. 10.)

The district court granted emergency protective services and set a show cause hearing. (D.C. Doc. 8.) At the hearing on December 3, 2009, Simeon advised the court that the mother was not present because of illness. Counsel for the Department moved to amend the petition to request temporary investigative authority and informed the court that the parties had agreed to stipulate that the allegations contained in CPS Wolff's affidavit are sufficient for a judicial finding that the children are abused or neglected, or in danger of being abused and neglected, and that the Department should have temporary investigative authority to investigate the allegations. In addition, counsel for the Department stated that the mother and the father stipulated to voluntary treatment agreements. Simeon confirmed her understanding of the stipulations as recited by counsel for the Department. (12/3/09 Tr. at 2-6.)

On February 25, 2010, the Department filed a petition for adjudication of the children as youths in need of care and for temporary legal custody of the children. (D.C. Doc. 25.) The petition was supported by the affidavit of Deborah Edelman, the Department's current CPS for the cases. (D.C. Doc. 25.) The affidavit sets forth a detailed chronology of the Department's contacts with the parents and the events that led to the Department's concerns about the children.

On March 3, 2010, the Tribes filed a notice of appearance and intervention, stating that tribal social service personnel would be available to assist the district court in its deliberations and reserving the Tribes' right to move for a transfer of jurisdiction if necessary. The notice was submitted by Ryan A. Shaffer, attorney for the Tribes. (D.C. Doc. 28.)

The Tribes also filed a motion to appear at the hearings telephonically. (D.C. Doc. 29.) The district court granted the motion and allowed the Tribes to appear at any and all hearings by telephone. (D.C. Doc. 30.)

The adjudication hearing was set for May 6, 2010. However, on that date the mother filed a motion for transfer of jurisdiction to the Assiniboine and Sioux Tribal Court, pursuant to 25 U.S.C. §1911(b). The mother requested a hearing on the motion in 30 days to allow time for the tribal court to formally accept or decline jurisdiction. (D.C. Doc. 60.)

The transfer motion was discussed by the parties and the court at the May 6 hearing. Counsel for the Department advised the court that as soon as the Department received a tribal court order accepting jurisdiction, the matter would be transferred to the tribal court. Ryan Shaffer, counsel for the Tribes, advised the court that the Tribes were seriously considering the transfer, that the Tribes undertake a series of steps to assess the resources and placement options on the reservation, and that the process requires additional time. Shaffer could not give

the court an exact date for the Tribes' decision, but he thought it probably would be made within 30 days. (5/6/10 Tr. at 2-4.)

The district court continued the adjudication hearing to June 17 and advised the parties that if the Tribes did not take the case by that time, the court would not have any option other than to proceed with the hearing. The court noted that the Tribes could file their motion at any time, but the court did not want to hold up the matter indefinitely. The GAL objected to the continuance and the resulting delay in the proceedings, noting that the parents had not taken any meaningful action toward reunification with their children. After a brief discussion about the Tribes' efforts to find a kinship placement for the children, the court adjourned the hearing until June 17, at which time the court would consider the questions of transfer and, if necessary, adjudication. (5/6/10 Tr. at 5-9; D.C. Doc. 61.)

At the June 17 hearing, counsel for the Department advised the district court that the parties, except the mother, had stipulated that the facts alleged in the affidavit of the child protection specialist are sufficient for the court to find, by clear and convincing evidence, that the children have been abused, neglected, or abandoned and are youths in need of care. Counsel made an offer of proof that the State's ICWA expert, Edie Adams, would testify that continuing custody of the children by the parents would likely result in serious emotional or physical damage to the children, and that ICWA has been satisfied. The stipulation provided that

the Department should be given temporary legal custody of the children in view of the ongoing risks of harm to the children. (6/17/10 Tr. at 2-4.)

Counsel for the Department also advised the court that the Department had gone to great lengths to make sure that the mother was present at the hearing, but the mother had disappeared after her release from custody and had not maintained contact with anyone in the case. Anne-Marie Simeon, counsel for the mother, stated that she did not have authorization from the mother to sign the stipulation, that she did not have any evidence to offer to rebut the Department's requested relief, and that she did not have any objection to the district court accepting the offer of proof with regard to ICWA's requirements for expert testimony. (6/17/10 at 4-5.)

The GAL noted that the adjudication was long overdue, that the Department had made herculean efforts to work with the parents voluntarily, that the efforts had not been successful, and that the children needed the parents to step up and make some effort at reunification. The district court accepted the offer of proof with respect to the ICWA requirements, took judicial notice of CPS Edelman's affidavit as if it were her testimony, and adjudicated the children as youths in need of care, granting temporary legal custody to the Department. (6/17/10 Tr. at 5.)

Regarding the transfer question, counsel for the Department advised the district court that the Tribes, which were aware of the hearing, had not filed

anything to indicate that they would accept jurisdiction. Counsel moved the court to vacate the transfer of jurisdiction portion of the hearing, subject to further review if the Tribes were to file something in the future. Counsel noted that the case had been pending for a long time, that the Department was proposing phased-in treatment plans for the parents, and that the Department was not inclined to drag out the proceedings for months and years if the parents did not cooperate. The court vacated the issue of transferring jurisdiction to the Tribes, noting that the Tribes did not have anyone at the hearing and did not appear interested in taking jurisdiction at that time. The court stated that if the Tribes were interested in taking the cases in the future, they could file something with the court. (6/17/10 Tr. at 6-7.)

On August 9, 2010, Katie M. Barber was assigned as counsel for the mother. (D.C. Doc. 75.) The district court conducted a permanency hearing on October 7, 2010. The mother and the father did not appear at the hearing. Counsel for the Department advised the district court that although the Department was continuing to attempt to work with the parents towards reunification, the Department may have to move toward termination. Counsel for the mother stated that she had had no contact with the mother and had no evidence to offer. CPS Deb Edelman testified that she had been working with the Tribes to find a family placement for the children. She stated that the last time she had any contact with the mother was

right after school adjourned in June, that prior to that time the mother had done some visitation with the children but had not finished any of the other requirements in the treatment plan, and that the visitations had stopped. (10/7/10 Tr. at 2-9.)

On November 17, 2010, the Department filed a petition for permanent legal custody and termination of parental rights with the right to consent to adoption or guardianship of the children. (D.C. Doc. 81.) The petition was supported by the affidavit and report of CPS Edelman, which contains a detailed chronology of the history and progression of the cases. (D.C. Doc. 80.) On the same date, attorney Marvin McCann was assigned to be counsel for the mother. (D.C. Doc. 83.)

Notice of the termination proceeding was given to the BIA and the Tribes in accordance with ICWA's notice requirements. (D.C. Doc. 86.) The district court conducted a hearing on the Department's petition on February 24, 2011. On that date, the GAL filed a report to the court that related the children's preferences for reunification but supported the Department's request for termination of parental rights. (D.C. Doc. 104.)

At the beginning of the hearing, counsel for the mother asked the district court to continue the hearing and to appoint an attorney for the children. Counsel stated that he believed it was a fundamental procedural defect for the children not to be represented and that the statutes required appointment of an attorney for the children. Counsel for the Department advised the court that attorney Judy

Williams, the GAL for the children, would stipulate to the children's desire to be reunited with their parents, even though her recommendation as GAL would be different, and that the Department would also stipulate that all four children would rather be returned to their birth parents than to continue in foster care. (2/24/11 Tr. at 5-6.)

The court noted that the children ranged in age from two to ten, that even in divorce proceedings the children's input as to living arrangements is not sought until age 14, and that the court would function under the assumption that the children wanted to be reunited with their parents. The court confirmed with Williams that she had seen all of the children, that the older three had made it clear that they would much prefer to be with their parents, and that the two-year-old was too young to express a preference. Williams noted that the parents were not at the hearing to attempt to preserve their parental rights and questioned whether another attorney for the children could accomplish anything that the attorneys for the mother and the father could not. (2/24/11 Tr. at 6-8.)

The district court noted that counsel for the mother had known about the situation well before the hearing and had plenty of opportunity to bring the alleged defect to the court's attention. The court was concerned that any of the children could give meaningful input on the matter. The court stated that Williams had advanced and advocated the children's wishes, to the extent that they could be

ascertained, and that the court would proceed under the assumption that the children wanted to be returned to their parents. The parties and the court recognized that Williams' recommendation, which supported the Department's request for termination of parental rights, was made as guardian ad litem and was contrary to the children's stated wishes. The court denied the motion for a continuance. (2/24/11 Tr. at 8-9.)

Lois Weeks, the ICWA director for the Assiniboine-Sioux Tribes, testified that the two older children were placed with a maternal aunt and that the two younger children were in a foster home in Park City. Weeks stated that the placements complied with ICWA. She was aware of the parents' drug use, homelessness, and family violence, and she believed that returning the children to the parents would likely result in severe emotional or physical damage to the children. She stated that the Tribes had been overseeing the case but had not transferred the case to tribal jurisdiction. She said a decision had been made to transfer, but the necessary paperwork was not done. She acknowledged that the case had been going on for 17 months. (2/24/11 Tr. at 11-17.)

The Department presented the testimony of Greg Pohle, owner of a company that provides drug and alcohol testing services. Pohle testified that the mother had failed to appear for her scheduled urinalysis testing more than 80 times. The Department also presented the testimony of CPS Deb Edelman, who related the

history of the Department's involvement with the parents and the four children. Edelman testified about reasons for the Department's intervention, the mother's failure to complete her treatment plan, and the mother's lengthy absences and incarcerations during the proceedings. Edelman also testified about the Department's efforts to work with the Tribes to find suitable family placements for the children. Edelman reviewed the current placements and the children's progress for the court. (2/24/11 Tr. at 19-58.)

At the conclusion of the testimony, counsel for the mother renewed his objection to proceeding without representation for the children. After entering oral findings and granting the Department's petition, the district court addressed counsel's argument again, noting that having another attorney to relate the children's wishes would not do much to provide the children with some consistency and to move the matter along so that the children can be in a long-term, safe environment that meets their developmental needs. (2/24/11 Tr. at 59-63.)

Additional facts will be discussed as necessary in the argument below.

STANDARDS OF REVIEW

This Court reviews for abuse of discretion a district court's termination of parental rights. Matter of I.B., 2011 MT 82, ¶ 18, 360 Mont. 132, 255 P.3d 56.

The Court determines whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct. Id. Where ICWA applies, the Court will uphold a district court's termination of parental rights if a reasonable fact finder could conclude beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. Id. The Court exercises plenary review to determine whether a parent has been denied effective assistance of counsel. Id.

Generally, a district court's application of the law to the facts of a case is a legal conclusion that the Court reviews to determine whether the interpretation of the law is correct. Matter of C.H., 2000 MT 64, 299 Mont. 62, 997 P.2d 776.

SUMMARY OF THE ARGUMENT

Because the Tribes effectively declined the transfer of jurisdiction, the district court properly retained jurisdiction and proceeded with the cases. The court complied with the letter and spirit of ICWA by looking for some indication from the Tribes that the transfer would be accepted before conducting a transfer/jurisdictional hearing.

The district court did not abuse its discretion by denying the mother's request for postponement of the termination hearing and appointment of counsel for the children. The court had previously appointed counsel for the children as

provided by statute, and the mother has not shown that the court's failure to appoint additional or substitute counsel was arbitrary or unreasonable under the circumstances.

The mother was not denied her due process right to effective assistance by reason of her attorney's conduct at the adjudication hearing. The mother was not present at the hearing, had not maintained any contact with the attorney, and had apparently not provided the attorney with any basis for disputing the Department's factual assertions concerning the mother's abuse and neglect of the children. In view of the mother's conduct, her attorney's performance was neither deficient nor prejudicial.

ARGUMENT

I. THE DISTRICT COURT PROPERLY RETAINED JURISDICTION WHEN THE TRIBES EFFECTIVELY DECLINED TO ACCEPT THE CASES.

The mother argues on appeal that the district court committed jurisdictional error when it failed to transfer the cases to the tribal court following her unopposed motion for the transfer. However, in view of the Tribes' apparent decision to decline the transfer of jurisdiction, this Court should find no error in the district court's handling of the transfer request.

The children in these cases are Indian children, and the proceedings were subject to the provisions of ICWA, including 25 U.S.C. §1911(b):

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

Subsection (b) provides for dual concurrent state and tribal jurisdiction where, as here, the Indian children are domiciled off the reservation. The United States Supreme Court has observed that the subsection "creates concurrent but presumptively tribal" jurisdiction and that state court proceedings for foster care placement or termination of parental rights are to be transferred to tribal court on petition of either parent except in cases of good cause, objection by either parent, or declination of jurisdiction by the tribal court. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

The mother maintains that her petition to transfer jurisdiction to the tribal court, in the absence of objection or demonstrated good cause to the contrary, triggered a mandatory and immediate duty on the part of the district court to

accomplish the transfer. She contends that the district court was mistaken to insist upon an affirmative "opt-in" request from the Tribes. According to the mother's argument, her transfer petition deprived the district court of jurisdiction to continue with the proceedings, including the subsequent adjudication hearing on June 17, 2010, and the termination hearing on February 24, 2011. She asks this Court to vacate the district court's adjudication and termination orders and remand the cases for transfer to the tribal court. She maintains that it would be unnecessary for the district court to conduct a transfer hearing upon remand, since there was no previous objection to the transfer petition from any of the parties.

However, this argument goes well beyond the mother's own request as set forth in her petition to the district court. The mother's petition specifically asked the court to continue the adjudication hearing for 30 days to allow time for the Fort Peck Tribal Court to formally accept or decline jurisdiction. Thus the mother anticipated that a tribal court order accepting jurisdiction would be a prerequisite for the transfer of jurisdiction to the Tribes. At no time did the mother suggest to the district court that her petition, without more, deprived the district court of its jurisdiction to proceed with the cases.

The record shows that the Tribes received actual notice of all the various state court proceedings from the beginning, under ICWA's notice provisions. Two months before the mother filed her petition, the Tribes intervened in the

proceedings and expressly reserved the right to request transfer of jurisdiction to the tribal court. The Tribes appeared through counsel at the May 6, 2010 hearing and advised the district court that the Tribes had not yet decided to request transfer of the cases to tribal court, that the decision required more time to assess the suitability of potential family placements on the reservation and the availability of tribal resources to manage the cases, and that the Tribes would let the court and the parties know of any decision to take the cases. All of the parties at the hearing, including the mother, understood that the Tribes' failure to agree to the transfer of the cases and to confirm that agreement with a tribal court order would amount to a declination of the transfer and would leave jurisdiction with the district court.

While this Court has not addressed the precise issue presented by the mother here, the Court has observed that an Indian tribe may effectively decline transfer of jurisdiction by failing to request transfer in the state court proceedings under §1911(b) despite being given actual notice of the proceedings. Matter of A.P., 1998 MT 176, ¶ 21, 289 Mont. 521, 962 P.2d 1186. Here the Tribes had actual notice of the proceedings, and the district court conferred with counsel for the Tribes about the transfer question at the May 6 hearing. Although Lois Weeks, ICWA director for the Tribes, testified at the termination hearing ten months later that a decision to transfer had been made, there is nothing in the record to suggest

that the Tribes or the tribal court ever indicated, either orally or in writing, that they would assume jurisdiction and take the cases.

To determine whether the tribal court would accept or decline the transfer of jurisdiction, the district court proceeded in a manner suggested in part by the Department of the Interior's Bureau of Indian Affairs Guidelines for State Courts in Indian Child Custody Proceedings, 44 Fed. Reg. 67584-95 (1979). Section C.4 of the Guidelines confirms that a tribal court to which transfer is requested may decline to accept such transfer. This guideline suggests that upon receipt of a transfer petition the state court should notify the tribal court in writing of the proposed transfer and inform the tribal court how long the tribal court has to make its decision. The guideline recommends that the tribal court have at least 20 days to decide whether to decline the transfer. Under this guideline, the tribal court should inform the state court of its decision to decline either orally or in writing. The parties are permitted to make any arguments to the tribal court they wish either for or against tribal declination of transfer. 44 Fed. Reg. at 67592.

While the district court's actions did not track Guideline C.4 completely, most likely because the guideline was not called to the court's attention, the court did give the Tribes approximately 41 days to decide whether to accept or decline the proposed transfer before proceeding with the adjudication. The court left the door open for the Tribes to obtain the transfer at a future time if the Tribes so

desired. At no time did the Tribes give notice to the state court that they had made the decision to accept the cases. In fact, although the Tribes had permission to appear at any hearing telephonically, the tribal attorney made no further appearance beyond the May 6 hearing and did not communicate anything further about the Tribes' intentions to the court or the parties.

Although the BIA guidelines are not binding on a state court, this Court has observed that the guidelines comport with the spirit of the Indian Child Welfare Act, are persuasive, and should be applied when interpreting ICWA. Matter of M.B., 2009 MT 97, ¶ 16, 350 Mont. 76, 204 P.3d 1242; Matter of M.E.M., 195 Mont. 329, 337, 635 P.2d 1313, 1318 (1981). The commentary section to Guideline C.4 indicates a difference of opinion with respect to whether affirmative action by a tribal court is required to decline the transfer, or whether the state court should presume the tribal court's declination of the transfer unless it hears otherwise. In this case, the district court took the latter approach, without the benefit of the guideline but consistent with the mother's petition. In view of §1911(b)'s failure to specify any procedure for determining whether and when a tribal court accepts or declines jurisdiction, the district court's approach was a reasonable interpretation of the statute.

Indeed, if the court had adopted the approach now suggested by the mother on appeal, the parties and the children would have been left in jurisdictional limbo

for an indefinite period of time while the Tribes conducted their investigation and deliberated on whether to accept the cases. The children were in foster care, and the parents were in need of services to help move them toward the goal of reunification. If the district court did not retain jurisdiction while the Tribes were making their decision, the state court proceedings would have to be dismissed, and the Department would not have continuing authority to provide foster care and other services. The children would have to be placed in the care and custody of the Tribes before the Tribes had decided to accept or decline the transfer. The district court's handling of the transfer matter was fully consistent with ICWA's presumption of tribal jurisdiction and the Tribes' sovereign and statutory right to decline cases that, for a variety of reasons and in the Tribes' sole judgment, are better left and resolved in state court.

In any event, a district court transfer hearing would be required before the cases could be transferred to the Fort Peck Tribal Court. Matter of G.L.O.C., 205 Mont. 352, 356-57, 668 P.2d 235 (1983). Citing M.E.M., 195 Mont. at 336, 635 P.2d at 1317, this Court in G.L.O.C. observed that under ICWA, a jurisdictional hearing is required before the district court can enter an order either granting or denying a request for the transfer of jurisdiction of Indian children to tribal custody where, as here, the Indian children live outside the reservation. A jurisdictional hearing before entry of a transfer order will help avoid "plunging the

children into circumstances that are traumatic or otherwise not in their best interest." Id.

The district court and the parties, including the mother, recognized that a transfer/jurisdictional hearing would be required after the Tribes were allowed sufficient time to consider the matter. While the parties did not express any preliminary objection to the proposed transfer at the time it was discussed, the court vacated the transfer hearing and did not consider the issue further when it became apparent that the Tribes were not presently interested in taking jurisdiction in the cases. A transfer hearing was never held. The cases are in a different posture now, and if this Court were to remand on this issue, the parties should be permitted to reconsider the matter and given an opportunity to present any evidence or argument with respect to the existence of good cause to deny the request for transfer.

However, this Court should find no reason to send the cases back to the district court. To date the Tribes have not advised the district court of any interest in assuming jurisdiction and responsibility for the cases. The Department continues to work with the Tribes to secure appropriate and permanent placements for the children. This Court should affirm the district court's retention of its concurrent jurisdiction and its ultimate disposition of the cases.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTHER'S REQUEST FOR APPOINTMENT OF ADDITIONAL COUNSEL FOR THE CHILDREN.

Both appellate counsel for the mother and appellate counsel for the children argue that the district court erred when it refused to appoint counsel for the children upon the mother's request at the termination hearing. Appellate counsel maintain that appointment of counsel was statutorily mandated, that the children had a constitutional right to court-appointed counsel, and that the GAL could not also serve as attorney for the children.

As provided by Mont. Code Ann. § 41-3-425(2)(b) (2009), the district court was required to immediately appoint or have counsel assigned for any child involved in an abuse and neglect proceeding brought under Mont. Code Ann. § 41-3-422. Since the petitions for temporary investigative authority, temporary legal custody, and termination of parental rights were filed under § 41-3-422, the children were entitled to the appointment or assignment of counsel.

The district court complied with the appointment statute by immediately appointing attorney Judy A. Williams to be counsel for the children. (D.C. Doc. 6.) Williams was also appointed to be the children's GAL. As this Court recognized in Matter of R.M.T., 2011 MT 164, ¶ 11, 361 Mont. 159, 256 P.3d 935, the court's appointment of an attorney to serve both as GAL and as attorney for the children was in accordance with the practice in Yellowstone County. From the

appointment in September 2009 until the termination hearing in February 2011, counsel for the mother raised no objection to the dual appointment.

However, at the beginning of the termination hearing the mother's counsel asked for a continuance and for the appointment of counsel for the children, arguing that the appointment was required by the statutes. Perhaps due to the timing of the request, the parties and the court apparently overlooked the earlier appointment of Williams as the children's attorney. Williams acknowledged the possible need for additional counsel, recognizing that her recommendation as GAL was at odds with the wishes of the older children as she knew them. As discussed above, the district court ultimately denied the request for a continuance, finding that Williams had adequately presented the children's wishes to the court and that the court would proceed with the understanding that the children wished to be reunited with their parents.

Despite the confusion at the beginning of the hearing, the district court in fact had complied with the statute by appointing Williams as the children's attorney in its initial order in the cases. The question of whether the district court should have made the dual appointment presents a different issue that is not before the Court at this time. R.M.T., ¶¶ 52-62 (Nelson, J., concurring). The question of whether Williams adequately represented the children during the proceedings is also not before the Court. Instead, the issue boils down to whether the district

court should have continued the hearing and appointed additional or substitute counsel for the children under the circumstances.

In the criminal context, this Court has held that a request for substitution of appointed counsel is a matter within the sound discretion of the district court, and the denial of such a request will not be overruled in the absence of an abuse of discretion. Robinson v. State, 2010 MT 108, ¶ 11, 356 Mont. 282, 232 P.3d 403. The Court's test for abuse of discretion requires a showing of arbitrary action, lack of conscientious judgment, and excessive unreasonableness resulting in substantial injustice. Id. Applying the test to the district court's actions at issue here, this Court should find no abuse of discretion.

At the hearing the court was faced with a belated request to postpone the case further and appoint an additional attorney (or perhaps four more attorneys) to represent the children. The court was made aware of the wishes of the children for reunification with the parents. The court recognized that there was little more an additional attorney could contribute to the court's ultimate determination, since counsel for the mother and the father were aligned with the children's opposition to the termination of the parent-child relationship and would advocate that position to the court. The court's decision to go forward without additional delay, to recognize the views of the children, and to deny the request for additional counsel for the children was neither arbitrary nor unreasonable under the circumstances.

The children's appellate counsel suggests that another attorney could have zealously advocated on behalf of the children throughout the proceedings by pursuing removal to tribal court, pushing the issue of placement, representing the children at the permanency hearing, and otherwise advancing the children's desires to be reunited with their parents. However, the transcripts of the hearings show that counsel for the parents and the children's GAL/attorney provided adequate advocacy on these matters, particularly with respect to the matter of the placement of the children. The district court correctly recognized that additional counsel could add little to the information and arguments already before the court.

In 2011 the Montana Legislature enacted Senate Bill 153, which amended the appointment of counsel provisions in Mont. Code Ann. § 41-3-425(2)(b). 2011 Mont. Laws, ch. 343. The amendment now gives discretion to district judges in the appointment of counsel for a child or youth in abuse/neglect proceedings when a guardian ad litem is appointed.

Appellate counsel for the mother and the children argue that the children had a constitutional right--in addition to the former statutory right--to the appointment of counsel in the abuse/neglect proceedings here. However, this alleged constitution-based right was not asserted as a basis for the mother's request for appointment of counsel for the children at the termination hearing. The request was based solely on the children's statutory right to counsel under the earlier

version of §41-3-425(2)(b). The district court was not asked to consider whether the children had an independent right, based on the Montana Constitution, to be represented in proceedings to terminate the parental rights of their parents. This Court should decline the mother's invitation to consider this constitutional argument for the first time on appeal, particularly in view of the fact that the argument amounts to an indirect challenge to the constitutionality of the recently enacted amendment to §41-3-425.

This Court has recognized that courts should avoid constitutional issues whenever possible. Matter of S.H., 2003 MT 366, ¶ 18, 319 Mont. 90, 86 P.3d 1027. This Court's power to determine the constitutionality of statutes is governed by certain constraints, including the principle that the Court will not rule on the constitutionality of a legislative act if the case may be decided without reaching the constitutional considerations. Id. As the Court has also observed, it is axiomatic that the Court will not review an argument, much less a constitutional challenge, that is raised for the first time on appeal. Matter of M.B., ¶ 10 n.1; State v. Normandy, 2008 MT 437, ¶ 18, 347 Mont. 505, 198 P.3d 834.

Here the issue may be decided without reaching the constitutional question. The district court complied with the applicable statute by appointing an attorney to represent the children in its initial order, and the court did not abuse its discretion by denying the continuance and effectively denying the request for appointment of

additional or substitute counsel for the termination hearing. The question of the constitutionality of the statutory amendment making the appointment discretionary should await another day and a direct challenge to the new statute where the issue has been presented to the district court and preserved for appeal.

As for the children's statutory right, even if the district court's denial of the mother's request for a continuance and the appointment of counsel is viewed as error, it is harmless error that does not require reversal of the district court's termination order. Matter of Z.J., 2010 MT 130, ¶¶ 18-20, 2010 Mont. LEXIS 188. The lack of additional counsel for the children has not been shown to have influenced, in any way, the outcome of the case. The district court was aware of the children's interests and desires. Regardless of whether the children had additional counsel, the mother failed to complete her treatment plan, was absent throughout the proceedings, and did not demonstrate an ability to safely parent the children. The mother has not shown any prejudice arising from the district court's failure to appoint additional counsel for the children.

The court's denial of the mother's motion should be affirmed.

III. COUNSEL FOR THE MOTHER PROVIDED ADEQUATE REPRESENTATION AT THE ADJUDICATION HEARING.

The mother contends that her attorney's failure to advocate for her during the adjudication hearing violated her right to the effective assistance of counsel. The claim is based on the fact that at the adjudication hearing the mother's attorney, Anne-Marie Simeon, advised the district court that she had had no contact with the mother, that she did not have the mother's authorization to sign the stipulation that the father, the GAL, and the Department had signed, and that she would not require any ICWA testimony and would accept the offer of proof presented by counsel for the Department. (6/17/10 Tr. at 4-5.)

To support her claim of ineffectiveness, the mother on appeal relies primarily upon this Court's decision in Matter of J.J.L., 2010 MT 4, 355 Mont. 23, 223 P.3d 921. In J.J.L., ¶ 29, also a parental rights termination case, this Court determined that the father had received ineffective assistance of counsel at the adjudication hearing. This conclusion was based on counsel's failure to object to hearsay evidence concerning the father's alleged sexual abuse of the children, counsel's failure to file a brief concerning the admissibility of the hearsay evidence, and counsel's failure to otherwise advocate during the hearing and to meet with the father or request additional time to do so. The Court applied the special test for effectiveness in termination proceedings first articulated in Matter of A.S., 2004 MT 62, ¶¶ 26-27, 320 Mont. 268, 87 P.3d 408.

The due process right to effective assistance in termination proceedings, as discussed in J.J.L. and A.S., requires counsel to have adequate training and experience and to provide adequate representation at the hearing. J.J.L., ¶ 19. Since counsel's training and experience are seldom a matter of record on appeal, the ineffectiveness inquiry will ordinarily focus on the second factor concerning counsel's advocacy. This Court looks to several aspects of the representation, including whether counsel has met with the client, researched the law, prepared for the hearing by interviewing witnesses and discovering documentary evidence, and demonstrated adequate trial skills. Id.

In the present case, the Department's request for adjudication of the children as youths in need of care was supported by the detailed affidavit of CPS Deb Edelman. The affidavit relates the Department's contacts with the parents and the reasons for the intervention, including the parents' incarcerations, homelessness, drug use, and inability to provide food and shelter for the children. The father stipulated that the facts alleged in the petition and Edelman's affidavit were sufficient for the district court to find, by clear and convincing evidence, that the children had been abused, neglected, or abandoned. (D.C. Doc. 67.) The district court found that the children could not be protected from the risk of harm from their parents' drug use, criminal records resulting in incarceration, and inability to provide food and a safe, clean environment. (D.C. Doc. 70.)

The mother, who had been personally served with notice of the hearing but was not present at the hearing, did not contact her attorney, Anne-Marie Simeon, before the hearing. Simeon advised the court that she was unable to locate her client and thus did not have authorization to join in the father's stipulation. The mother now complains that Simeon should have required the Department to prove its case by putting on the evidence that was contained in CPS Edelman's affidavit. The mother also maintains that Simeon should have required ICWA testimony from the Department's ICWA expert. Both Edelman and the ICWA expert, Edie Adams, were present at the hearing.

However, the mother does not suggest what Simeon could have accomplished by proceeding in such a manner. Since the mother had not contacted Simeon, Simeon could only represent to the court that she did not have either her client's authorization to sign the stipulation or any evidence from her client to challenge the Department's requested relief. Unlike the situation in J.J.L., where the facts concerning the father's conduct were in dispute, nothing in the record here suggests that the basic facts upon which the Department's intervention and the court's adjudication were based could have been successfully disputed, particularly in the absence of the mother.

The record shows that Simeon unsuccessfully attempted to contact and meet with the mother before the adjudication hearing. It is unknown whether the mother

would have joined in the stipulation if she had cooperated by staying in contact with her attorney, meeting with her attorney before the hearing, and discussing the matter. At the earlier show cause hearing on December 3, 2009, the mother had stipulated that the same facts, as alleged in the CPS's affidavit, were sufficient to justify the Department's involvement. (12/3/09 Tr. at 4-5.) At the time of the adjudication hearing, all of the parties were still working toward reunification, and it would have been reasonable for the mother to agree to the stipulation in the absence of some evidence to support a challenge to the affidavit's factual assertions.

In Matter of C.R.C., 2009 MT 125, 350 Mont. 211, 207 P.3d 289, a mental health commitment case, this Court considered whether appointed counsel's waiver of the client's adjudicatory hearing and stipulation to treatment constituted ineffective assistance of counsel. Noting that the client refused to cooperate in her defense, refused to meet with counsel, refused to make court appearances, and refused to participate in an evaluation requested by her attorney, this Court held that the attorney was not ineffective. The Court observed that the client's refusal to participate in the proceedings seriously undermined counsel's efforts to advocate on her behalf. Id., ¶ 24.

Similarly, this Court may appropriately ask what Simeon should have done to effectively assist the mother. To demand that the Department present evidence of the mother's abuse and neglect of the children and the ICWA expert's opinion on the risks to the children would not necessarily advance the long-term interests of the mother, particularly in the absence of any information or evidence from the mother or elsewhere that could be used to dispute the facts or challenge the opinion. The mother's brief on appeal does not suggest any such information or evidence that was available to Simeon to make a good-faith challenge to the Department's evidence of neglect and abuse.

In addition, the record does not suggest that Simeon was unprepared for the hearing or unfamiliar with the evidence and the law applicable to the adjudication hearing. Unlike criminal cases in which a postconviction hearing affords defense counsel an opportunity to explain the reasons for his or her actions and defend against claims of ineffective assistance, Simeon has had and will have no opportunity to make a record of the reasons for her actions in representing the mother. On the existing record in this appeal, this Court should be reluctant to conclude that Simeon's representation denied the mother her due process right to effective assistance. This Court has stated that an attorney's reputation is his or her most prized possession, and the fact that another attorney would have provided different representation is no ground for branding the appointed counsel with the

opprobrium of ineffectiveness, infidelity, or incompetence. State v. Field, 215 Mont. 361, 366, 697 P.2d 1339, 1342 (1985).

As this Court also observed in Matter of I.B., ¶ 43, reversal of a termination order on grounds of ineffective assistance of counsel is warranted only if the parent suffers prejudice as a result of counsel's performance. In the absence of a showing of prejudice, this Court should not disturb the district court's adjudication and termination orders. The mother does not claim ineffective assistance with respect to the subsequent representation of the two other attorneys assigned to her case. She has not shown that different representation at the adjudication hearing would have led to a different result or affected the outcome of the case in any manner. Her due process claim of ineffective assistance should be denied.

CONCLUSION

The district court's adjudication and termination orders should be affirmed.

Respectfully submitted this 7th day of September, 2011.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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