

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 18-0025

IN RE THE MARRIAGE OF:

CHAD MICHAEL BESSETTE,

Petitioner and Appellee,

and

JENNIFER RUTH BESSETTE,

Respondent and Appellant.

APPELLEE'S ANSWER BRIEF

**On Appeal from
Montana Eleventh Judicial District Court, Flathead County
Before the Honorable Robert B. Allison, DR-15-800(B)**

Appearances:

**Sean R. Gilchrist
Johnson-Gilchrist Law Firm, P.C.
6336 Highway 93 South
Whitefish, MT 59937
Telephone: (406) 862-3920
sean@johnsongilchristlaw.com**

ATTORNEY FOR APPELLEE

**Jennifer Ruth Bessette
202 Blenn Street
Bigfork, MT 59911
Telephone: (406) 210-6844
jennerality@icloud.com**

PRO SE APPELLANT

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STATEMENT OF THE ISSUES

1. Must the District Court find a significant change in circumstances to protect the child where neither party asked the parenting plan be modified?
2. Did the District Court's authority to protect the minor child expire 21 days following Chad's Motion for Ex Parte Order for Interim Relief?
3. Did the District Court err by ordering supervised visitation?
4. Did the District Court err in refusing to admit the psychological evaluation into evidence where the evaluator was unavailable for cross-examination?
5. Did the District Court err in refusing to refer the matter to Family Court Services where a Guardian ad Litem was already involved?

STATEMENT OF THE CASE

Appellee agrees with the Appellant's Statement of the Case.

STATEMENT OF FACTS

Chad and Jennifer are married and are the parents of one minor child, L.G.B., age six. On November 15, 2016, the parties entered into a *Stipulated Final Parenting Plan*. (D.C. Doc. 56.) Pursuant to that Plan, during the months of November through March, L.G.B. was with Chad from Wednesday evening until Friday afternoon, as well as alternating weekends. From March to November, L.G.B. was with Chad every Thursday evening to Friday evening, and alternating weekends. The remainder of the time was Jennifer's parenting time. *Stipulated Final Parenting Plan*, page 6.

A decree approving the *Stipulated Final Parenting Plan* was never entered, as the parties were unable to resolve their dispute as to division of the marital estate until a year after the Plan was entered into by the parties.

On June 12, 2017, Jennifer filed a *Motion to Amend Parenting Plan and Request for Hearing*. (D.C. Doc. 102.) Following a Pre-trial Conference on August 3, 2017, the District Court denied Jennifer's *Motion to Amend Parenting Plan* on August 8, 2017, and set all remaining issues for a nonjury trial. (D.C. Doc. 160, 161.)

On August 7, 2017, Chad requested a *Temporary Order of Protection* against Jennifer. (Flathead District Court Companion Case, Cause No. DR-17-555(B), Doc. 1.) Following a hearing on August 23, 2017, the District Court extended the *Protection Order* until August 23, 2018. (Flathead County Companion Case, Cause No. DR-17-555(B), Doc. 7.) Judge Allison's *Protection Order* included both Chad and L.G.B. as protected persons, and ordered that Jennifer was to have no contact with L.G.B. unless approved by the child's counselor, Diana Auerhammer, and also referenced a Partner/Family Member Assault criminal proceeding in Justice Court (DR-17-555(B), Doc. 7.)

The District Court then vacated the scheduling order and trial date in the dissolution matter upon Jennifer's request. (D.C. Doc. 163.)

On September 8, 2017, Jennifer filed an *Unopposed Motion for Appointment of Limited Scope Guardian ad Litem*. (D.C. Doc. 166.) Ms. Christina Larsen was appointed by the Court on September 15, 2017, to address “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.

Prior to Ms. Larsen completing her investigation and report, the parties attended a settlement conference on November 29, 2017, and entered into a *Stipulated Amended Parenting Plan and Marital and Property Settlement Agreement*. (D.C. Doc. 180, 181.) The *Stipulated Amended Parenting Plan* was approved by the District Court on December 1, 2017. (D.C. Doc. 182.)

Pursuant to the *Stipulated Amended Parenting Plan* agreed upon by the parties, Jennifer’s parenting time was to gradually increase over a period of time according to a “Transitional Parenting Schedule” designed to gradually reintegrate Jennifer with L.G.B. Phase 1 included day time visits on Saturday or Sunday in addition to a midweek after-school visit, for a period of two weeks. (*Stipulated Amended Parenting Plan*, p. 5.)

Phase 2 of the Transitional Parenting Schedule was to last three weeks, and allowed for overnight parenting time from Saturday at 8:00 a.m. to Sunday at 6:00 p.m. Phase 3, to last four weeks, granted alternating weekend parenting time to Jennifer, from Friday after school until Monday morning. (*Stipulated Amended Parenting Plan*, p. 5.) After successful completion of the Transitional Parenting Schedule, the parties were to begin sharing equal time on an alternating week schedule. (*Stipulated Amended Parenting Plan*, p. 6.)

The parties specifically agreed to maintain Ms. Larsen's involvement to oversee the Transitional Parenting Schedule. Ms. Larsen was requested to "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." Chad was to pay for the future services of the GAL (*Stipulated Amended Parenting Plan*, p. 6.)

The parties agreed to request the District Court to remove L.G.B. from the *Protection Order* issued on August 23, 2017. (*Stipulated Amended Parenting Plan*, p. 9.) They further agreed that parenting exchanges would be an exception to the *Protection Order* that remained protecting Chad against Jennifer, but that there was to be no communication between the parties at the exchanges.

On December 13, 2017, on the last day of Phase 1 of the “Transitional Parenting Schedule,” a troublesome incident occurred at the parenting exchange at the end of Jennifer’s parenting time.

On December 15, 2017, Chad filed a *Motion for Ex Parte Order for Interim Relief and Order to Show Cause*, with a *Brief in Support*, *Affidavit in Support*, and *Rule 3 Certification*. (D.C. Docs. 184-187.) Chad’s motion requested immediate suspension of the *Stipulated Amended Parenting Plan*, suspension of Jennifer’s unsupervised contact with L.G.B., and reinstatement of Christina Larsen as GAL under the terms of the prior *Order Appointing Limited Scope Guardian ad Litem*. (*Motion for Ex Parte Order for Interim Relief*, p. 1-2). Chad did not request the court to modify the parties’ *Stipulated Amended Parenting Plan*.

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

On December 28, 2017, Jennifer filed her response, arguing Chad had “not established a substantial change in circumstances sufficient to warrant a modification of the *Stipulated Amended Parenting Plan*.” *Response and Objection*, p. 1.) She also sought to refer the matter to Family Court Services –

over two years after the matter was first filed, and after a Guardian ad litem had already been involved by consent of both parties. *Id.*, p. 5-6.)

At the hearing on January 3, 2018, Chad testified that at the December 13, 2017, exchange, Jennifer sped toward he and L.G.B. as they stood by his car, came within about a foot and a half to two feet of their car, and started repeatedly screaming “you shouldn’t bring that bitch here.” He testified that L.G.B. “starting screaming, she was historical (sic), yelling at her mom to stop, stop fighting.” Jennifer then sped off. (*Transcript*, at 20.) When asked what he witnessed in L.G.B. that night, he answered, “a lot of crying, a lot of anxiety...she was emotionally afraid.” (*Transcript*, at 23.)

Jennifer testified that she merely “parked very close to [Chad’s car]...because it was icy and snowy and [she] didn’t want [L.G.B.] to have to walk across the lot and slip on the ice.” (*Transcript*, at 101.) Later, she admitted that her “reaction could have been better.” (*Transcript*, at 103.)

Ms. Larsen also testified regarding her investigation into the incident, relating that L.G.B. “reported her body was stiff and she couldn’t move after the incident.” (*Transcript*, at 68-69.) In her role as GAL, Ms. Larsen was granted authority to speak to the child’s counselor to help form the basis of her investigation. (*Order Appointing Limited Scope Guardian ad litem*, p. 2 D.C.

Doc. 167.) Ms. Larsen testified that L.G.B. continues to be traumatized by frightening incidents with her mother, and the counselor is concerned for L.G.B. because Jennifer remains “so overcome with her rage against Chad that she can’t control herself even in front of [L.G.B.]” (*Transcript*, at 69.)

Ms. Larsen agreed with the child’s counselor that Jennifer should participate in anger management counseling, and that she should have no unsupervised time with L.G.B.:

MR. GILCHRIST: Okay. And did she make any recommendations to you?

MS. LARSEN: Yeah, she recommended that Jennifer should undergo anger management counseling and also that she should only have supervised time with [L.G.B.].

MR. GILCHRIST: Does Ms. Auerhammer believe [L.G.B.] is safe in her care?

MS. LARSEN: She does not.

MR. GILCHRIST: Do you agree with her concerns and recommendations?

MS. LARSEN: I do.

MR. GILCHRIST: Is that just based strictly on your conversation with her or based on your collateral evidence and interviews and information in this case?

MS. LARSEN: No, I have spoken since the incident with Kelly Ewalt, who is Jen’s therapist, as well as Gregg Hill, and on two occasions with [L.G.B.].

MR. GILCHRIST: Okay. So you were able to speak with [L.G.B.] following the incident?

MS. LARSEN: Yes.

MR. GILCHRIST: And could you please briefly describe what [L.G.B.] told you concerning what happened at the exchange?

MS. BESSETTE: Can I object hearsay?

THE COURT: You may. It's overruled. But your objection is noted for the record.

MS. LARSEN: [L.G.B.] told me that as she pulled into the parking lot with her mom her mom asked her who was in the car, and she told her it was – [L.G.B.] told her mom that it was Robyn. She said that after she walked over to be with her dad by the side of his car her mom came over and started yelling and that she said a word that she thought was a bad word, and she thought that it was “bunch,” which sounds like bitch, and that she yelled that over and over. [L.G.B.] said that she was very upset and she screamed back at her mom to stop fighting. She said after that, that her mom sped away, that she was afraid and she thought the car would tip over.

MR. GILCHRIST: Okay. Was she terrified by this behavior or just in – shortly?

MS. LARSEN: When I asked her if she was scared she said oh, just a little, and then later she said she was so frightened she couldn't move.

Transcript, at 69-71.

Ms. Larsen opined that L.G.B. is harmed by exposure to Jennifer's rage toward Chad.

MR. GILCHRIST: Okay. Do you believe it's in [L.G.B.'s] best interest to have unsupervised contact with Jennifer at this time?

MS. LARSEN: No.

MR. GILCHRIST: And what's your basis for that?

MS. LARSEN: I feel like nothing has changed in this case. I think we are in – I feel that Jen is in almost exactly the same place she was when I first met her in September. She seems unable to control her anger against Chad and she seems unable to protect [L.G.B.] from that anger.

Transcript, at 72.

Indeed, Ms. Larsen repeated throughout her testimony that L.G.B. is frightened by her mother:

- “[L.G.B.] has continued to state to me that she’s frightened of her mother.” (*Transcript*, at 73.)
- “I think [L.G.B.] is afraid. I am frightened by Jen’s lack of control.” (*Transcript*, at 73.)
- [L.G.B.] continues to be frightened of her mother, she continues to be frightened of interactions between her parents that her father will be hurt by her mother. (*Transcript*, at 74.)

Later in the hearing, Chad’s girlfriend, Robyn Paulson testified what she saw in [L.G.B.] at the exchange on December 13, 2017, stating that she was “screaming and shaking, ‘she’s going to kill you dad...Please, just get in the car, she’s going to hurt daddy, she’s going to hurt you and she knows where you live.’” *Transcript*, at 92.

At the close of the hearing on January 3, 2018, the District Court directly addressed Jennifer regarding her actions, stating:

“And Jennifer, I am concerned about you. I don’t think you’re an immediate or direct threat to Lily when she’s with you with other members of your family, friends, that sort of thing, but for reasons quite unbeknownst to me when Chad is in the picture at times just all hell breaks loose, and at that point you have at least on a couple of occasions behaved in a way that has scared, frightened [L.G.B.] to the point where on one occasion she’s on the phone – and whoever hears of a six-year old dialing 9-1-1? It just doesn’t happen very often. And then this incident on the 13th, which wasn’t [ideal], but it sounds like you’re the one that escalated it, that caused it to get out of hand, if you will.”

Transcript, at 132.

The Court also noted Jennifer's pending Partner/Family Member Assault charge that at that time was set for trial in January. (*Transcript*, at 132.)

Judge Allison made clear that he was not modifying the parties' parenting based on any change in circumstances, but rather was taking action to protect [L.G.B.] based on Jennifer's very concerning behavior around both the child and Chad:

"This incident that happened on the 13th was just a continuation of what had been going on before, so it isn't a change of circumstances, it's the same old – stuff...However, Jennifer, you've really scared some people. Some of the stuff that I've read has even caused me concern, and it takes kind of a lot to do that."

Transcript, at 134.

Leading into his determination that Jennifer's time should be supervised and the *Stipulated Amended Parenting Plan* suspended pending Jennifer's obtaining counseling, Judge Allison noted how Jennifer's actions were harming L.G.B.:

"Because this kind of stuff harms children. Children that experience domestic violence between their parents it literally effects how their brain develops in a very negative way. And if you want to make sure that your kid is maladjusted and, you know, having all kinds of social adjustment problems as an adult keep it up."

Transcript, at 135.

Judge Allison also made clear that he was not amending the parenting plan but only suspending it while Jennifer sought counseling:

“I also think [L.G.B.] would be ill-served to not have contact with her mom...so I’m going 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.

Judge Allison also made clear that Jennifer’s parenting time would not necessarily be supervised for a full 40 weeks, but rather the Transitional Parenting Schedule under the *Stipulated Amended Parenting Plan* would resume as soon as Christina Larsen (GAL), Diane Auerhammer (child’s therapist), and John Buttram (Power and Control counselor) determined it is appropriate:

THE COURT: - they should be able to provide him with information as well. And then I would think [Buttram] would have a little at least better idea of what he’s dealing with. And then if he and Diane Auerhammer communicate with one another and they can agree upon a resumption of unsupervised parenting time under phase 1, followed by 2, followed by 3, God bless ‘em.

MR. GILCHRIST: Following the completion of the –

THE COURT: Well, following – I’m not going to say that it can’t start until after the 40 hours. If they communicate as this is in progress and feel like it could start sooner than that –

MR. GILCHRIST: Okay.

THE COURT: - that’s fine.

...

MS. BESSETTE: Who is “they” again, Your Honor.

...

THE COURT: Then I'll do this, it can be Diane Auerhammer or Christina Larsen.

MS. BESSETTE: Would you be willing also to grant John Buttram that authority?

THE COURT: Not unilaterally, but in consultation with Ms. Larsen or Diane Auerhammer, yes. I don't want to give any one person total control over that, I would like there to be a little bit of a check and balance...

...

THE COURT: In consultation with Mr. Buttram. And I guess what I would want is for Mr. Buttram to be able to tell them I feel like I've made enough progress with Jennifer that I think these sorts of incidents aren't going to reoccur or, you know, something like that.

Transcript, at 136 – 138.

Judge Allison in fact stated that he *expected* Jennifer to be exercising unsupervised visits prior to the end of her 40-week counseling:

MS. BESSETTE: And that's in the interim. And then can I just clarify, after the 40 hours then do we have a hearing to review, or what is your order –

THE COURT: Hopefully not. Hopefully by the time you've completed the 40 hours by this time you're into at least phase 1.

Transcript, at 138.

Finally, Judge Allison closed the hearing by stating: “quite frankly, I’m hopeful – I’m not throwing out your parenting plan, I’m hopeful that within – that a year from now it will be going full tilt 50/50.” (*Transcript*, at 142.)

The District Court 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. And I sort of hate to reinvent the wheel at this point.” (*Transcript*, at 142.)

The District Court reduced all of this to its written *Findings of Fact, Conclusions of Law and Order* (D.C. Doc. 202.) That Order clearly stated that Jennifer’s parenting time was not necessarily supervised for 40 weeks; rather, the length of time Jennifer’s parenting time is to be suspended is based on her interactions with Power and Control counselor John Buttram, GAL Christina Larsen, and L.G.B.’s counselor Diane Auerhammer. (*Findings of Fact, Conclusions of Law and Order*, p. 5, ¶ g.) The Order did not modify the parties’ *Stipulated Amended Parenting Plan*, but rather suspends the plan temporarily. (*Findings of Fact, Conclusions of Law and Order*, p. 4, ¶2a.).

From the *Findings of Fact, Conclusions of Law and Order*, Jennifer now appeals.

SUMMARY OF ARGUMENT

The District Court was not required to find a substantial change in circumstances, because it did not – nor was it asked to – amend the parties’ parenting plan. Indeed, the District Court specifically found that even though Jennifer’s dangerous behavior was “the same old stuff” she had previously

exhibited, it was not “throwing out [the] parenting plan.” Rather, the District Court, noting that Jennifer’s “kind of stuff harms children,” temporarily suspended the parenting plan while she got counseling. Her parenting time was not suspended for 40 weeks, but only until her counselor, the child’s counselor, and the child’s GAL determined it was safe for the child to resume contact pursuant to the *Stipulated Amended Parenting Plan*.

Chad presented a motion and evidence alleging that Jennifer’s actions were harming the child’s physical, mental, and emotional health. The District Court agreed, and temporarily granted Jennifer supervised visits because “this kind of stuff harms children.”

The District Court did not err by refusing to admit a psychological evaluation, because the evaluator was not present to be cross examined. And the District Court did not err by retaining the child’s current guardian ad litem instead of starting the whole case over by inserting even more professionals into her life.

This Court should affirm the District Court, with encouragement to Jennifer to follow through with the guidance already provided by the District Court and multiple other professionals so she may resume being a positive, healthy parent for L.G.B.

STANDARD OF REVIEW

The Supreme Court reviews a parenting plan order to determine if the trial court's findings are clearly erroneous. *In re Marriage of Woerner*, 2014 MT 134, ¶ 11, 375 Mont 153, 325 P.3d 1244 (citing *In re Marriage of Crowley*, 2014 MT 42, ¶ 44, 374 Mont. 48, 318 P.3d 1031). A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if the Supreme Court is left with a definite and firm conviction that a mistake has been made. *Albrecht v. Albrecht*, 2002 MT 227, ¶ 8, 311 Mont. 412, 56 P.3d 339.

Absent clearly erroneous findings, the district court's decision regarding parenting will not be disturbed unless there is a clear abuse of discretion, and there is no abuse of discretion unless the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *Woerner*, ¶ 12 (citing *In re Marriage of Epperson*, 2005 MT 46, ¶ 17, 326 Mont. 142, 107 P.3d 1268).

Trial Courts have broad discretion when considering the parenting of a child, and it is presumed that the court carefully considered the evidence and made the correct decision. *In re Marriage of Tummarello*, 2012 MT 18, ¶ 34 363 Mont. 387, 270 P.3d 28. The Supreme Court has "repeated on numerous

occasions that the trial court's decision is to be accorded great deference because it is in a better position than this Court to resolve child custody issues." *In re Marriage of Klatt*, 2013 MT 17, ¶13, 368 Mont. 290, 294 P.3d 391 (citations omitted).

A district court's interpretation and application of statutes is reviewed for correctness. *In re T.H.*, 2005 MT 237, ¶35, 328 Mont. 428, 121 P.3d 541.

A district court's evidentiary ruling is reviewed for abuse of discretion. *Puccinelli v. Puccinelli*, 2012 MT 46, ¶12, 364 Mont. 235, 272 P.3d 117. To the extent a discretionary ruling is based on a conclusion of law, the Supreme Court's review is plenary and must determine whether the court correctly interpreted the law. *Puccinelli*, ¶12, citing *In re T.W.*, 2006 MT 153, ¶8, 332 Mont. 454, 139 P.3d 810 (internal citations omitted).

ARGUMENT

I. The District Court was not required to find substantial change of circumstances pursuant to Mont. Code Ann. § 40-4-219(1) because Chad did not ask the District Court to amend the parties' *Stipulated Amended Parenting Plan*

Jennifer spends a significant portion of her *Opening Brief* discussing a purported amendment to the parties' Parenting Plan under M.C.A. §40-4-219 and the corresponding pre-requisite for a substantial change in circumstances.

Opening Brief of Appellant, p. 20-25. Jennifer also spent significant time exploring what she labels Chad's "buyer's remorse" after filing of the *Stipulated Amended Parenting Plan*. *Opening Brief of Appellant*, p. 10-12.

But nothing is Chad's motion suggests an amendment. Following the traumatic incident on December 13, 2017, Chad filed a *Motion for Ex Parte Order for Interim Relief, and for Order to Show Cause*, along with supporting Brief and Affidavit. Nowhere in his motion or brief did he ask for the *Stipulated Amended Parenting Plan* to be amended, nor did he cite to M.C.A. § 40-4-219, the amendment statute. The relief he sought was clear. He asked the District Court to reinstate Christina Larsen as the GAL with authority to investigate and make a report to the Court, specifically requesting the parties to comply with any interim recommendations by her. (*Motion for Ex Parte Order for Interim Relief, and for Order to Show Cause*, p. 1-2.) Chad also asked the District Court to suspend the terms of the *Stipulated Amended Parenting Plan*, and to cease unsupervised visits pending investigation by the child's counselor, the child's GAL, and Respondent's counselor, "to protect the immediate physical, mental, and emotional health" of L.G.B. (*Brief in Support of Motion for Ex Parte Order for Interim Relief, and for Order to Show Cause*, p. 4-5.)

Chad based his motion on M.C.A. §40-4-205 (Guardian ad litem), § 40-4-215 (Investigations and Report), and § 40-4-220 (Affidavit Practice, Ex Parte Temporary Living Arrangements). None of these statutes require the District Court to find a change of circumstances in order to act.

Chad made no mention of amending the Parenting Plan. The District Court's *Findings of Fact, Conclusions of Law, and Order*, made no mention of amending the Parenting Plan. Indeed, the District Court specifically closed the hearing by stating, "I'm not throwing out your parenting plan. I'm hopeful that within – that a year from now it will be going full tilt 50/50," which is exactly what the parties' *Stipulated Amended Parenting Plan* states should happen within a year of the plan. (*Transcript*, at 142.)

A change in circumstances was not required because there was no amendment to the Parenting Plan.

II. The District Court has broad discretionary authority to protect a minor child, and its authority to protect that child is not limited to 21 days or less

Jennifer's argument on this issue is based on a false presumption. She claims "[t]he 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." *Opening Brief of Appellant*, p. 28. Jennifer's

argument assumes her own failure to progress in counseling and to provide a safe place for L.G.B. What the District Court actually ordered is that Jennifer will resume the Transitional Parenting Schedule when three disinterested professionals – two of whom have the sole duty to protect the child – determine that Jennifer has reached a state where she can safely parent her daughter.

Jennifer next suggests Mont. Code Ann. § 40-4-220(2), limits a District Court to only provide emergency relief for a child during the period of time it takes for a court to set a matter for a hearing, implying that the Court may only protect a child for a period of 21 days or less.

On the contrary, there is no provision in Mont. Code Ann. § 40-4-220(2) that corners the Court after 21 days to either a) find a change in circumstances and modify the prior parenting plan, or b) absent a finding of changed circumstances, return the child to the harmful status quo.

The only deadline imposed on the District Court by this statute is the requirement to hold a hearing within 21 days of the ex parte motion, requiring the parties to show cause “why the interim parenting plan should not remain in effect until further order of the court.” Mont. Code Ann. § 40-4-220(2)(b).

The suggestion that a court has only 21 days to remedy all faults in the parents and send a defenseless child on her way is absurd.

The Montana Supreme Court has affirmed the actions of District Courts in other cases that have taken the same action as the lower court in this case. See *In re Marriage of Njos*, 270 Mont. 54, 889 P.2d 1192 (1995). In *Njos*, the parties, Tamara and Robert, had a parenting plan in which Robert exercised regular parenting time, including weekend, summer, and holiday visitation. Based on incidents that occurred prior to the parties' parenting plan, Tamara later sought and received an *ex parte* order pursuant to Mont. Code Ann. § 40-4-220(2)(a)(ii) (1993)¹ requiring that Robert's visitation be supervised. *Njos*, 270 Mont. at 56, 889 P.2d at 1193. At the hearing, two of Tamara's younger sisters testified that Robert had sexually assaulted them when they were children. Following a hearing, the lower court found that the father posed a risk to the children during their visitation, and ordered that the temporary modification of the father's visitation rights continue and that he undergo a sex offender evaluation. *Marriage of Njos*, 270 Mont. at 60, 889 P.2d at 1196.

The Montana Supreme Court found that the District Court did not abuse its discretion in *continuing the temporary order requiring supervised visitation*

¹ In 1993, Mont. Code Ann. § 40-4-220(2)(a)(ii) read, "A party seeking a temporary custody order may request that the court grant a temporary assignment of custody ex parte. He shall so request in his moving papers and shall submit an affidavit showing that...although a previous determination of custody has been made, the child's present environment endangers his physical or emotional health and an immediate change of custody would serve to protect the child's physical or emotional health."

following the show cause hearing. Marriage of Njos, 270 Mont. at 60, 889 P.2d at 1196. It further affirmed the District Court's decision to require Robert to undergo a sex offender evaluation.

The facts here are similar to the facts in *Njos*. Like Tamara Njos, Chad filed a motion seeking *ex parte* relief pursuant to Mont. Code Ann. § 40-4-220(2)(a)(ii). (Although the statutory language previously referred to custody/visitation, rather than parenting, the intent of the statute remains the same.) As in *Njos*, the District Court here determined that Jennifer should continue with supervised parenting after the hearing date. And, the District Court also determined that Jennifer should undergo post-hearing counseling – in this case, Power and Control Counseling.

Similarly here, the court did hold a timely hearing, and after presentation of all the evidence and testimony, the District Court was left convinced that the interim relief it earlier granted in suspending – not amending – the Parenting Plan should continue for a period of time not to exceed the 40 weeks Power and Control Counseling, and then return to the terms of the *Stipulated Amended Parenting Plan*.

The Montana Supreme Court has also affirmed a lower court's decision to temporarily suspend a prior child custody agreement, with an order to return

to the initial Agreement on a set date following the hearing. *In re Marriage of Huotari*, 284 Mont. 285, 943 P.2d 1295 (1997). In *Huotari*, Jeff moved *ex parte* to modify the child custody provisions of the parties' child custody agreement pursuant to Mont. Code Ann. § 40-4-219 and § 40-4-220(2)(a)(ii) (1995).² At the close of the September 6 hearing, the District Court ordered that the *temporary* custody order, with the child to remain in Jeff's care, would remain in effect until further order of the court. Then, approximately 54 days following the hearing, the District Court issued its findings, conclusions, and order. It ordered that the child would remain in Jeff's primary care for another eight months (the remainder of the school year), the parties would then equally share the summer, and then the parties were to resume the terms of their initial Child Custody Agreement. *Huotari*, 284 Mont. at 287 - 88, 943 P.2d at 1297. The Montana Supreme Court held that the lower court did not abuse its discretion with regard to the temporary custody situation, even though the temporary change lasted for nearly a full year after Jeff filed his *ex parte* motion. *Huotari*, 284 Mont. at 290, 943 P.2d at 1298.

In *Huotari*, the father sought both a short term order pursuant to Mont. Code Ann. § 40-4-220(2)(a)(ii), and a long term modification pursuant to Mont.

² As in *Njos*, the statutes involved custody/visitation rather than 'parenting,' but the application of the statutes is consistent.

Code Ann. § 40-4-219. Here, Chad did not seek modification under § 40-4-219, but rather sought only a temporary order under § 40-4-220(2)(a)(ii). As seen in *Huotari*, a temporary order can clearly extend beyond 21 days. Indeed, the temporary order in *Huotari* lasted nearly a full year. Here, Judge Allison's temporary order was to last no more than 40 weeks, with the expectation that Jennifer would return to the Transitional Parenting Schedule under the *Stipulated Amended Parenting Plan* long before the end of 40 weeks.

Finally, a District Court may arguably suspend a parent's visitation rights indefinitely even where a motion to modify the parenting plan is not even before the court. *In re Custody of Arneson-Nelson*, 2001 MT 242, 36 P.3d 874, 307 Mont. 60. In *Arneson-Nelson*, mother Pengra and father Nelson were engaged in lengthy custody litigation over their minor child. After four years of litigation, including an investigative report in which doctors described Nelson as verbally aggressive toward Pengra and the neutral observers, indicating that "these outbursts had a negative effect on [the child]...that [the child] was not frightened of his father, except during Nelson's outbursts." *Arneson-Nelson*, ¶ 11. The District Court entered a Final Parenting Plan in April 1999, placing the child primarily with Pengra, granting specific visitation to Nelson, and requiring Nelson to undergo anger management counseling. *Arneson-Nelson*, ¶ 12.

Less than a year after the Final Parenting Plan was ordered, Pengra filed a Motion for an Ex Parte Order and Hearing, asking the court to suspend Nelson's visitation rights. *Arneson-Nelson*, ¶ 13. She also asked the court to set a hearing in six months to determine whether supervised visits could renew. *Arneson-Nelson*, ¶ 40. At the hearing on Pengra's ex parte motion, her expert testified that Nelson's behavior negatively affected the child, that the child was emotionally disturbed, and that the source of these problems was the child's fear of his father and the hostilities between the parents. *Arneson-Nelson*, ¶ 18.

The trial court actually went beyond what Pengra requested, indefinitely suspending Nelson's physical contact with the child, effectively terminating Nelson's rights to physical contact with the child. *Arneson-Nelson*, ¶ 14, 42. The Montana Supreme Court affirmed the lower court's decision to effectively amend the prior parenting plan by suspending Nelson's physical conduct indefinitely – even though Pengra did not file a motion to amend the parenting plan, and even though the trial court did not make a specific finding of a “change in circumstances.” *Arneson-Nelson*, ¶ 38.

Here, as in *Arneson-Nelson*, the parties are engaged in a high-conflict dispute, involving multiple requests for orders of protection, multiple requests for ex parte relief, a Partner/Family Member Assault charge against Jennifer,

and testimony from multiple sources that the minor child is frightened by her mother. Even though the Montana Supreme Court has affirmed the actions of other District Court's that issued long-term suspensions of parental contact following motions for temporary ex parte relief, the District Court in this case did not even go as far as those courts.

Jennifer admits that the GAL was "empowered under the language of the *Stipulated Amended Parenting Plan* to slow down the transition schedule." *Opening Brief of Appellant*, p. 24. That is exactly what the District Court has done after the January 3, 2018, hearing. It has suspended the parenting plan, and the transitional parenting schedule, pending a follow up investigation by the GAL and attendance of Power and Control Counseling by Jennifer.

Jennifer's suggestion that Judge Allison's suspension of the parenting plan "is nothing more than a thinly-veiled amendment" is directly contrary to his statement that he is "not throwing out [the] parenting plan," and the temporary nature of his order is exactly what is contemplated by Mont. Code Ann. § 40-4-220(2)(a)(ii).

III. Because Jennifer has behaved in a manner that frightens the child and concerns the Court, the District Court has authority to require supervised visitation to protect the child's emotional development.

Pursuant to 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 supervision should not be ordered “unless the judge finds some extraordinary need for it.” *Commissioners’ Note*, Mont. Code Ann. § 40-4-218 at ¶ 2.

Although he did not cite the statutory language in his Order, Judge Allison noted Jennifer’s extraordinarily concerning behavior, when he told her “you’ve really scared some people. Some of the stuff that I’ve read has even caused me concern, and it takes kind of a lot to do that.” *Transcript*, at 134. The District Court did, however, conclude that “an emergency situation has arisen in the child’s present environment that endangers the child’s physical, mental, and emotional health,” which does satisfy the statutory requirements to impose supervision. (*Findings of Fact, Conclusions of Law and Order*, p. 4, ¶ 2.)

Jennifer’s argument fails to provide the complete picture of the Order. She correctly points out that the Court gave “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,” and that

her parenting time should be supervised “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*, p. 3.) But she ignores the section of the District Court’s order stating supervision should cease as soon as it is appropriate. Judge Allison ordered that:

“the GAL, Christina H. Larsen, Esq., appointed herein, in consultation with Ms. Auerhammer, and Mr. Buttram may determine at any time during the pendency of Jennifer’s completion of her forty (40) hours of Power and Control Counseling with Mr. Buttram if and when Jennifer’s supervised parenting time is no longer necessary.”

Findings of Fact, Conclusions of Law and Order, p. 5, ¶ g (*emphasis added*).

Extraordinary circumstances warranting supervised parenting time for Jennifer were present in this case, because “it takes kind of a lot” to concern Judge Allison. (*Transcript*, at 134.) Despite his extraordinary concern, Judge Allison determined that several professionals – the child’s GAL, the child’s counselor, and Jennifer’s Power and Control Counselor – would be in the best position to determine when the supervision should cease.

Most importantly, the child was frightened “stiff” by her mother’s behavior, and both the child’s counselor and the GAL believed supervision was necessary to keep L.G.B. safe. (*Transcript*, at 68-69).

The District Court complied with the Judicial Supervision statute.

IV. The District Court properly did not admit the psychological evaluation where Dr. Reed was unavailable to be cross-examined

An unsworn report where there is no right to cross-examine comes within the hearsay rule and is inadmissible. *Matter of Swan*, 173 Mont. 311, 315, 567 P.2d 898, 901 (1977). “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.

Here, Jennifer moved to admit her psychological evaluation by Dr. Reed into evidence. If the District Court had admitted Dr. Reed’s report, it would actually have been a violation of Chad’s due process rights. When Jennifer attempted to admit the psychological evaluation, Chad’s counsel immediately objected, because Dr. Reed was not present to undergo proper scrutiny upon cross-examination. (*Transcript*, at 82).

The District Court permitted Jennifer to ask the GAL questions about Dr. Reed’s psychological evaluation, but Chad’s counsel certainly was not expected to object over and over. He immediately objected to the admittance of the report, and therefore it certainly cannot be said that he waived his objection. If

the Court would have admitted Dr. Reed's report into evidence, then that would have been an obvious error.

V. The District Court maintained continuity for the child by retaining the child's current Guardian ad Litem and declining to insert new professionals from Family Court Services

Following the January 3, 2018, hearing, the District Court "reinstated the full authority of the GAL [Christina Larsen] for the minor child as more specifically set forth in the *Order for Ex Parte Interim Relief and Order to Show Cause* issued herein on December 15, 2017." (*Findings of Fact, Conclusions of Law, and Order, February 3, 2018*, p. 5, ¶ e). In that December 15, 2017, order, the District Court found that the "full authority provided to the GAL as previously set forth under the provisions of the *Order Appointing Limited Scope Guardian ad Litem* issued herein on September 15, 2017, should be reinstated." (*Order for Ex Parte Interim Relief and Order to Show Cause, December 15, 2017*, p. 2, ¶ 5). Finally, according to the September 5, 2017, *Order Appointing Limited Scope Guardian ad Litem*, the parties agreed to equally share the costs of the GAL. (*Order Appointing Limited Scope Guardian ad Litem, September 15, 2017*, p. 2, ¶ 1).

However, following the parties' lengthy settlement conference on November 29, 2017, the parties agreed that "[Chad] shall be solely responsible for the costs associated with the GAL's services from the date of the Plan forward." (*Stipulated Amended Parenting Plan*, November 30, 2017, p. 6). The parties Plan was approved on December 1, 2017.

Jennifer's primary complaint with the District Court maintaining Christina Larsen as guardian ad litem "was largely due to financial circumstances," as she "expressed an inability to maintain Christina Larsen as a private GAL..." (*Opening Brief of Appellant*, p. 37). She correctly points out that "the *Stipulated Amended Parenting Plan* kept Christina Larsen involved as a GAL, but on Chad's dime." *Id.*

As seen in the record, Judge Allison did not "throw out," or amend, the parties' *Stipulated Amended Parenting Plan*. That Parenting Plan includes the provision that Chad would pay for all of the GAL's services following the date of the Plan. Therefore, the agreement and corresponding order that Chad pay for all further services of the GAL remains intact. There is no indication in the record that Judge Allison intended to suspend that portion of the Parenting Plan.

To the extent that the District Court's orders may be confusing or inconsistent with regard to payment for the GAL, Chad agrees that he will

continue to be solely responsible for future costs of the GAL if that is what is required to continue to provide L.G.B. with the necessary protections for a safe and healthy parenting environment.

However, Jennifer's actions caused the need for ex parte relief in this matter and the need for further investigation by the GAL. To mandate that Chad continue to be solely responsible for the costs associated with the GAL's further investigation for the benefit of the minor child as a direct result of an incident caused by Jennifer would be prejudicial to Chad. When Chad agreed to be solely responsible for the GAL's continued services through the Transitional Parenting Schedule of the parties' *Stipulated Amended Parenting Plan*, it was not contemplated or considered at that time that the scope of the GAL's services would need to be significantly expanded to investigate and protect the best interest of the child due to future harmful actions of Jennifer. The District Court exercised its discretion based on the testimony and evidence presented at hearing to hold Jennifer equally responsible for the GAL's continued services until it was determined by the professionals involved that it was safe for the child for Jennifer to resume Phase 1 of the parties' *Stipulated Amended Parenting Plan*.

With any purported financial roadblocks set aside for Jennifer, it is clear that the District Court retains broad discretion to determine which investigative tool would best suit the needs for L.G.B. At the time of the hearing, Christina Larsen had already been involved with the family as GAL for four months. She had already been arranging supervised visits for Jennifer and the child; researched appropriate parent/child therapy; interviewed multiple mental health professionals who worked with Jennifer, including the psychologist who evaluated her, Jennifer's therapist, and the professionals involved with her involuntary stay at Pathways; Jennifer's parent-child supervisor; L.G.B.'s therapist; and multiple other collateral contacts. (*Transcript*, at 64-65.) Ms. Larsen had also already begun building rapport with the minor child, including discussions about traumatic incidents she witnessed involving her parents. (*Transcript*, at 70-71.)

L.G.B. has already been involved with a GAL, a therapist, and a parent-child supervisor. The last thing this child needs is yet another adult professional poking and prodding her about what is clearly already a traumatic situation for her. Judge Allison was exactly right when he denied Jennifer's request to refer the matter to Family Court Services, stating, "if this case was going to be referred to Family Court Services it probably should have been done a year or

two ago. And I sort of hate to reinvent the wheel at this stage.” (*Transcript*, at 142.) In other words, the court does not want the child starting from scratch with a new investigative agency.

Jennifer essentially waived her right to refer the matter to Family Court Services by agreeing to retain the services of a GAL instead, and to continue the services of the GAL, even after her investigation, through the Transitional Parenting Schedule of the parties’ *Stipulated Amended Parenting Plan*. Jennifer herself filed the Motion for Appointment of GAL (unopposed) in the first place. If she wanted a referral to Family Court Services, she should have made the request at that time, not a significant amount of time after the GAL had already been extensively involved with the parties, their child, and the other professionals involved in their case. If the Court were to allow every request to Family Court Service to immediately be granted, regardless of the facts and circumstances of the case prior to said request, this would allow any party currently involved in a parenting evaluation (with a requested and agreed upon evaluator in this case) to immediately stop the evaluation for any reason and start the entire process over again with a new agency / evaluator. This clearly would be prejudicial to the other parent and contrary to the best interest of the child(ren) involved in the proceeding.

At some point, L.G.B. must be allowed to be a child, to the greatest extent possible given the high-conflict nature of this case. Any further hassle, stress, or inconvenience of therapy or investigations aimed at improving the mother-daughter relationship should be born by Jennifer, not her daughter. The District Court was correct in refusing to insert new professionals into L.G.B.'s life.

CONCLUSION

The District Court did not amend the parties' parenting plan under M.C.A. § 40-4-219, and therefore did not need to find a change in circumstances. It did grant a temporary order pursuant to M.C.A. § 40-4-220(2)(a)(ii), providing for temporary arrangements to protect the child. Temporary supervision was proper to protect the child's emotional health pursuant to M.C.A. §40-4-218(2), pending other recommendations by the child's GAL, the child's counselor, and Jennifer's Power and Control counselor. The District Court did not err by refusing to admit a psychological evaluation where the evaluator was not present to testify. Finally, the District Court best served the child by maintaining her current GAL, the individual with whom she

and the parties are already well-acquainted and who had already conducted a thorough investigation into the parenting of the child.

Based on the foregoing, the District Court's *Findings of Fact, Conclusions of Law, and Order* dated February 23, 2018, should be affirmed.

Respectfully submitted this 14th day of May, 2018.

JOHNSON-GILCHRIST LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read 'Sean R. Gilchrist', written over a horizontal line.

Sean R. Gilchrist
Attorney for Petitioner / Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16 of the Montana Rules of Appellate Procedure, I certify that *Appellee's Answer Brief* is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is no more than 10,000 words, excluding certificate of service and certificate of compliance.

Dated this 14th day of May, 2018.



Sean R. Gilchrist
Johnson-Gilchrist Law Firm, P.C.
Attorney for Petitioner/Appellee