IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0611

IN THE MATTER OF:

S.Y.,

Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Karen S. Townsend Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE ISSUE

Whether K.P.'s failure to challenge the constitutionality of the putative father registry statutes to the district court precludes him from raising these claims on appeal.

Whether the district court abused its discretion when it terminated K.P.'s parental rights.

STATEMENT OF THE CASE

When S.Y. was born in 2013, her mother, K.Y. (Mother), was married to A.C.Y. (who was in prison at the time) and A.C.Y.'s name appeared on the birth certificate. (08/27/18 Tr. (Hr'g); Docs. 1, 91, 104.) Thus, when the Department of Public Health and Human Services (DPHHS) became involved with Mother and A.C.Y. in early 2015, the two children removed from their care, S.Y. and A.Y. (born in 2008) were presumed to be their biological children. (*Id.*) DPHHS was granted temporary legal custody (TLC) and the children were placed with their maternal grandparents (Grandparents). (*Id.*) Over the next two years, the parents worked on their treatment plans. (*Id.*) However, in late August 2017, the parents admitted that A.C.Y. is not S.Y.'s biological father and paternity testing confirmed that fact in September 2017. (*Id.*)

Despite repeated requests by DPHHS, Mother refused to name S.Y.'s father until early 2018, when she finally provided the full name of S.Y.'s father, K.P., along with two other first names of possible fathers. (Docs. 68, 72, 104.) During this time period, Mother lost her housing and was not adhering to her treatment plan so S.Y. was returned to Grandparents who had become A.Y.'s legal guardians in September 2017. (Docs. 54, 72, 91.) In March 2018, DPHHS filed a petition for termination of parental rights (TPR) for Mother, A.C.Y., and all putative fathers. (Doc. 72.)

When DPHHS successfully located K.P., paternity testing confirmed K.P. is S.Y.'s biological father. On July 10, 2018, DPHHS filed an amended TPR petition, which asserted K.P.'s parental rights should be terminated based on abandonment. (Doc. 91.) Following a hearing on August 27, 2018, the court granted the amended petition and terminated K.P.'s parental rights. (Doc. 104.) The court terminated Mother's parental rights after a hearing in October 2018, and on December 4, 2018, A.C.Y. was dismissed from the case. (Hr'g; Docs. 113, 121, 122.) Only K.P. has appealed.

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STATEMENT OF THE FACTS

In 2012, A.C.Y. was in prison and Mother and A.Y. lived with K.P. in Great Falls. (Docs. 91, 104.) In July 2012, DPHHS received a report of alleged drug use by Mother and K.P. and concerns for A.Y.'s well-being. Mother worked voluntarily with DPHHS and no further action was taken. (*Id*.)

Mother got pregnant with S.Y. in the fall. (Docs. 23, 104; Hr'g at 158-62, 260-62, 358-60, 369-71, 396-97, 403-05; Hr'g Ex. 15.) Except for one month when she moved out, Mother lived with K.P. until March 2013, when she and A.Y. moved out. (*Id*.) After Mother left K.P.'s, she stayed with A.C.Y.'s sister for a week and then moved in with a mutual friend of K.P. and Mother. (Hr'g at 263-73; 283-98.) Shortly after S.Y.'s birth, Mother moved to Missoula where she continued to live. (*Id*.) Mother stated she was afraid K.P. and his family would take S.Y. away from her so she did not answer his social media messages. (*Id*.)

When S.Y. was born in May 2013, A.C.Y. was listed as her biological father since A.C.Y. and Mother were married and Mother did not report the possibility he was not the father. (Hr'g at 285-888; 352-53.) A mutual friend of Mother's and K.P.'s told K.P. when S.Y. was born so he knew S.Y.'s name and that she was born in Great Falls. (Hr'g at 165-75, 185-211, 225-28, 251-57.)

According to K.P., the same day he heard about S.Y.'s birth, he went to the local DPHHS office to ask for help in locating Mother and his child. (*Id*.) K.P.

stated the receptionists sent him to the police, but according to K.P. the police would not help him find Mother and told him he needed proof he was S.Y.'s father before they would help him locate her. (*Id*.) Father did not return to DPHHS or seek any other assistance in locating Mother. (*Id*.) In August 2013, K.P. sent eight messages to Mother through social media asking to see his child. (*Id*.; Hr'g at Ex. 1.) K.P. made no other efforts to locate Mother or S.Y., or assert his parental rights. (*Id*.)

In February 2015, Missoula County DPHHS learned that Mother was using methamphetamine while caring for A.Y. (age 6) and S.Y. (age 21 months). (Doc. 1.) DPHHS investigated and met with Mother who admitted using methamphetamine for the past seven months with A.C.Y. (*Id*.) Mother reported A.C.Y. had failed to check in with his parole officer and when the family's home was searched, officers discovered hypodermic needles, baggies with methamphetamine residue, and drug paraphernalia. (*Id*.) The Child Protection Specialist (CPS) placed the children in protective custody with Grandparents and filed for EPS, adjudication, and TLC. (*Id*.)

Mother and A.C.Y. stipulated to adjudication and TLC, and treatment plans were prepared and approved for them. (04/07/15 Tr.; 05/05/15 Tr.; 05/10/15 Tr.; 07/21/15 Tr.; Docs. 16, 22.) Mother continued to work on her treatment plan

through the summer and DPHHS requested extension of TLC to allow her more time to complete her plan. (Docs. 23, 27, 56.) The court extended TLC on September 1, 2015. (*Id*.) The children began a trial home visit with Mother which continued to be successful into early 2016. (11/03/15 Tr.; 01/06/16 Tr.; Doc. 30.) However, A.Y. exhibited serious behavior problems in February 2016 and had to return to Grandparents' home. (03/29/16 Tr.; Docs. 32, 36.) In March 2016, the permanency plan, reunification with the parents, was approved. (*Id*.)

A.C.Y. was released from prison in July 2016 and Mother moved to university housing. (07/19/16 Tr.; 09/13/16 Tr.; 02/28/17 Tr.; Docs. 41, 43, 46.) DPHHS requested two more TLC extensions and also documented exceptions to filing for TPR. (*Id*.) At the February 28, 2017 hearing, DPHHS explained the plan for S.Y. was reunification with Mother, but the plan for A.Y. was guardianship with Grandparents, given his emotional needs. (*Id*.) Mother continued to succeed with her treatment plan into 2017, but A.C.Y. was arrested for a probation violation and eventually returned to prison in the spring of 2017. (03/14/17 Tr.; Doc. 46.) While S.Y. remained with Mother, the parties negotiated A.Y.'s guardianship, which was finally ordered in September 2017. (05/02/17 Tr.; 06/27/17 Tr.; 07/18/17 Tr.; 09/05/17 Tr.; Doc. 49.)

Significantly, during the September 5, 2017 hearing, counsel for DPHHS reported to the court that A.C.Y. recently told CPS Rebecca Visser that he was not

S.Y.'s biological father. (09/05/17 Tr. at 105; Hr'g at 368-69.) Mother confirmed that A.C.Y. is not S.Y.'s biological father but provided only the first names of three possible fathers. (*Id*.) Since A.C.Y.'s name was on S.Y.'s birth certificate and he was married to Mother when she was born, DPHHS correctly presumed he was S.Y.'s father. (*Id*.) Paternity testing was arranged for A.C.Y. (12/12/27 Tr.; Doc. 63.)

A short time later, DPHHS filed a petition to extend TLC given that Mother had lost her housing and her ability to safely care for S.Y. was again in question. (09/12/17 Tr.; Doc. 54.) In addition, the identity of S.Y.'s birthfather was unknown since DNA testing confirmed that A.C.Y. was not S.Y.'s biological father. (*Id*.; Doc. 60.)

At the February 27, 2018 hearing, the parties discussed the intervention conference held the day before. (02/27/18 Tr.; Hr'g at 368-70; Docs. 68, 72.) During the conference, Mother and A.C.Y. stated they knew the identify of S.Y.'s biological father, but neither disclosed his name. (*Id*.) DPHHS explained it planned to pursue termination of parental rights to provide permanency for S.Y. through adoption and requested Mother disclose the identity of S.Y.'s biological father. (*Id*.) Mother explained she was not sure who was the father, but did mention several possibilities, all of whom she had known in Great Falls. (*Id*.) The only person Mother provided both first and last names for was K.P. (*Id*.) Mother

claimed no knowledge about the current whereabouts or contact information for any of the possible fathers. (*Id*.)

CPS Rebecca Wemple located a man in Great Falls with the same name as K.P. who turned out to be K.P.'s father. (03/13/18 Tr.; Hr'g at 359-60, 369-71; Docs. 72, 74.) He provided a number and address for his son, the now named father. (*Id*.) DPHHS filed a TPR petition for Mother, A.C.Y. (legal father), and any and all putative fathers named by Mother. (Doc. 72.) DPHHS alleged K.P.'s (and other possible putative father's) rights should be terminated pursuant to Mont. Code Ann. §§ 41-3-609(1)(b), (1)(d), (1)(e). (*Id.)*

K.P. was served with the TPR petition and minute entries for the February 27, 2018 and May 14, 2018 hearings. (Docs. 74, 79.1.) Paternity testing eventually established that K.P. is S.Y.'s biological father. (05/14/18 Tr.) At the May 14, 2018 hearing, following open discussion, the court requested that the parties and both sets of grandparents create a report or affidavit to set forth their respective efforts to communicate about S.Y. and her parentage. (05/14/18 Tr.)

On July 10, 2018, DPHHS filed an amended TPR petition to terminate Mother's parental rights and the parental rights of A.C.Y. (presumed/legal father) and K.P. (biological father). (Doc. 91.) Relevant to K.P., DPHHS asserted that his parental rights should be terminated based on "abandonment" pursuant to either

Mont. Code Ann. §§ 41-3-609(1)(b) or -609(1)(d). A hearing on the petition was held on August 27, 2018, where the following witnesses testified: CPS Wemple; K.P.; Mother; Patrick Quinn; paternal grandmother; and maternal grandmother. (Hr'g.)

At the hearing, K.P. stated he knew Mother (and her maiden name) from high school and after the two began dating in 2012, Mother and A.Y. moved into his Great Falls home. (Hr'g at 159-65, 184-211, 235-40.) K.P. knew that Mother was married to A.Y.C., who was in prison at the time, and while he met Mother's parents twice, he claimed not to know where they lived. (*Id*.) K.P. testified that after DPHHS made contact with him and Mother in July 2012, over concerns about A.Y., A.Y. went to live with Grandparents for a short time. (*Id*.)

In October 2012, K.P. went with Mother to get a blood test to confirm her pregnancy, learned the expected due date, and attended prenatal appointments with her. ((Hr'g at 159-65, 184-211, 235-40; K.P. Exs. 1, 2, 3.) K.P. stated that in March/April 2013, Mother told him she was going to Missoula because her father was dying. (Hr'g at 165-75, 185-211, 225-28, 251-57.) K.P. tried calling Mother, but she did not return his calls. (*Id*.) In April 2013, K.P. began dating Jessica. (*Id*.)

K.P. testified that a mutual friend told him when/where S.Y. was born. (Hr'g at 165-75, 185-211, 225-28, 251-57.) K.P. stated he went to the local

DPHHS office to try and find Mother, but he was referred to the police who he claimed refused to take a report. (*Id*.) The police suggested he return to DPHHS, but K.P. did not follow their advice. (*Id*.)

K.P. sent eight messages to Mother through social media in August 2013. (Hr'g at Ex. 1.) Father knew Mother's parents' last name (Mother's maiden name), and A.C.Y. and he and Mother had a friend in common; however, he did not reach out to any of them to locate S.Y. or Mother. (Hr'g at 165-75, 190-211, 235-40.) K.P. admitted that he chose not to try and contact Mother or find S.Y. because he did not want to upset his girlfriend or complicate S.Y.'s life. (*Id*. at 241, 255-57.) For the past four years, Mother listed her town of residence on her social media account. (*Id*. at 263-73; 283-98.)

K.P. admitted he did not register with Montana's putative father registry (Registry), but asserted that if he had known about it he would have registered. (Hr'g at 165-75, 190-211, 235-40.) K.P. made no other efforts to locate Mother or S.Y. or to assert his parental rights and later doubted if he was the father. (*Id*.) K.P. made no financial contributions to S.Y. despite having the capacity to do so. (*Id*. at 165-75, 206, 228-33.)

Quinn, an attorney with Montana's Child Support Enforcement Division (CSED), explained the process and procedures for men who inquire about finding

and providing for a child they believe they fathered. (Hr'g at 273-82; Exs. 2, 3.) Quinn described the CSED website and that people can also come into the local office to apply for paternity testing. (*Id*.) Once an application is complete, CSED investigators would search for the parent and child at issue. (*Id*.) Quinn also explained the Registry, which began in 1998, and that it is also linked to the CSED website. (*Id*.; Ex. 4.) .)

CPS Wemple explained DPHHS's involvement with this family, particularly how K.P.'s identity as S.Y.'s biological father came to light nearly three years after DPHHS became involved. (Hr'g at 351-65, 368-75, 388, 396-97.) Wemple began working with this family in September 2016, and at that time she believed A.C.Y. was S.Y.'s father. (*Id*.) It was not until August 2017 that Wemple was told A.C.Y. was not the father and over six more months until Mother finally provided K.P.'s complete name. (*Id*.) Wemple confirmed K.P. was not on the Registry and after tracking down his contact information, Wemple set up paternity testing for him in April 2018. (*Id*.) A month later the results came back confirming K.P. is S.Y.'s biological father. (*Id*.)

In Wemple's opinion, K.P.'s failure to establish any parental relationship with S.Y. despite knowing she was born in the spring of 2013, take any steps to locate Mother or S.Y. after August 2013, or make any overtures to provide for his

child emotionally or financially indicated K.P. had no intention of caring for S.Y. in the future. (Hr'g at 355-56, 387-88.)

Wemple explained that during the more than three years of DPHHS intervention, S.Y. had been in either Grandparent's care with A.Y. or on a trial home visit with Mother. (Hr'g at 356-67; 383-400.) In Wemple's opinion, it would be in S.Y.'s best interest to remain with Grandparents, who have guardianship over A.Y. and are willing to adopt S.Y. (*Id*.) Wemple explained that Grandparents are the most stable and consistent caregivers S.Y. has ever known and that any continued uncertainty about her permanency would be detrimental to her mental and emotional well-being. (*Id*.) Mother believed it was in S.Y.'s best interest to live with, and be adopted by, her parents because S.Y.'s half-brother is with them and she has lived with them much of her life. (Hr'g at 263-73, 283-98.)

Wemple acknowledged that in July 2012, DPHHS investigated reports of concern for A.Y. in Mother's and K.P.'s care. (Hr'g at 358-60, 369-51, 396-97, 403-05.)[1] The report against K.P. was not substantiated and A.Y. returned to Mother's care within weeks. (*Id*.) Mother was not pregnant at that time. (*Id*.) Wemple explained that given that the next contact with S.Y. was in early 2015 and

[1] The CPS affidavit in support of TLC extension filed in August 2015 references the 2012 investigation. (Doc. 23.)

A.C.Y. was listed on her birth certificate and Mother and A.C.Y. were married, DPHHS had no reason to question paternity for S.Y. (*Id.*) Wemple explained that had K.P. been identified as S.Y.'s father at the beginning of this case, a treatment plan would have been offered to him to evaluate his capacity to parent. (Hr'g at 366.)

Wemple arranged for K.P. to meet S.Y. and the three visits between June and August were primarily designed for the two to get to know each other. (Hr'g at 359, 376-81, 386-92, 403-05.) Wemple explained that it would take time and several more visits where K.P. would actually parent S.Y. and complete a treatment plan before it would be appropriate to consider placing her in his care. (*Id.*) Even if K.P. was a "totally prepared parent," in Wemple's opinion, it would be detrimental to immediately place S.Y. with him because S.Y. was not prepared for more change and loss of permanency. (*Id.*) In response to K.P.'s statement that Jessica would be caring for S.Y. should she be placed in his care, Wemple expressed additional concerns based on Jessica's history with DPHHS and the fact she did not complete a treatment plan when offered. (Hr'g at 356-67, 383-90.)

S.Y.'s attorney submitted a post-hearing brief in support of termination of K.P.'s parental rights. (Doc. 101.) In this brief, counsel suggested that an alternate TPR theory under Mont. Code Ann. § 41-3-609(1)(e) applied to K.P. because he met the definition of "putative father." (*Id.* at 8-9.)

On September 25, 2018, the court entered an order granting the amended TPR petition and terminating K.P.'s parental rights based on abandonment. (Doc. 104 at 16 (citing Mont Code Ann. § 41-3-102(1).)

STANDARD OF REVIEW

This Court reviews a district court's decision to terminate a person's parental rights for an abuse of discretion. *In re M.J.C.*, 2014 MT 122, ¶ 9, 375 Mont. 106, 324 P.3d 1198 (citation omitted); *In re J.B.*, 2016 MT 68, ¶¶ 9-11, 383 Mont. 48, 368 P.3d 715. A district court abuses its discretion when it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in a substantial injustice. *Id.*

This Court reviews the factual findings of the district court to determine if they are clearly erroneous and reviews conclusions of law to determine if they are correct. *M.J.C.*, ¶ 10 (citation omitted); *J.B.*, ¶¶ 9-10 (citations omitted). "A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been committed." *Id.*

In a dependent neglect proceeding, this Court's review of constitutional law questions is plenary. *In re A.L.D.*, 2018 MT 112, ¶ 4, 391 Mont. 273, 417 P.3d 342 (citation omitted).

SUMMARY OF THE ARGUMENT

K.P.'s appeal should be dismissed because he failed to present any constitutional arguments to the district court for its consideration and, therefore, failed to preserve his challenges for appeal. K.P. offers no legal argument to excuse his failure to raise this argument below and allow this Court to nonetheless reach his claims. Nor has K.P. set forth any extraordinary circumstances or even suggested plain error review should be applied. Moreover, this Court has consistently held that whenever possible, courts should resolve the merits of a case without resorting to consideration of any constitutional question presented. Based upon this Court's rules of appellate review, and the fact that resolution of the constitutional issue would have no bearing on the trial court's TPR order, this Court should decline to consider K.P.'s arguments on appeal about the constitutionality of the Registry.

Significantly, the district court terminated K.P.'s parental rights based on the theory of abandonment and not the fact that he did not register as a putative father. Thus, K.P. was not prejudiced by any findings related to the Registry. K.P. offers no factual or legal argument challenging the court's findings of fact as clearly erroneous. In fact, the record establishes that the court's findings were supported by substantial, credible evidence that established a reasonable belief that K.P. had no interest in caring for S.Y. It is undisputed that after August 2012 (three months

following S.Y.'s birth), K.P. made no inquiry into Mother's and S.Y.'s whereabouts and initiated no interest in parenting S.Y. until DPHHS contacted him in the spring of 2018. Whether K.P. registered as a putative father would not have altered the fact that he had done nothing to express an intent to care for S.Y. in years. The district court did not abuse its discretion when it terminated K.P.'s parental rights based on abandonment and it is unnecessary to consider the putative father statutes to affirm the TPR order.

Even if K.P.'s unpreserved arguments about the Registry are considered, this Court should reject them as unsupported in fact and law. K.P. failed to carry his burden and establish, beyond a reasonable doubt, that statutes in question violate his due process and equal protection rights. In asserting his constitutional claims, K.P. misinterprets the purpose of the Registry as imposing an obligation upon him. Rather, those provisions are in place to provide potential fathers with an avenue for securing notice of future proceedings involving a child who may be theirs. Contrary to K.P.'s premise, when a possible father fails to take any action towards caring for his child's emotional or physical well-being or demonstrate an interest in exercising his right to parent, it does not offend his constitutional rights to treat his right to parent differently than the custodial parent who has established and fostered a relationship with the child.

ARGUMENT

I. K.P. failed to preserve constitutional claims for appellate review

The only argument K.P. presents on appeal is that the "Registry statutes deprived K.P. of Equal Protection and Due Process of Law." (Opening Brief (Br.).) However, since this is the first time K.P. asserted any constitutional claim, this Court is precluded from reviewing it on appeal.

It is axiomatic that this Court will not address an issue raised for the first time on appeal because it will not fault the trial court on an issue it was not given an opportunity to consider. *In re A.N.W.*, 2006 MT 42, ¶ 41, 331 Mont. 208, 130 P.3d 619. "In order to preserve a claim or objection for appeal, an appellant must first raise that specific claim or objection in the district court." *In re B.W.S.*, 2016 MT 340, ¶ 11, 386 Mont. 33, 386 P.3d 595 (citation omitted). This Court has consistently held that "when an appellant argues he was deprived of a fundamentally fair procedure, it [is] necessary that he make the same argument to the [d]istrict [c]ourt." *B.W.S.*, ¶ 11; *In re A.T.*, 2006 MT 35, ¶ 15, 331 Mont. 155, 130 P.3d 1249 (untimely objections are not heard on appeal because the time for correcting the error has passed; accordingly, failure to make a timely objection constitutes a waiver of the party's right to appeal).

Just like the appellants in *B.W.S.,* K.P. failed to raise any claim related to the constitutionality of the Registry statutes with the trial court. *B.W.S.*, *supra*;

A.N.W., ¶ 41; *In re A.S.*, 2006 MT 281, ¶ 35, 334 Mont. 280, 146 P.3d 778 (faulting trial court for not addressing statutory issues that were not asserted "would encourage litigants to withhold objections rather than raise the issues appropriately in the district court."). K.P. did not give the trial court the opportunity to consider the constitutionality of the Registry or the applicability of the Registry to the TPR proceedings. He is, therefore, precluded from raising such issues now.

This Court has allowed review of an issue not objected to during a dependent neglect proceeding in only rare situations. For instance, when a pro se litigant failed to lodge objections in a case characterized as "muddled throughout," this Court noted "the extraordinarily confusing nature of [a hearing to continue temporary investigative authority]" and "misinformation repeatedly provided to mother by the district court" when it granted review. *In re M.O.*, 2003 MT 4, 314 Mont. 13, 62 P.3d 265 (held, mother's failure to object to termination of her parental rights was excusable).

This Court also allowed an appeal of an issue despite no contemporaneous objection when the matter fell under the Indian Child Welfare Act (ICWA) and the holding was based upon its jurisdictional power to review alleged violations of ICWA. *In re K.B.*, 2013 MT 133, ¶ 22, 370 Mont. 254, 301 P.3d 836 ("A 'court of competent jurisdiction' under 25 U.S.C. § 1914 has been held to include an appeals

court; thus, failure to comply with ICWA notice requirements may be raised for the first time on appeal."). The holding from *K.B.* is specific only to ICWA cases and does not forgive K.P.'s failure to challenge the constitutionality of the Registry provisions, and K.P. has not alleged sufficient extraordinary circumstances like those in *M.O.* to excuse his failure to present the claims he now brings on appeal.

Nor has K.P. requested this Court apply plain error review, which this Court applies sparingly even when it is properly asserted. *See In re H.T.*, 2015 MT 41, ¶ 14, 378 Mont. 206, 343 P.3d.159. Nor may K.P. raise such an argument in his reply brief. *See* Mont. R. App. P. 12(3) ("The reply brief must be confined to new matter raised in the brief of the appellee."); *State v. Sattler*, 1998 MT 57, ¶ 47, 288 Mont. 79, 956 P.2d 54 (legal theories raised for the first time in an appellant's reply brief are outside the scope of such a brief and this Court has repeatedly refused to address them).

Plain error review is applied only where "failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *In re J.S.W.*, 2013 MT 34, ¶ 15, 369 Mont. 12, 303 P.3d 741; *H.T.*, ¶ 14; *In re D.A.*, 2008 MT 247, ¶¶ 33-34, 37, 344 Mont. 513, 189 P.3d 631 (Court declined to engage in plain error review of alleged due

process claim, noting the court's findings were issued pursuant to the statute and were supported by sufficient evidence.). As detailed more below, the district court did not terminate K.P.'s parental rights based on his failure to list his name on the Registry. Accordingly, plain error review is not warranted since K.P. could not establish how failing to address his unpreserved constitutional argument would result in a manifest miscarriage of justice. *D.A., supra*.

Finally, this Court has repeatedly "recognized that courts should avoid constitutional issues whenever possible." *In re S.H.*, 2003 MT 366, ¶ 18, 319 Mont. 90, 86 P.3d 1027 (citation omitted). This Court has "held that certain constraints govern the Court's power to determine the constitutionality of statutes. Among those constraints is the principle that [this Court] will not rule on the constitutionality of a legislative act if [it is] able to decide the case without reaching constitutional considerations." *S.H.*, ¶ 18.

Significantly, when faced with a challenge to the constitutionality of the Registry, this Court declined to resolve the case on those grounds. *M.B.J. v. Fourth Judicial District Court,* 2010 Mont. LEXIS 515 (2010) (Court granted petition for writ of supervisory control and reversed trial court's order that mother must disclose identity of birth father so he could be properly served; Court observed that regardless of resolution of constitutional issue, the matter would

need to be remanded with directions for accomplishing service upon putative father(s)). This Court stated,

> For over a hundred years, we have held fast to the proposition that, where it is possible to resolve the merits of a case without resort to resolution of the constitutional question presented, we will do so. We will not pass upon the constitutionality of an act of the Legislature "unless it is absolutely necessary to a decision of the case." We should be especially mindful of this rule here, as declaring the Registry provisions unconstitutional could cast into question hundreds of adoptions finalized over the past 14 years in reliance upon [Montana Adoption] Act's provisions.

M.B.J., ¶ 6 (internal citations omitted).

This rule of appellate review is particularly relevant when, as was the case here, the district court was not presented with any legal argument or authority challenging its reliance on the Registry when determining whether K.P. "abandoned" his child as defined by the Montana Code Annotated. Moreover, since the district court did not, in fact, terminate K.P.'s parental rights under Mont. Code Ann. § 41-3-609(1)(e) (putative father), this Court may decide this case without considering K.P.'s unpreserved constitutional arguments.

K.P.'s failure to raise any constitutional claims against the Registry precludes this Court from considering them on appeal. K.P. has offered no justifiable basis or legal excuse for this Court to ignore its appellate rules and long-standing principles of review to nonetheless consider his arguments. Moreover, K.P. cannot establish how he will suffer any prejudice if this Court does

not consider his constitutional challenges to the Registry since the district court did not rely upon those statutory provisions to terminate K.P.'s parental rights.

II. The district court properly terminated K.P.'s parental rights based on its supported findings and conclusions that K.P. "abandoned" S.Y.

"A parent's right to the care and custody of a child is a fundamental liberty interest which must be protected by fundamentally fair procedures. For that reason, the State must show by clear and convincing evidence" that the statutory criteria at Mont. Code Ann. § 41-3-609 are established before terminating a parent's rights. *In re S.S.*, 2002 MT 270, ¶ 8, 312 Mont. 343, 59 P.3d 393 (citing *In re A.E.*, 255 Mont. 56, 59, 840 P.2d 572, 574 (1992)); Mont. Code Ann. §§ 41-3-423(4), -422(5)(iv); *In re J.M.W.E.H.*, 1998 MT 18, ¶ 33, 287 Mont. 239, 954 P.2d 26 ("clear and convincing evidence" is "that quality of proof 'more than a mere preponderance but not beyond a reasonable doubt.'").

The guiding principle in determining whether to terminate parental rights is always and foremost the best interest of the child: "the district court is bound to give primary consideration to the physical, mental, and emotional conditions and needs of the [child], thus, the best interests of the [child] are of paramount concern in a parental rights termination proceeding and take precedence over the parental rights." *A.T.*, ¶ 20 (citation omitted). The best interest of the child is the primary

and paramount statutory standard for termination. *See*, *e.g.*, Mont. Code Ann. § 41-3-609(3) (district court shall give "primary consideration to the physical, mental, and emotional conditions and needs of the child."); Mont. Code Ann. § 41-3-101(4) (the child's health and safety are of paramount concern).

In its amended TPR petition, DPHHS alleged a district court may terminate K.P.'s parental rights if either of the following circumstances exist: "the child has been abandoned by the parent; [or] the parent has subjected a child to any of the circumstances listed in 41-3-423(2)(a) through (2)(e)." Mont. Code Ann. §§ 41-3-609(1)(b) and (d).[2] The relevant circumstance alleged by DPHHS under Mont. Code Ann. § 41-3-423, was subsection (2)(a) ("subjected a child to aggravated circumstances, including but not limited to *abandonment*, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child). (Emphasis added).

As applied to K.P. and as alleged by DPHHS, "abandoned" means "leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future." Mont. Code Ann.§ 41-3-102(1)(a); *S.S.*, ¶ 9; *A.E.*, 255 Mont. at 60, 840 P.2d at 575 (no express time frame applies to the definition of abandonment under Mont. Code Ann. § 41-3-102(1)(a)(i)). A trial

[2] In its first TPR petition, DPHHS asserted subsection Mont Code Ann. § 41-3-609(1)(e) with regard to K.P. however, it omitted this theory of termination in its amended TPR petition. (*See* Docs. 72, 91).

court may determine that a non-custodial father abandoned his child where the court finds that he did not intend to resume care of his child. *See In re M.W.*, 234 Mont. 530, 534, 764 P.2d 1279, 1282 (1988); *In re M.J.D.*, 225 Mont. 200, 205-06, 731 P.2d 937, 940 (1987).

As this Court has explained, "[a]bandonment is retrospective in nature, and requires evidence from the past to support a reasonable belief that the parent has left a child under circumstances indicating that the parent does not intend to resume care of the child." *S.S.*, ¶ 23. Here, the district court correctly determined K.P.'s past actions, or lack thereof, over a five-year period created a "reasonable belief" that K.P. did not intend to care for S.Y.

This Court has affirmed district court orders terminating parents' rights in several cases. *See e.g.*, *In re J.J.*, 2001 MT 131, 305 Mont. 431, 28 P.3d 1076; *In re M.J.W.*, 1998 MT 142, 289 Mont. 232, 961 P.2d 105; and *A.E.*, *supra*. In those cases, the district courts applied the appropriate sections of the code as well as the correct legal definition of "abandon" when evaluating evidence of the parents' lack of effort to contact either DPHHS or the other parent over a long period of time. The same is true here.

In its TPR order, the district court credited K.P. with his attempts to locate S.Y. and Mother in the months immediately following S.Y.'s birth. (Doc. 104 at 4-5 (noting eight social media messages over five days, phone calls, and one trip to

the local DPHHS office and police station).) However, these efforts were short-lived and, as the court found, it was undisputed that K.P. made no further attempts to find Mother or assert his parental rights after August 2013. (*Id*.) The court correctly found that K.P. offered no financial support to either S.Y. or Mother following S.Y.'s birth despite having the ability to do so. (*Id*.) The court found that K.P. did not seek assistance from available legal services options, DPHHS or CSED, and did not file anything with the Registry. (*Id*.)

The court also found that shortly after Mother left K.P., he began dating Jessica, who had a current case with DPHHS. (Doc. 104.) At the TPR hearing, K.P. admitted he stopped looking for S.Y. or Mother, claiming he feared being prosecuted for harassment if he continued and also stated that it would have been upsetting to Jessica if he pursued trying to get in touch with Mother and S.Y. (Hr'g at 228, 241.)

Finally, the court also made relevant and correct findings about S.Y.'s best interests, including her emotional and mental health, long-term consistent relationship with Grandparents, and connection to A.Y. (Doc. 104.) The court correctly found that K.P. was a stranger to S.Y., and noted concerns with delaying permanency for S.Y. (Doc. 104 at 11-13.)

K.P. offers no arguments or challenges to the court's findings or assessment of the evidence presented. As this Court consistently states, the credibility of

witnesses is exclusively within the province of the finder of fact. *A.N.W.*, ¶ 28 (the Court should not reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence for that of the district court). Even if presented with conflicting evidence, a trial court is "not preclude[d] from determining clear and convincing evidence exists to support a fact." *In re A.K.*, 2015 MT 116, ¶ 31, 379 Mont. 41, 347 P.3d 711 (citation omitted); *J.M.W.E.H.*, ¶ 34 ("[T]he fact that Appellant's testimony conflicts with other witness testimony, or the fact that the witnesses' allegations are based in inferences, does not automatically preclude the court from finding that Appellant violated her treatment plan.").

The district court's thorough and specific findings of fact establishing the reasonable belief that K.P. did not intend to care for S.Y. were supported by substantial evidence, which the court did not misapprehend. *M.J.C.*, ¶ 10; *J.B.*, ¶¶ 9-10. Review of the record does not establish a mistake was committed when the court concluded K.P. had abandoned S.Y. *Id.* As established, and contrary to K.P.'s argument on appeal, it was not just his failure to file notice with the Registry that supported the court's TPR order.

Whether K.P. was a "putative father" who filed something with the Registry was merely one fact the court considered in determining whether clear and convincing evidence established a "reasonable belief" that K.P. did not intend to provide care for S.Y. over the past five years. Even if K.P. had registered, it

would not have overcome the other credible and substantial evidence of his lack of effort or projected interest in parenting S.Y. (*i.e.*, abandoned S.Y.).

While the court did note K.P. met the definition of putative father and had not registered, those findings alone did not establish he abandoned S.Y. Nor did those findings equate to the court making a legal conclusion that K.P.'s parental rights should be terminated under Mont. Code Ann. §§ 41-3-609(1)(e) and -423(3) (putative father statutes). Although S.Y.'s counsel argued in her post-hearing trial brief that K.P.'s rights could also be terminated under the putative father statutes, DPHHS did not argue for application of subsection (e) and it would not have been appropriate for the court to terminate K.P.'s parental rights on a theory not properly presented. (Doc. 101.) *See In re T.C.*, 2001 MT 264, ¶ 22, 307 Mont. 244, 37 P.3d 70 (violation of due process to terminate parent's rights on a theory not sufficiently noticed up to the parent prior to the TPR hearing).

Based on the substantial, credible evidence, the district court correctly applied the definition of "abandonment" and properly concluded K.P.'s rights should be terminated, as DPHHS requested, pursuant to Mont. Code Ann. §§ 41-3-609(1)(b) and (d). (Docs. 91, 104.) *See In re M.P.*, 2008 MT 39, ¶ 22, 341 Mont. 333, 177 P.3d 495 (termination of parental rights is proper if the district court correctly relies upon any one theory under Mont. Code Ann. § 41-3-609).

The key to K.P.'s constitutional claims is his theory that he was penalized for not registering with the Registry despite not having any knowledge of its existence. However, as stated, K.P.'s parental rights were not terminated under the putative father provisions as described above. And, *even if* those provisions were applied, the act of registering would not have automatically prevented the court from terminating his rights under Mont. Code Ann. § 41-3-609(1)(e) because failing to register is only one criterion under Mont. Code Ann. § 41-3-423(3). That provision states:

> Preservation or reunification services are not required for a putative father, as defined in 42-2-201, if the court makes a finding that the putative father has failed to do ***any*** of the following:
>
> (a) contribute to the support of the child for an aggregate period of 1 year, although able to do so;
>
> (b) establish a substantial relationship with the child. A substantial relationship is demonstrated by:
>
> (i) visiting the child at least monthly when physically and financially able to do so; or
>
> (ii) having regular contact with the child or with the person or agency having the care and custody of the child when physically and financially able to do so; and
>
> (iii) manifesting an ability and willingness to assume legal and physical custody of the child if the child was not in the physical custody of the other parent.
>
> (c) register with the putative father registry pursuant to Title 42, chapter 2, part 2, and the person has not been:
>
> (i) adjudicated in Montana to be the father of the child for the purposes of child support; or
>
> (ii) recorded on the child's birth certificate as the child's father.

Mont. Code Ann. § 41-3-423(3) (emphasis added).

Thus, even if K.P. registered, his parental rights could still have been terminated under either subsection (3)(a) or (3)(b).

Regardless, even though the court made some findings related to K.P.'s status as a putative father and his failure to notify the Registry, the court did not terminate K.P.'s parental rights under Mont. Code Ann. § 41-3-609(1)(e). The constitutionality of the Registry statutes had no bearing on the court's TPR order and this Court may affirm the order without considering K.P.'s unpreserved constitutional claims. *S.H.*, ¶ 18 ("courts should avoid constitutional issues whenever possible"); *M.B.J.*, ¶ 6.

III. K.P. has not established how the Registry violates his constitutional due process or equal protection rights.

Even if this Court considers K.P.'s claims against the Registry, he has failed to carry his burden and establish how these provisions violate his constitutional rights. A party asserting a constitutional challenge to a statute bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional, and any doubt is resolved in favor of the statute. *In re M.H.*, 2006 MT 208, ¶ 22, 333 Mont. 286, 143 P.3d 103 (citation omitted). The constitutionality of a statute is generally presumed. *In re D.S.*, 2005 MT 275, ¶ 15, 329 Mont. 180, 122 P.3d 1239 (citation omitted) (Court will uphold a statute upon review unless

an appellant proves the unconstitutionality of the statute beyond a reasonable doubt).

K.P.'s appellate arguments miss the mark by not appreciating that the purpose of the Registry is to provide access and opportunity for possible fathers to assert their parental rights. Contrary to K.P.'s interpretation of the Registry as applied to him, those provisions were not designed to be a sword for DPHHS to rely upon to terminate their rights. *See* Mont. Code Ann. § 42-2-203 (purpose of Registry is to "provide notice of [TPR] to a putative father who asserts a parental interest in a child so that the putative father may appear in a proceeding").

The Registry and definition of "putative father" appear in the Montana Adoption Act (Act), which sets forth the policy and procedures for *adoptions* in Montana. *See* Mont Code Ann. Title 42, chps. 1-10. The Act provides the rights and responsibilities of all parties in adoption proceedings and specifically includes protection and notice provisions for putative fathers at Mont. Code Ann. §§ 42-2-201 through -230.

Thus, contrary to K.P.'s interpretation, the Registry is designed for the benefit of prospective fathers and provides one avenue to ensure they will know if any court action takes place concerning a child they believe is theirs. These provisions, therefore, provide a potential father with due process; they do not, as K.P. asserts, foreclose or frustrate due process. *See Lehr v. Robertson*,

463 U.S. 248, 261-65 (1983) (New York's putative father registry provisions did not violate due process; those provisions *protected* an unmarried possible father's parental interests).

Montana's dependent neglect proceedings require notice to all parents, specifically putative fathers. *See* Mont. Code Ann. §§ 41-3-422(6), (7), and -428 through -430 (putative fathers). K.P. was given notice of the proceedings immediately upon DPHHS learning his identity. His failure to register and the deceit perpetrated by Mother and A.C.Y. delayed K.P. receiving notice of DPHHS's involvement. It was not the result of the putative father statutes.

As the United States Supreme Court explained, the putative father statutory scheme created a right to receive notice that was completely in the putative father's control and clarified that "[t]he possibility that he may have failed to [register] because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself." *Lehr*, 463 U.S. at 264. After noting the importance of expeditious adoption proceedings, the Court further declared that "[t]he Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." *Lehr*, 463 U.S. at 265.

Contrary to K.P.'s belief that the Registry is "obscure" and his blanket, unsupported assertion[3] that the general public is unaware of the provisions, the statutory scheme does not impede a possible father's rights. Other than K.P.'s vague recollection of his visit to the DPHHS office after S.Y.'s birth, there is nothing in the record to support or refute his claims of inadequate notice. Moreover, Mont. Code Ann. § 42-2-202, specifically states that failure of an agency to post proper notice does not relieve a putative father of the obligation to register.

K.P. has not established how the putative father statutes violated his due process rights. Nor has he established how the provisions violate equal protection. Notably, the *Lehr* holding and observations directly refutes K.P.'s claim that "[t]here is no conceivable nexus between a parental relationship and the putative father registry." (Br. at 30.)

When rejecting Lehr's equal protection claim, the Court held that when "one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights." *Lehr*, 463 U.S. at 267-68.[4]

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[3] Appellate Counsel's anecdotal observations about the presence of notice of the Registry are not part of the record and should be disregarded. (Br. at 35.)

[4] On appeal, K.P. mistakenly asserts equal protection claims for "children" in general, of which he lacks standing to bring, and this Court should decline to consider. (Br. at 31-32.)

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Lehr, 463 U.S. 262 (internal citations omitted).

The district court correctly concluded that K.P. "abandoned" S.Y. as defined in the Montana Code Annotated and, thus, established by clear and convincing evidence the criteria at Mont. Code Ann. §§ 41-3-609(1)(b) and (d). The court also properly concluded that S.Y.'s best interests would be served by termination of K.P.'s parental rights.

CONCLUSION

This Court should affirm the district court's order terminating K.P.'s parental rights.

Respectfully submitted this 11th day of June, 2019.

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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 7,528 words, excluding certificate of service and certificate of compliance.

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