IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 18-0025

IN RE THE MARRIAGE OF:

CHAD MICHAEL BESSETTE,

Petitioner and Appellee,

and

JENNIFER RUTH BESSETTE,

Respondent and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal From
Montana Eleventh Judicial District Court, Flathead County
Before the Honorable Robert B. Allison

APPEARANCES:

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2. Did the District Court err in suspending the Stipulated Amended Parenting Plan under the guise of a temporary order?

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4. Did the Court err in failing to admit the psychological evaluation into evidence?

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STATEMENT OF THE CASE

This case began on November 5, 2015, when Petitioner and Appellee Chad Michael Bessette (hereinafter "Chad") initiated the proceeding by filing a Petition for Dissolution of Marriage and for Parenting Plan in the Eleventh Judicial District Court of Montana in Flathead County. (D.C. Doc. 1.) Respondent and Appellant Jennifer Ruth Bessette (hereinafter "Jennifer") timely responded and litigation ensued. The matter proceeded forward with the parties entering into a Stipulated Final Parenting Plan, filed November 16, 2016. (D.C. Doc. 56.)

In August 2017, Chad sought and obtained a Temporary Order of Protection against Jennifer after an incident at the marital residence. Shortly thereafter, the

parties engaged Christina Larsen, Esq. to act as Guardian ad Litem on behalf of the minor child. Ms. Larsen was appointed by Order of the Court on September 15, 2017, as a "limited scope" Guardian ad Litem. (D.C. Doc. 167.)

On November 29, 2017, the parties entered into a Stipulated Amended Parenting Plan concerning the care and support of the minor child, as well as a Marital and Property Settlement Agreement resolving their dispute as to the division of their marital estate and the maintenance of either spouse. (D.C. Docs. 180 & 181.) The Stipulated Amended Parenting Plan was approved and adopted by Order of the Court on December 1, 2018. (D.C. Doc. 182.)

On December 15, 2017, Chad filed a Motion for Ex Parte Order for Interim Relief and for Order to Show Cause, along with a Brief in Support, Affidavit, and Rule 3 Certification. (D.C. Docs. 184 – 187.) Although her role had been limited by the terms of the Stipulated Amended Parenting Plan, the Guardian ad Litem also filed a Confidential Emergency Report to the Court on December 15, 2017. (D.C. Doc. 183.) The District Court issued an Order for Ex Parte Interim Relief and Order to Show Cause on December 15, 2017, setting the matter for hearing. (D.C. Doc.188.)

The hearing occurred on January 3, 2018. Chad appeared with counsel, Sean R. Gilchrist. Jennifer appeared *pro se.* At the hearing, Jennifer objected to the relief requested by Chad and argued that the Stipulated Amended Parenting

Plan should remain in full force and effect due to the lack of substantial change in circumstances. However, Jennifer requested that the District Court refer the matter to the Eleventh Judicial District Court's Family Court Services if the District Court was inclined to involve a Guardian ad Litem again. Her motion was denied. Jennifer also attempted to introduce her psychological evaluation into evidence. Chad objected, but the Court did not overrule or sustain the objection.

At the conclusion of the hearing, the District Court made an oral pronouncement that "I'm not going to modify the Parenting Plan, I'm – at least I'm going to suspend it for a period of time." *Transcript*, at 132-133. "...it isn't a change in circumstances, it's the same old –stuff." *Transcript,* at 134. "So I'm going to suspend the Parenting Plan until such time – I want you to completed [sic] the 40 hours of – its actually called Power and Control counseling with John Buttram..." *Transcript,* at 135. Upon completion of counseling with Mr. Buttram and upon recommendation of Christina Larsen and the child's counselor, Diana Auerhammer, "they can agree upon a resumption of unsupervised parenting time under phase 1, followed by 2, followed by 3..." *Transcript*, at 136.

On January 11, 2018, Jennifer filed her Notice of Appeal with this Court after the District Court's oral pronouncement. The District Court issued its Findings of Fact, Conclusions of Law and Order on February 23, 2018. (D.C. Doc. 202.) Jennifer now appeals.

STATEMENT OF THE FACTS

Chad and Jennifer are currently married and are the parents of one minor child, L.G.B., currently age six. On November 15, 2016, the parties entered into a Stipulated Final Parenting Plan providing for the care and support of the minor child. (D.C. Doc. 56.) Under the terms of the Plan, the parties' minor child L.G.B. spent the majority of her time in Jennifer's primary care. *Stipulated Final Parenting Plan,* page 6. Due to changes in Chad's work schedule during winter months, his parenting time differed depending on the time of year. From November through March, Chad had parenting time every Wednesday evening until Friday afternoon, along with alternating weekends. *Id.* From March through November, Chad had parenting time every Thursday evening until Friday evening, along with alternating weekends. *Id.* The remainder of the child's time was spent in Jennifer's care.

The parties did not resolve their dispute as to the division of the marital estate, such that no decree was entered and no Marital and Property Settlement Agreement was signed at that time. Additional litigation ensued concerning property issues and discovery disputes.

On June 12, 2017, Jennifer filed a Motion to Amend Parenting Plan and Request for Hearing, along with a supporting Affidavit and Proposed Amended Parenting Plan. (D.C. Docs. 102-14.)

The parties attended a Pre-trial Conference on August 3, 2017. On August 8, 2017, the District Court issued an Order Denying Motion to Amend Parenting Plan. (D.C. Doc. 161.) The same day, the District Court set the remaining issues for nonjury trial. (D.C. Doc. 160.) Around the same time, Chad sought and obtained a Temporary Order of Protection against Jennifer in companion case Flathead County Cause No. DR-17-555(B). The District Court then vacated the scheduling order and trial dates. (D.C. Doc. 163.)

On September 8, 2017, Jennifer filed an Unopposed Motion for Appointment of Limited Scope Guardian ad Litem, seeking the appointment of Christina Larsen, Esq. to act as *guardian ad litem* for L.G.B. (D.C. Doc. 166.) Ms. Larsen was appointed by Order of the Court dated September 15, 2017. (D.C. Doc. 167.) Ms. Larsen's role as Guardian ad Litem (hereinafter "GAL") was to be limited to "issues of parenting and parental contact in light of the Order of Protection recently issued by the Court and recommendations to the Court concerning what contact the child should have with Respondent." *Order Appointing Limited Scope Guardian Ad Litem,* ¶ 2.

Upon her appointment as GAL, Ms. Larsen worked on "arranging supervised visitation between [Jennifer] and [L.G.B.]." *Transcript,* at 64. Ms. Larsen met and interviewed the child, met the parties, and spoke to various other individuals involved in the matter. *Id.*

Prior to Ms. Larsen completing a report and recommendation, the parties resolved the pending issues. *Transcript,* at 65-66. On November 29, 2017, the parties attended settlement conference with Vanessa Ceravolo, Esq. *Transcript,* at 29. Both of the parties had counsel present and the conference was approximately 12 hours in length. *Id.*

The parties eventually entered into a Stipulated Amended Parenting Plan and Marital and Property Settlement Agreement. (D.C. Docs. 180 & 181.) The Stipulated Amended Parenting Plan was approved and adopted by Order of the District Court dated December 1, 2017. (D.C. Doc. 182.)

In recognition of the history of the case, the parties agreed to a carefully crafted, phased-in parenting schedule they described as a "Transitional Parenting Schedule." *Stipulated Amended Parenting Plan,* page 5. Under the Transitional Parenting Schedule, Jennifer's contact with the child gradually increased over a period of several months. Phase 1 began with "day time parenting on either Saturday or Sunday from 8:00 a.m. to 6:00 p.m. for a two week period," as well as "midweek visits with the minor child on Wednesday from afterschool (approximately 3:30 p.m.) until 7:00 p.m." *Id.*

Phase 2 included overnight parenting time from Saturday at 8:00 a.m. until Sunday at 6:00 p.m. on Sunday. *Id.* After three weeks of phase 2, Jennifer was to move onto alternating weekend parenting from Friday after school until Monday

morning. *Id.* Phase 3 was to last approximately four weeks. Thereafter, the parties were to share time with the child on a week-on, week-off basis with exchanges taking place on Fridays afterschool. *Id.,* at 6. The parties expected the week-on, week-off schedule to begin on February 9, 2018. *Id.*

Under the terms of the Stipulated Amended Parenting Plan, Ms. Larsen's role as GAL was specifically modified as follows:

> Guardian Ad Litem. The parties agree to continue the appointment and services of Christina H. Larsen, Esq. as the Guardian Ad Litem (GAL) for the minor child to oversee the Transitional Parenting Schedule as set forth above and for the first month of the Regular Schedule set forth below. The parties agree that the GAL shall not reduce the time periods identified under the Phase periods above. The GAL shall support the parties' Transitional Parenting Schedule above, absent a finding of new extenuating circumstances which will lead her to conclude that the pace of the transition is contrary to the child's best interest. The parties agree that the GAL shall be monitoring the child's adjustment through the Phase periods above. The parties agree to begin the Regular Schedule set forth below beginning February 9th, 2018, with Mother to have the first parenting week in the parties' alternating week schedule. The parties shall share equally in the cost of the GAL's services prior to date. Father shall be solely responsible for the costs associated with the GAL's services from the date of the Plan forward.

Stipulated Amended Parenting Plan, page 6.

The parties agreed that the minor child would be removed from the Temporary Order of Protection Chad obtained in August 2017. *Id.*, page 9.

The Stipulated Amended Parenting Plan further included provisions for the child's continued counseling, as well as counseling for Jennifer. *Id.,* page 5.

The parties also agreed to specific provisions concerning exchanges of the minor child, including that "exchanges of the minor child at [the specified location] shall be an exception to the Order of Protection issued against Mother in favor of Father issued on August 7th, 2017." *Id.*, page 9. And that "there shall be no communication between the parties at the exchanges. If either party fails to respect the terms set forth herein regarding the exchanges of the minor child, the exchange provisions set forth herein may be modified upon motion of either party." *Id.*

On December 13, 2017, approximately two weeks after the Stipulated Amended Parenting Plan was executed, an incident occurred at the exchange of the minor child at Pick's Bowling Alley in Bigfork, Montana. Chad brought his girlfriend, Robyn Paulson, to the exchange, despite Ms. Paulson having a Temporary Order of Protection against Jennifer. *Transcript,* at 44.

The details of the incident differ depending on which party describes the events. Chad alleges that Jennifer "sped towards [him and L.G.B.]...came within a foot and half, two feet of [his] car, and started yelling... 'you shouldn't bring that bitch here...." *Transcript,* at 20. According to Chad, Jennifer then "hit the accelerator, sped off, went through the parking lot and exited." *Id.*

Jennifer's version of the events differs in that Jennifer recalls her car being "parked very close to [Chad's] because it was icy and snowy and [she] didn't want [the child] to have to walk across the lot and slip on the ice." *Transcript,* at 101. Jennifer acknowledges that she saw Robyn Paulson was in Chad's car and she "pulled forward to leave the lot, and slowed down beside [Chad's] car, rolled down [her] window and told [Chad] do not bring [his] girlfriend near [Jennifer]." *Id.*

The District Court made no specific findings of fact as to the incident. See generally, *Findings of Fact, Conclusions of Law and Order* (D.C. Doc. 202.)

On December 15, 2017, Chad filed a Motion for Ex Parte Order for Interim Relief and Order to Show Cause, along with a Brief in Support, Affidavit in Support, and Rule 3 Certification by his counsel. (D.C. Docs. 184-187.) Chad's Motion requested reinstatement of Christina Larsen as GAL, immediate suspension of the Stipulated Amended Parenting Plan, and immediate suspension of Jennifer's unsupervised contact with the minor child. *Motion for Ex Parte Order for Interim Relief,* pages 1-2. Chad's sole basis for the relief sought was the incident at Pick's Bowling Alley. See generally, *Affidavit of Chad Michael Bessette* (D.C. Doc. 186.)

The District Court issued the Order for Ex Parte Interim Relief and Order to Show Cause on December 15, 2017, setting the matter for hearing on January 3, 2018. (D.C. Doc. 188.)

On December 28, 2017, Jennifer filed her Response and Objection to Petitioner's Motion for Ex Parte Order for Interim Relief and Affidavit in Support. (D.C. Docs. 189 & 190.) In those filings, Jennifer argued that no substantial change in circumstances had occurred and that the Stipulated Amended Parenting Plan already included provisions that provided for the situation. Jennifer further argued that if the District Court was inclined to refer the matter back to a GAL, it should instead refer the case to Family Court Services. *Response and Objection,* page 5.

At the hearing on January 3, 2018, the parties each gave their differing accounts of the incident at the bowling alley. Chad also provided testimony concerning incidents and information that was known to the parties and the District Court *prior* to the Stipulated Amended Parenting Plan being executed by the parties and adopted by the Court. For example, Chad testified as to unsubstantiated allegations that Jennifer had keyed his girlfriend's car. *Transcript,* at 13.

During his testimony, Chad acknowledged substantial buyer's remorse as it related to his signing of the Stipulated Amended Parenting Plan.

> THE COURT: (quoting Mr. Gilchrist) "Why did you agree to a parenting plan which allowed Jennifer unsupervised time." Overruled. Go ahead.
> MR. BESSETTE: The reason for that was a risk on my part. I did not want to raise my daughter in continued conflict with Jennifer, it had gone on for so many years at

this point, and I just I thought maybe had we entered into a Final Parenting Plan with some amendments that at some point we could actually parents (sic) together and in the best interest of [L.G.B.] do that, and after what had happened at the bowling alley that night I see that you know that I may have not made the right choice.

Transcript, at 15.

MS. BESSETTE: And you agreed to that Stipulated Amended Parenting Plan knowing the entire history of this case and being fully aware of all the facts to consider?
MR. BESSETTE: Uh-huh.
MS. BESSETTE: Okay. Was that a yes?
MR. BESSETTE: Yes.

Transcript, at 33.

MS. BESSETTE: Okay. And did you show up at the lawyer's office the first thing the following morning to rescind your signature?
MR. BESSETTE: I wanted to follow up to see if you had in fact signed that, and if not what the options were at that point.
MS. BESSETTE: Was it not your desire to rescind your signature the following morning?
MR. BESSETTE: I had had reservations about how the Parenting Plan was going to go into effect and thought that had you not signed it may be we could look at some other options.
MS. BESSETTE: So is that a yes?
MR. BESSETTE: Are you asking if I wanted to rescind it?
MS. BESSETTE: yes.
MR. BESSETTE: I had thoughts about it, yes.

Transcript, at 35-36.

> MS. BESSETTE: Thank you. Is it fair to say that you were unhappy with the agreement by the following morning?
> MR. BESSETTE: Yes.

Transcript, at 37-38.

Aside from the incident at the bowling alley, Chad offered no new facts or additional information related to any change that occurred between the signing of the Stipulated Amended Parenting Plan and his filing for ex parte relief approximately two weeks later.

GAL Christina Larsen, Esq. was called to testify at the hearing. She provided extensive hearsay testimony concerning the child's alleged account of the incident at the bowling alley. *Transcript,* at 70. Jennifer appropriately objected as to the testimony being hearsay. *Id.* Jennifer's objections were overruled and Ms. Larsen was permitted to testify as to what L.G.B. allegedly told her. *Id.*

Aside from the incident at the bowling alley, Ms. Larsen did not have new information to consider. Rather, she expressed disagreement with the Stipulated Amended Parenting Plan based on the past:

> MS. LARSEN: I feel like nothing has changed in this case. I think we are in – I feel that [Jennifer] is in almost exactly the same place she was when I first met her in September.

Transcript, at 72.

During cross-examination by Jennifer, Ms. Larsen was asked about the psychological evaluation she requested Jennifer undergo by Dr. Reed.

> MS. BESSETTE: Did you feel that the findings were positive?
> MS. LARSEN: They were quite favorable to you, yes.
> MS. BESSETTE: Did the eval determine there were any concerns for my parenting time?
> MS. LARSEN: I don't think the eval used those words. The eval identified concerns regarding obsessive behavior on your part, but also Dr. Reed made a number of observations that were very favorable to you, and I think she did say that she thought you should have time with your daughter. But I can't remember if she – I can go look at the eval.

Transcript, at 81-82.

When Jennifer attempted to have the evaluation by Dr. Reed admitted into evidence, Chad objected. *Transcript,* at 82. Despite having allowed Ms. Larsen to testify at length regarding the child's statements, Jennifer was initially prevented from introducing the evaluation by Dr. Reed into evidence. See *Exhibit B.* However, the District Court did allow Jennifer to ask Ms. Larsen questions concerning the same.

> MS. BESSETTE: Would it be accurate to say that Dr. Reed determined that there was no indication of major or chronic psychiatric problems.
> ...
> MS. LARSEN: Yes.
> MS. BESSETTE: Okay. And at the top of that page for the Parenting Stress Index would it be correct to say that Dr. Reed determined that I produced valid results due to

> open responding and that my profile is within normal limits?
> MS. LARSEN: Yes.
> MS. BESSETTE: Okay. Would it also be correct to say that Dr. Reed in her professional opinion based on evaluation results determined there was insufficient evidence that I met any criteria for substance use disorders or major mental illnesses?
> MS. LARSEN: Yes.
> MS. BESSETTE: And that Dr. Reed determined that my current psychological test results are all within normal limits?
> MS. LARSEN: Yes.
> MS. BESSETTE: And lastly, did Dr. Reed determine that my capacity to parent a young child is not significantly impaired at this time, that I'm considered trustworthy and psychiatrically stable at this time and for the foreseeable future?
> ...
> MS. LARSEN: That was her opinion.
> MS. BESSETTE: Okay. Was it also her opinion that there was no reason to continue blocking my access to [L.G.B.]?
> MS. LARSEN: That was her opinion.
> MS. BESSETTE: Okay. And was it – lastly, was it her opinion that if there were no rule violations during supervised visits that it was reasonable to progress rapidly to unsupervised visits?
> MS. LARSEN: That was her opinion, yes.

Transcript, at 82-84.

During her testimony, Jennifer acknowledged that her "reaction could have been better" at the bowling alley, but appropriately pointed out that the incident was not substantial enough to throw out the extensively negotiated Stipulated Amended Parenting Plan. *Transcript,* at 103. Jennifer also acknowledged how

well things had been going since the Stipulated Amended Parenting Plan was signed.

> MS. BESSETTE: I had several visits with [L.G.B.] after November 29th that went very well. When [L.G.B.] first got back to our house the first time she kissed the garage door because she was so happy to be back home. All of our visits went really well and she was eager to spend more time with me.

Transcript, at 104.

Jennifer also made a specific request that if the Court was inclined to reappoint a GAL, it refer the matter to Family Court Services instead.

> MS. BESSETTE: My position is that the Stipulated Amended Parenting Plan should be reinstated as written, but if the Court decides to reappoint a guardian ad litem I request that the case be sent to Family Court Services because yesterday was my last day, I was laid off with all the other case managers at Western Montana Mental Health Center and I'm currently unemployed.

Transcript, at 105.

Jennifer noted that there were other ways to prevent future incidents at exchanges, just as is outlined in the Stipulated Amended Parenting Plan.

> MS. BESSETTE: Also, to prevent something like the event at Pick's from happening there are other options. We could agree to change – exchange [L.G.B.] inside Pick's where there would be someone present, I'm fine with meeting inside the White Oak Gas Station, which is one of the other designated handoff locations, instead of meeting at the bank that's in the Parenting Plan. We could meet inside the Bigfork grocery store. I am flexible and open to any other options.

Transcript, at 105-106.

At the conclusion of testimony, the District Court made a number of legally relevant observations on the record.

> THE COURT: I do agree with [Jennifer], however, that after all the work and time and effort that went into crafting this Parenting Plan that there hasn't been a change in circumstances so substantial and continuing that's arisen since the plan that a lot of the circumstances that existed between you and Chad took place prior to the negotiation of that plan, and that when you negotiated it you both – you both knew the history.
> ...
> I'm not going to modify the Parenting Plan, I'm – at least I'm going to suspend it for a period of time.
> ...
> This incident that happened on the 13th [of December] was just a continuation of what has been going on before, so it isn't a change in circumstances, it's the same old – stuff.
> ...
> So I'm going to suspend the Parenting Plan until such time – I want you to completed (sic) the 40 hours of – its actually called Power and Control Counseling with John Buttram, I want you to allow him to get collateral information from Christina Larsen and from Chad and from...Yeah, [the child's counselor] and [Jennifer's counselor] both –

Transcript, at 132-136.

As the parties and the District Court discussed the decision in more detail, it became apparent what sort of timeframe the "suspension" would cover. Specifically, the 40 hour Power and Control Counseling would consist of one hour

of counseling per week for a 40 week period. In the meantime, Jennifer would be permitted only supervised visits at the Nurturing Center, until John Buttram, Christina Larsen and the child's counselor recommended otherwise. *Transcript,* at 139.

The District Court then denied Jennifer's request to refer the matter to Family Court Services stating, "[n]o, because, you know, if this case was going to be referred to Family Court Services it probably should have been done a year or two ago." *Transcript,* at 142.

On February 23, 2018, the District Court issued its written Findings of Fact, Conclusions of Law and Order (hereinafter "the Order"). (D.C. Doc. 202.) The Order largely mirrored the District Court's oral pronouncement from the hearing. The Order does not include a finding of a change in circumstances. Rather, the Order concludes that the District Court has authority under Mont. Code Ann. § 40-4-220(2)(ii) to suspend the Stipulated Amended Parenting Plan for a temporary period. *Findings of Fact, Conclusions of Law and Order,* page 2, ¶ 3. The Order presumes that a period of up to 40 weeks would constitute a temporary period for the purposes of that statute. Further, the Order denied Jennifer's request to have the matter referred to Family Court Services.

From that Order, that Jennifer now appeals.

SUMMARY OF THE ARGUMENT

The District Court erred by amending the parties' Stipulated Amended Parenting Plan when no substantial change in circumstances occurred. Rather than acknowledging it was amending the parenting plan, the District Court relied on the "temporary order" language of the *ex parte* statute to justify making significant, long-term modifications to the Stipulated Amended Parenting Plan. The District Court misinterpreted and misapplied the statute, using it to circumvent the jurisdictional prerequisites required by the parenting plan amendment statute.

The District Court erred by ordering Jennifer to undergo supervised visitation without meeting the requirements of the judicial supervision statute. The District Court further erred by failing to introduce a psychological evaluation into evidence.

Finally, the District Court erred by failing to refer this matter to Family Court Services when the District Court's own Local Rule mandates referral upon request of a party. Instead, the District Court referred the matter back to a private GAL, whom Jennifer cannot afford to pay.

This Court should vacate the Court's January 3rd Findings of Fact, Conclusions of Law and Order with specific instructions to the District Court to immediately reinstate the Stipulated Amended Parenting Plan in full force and effect.

STANDARD OF REVIEW

The standard of review with respect to parenting plan modifications is as follows: the Supreme Court reviews the findings underlying a district court's decision to modify a parenting plan to determine whether those findings are clearly erroneous; and when the findings upon which the modification decision is predicated are not clearly erroneous, the Court will reverse the district court's decision only where an abuse of discretion is clearly demonstrated. *Jacobsen v. Thomas,* 2006 MT 212, ¶ 13, 333 Mont. 323, 324, 142 P.3d 859, 862 (citing *In re Marriage of Oehlke,* 2002 MT 79, ¶ 9, 309 Mont. 254, ¶ 9, 46 P.3d 49, ¶ 9).

A district court's interpretation and application of statutes is reviewed for correctness. *In re T.H.*, 2005 MT 237, ¶ 35, 328 Mont. 428, ¶ 35, 121 P.3d 541, ¶ 35. Issues of statutory interpretation are reviewed *de novo. Jacobsen,* 2006 MT at ¶ 13.

A district court's evidentiary ruling is reviewed for an abuse of discretion. *Puccinelli v. Puccinelli,* 2012 MT 46, ¶ 12, 364 Mont. 235, 241, 272 P.3d 117, 122. "The district court has broad discretion in determining the admissibility of evidence. Notwithstanding this deferential standard, however, judicial discretion must be guided by the rules and principles of law; thus, our standard of review is plenary to the extent that a discretionary ruling is based on a conclusion of law. In such circumstances, we must determine whether the court correctly interpreted the

law." *Id.,* (citing *In re T.W.,* 2006 MT 153, ¶ 8, 332 Mont. 454, 139 P.3d 810 (internal citations omitted)).

ARGUMENT

I. THE DISTRICT COURT ERRED IN AMENDING THE PARENTING PLAN WHEN NO SUBSTANTIAL CHANGE IN CIRCUMSTANCES HAD OCCURRED.

"The court may in its discretion amend a prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interest of the child." Mont. Code Ann. § 40-4-219(1). "Preference must be given to carrying out the parenting plan." Mont. Code Ann. § 40-4-219(7).

A finding of changed circumstances is a jurisdictional prerequisite, and without a finding of changed circumstances, a district court *may not* modify an existing parenting arrangement. *In re Marriage of Syverson,* 281 Mont. 1, 16-17, 20, 931 P.2d 691, 701, 702 (1997) (citing *In re Marriage of Johnson,* 266 Mont. 158, 166, 879 P.2d 689, 694 (1994) and *In re Marriage of Boyer*, 274 Mont. 282, 286, 908 P.2d 665, 667 (1995)).

"As [the language of § 40-4-219(1)] makes clear, in order to modify the parties' existing parenting plan the [district court] was required *first* to find (1) that a change had occurred in [the child's] circumstances and (2) that an amendment to

the parenting plan was necessary to serve the children's best interests." *Jacobsen*, ¶ 16 (emphasis included). The two findings are "required to be based on facts that [have] arise since the prior plan was entered or that were unknown to the court at the time the prior plan was entered." *Id.*

The jurisdictional prerequisite codifies the basic policy behind the modification statute, which is a presumption in favor of custodial continuity. *Custody of Dallenger,* 173 Mont. 530, 534, 568 P.2d 169, 171-2 (1977). To prove substantial change in circumstance, the party seeking to modify a parenting plan carries a heavy burden of proof. *In re Marriage of D'Alton*, 2009 MT 184, 351 Mont. 51, 209 P.3d 251. "The change must be significant enough in relation to the best interests of the child that those interests are no longer served by the [order] in force." *R.L.S. v. Barkhoff,* 207 Mont. 199, 674 P.2d 1082 (1983).

Although the district courts have "broad discretion when considering the parenting of a child," in a modification context, "discretion is contoured by an initial determination of change circumstances, a legal conclusion." *In re R.J.N.,* 2017 MT 249, ¶ 12, 389 Mont. 68, 72, 403 P.3d 675, 678 (citing *In re Marriage of Tummarello,* 2012 MT 18, ¶ 34, 363 Mont. 387, 270 P.3d 28).

In *Marriage of D'Alton*, this Court determined that there had not been a substantial change in circumstances when six years had passed, the children were both enrolled in school, there was no longer a nanny caring for the children and

there were allegations of frustrated contact with the children. *Marriage of D'Alton*, ¶10. The district court noted, and this Court agreed, that "if the passage of six (6) years and the children both being in school is sufficient to warrant an amendment, then the courts would be flooded with motions..." *Id.*, ¶11.

In the present action, Chad cannot dispute that the Stipulated Amended Parenting Plan was executed on November 29, 2017, or that the Court approved and adopted the Stipulated Amended Parenting Plan by Order dated December 1, 2017. As such, the only relevant information for the District Court to consider when making a change or amendment is "facts that have arise since the prior plan or that were unknown to the court at the time of entry of the prior plan." Mont. Code Ann. § 40-4-219(1).

The only facts alleged by Chad to have arisen since the Stipulated Amended Parenting Plan was signed approximately two weeks earlier was the incident at Pick's Bowling Alley. The incident may not have been ideal, but it was not substantial enough to warrant a change in a parenting plan that had signed just two weeks before. If a minor disagreement at a parenting exchange two weeks after signing was a sufficient basis to modify a parenting plan, the District Courts would be flooded with motions to amend.

Not only did the District Court's Order neglect to make any findings that could constitute a change in circumstances, but the the oral pronouncement at the hearing directly reached the opposite conclusion.

> THE COURT: I do agree with [Jennifer], however, that after all the work and time and effort that went into crafting this Parenting Plan that there hasn't been a change in circumstances so substantial and continuing that's arisen since the plan that a lot of the circumstances that existed between you and Chad took place prior to the negotiation of that plan, and that when you negotiated it you both – you both knew the history.
> ...
> This incident that happened on the 13th [of December] was just a continuation of what has been going on before, so it isn't a change in circumstances, it's the same old – stuff.
> ...

Transcript, at 132-136.

It is obvious Chad regrets signing the Parenting Plan. The GAL indicated she did not necessarily agree with it. And although the District Court did not exactly articulate the same, the District Court may also in hindsight have felt it was too much, too soon. However, the Stipulated Amended Parenting Plan was executed and was approved by the District Court with all involved being fully aware of the history of the case.

The District Court specifically concluded that there was *no* substantial change in circumstances, which means that the first requirement of Mont. Code Ann. § 40-4-219(1) cannot be met. Without finding the jurisdictional prerequisite

of a change in circumstances, there was no need for the District Court to look at the second step of determining if the amendment is necessary to serve the child's best interest.

However, even if a finding of a change in circumstances had occurred, it would not have been an appropriate conclusion to find that the amendment was "necessary to serve the child's best interest," because the existing Stipulated Amended Parenting Plan already provided specific provisions that could have been invoked to avoid any alleged harm to the child going forward.

As is required by Mont. Code Ann. § 40-4-219(7), the District Court should have given preference to the existing parenting plan. Had it done so, the District Court could have adequately made modifications to the exchange provisions set forth in ¶ II(E), which states, "if either party fails to respect the terms set forth herein regarding the exchanges of the minor child, the exchange provisions set forth herein may be modified upon motion of either party." *Stipulated Amended Parenting Plan,* page 9, ¶ II(E). Further, the GAL was empowered under the language of the Stipulated Amended Parenting Plan to slow down the transition schedule if "new extenuating circumstances" arose that justified the same. Because this case has been so litigious, the parties and their respective counsel put the time and energy into including these safeguards specifically to avoid this circumstance.

The District Court could have ordered the parties to exchange the child in a different location or required the parties to retain a third party to assist in facilitating the exchanges. Meanwhile, the GAL could have recommended the transition schedule be slowed down. This result would have been entirely in line with the language of the Stipulated Amended Parenting Plan and would have adequately addressed the District Court's concerns without requiring any amendment.

Instead, the District Court made substantial amendments and modifications to the Stipulated Amended Parenting Plan. While the Stipulated Amended Parenting Plan provided for unsupervised time *immediately,* the District Court's Findings of Fact, Conclusions of Law and Order prevents Jennifer from exercising any unsupervised parenting time for a period of up to 40 weeks. The Order also obligates her to pay for GAL services and to involve various professionals that were not included in the Stipulated Amended Parenting Plan. Those changes are clearly amendments to the Stipulated Amended Parenting Plan. Making the modifications without a substantial change in circumstances was in error and, therefore, the District Court's Order should be vacated.

II. THE DISTRICT COURT ERRED IN AMENDING THE PARENTING PLAN UNDER THE GUISE OF A "TEMPORARY ORDER."

"A party seeking an interim parenting plan may request that the court grant a temporary order providing for living arrangements for the child *ex parte.* The

party shall make the request in the moving papers and shall submit an affidavit showing that:...(ii) although a previous parenting plan has been ordered, an emergency situation has arisen in the child's present environment that endangers the child's physical, mental, or emotional health and an immediate change in the parenting plan is necessary to protect the child." Mont. Code Ann. § 40-4-220(2)(a)(ii) (emphasis added).

Pursuant to Uniform District Court Rule 3, parties are not entitled to seek *ex parte* relief unless provided for specifically in the Uniform District Court Rules or under a statute. Absent a rule or statute providing otherwise, "no document, including briefs, proposed orders and proposed judgments, may be presented to the court at any time unless it is first filed with the court and served on all parties." U.D.C.R. 3(d).

Mont. Code Ann. § 40-4-220(2)(a) is intended to provide an avenue for emergency relief during the period of time it takes for a court to set a matter for a hearing. It allows the district court to act on an *ex parte* basis when a temporary order is required to protect a child in danger.

Section § 220(2)(b) goes on to set requirements for the timing of the hearing. "The court shall require all parties to appear and show cause within 21 days from the execution of the interim parenting plan why the interim parenting plan should

not remain in effect until further order of the court." Mont. Code Ann. § 40-4-220(2)(b).

"[Section § 40-4-220] establishes a procedure for seeking temporary custody or a modification of a custody decree by motion supported with affidavits. The procedure is designed to result in denial of the motion without a hearing unless the court finds that the affidavits establish adequate cause for holding a hearing. The procedure will thus tend to discourage contests over temporary custody and prevent repeated or insubstantial motions for modification." *Commissioners' Note,* Mont. Code Ann. § 40-4-220.

It is clear that the term "temporary order" in § 220(2)(a) is intended to mean that the district court may issue an ex parte order during the 21 day period between the motion and a hearing on the same. The Commissioners' Note further clarifies that this statute is not intended to provide an end-run around the requirements of Mont. Code Ann. § 40-4-219(1), but rather, it is intended to "discourage" litigious behavior surrounding the same.

The District Court incorrectly decided that Mont. Code Ann. § 40-4-220(2)(a)(ii) allowed it to make long-term modifications of the Stipulated Amended Parenting Plan. The Order concludes that "pursuant to M.C.A. § 40-4-220(2)(ii), the Court has the authority to grant a temporary order providing for living arrangements for the child *ex parte* as an emergency situation has arisen in

the child's present environment that endangers the child's physical, mental, and emotional health and as immediate change is necessary to protect the child." *Findings of Fact, Conclusions of Law and Order*, page 2, ¶ 2.

The District Court then relied on the conclusion of law to order "that the parties' Stipulated Amended Parenting Plan is hereby SUSPENDED until such time as Jennifer completes forty (40) hours of Power and Control Counseling with John Buttram, LCPC." *Id.,* at page 3, ¶ 2(a) (emphasis included).

Although the Court called it a suspension, the Order substantially changed numerous provisions of the Stipulated Amended Parenting Plan. The Order prevents Jennifer from exercising any unsupervised time until completing a 40 week counseling series, which essentially stalls the plan for a period of 10 months. Jennifer is required to incur GAL expenses she had specifically contracted she would not have to pay. She further is obligated to defer to recommendations from various professionals that the parties had specifically agreed would not be empowered. The "suspension," is nothing more than a thinly-veiled amendment and it is certainly not the temporary order contemplated by § 40-4-220(a).

The District Court erred in determining its modification of the Stipulated Amended Parenting Plan constituted a temporary order for the purposes of Mont. Code Ann. § 40-4-220(a). Therefore, the Court's Findings of Fact, Conclusions of

Law and Order should be vacated and the Stipulated Amended Parenting Plan reinstated.

III. THE DISTRICT COURT ERRED IN ORDERING SUPERVISED VISITATION WITHOUT COMPLYING WITH STATUTE ON JUDICIAL SUPERVISION.

Under Mont. Code Ann. § 40-4-218(2), a court may order supervised visitation by a noncustodial parent, "if both parents or all contestants agree to the order or if the court finds that in the absence of the order the child's physical health would be endangered or the child's emotional development significantly impaired." Mont. Code Ann. § 40-4-218(2).

The intention of the judicial supervision statute is to "[pursue] the family privacy theme by significantly limiting the judge's authority to order supervision...." *Commissioners' Note,* Mont. Code Ann. § 40-4-218 at ¶ 2. "If parents cannot agree to supervision...it should not be ordered unless the judge finds some extraordinary need for it. Thus, the provision adopts a more stringent standard than the normal 'best interest' standard." *Id.*

As such, the statute anticipates a district court making findings supporting an order for supervised visitation and those findings should go beyond a conclusion that supervised visitation would be in the child's best interest.

In the present action, the District Court found only that "the best interest of the minor child, L.G.B., would be served by awarding immediate exclusive

residential custody and care of the child to Chad during the pendency of Jennifer's completion of the forty (40) hours of Power and Control Counseling with Mr. Buttram." *Findings of Fact, Conclusions of Law and Order,* page 3, ¶ c (emphasis included). The District Court then found that "Jennifer's parenting time with the minor child, L.G.B. should be supervised by the Nurturing Center located at 146 3rd Ave. West, Kalispell, Montana during the pendency of Jennifer's completion of the forty (40) hours of Power and Control Counseling with Mr. Buttram." *Id,* at ¶ d.

The Order did not articulate any specific findings that could constitute an "extraordinary need" for supervised visitation. At the hearing, the District Court specifically noted that Jennifer is *not* "an immediate or direct threat to [L.G.B.]," and that the problematic times are those when Jennifer and Chad are together with the child. *Transcript,* at 131. As noted above, the Stipulated Amended Parenting Plan already provides for that exact situation. If the child is not safe or secure during exchanges between Jennifer and Chad, the exchange provisions of ¶ II(E) should and could have been modified to provide additional safeguards. "If either party fails to respect the terms set forth herein regarding the exchanges of the minor child, the exchange provisions set forth herein may be modified upon motion of either party." *Stipulated Amended Parenting Plan,* page 9, ¶ II(E).

For those reasons, the District Court erred in ordering supervised visitation for Jennifer.

IV. THE DISTRICT COURT ERRED IN FAILING TO INTRODUCE THE PSYCHOLOGICAL EVALUATION INTO EVIDENCE.

The Supreme Court has considered the admissibility of hearsay evidence in custody hearings. In *Matter of Swan*, the district court reviewed and considered various reports prepared by social workers and police officers. *In re Swan*, 173 Mont. 311, 567 P.2d 898 (1977). The district court referenced the reports in its decision. This Court reversed the district court's decision finding that "as to written hearsay contained in the reports submitted to the court, this jurisdiction has long followed the rule that unsworn statements made out of court with no opportunity afforded to confront the writer and question him as to their veracity are hearsay... Unsworn report where there is no right to cross-examine come within the hearsay rule and are inadmissible." *Swan*, 173 Mont. at 314-15, 567 P.2d at 900-01.

This Court confirmed its previous ruling in *Swan*, as well as a number of other cases in *Puccinelli v. Puccinelli* when it concluded that "a district court may not rely on hearsay evidence contained in out-of-court reports when the report's author does not testify at the custody hearing and is not subject to cross-examination. To rely on such reports is a violation of the parent's due process rights." *Puccinelli*, ¶ 21.

However, a party must preserve a hearsay objection. "We repeatedly have held that the complaining party must make a timely objection or motion to strike and state the specific grounds for its objection in order to preserve an objection to the admission of evidence for purposes of appeal." *Siebken v. Voderberg,* 2015 MT 296, ¶ 19, 381 Mont. 256, 261, 359 P.3d 1073, 1077 (citing *In re Bower,* 2010 MT 19, ¶ 20, 355 Mont. 108, 225 P.3d 784).

At the January 3rd hearing, Jennifer attempted to introduce a psychological evaluation into evidence completed by Theresa Reed, Ph.D. See *Exhibit B.* Jennifer was referred by GAL Christina Larsen and the evaluation became a part of Ms. Larsen's file.

When Jennifer moved for the admission of the evaluation, Chad's counsel initially objected.

> MS. BESSETTE: Well, can I move to admit the psychological eval?
> MR. GILCHRIST: No, Your – I object that that's completed hearsay. The doctor is not here to testify to it. If she wants to ask her about her –
> THE COURT: Well, but Ms. Larsen has received the eval. So you can ask her questions about it.

Transcript, at 82.

The District Court did not specifically overrule or sustain the objection. Jennifer then went on to ask Ms. Larsen about Dr. Reed's findings without additional objection from Chad's counsel.

MS. BESSETTE: Did you feel that the findings were positive?
MS. LARSEN: They were quite favorable to you, yes.
MS. BESSETTE: Did the eval determine there were any concerns for my parenting time?
MS. LARSEN: I don't think the eval used those words. The eval identified concerns regarding obsessive behavior on your part, but also Dr. Reed made a number of observations that were very favorable to you, and I think she did say that she thought you should have time with your daughter. But I can't remember if she – I can go look at the eval.
...
MS. BESSETTE: Would it be accurate to say that Dr. Reed determined that there was no indication of major or chronic psychiatric problems.
...
MS. LARSEN: Yes.
MS. BESSETTE: Okay. And at the top of that page for the Parenting Stress Index would it be correct to say that Dr. Reed determined that I produced valid results due to open responding and that my profile is within normal limits?
MS. LARSEN: Yes.
MS. BESSETTE: Okay. Would it also be correct to say that Dr. Reed in her professional opinion based on evaluation results determined there was insufficient evidence that I met any criteria for substance use disorders or major mental illnesses?
MS. LARSEN: Yes.
MS. BESSETTE: And that Dr. Reed determined that my current psychological test results are all within normal limits?
MS. LARSEN: Yes.
MS. BESSETTE: And lastly, did Dr. Reed determine that my capacity to parent a young child is not significantly impaired at this time, that I'm considered trustworthy and psychiatrically stable at this time and for the foreseeable future?
...

> MS. LARSEN: That was her opinion.
> MS. BESSETTE: Okay. Was it also her opinion that there was no reason to continue blocking my access to [L.G.B.]?
> MS. LARSEN: That was her opinion.
> MS. BESSETTE: Okay. And was it – lastly, was it her opinion that if there were no rule violations during supervised visits that it was reasonable to progress rapidly to unsupervised visits?
> MS. LARSEN: That was her opinion, yes.

Transcript, at 82-84.

Chad allowed the line of questioning that specifically addressed language of Dr. Reed's report and conclusions. Because he failed to object, the testimony was permitted. Once the contents of Dr. Reed's report were introduced into evidence through testimony by Ms. Larsen, the alleged hearsay evidence was already before the District Court.

In review of the record, it is notable that the District Court never sustained or overruled Chad's initial objection, nor did the Court make an actual determination as to whether or not Dr. Reed's evaluation should be admitted into evidence. However, the District Court did address other exhibits at the conclusion of Jennifer's cross-examination of Ms. Larsen.

> THE COURT: Exhibit C did you want admitted? This is one you put in somewhat a while ago; this was the email –
> MS. BESSETTE: Text, yeah.
> THE COURT: -- on December 13th about the dentist. So C is admitted. B and C have been admitted. You can step down.

Transcript, at 85-86.

Because Chad waived further objection, the Court should have admitted the evaluation into evidence at the time it addressed the other exhibits introduced by Jennifer. For those reasons, the District Court erred by failing to introduce Dr. Reed's evaluation into evidence.

V. THE DISTRICT COURT ERRED IN FAILING TO REFER THE CASE TO FAMILY COURT SERVICES.

Pursuant to Mont. Rule Civ. P. 83, "each district court, upon agreement of the judge or a majority thereof, may from time to time make and amend rules governing its practice not inconsistent with these rules or other rules prescribed by the supreme court." Mont. Rule Civ. P. 83. A similar rule is found within the Uniform District Court Rules, "nothing in these Rules shall be construed as limiting the power of the district courts from promulgating rules that do not conflict with these Rules." U.D.C.R. 15.

As it relates to construction of a statute, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Mont. Code Ann. § 1-2-101.

In determining intent, the court must first look at the plain meaning of the statute. *Lodge Grass High School v. Hamilton,* 264 Mont. 290, 293, 871 P.2d 890, 892 (1994). For statutory construction purposes, both "shall" and "must" are mandatory, rather than permissive. *Montco v. Simonich,* 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997) (citing *ISC Distributors, Inc. v. Trevor*, 273 Mont. 184, 201, 903 P.2d 170, 179 (1995)).

Eleventh Judicial District Court Rule 22(D)(2) states "Upon request of either party, the Court *shall* order that the matter be referred to the Director of Family Court Services for investigation, report and recommendation regarding custody, support, and visitation rights of each child and parent. The report shall be returned to the Court, the parties and their attorneys as soon as reasonably possible thereafter." Local Rule 22(D)(2) (emphasis added).

In order to interpret Local Rule 22(D)(2), it is reasonable to apply the same logic that applies to the construction of a statute. Rule 22(D)(2) mandates that a matter be referred to the Director of Family Court Services upon request of either party. If the Eleventh Judicial District Court intended Rule 22(D)(2) to be permissive, the Rule would state that the "Court *may* order that the matter be referred." But because Rule 22(D)(2) states that a matter "shall" be referred, the Rule is mandatory and requires referral upon request of either party.

In the present action, Jennifer requested referral to Family Court Services on two separate occasions. First, in her Response and Objection to Petitioner's Motion for Ex Parte Order for Interim Relief and a second time at the hearing on January 3, 2018. Jennifer's request was largely due to financial circumstances. She expressed an inability to maintain Christina Larsen as a private GAL in both her Response and Objection, as well as during her testimony at the hearing. Jennifer testified that she was being laid off from her previous employment and would be without income after January 2, 2018. It is notable that the Stipulated Amended Parenting Plan kept Christina Larsen involved as a GAL, but on Chad's dime.

The District Court denied Jennifer's request during its oral pronouncement on January 3, 2018, as well as in the written Order issued on February 23, 2018. Instead, the District Court referred the matter back to Christina Larsen under the terms of its previous Order Appointing Limited Scope Guardian ad Litem. The result is Jennifer being responsible for half of Ms. Larsen's fees, which she cannot possibly afford.

Because Rule 22(D)(2) mandates referral to Family Court Services upon request of either party, the District Court erred in failing to refer the matter upon Jennifer's request.

CONCLUSION

Because no substantial change in circumstances occurred, the District Court was without the authority to modify or change the Stipulated Amended Parenting Plan. The Stipulated Amended Parenting Plan included specific provisions that provided for Chad's concerns and simple enforcement of those provisions would adequately address those issues.

The District Court then misapplied the affidavit practice statute as allowing long-term "temporary" changes to the Stipulated Amended Parenting Plan. The statute is intended to provide for short-term arrangements during the 21 day period between an ex parte motion and a hearing, not to justify amendments that do not meet the requirements of § 40-4-219.

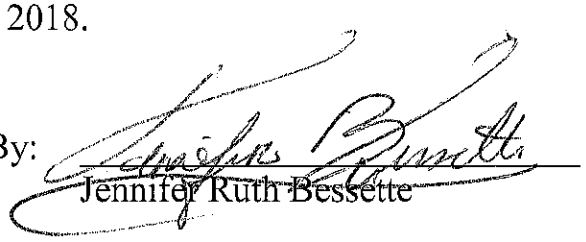
The District Court further erred by ordering Jennifer to undergo supervised visitation without meeting the requirements of the judicial supervision statute and additionally erred by failing to introduce Dr. Reed's psychological evaluation into evidence.

Lastly, the District Court erred when it denied Jennifer's request to refer the matter to Family Court Services when its own Local Rule mandates referral upon request.

For those reasons, this Court should vacate the Court's January 3rd Findings of Fact, Conclusions of Law and Order with specific instructions to the District

Court to immediately reinstate the Stipulated Amended Parenting Plan in full force and effect.

DATED: March 16, 2018.

By: 
Jennifer Ruth Bessette

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I served a true and accurate copy of the foregoing Brief of Appellant to:

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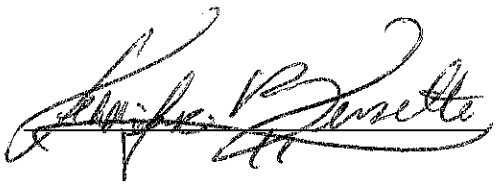

CERTIFICATE OF COMPLIANCE

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

By: 
Jennifer Ruth Bessette