IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA-18-0236

IN RE PARENTING OF: T.P.D.C.,

A minor child.

TAMI DISNEY,

Petitioner and Appellant,

vs.

BRANDON STAAT,

Respondent, Appellee and Cross-Appellant.

BRIEF OF APPELLEE AND CROSS-APPELLANT

ON APPEAL FROM: the District Court of the Fourth Judicial District, in and for the County of Missoula, Cause No. DR-15-27, Before the Honorable Robert L. Deschamps, III, District Judge.

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STATEMENT OF THE ISSUES

I. Did the District Court abuse its discretion when it denied Mother's petition to terminate the father-child relationship?

II. Did the District Court err when it denied Father's motion to dismiss Mother's petition to terminate?

STATEMENT OF THE CASE

After more than three (3) years of paternity and parenting plan litigation (with Mother's countless accusations conspicuously void of any suggestion of rape or other abuse), after several mediations, and after Mother stipulated the final parenting plan being in the child's best interest (while duly represented by capable counsel), Mother alleged—for the first time—the minor child was conceived of non-consensual intercourse and requested the father-daughter relationship be terminated pursuant to § 41-3-801(2)(b), MCA. *Petition to Terminate Respondent's Parental Rights and Motion to Set Hearing* ("*Petition to Terminate"*)(Jan. 11, 2018)(D.C. doc. 106). Mother alleges the child was conceived from nonconsensual intercourse due to Mother purportedly being too intoxicated to have consented to intercourse in 2014. *Id.*

Father motioned to dismiss Mother's vexatious petition based on collateral estoppel and lack of retroactive application authority, amongst other equitable and protective doctrines. *Father's Combined (1) Objection and Motion to Dismiss*

Mother's "Petition to Terminate Respondent's Parental Rights and Motion to Set Hearing", and (2) Motion for Attorney Fees (Jan. 24, 2018)(D.C. D.C. Doc. 110).

The District Court did not analyze or address Father's motions to dismiss (except a single line rejecting Father's argument the legislature did not authorize retroactive application of the statue). The District Court effectively denied Father's motions by setting the matter for hearing. *Order* (Feb. 9, 2018)(D.C. doc. 118).

Following extensive hearing and witness testimony, the District Court found "at least" a preponderance of the evidence shows the child was conceived of consensual intercourse and denied Mother's petition to terminate. *Findings of Fact, Conclusions of Law and Order* (D.C. doc. 126).

Mother appeals the Court's denial of her petition.

Father cross-appeals on the basis the District Court should have granted Father's motion to dismiss.

STATEMENT OF THE FACTS

Mother and Father were never married. Introduced by a mutual friend in February 2014, they had a romantic relationship spanning over a month. *Hr. Tr.* 223:9-14 (Mar. 2, 9, and 28, 2018).

After introduction at Father's home, Mother and Father had a second interaction at the Lucky Strike in Missoula, where they played darts. *Id.* at 223:15-

18. Mother drank, but was normal, coherent, and threw darts well. *Id.* at 223:22 – 22512. From Lucky Strike, they dropped off Mother's friend and went to Father's house where they had their first kiss. *Id.* at 225:13 – 227:5. Mother and Father "were making out pretty hard," but had no intercourse, mutually agreed to slow things down, and Father drove Mother to her house. *Id.*

On February 14, 2014, Mother indicated to Father she was ashamed of her actions February 12. *Id.* at 227:3-4; 228:11-18. Mother stated in a text message to Father: "Oh okay gotcha my best friends name is Liz and she was with me that night so I was confused, sorry I was very wasted that night and should have been a lot earlier than I was. I am glad you brought me home cuz (sic) I felt a little uncomfortable the next day. I was just so drunk and probably should not have been in that situation, I was almost blacked out:(". *Id.* at 264:11-18. Mother further states she was "embarrassed and ashamed" of her actions on February 12th. *Id.* at 265:14-15. "Disgust, guilt, and shame," are the words Mother uses over four years later to describe purported non-consensual sex February 19, 2014. *Id*. at 74:11-12; *Aff. of Tami Disney*, ¶22 (D.C. Doc. 108). Mother appears to conflate events.

Regardless, the first formal date was February 16, 2014, on the Depot deck. *Id.* at 230:13-14. Father brought Mother flowers, and they went to O'Keefe's after dinner where they played darts. *Id.* at 231:16-18 to 232:4-5. After darts,

they went to Mother's house where they again kissed. *Id.* at 233:8-15.

On February 19, 2014, Mother coordinated to meet and play darts at Katie O'Keef's. *Id.* at 234:4 - 235:13. Mother and Father drank while socializing, but were "not wasted or anything like that," and Mother played darts really well. *Id.* at 235:11-24. At 11:33 p.m. Mother wrote an articulate, coherent, and lengthy text message to Father devising a plan to go home with Father without Mother's friend (Lyle Vinson) knowing. *Id.* at 267:1-17. As part of Mother's plan, Mother drove around the block until "the coast was clear" then Mother returned to the parking lot. *Id.* at 239:8-9, 19-20. Mother then walked to Father's truck without stumbling or swaying, and entered and attached her seatbelt without difficulty. *Id.* at 240:7-22. They drove to Father's house. *Id.* at 240:24. Walking without difficulty and in a normal manner, Mother navigated multiple steps and entered Father's house. *Id.* at 241:3-20. Inside, they exchanged affections, kissing and discussing how much they liked each other. *Id.* at 242:4-7. Mother's speech was coherent. *Id.* at 242:17-18. They went to the restroom where they brushed their teeth, joking and flirting. *Id.* at 243:3-15. Mother then went to Father's bedroom on her own accord, where she undressed herself and entered Father's bed; she was in her bra and panties when Father joined her. *Id.* at 243:23 to 244:5. After small talk, they began kissing and Father gave Mother oral sex (noticing Mother sprayed perfume on her pelvic region). *Id.* at 244:10-20. Mother encouraged Father to

keep going. *Id.* at 244:21-24. Mother reciprocated and gave Father oral sex. *Id.* at 246:1. After oral sex, Mother mounted Father and initiated penetration (inserting Father's penis into her vagina without protection). *Id.* at 246:9-18. After an hour of intercourse, and when each approached climax, Mother wrapped her arms and her legs around Father's pelvis and pulled his torso in toward her body. *Id.* at 246:19 to 247:3. After sex, they slept in each other's arms. *Id.* at 247:21.

The morning of February 20, 2014, Father drove Mother to her car where they kissed goodbye. *Id.* at 247:23-24; 248:11-12. At 7:37 a.m., Mother texted Father: "…thank you, you're a good guy, (sic) I kinda like you;)". *Id*. at 50:18-19. A few minutes later, Mother texted Father: "…sorry things got a little farther than I was planning on last night but I am not gonna stress about it, I am 35 years old I can do what I want right?:) have a good day if ya can sorry your tired:(". *Id.* at 51:13-18. At 1:57 p.m., Mother texted Father: "We should get a movie or something and just relax, you wanna just swing up and grab me when you get off?" *Id.* at 50:23-25.

Sometime during February 20, 2014, Mother told Tamberlee Mercer (a friend and co-worker) she was disappointed and "kinda" mad at herself. *Id.* at 82:4-5. Mother did not tell Mercer the sex was nonconsensual or that Mother was upset with Father. *Id.* at 84:12.

At 9:21 p.m. that same day, Mother texted Father: "…I am at a point in my life where I just want something good and simple and I enjoy having the company and you seem super nice and I like the way you treat me and you boost my confidence so thank you." *Id.* at 52:5-9. Mother went on to text: "…I know that we don't know each other very well yet but I feel good and safe when I am with you and in your arms and I like it." *Id.* at 52:13-18.

On February 22, 2014, Father and Mother met at the Lucky Strike where they played darts. *Id*. at 249:5-12. Father and Mother went back to Father's house and had intercourse a second time without protection. *Id.* at 250:7, 12-15. Mother again wrapped her arms and legs around Father and pulled his torso toward her body when Father climaxed. *Id.* at 250:18-20. After intercourse, they snuggled, then smoked a cigarette. *Id.* at 250:25 to 251:1. Mother showed no duress and was coherent. *Id.* at 250:5-10.

Father's roommate (Liz Masters) testified Mother went to Father's house numerous times when they were "dating," witnessed at least one event where Father and Mother had intercourse, and observed Mother was affectionate, coherent, and not intoxicated. *Id.* at 94:23 – 101:25.

On February 28, 2014, Mother texted Father: "I know you are sleeping so you will read when you get up but I was thinking about you and I just wanted you to know that I really like you, I am excited, I haven't felt this way about anyone in

a long time, you make me happy:) thanks for being you….." *Id*. at 55:11-16.

On March 6, 2014, Mother informed Father she was pregnant. *Id*. at 252:3-6. At the end of March, Mother broke up with Father, indicating she wanted to just be friends. *Id*. at 66:25 to 67:2. During this span, Mother formed the idea Father "disgusted" her based off Father's alleged interactions with other people. *Mother's Affidavit*, ¶¶ 10, 11 (D.C. Doc. 108).

Between March and June 2014, Mother repeatedly invited Father to her home, having Father help her move, hang curtains in her new home, and share dinner with her children. *Hr. Tr.* 253:12-16.

While Mother and Father were dating, Mother claims she was addicted to opioids and abused alcohol. *Id.* at 23:13-14; 24:20 to 25:1. However, Ms. Mercer, who is "like her mother", was unaware of any such issues, and testified Mother was an exemplary employee with minimal mistakes, good attendance and no write-ups. *Id.* at 83:17; 87:19 to 89:1. Further, Mother had three children, was a single parent, and represents she appropriately cared for her children during this time. *Id*. at 226:13-15, 234:1-5.

T.P.D.C. was born on October 22, 2014. *Id.* at 197:2-3. During ensuing paternity and parenting proceedings, Mother filed a sworn statement that "I want to support [the father-daughter] relationship." *Id.* at 162:5-6 (quoting *Affidavit* at D.C. Doc. 18).

About 1 ½ years after the alleged rape, Mother and Father entered the *Final Stipulated Parenting Plan* (Sep. 29, 2016)(D.C. Doc. 85). Mother signed the agreement under oath (and with approval of her then attorney, Lucy Hansen), agreeing the plan is "in the best interest of the minor child" and requesting the Court order the plan. *Final Stipulated Parenting Plan*, 1, 17-18 (Sep. 29, 2016)(D.C. Doc. 85). The Court granted Mother's request. *Order Adopting Final Stipulated Parenting Plan* (D.C. doc. 86). The stipulated parenting plan essentially provides 5 days of father-daughter time every 2-week period, which includes 4 overnights. *Id.* at Section 3.

Approximately one year later, Mother filed a *Petition for Ex-Parte Temporary Order of Protection*, Cause No. DR-17-839 (Nov. 15, 2017)(again, making no suggestion of rape). The District Court denied Mother's request stating Mother had no basis for an Order of Protection. *Order,* Cause DR-17-839 (Nov. 16, 2017).

The next day, Mother filed an *Ex Parte Motion for Interim Parenting Plan* (Nov. 17, 2017)(D.C. Doc. 90) (again making no suggestion of rape). Father filed to enforce the parenting plan. *Father's Motion for Order to Show Cause* (Nov. 21, 2017)(D.C. Doc. 92).

At a status conference, the Court declined to temporarily cut off the father-daughter relationship as Mother requested. However, Father was (and continues

to be) stripped of his overnight visits since December 6, 2017 without due process or hearing (he is only allowed daytime visits).

Per Father's request, the Court instructed Mother to recommence T.P.D.C.'s therapy with Dr. Cindy Miller, and set the matter for hearing on January 5, 2018 which was later postponed.[1] *Minute Entry* (Dec. 6, 2017)(D.C. Doc. 101).

On January 3, 2018, Mother filed notice that she unilaterally started counseling for T.P.D.C. with a different counselor (Cindy Woods[2]), violating the parenting plan and the Court's December 6, 2017 bench order. *Notice* (D.C. Doc. 103).

On January 8, 2017, Father motioned for attorney fees incurred to enforce the December 6, 2017 order to use Cindy Miller, and to enforce the parenting plan requirement the parties "mutually" agree on a counselor. *Father's Motion to Enforce Parenting Plan and Court's Bench Order Regarding Counseling, and Request for Attorney Fees* (D.C. Doc.105). Mother failed to file a response or objection and the deadline expired.

While the District Court attempted to reschedule hearing on Mother's *Ex*

1 Less than 24 hours before hearing, Mother's counsel contacted Father's counsel by e-mail requesting the hearing be continued due to Mother purportedly having intestinal issues. The morning of the hearing, the Court postponed the hearing. No formal order was filed. The Court's judicial aid e-mailed counsel to requesting dates of availability to reschedule. Mother delayed in confirming available dates for rescheduling the hearing, and instead took the opportunity to file her *Petition to Terminate* (Jan. 11, 2018)(D.C. Doc. 106).

2 Cindy Woods, L.C.S.W. is Mother's therapist who Mother called as an expert witness at hearing on the *Petition to Terminate*. Mother's efforts to unilaterally appoint Cindy Woods as T.P.D.C.'s therapist appears to have been a tactic to appoint a therapist partial to Mother.

Parte Motion for Interim Parenting Plan, Mother filed her *Petition To Terminate* (Jan. 11, 2018)(D.C. Doc. 105). Mother alleged T.P.D.C. was conceived of nonconsensual intercourse February 19, 2014, admitted her memory is "fuzzy" regarding events that purportedly occurred over four (4) years ago, but alleged she was too intoxicated to have provided consent. *Mother's Affidavit*, ¶¶4, 6, 21 (D.C. Doc. 108).

Simultaneously, Mother filed a *Notice of Related Case* requesting the Court assign the case to Department 1 on grounds of "efficient administration of justice," since Department 1 presided over Mother's divorce and parenting of her other children. *Notice of Related Case* (Jan. 11, 2018)(D.C. Doc. 109). Mother never requested her *Petition to Terminate* be assigned a separate cause number.

Father motioned to dismiss Mother's *Petition to Terminate* as barred by the 2-year statute of limitations for assault, laches, res judicata, collateral estoppel, law of the case, equitable estoppel, and non-retroactive application of § 41-3-801, MCA. Father additionally requested fees pursuant to the parenting plan attorney fee provision and § 37-61-421, MCA. *Father's Motion Dismiss and Motion for Attorney Fees* (Jan. 24, 2018)(D.C. Doc. 110).

On February 6, 2018, Father provided notice the CPS report Mother relied on for her *Ex Parte Motion for Interim Parenting Plan* (D.C. Doc. 90) "is closed as unsubstantiated," and motioned to dismiss Mother's *ex parte* request. *Notice*

(D.C. Doc. 113); *Father's Motion to Deny and Dismiss Mother's Ex Parte Motion for Interim Parenting Plan* (D.C. Doc. 114). Mother did not respond and the response deadline expired.

On February 9, 2018, District Court Judge Robert Deschamps scheduled an evidentiary hearing on Mother's *Petition to Terminate. Order* (D.C. Doc. 118).[3]

Judge Deschamps presided over evidentiary hearings March 2, 9 and 28, 2018 on Mother's *Petition to Terminate*. Mother did not present her case in the time originally allotted for hearing, consumed the vast majority of the extended time permitted, repeatedly interrupted the proceedings making objections the Court previously considered and rejected, and lacked decorum (Mother's counsel threw his arms and papers into the air requiring Bailiff intervention, was combative, and received numerous warnings and admonishments).[4]

On April 6, 2018, the Court entered its *Findings of Fact, Conclusions of Law and Order* (D.C. Doc. 126). The Court found the testimony and evidence demonstrate "at least a preponderance of evidence that the act of sexual intercourse that caused T.P.D.C. to be conceived was consensual," concluded "[t]here is no clear and convincing evidence that the act of sexual intercourse that caused

3 In setting hearing on Mother's *Petition to Terminate*, the Court rejected Father's argument that § 41-3-801 (effective October 17, 2017) does not apply retroactively, but did not analyze or provide an opinion regarding collateral estoppel or other protections.

4 This information is provided in light of allegations by Mother's counsel the Court "lost objectivity" and "became emotionally agitated." If anything, the Court was calm and tolerant to a fault.

T.P.D.C. to be conceived was without consent," denied Mother's *Petition to Terminate* Father's parenting rights, and returned the matter to Standing Master Brenda Desmond to resolve remaining issues. *Findings of Fact, Conclusions of Law and Order*, FOF ¶ 26, COL ¶ 2, Order (D.C. Doc. 126).

Father motioned for attorney fees incurred to defend and enforce his parenting rights. *Father's Motion for Attorney Fees Pursuant to Parenting Plan* (Apr. 10, 2018)(D.C. Doc. 127). Mother motioned to extend her response deadline to "May 4, 2018." *Motion for Extension of Time* (Apr. 26, 2018)(D.C. Doc. 131). Mother did not provide a proposed order (as required by Local Court Rule 3), and did not file a response within her requested deadline extension. The Court did not grant Mother's request for an extension, and even if it had, Mother filed her response four (4) days after the "May 4, 2018" extension she requested. *Response to Motion for Attorney Fees* (May 8, 2018)(D.C. Doc. 137).

At status conference with Standing Master Brenda Desmond, Father requested reinstatement of his overnight visits (no hearing was held within 21 days of the December 26, 2017 interim order as required by § 40-4-220(2)(b)), and determination of the outstanding motions. *Minute Entry* (May 2, 2018)(D.C. Doc. 132). Mother simultaneously filed a Rule 59 *Motion to Alter, Amend, or Grant New Trial* ("*Rule 59Motion*") (May 2, 2018)(D.C. Doc. 133), and *Notice of Appeal* (May 2, 2018)(D.C. Doc. 134). Mother continued her recalcitrant accusations,

and inconsistently requested (and obtained) further interim changes to the parenting plan while arguing the Court had no authority to hold hearing or decide pending motions since Mother filed a *Notice of Appeal.* Standing Master Desmond took the matters under advisement pending a decision by Judge Deschamps regarding jurisdiction. *Minute Entry* (May 2, 2018)(D.C. Doc. 132).

Judge Deschamps denied *Mother's Motion to Alter or Amend Judgment or Grant a New Trial* for mootness and held the remaining motions for consideration and rulings "once the Supreme Court renders its decision and jurisdiction returns to the District Court". *Order* (Jun. 11, 2018)(D.C. Doc. 143).

STANDARD OF REVIEW

The appellant bears the burden of establishing the district court's factual findings are clearly erroneous. *In re D.F.*, 2007 MT 147, ¶ 22, 337 Mont. 461, 161 P.3d 825. A district court's decision whether to terminate parental rights under Title 41 is reviewed for abuse of discretion. *Matter of L.D.*, 2018 MT 60, ¶ 10, 391 Mont. 33, 414 P.3d 768. A district court's factual findings are reviewed for clear error. *Id.* "Findings of fact are clearly erroneous if not supported by substantial evidence, the court misapprehended the effect of the evidence, or this Court has a definite and firm conviction that the lower court was mistaken." *Id.*

This Court "will not reverse a district court's ruling by reason of an error that 'would have no significant impact upon the result.'" *In re H.T.*, 2015 MT 41,

¶ 10, 378 Mont. 206, 343 P.3d 159 (citation omitted). This Court "will not disturb a district court's decision on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion." *Id.* This Court reviews a district court's conclusions of law for correctness. *Id.*

Whether a victim is "physically helpless" and unable to consent to intercourse at any given moment is a question of fact. *State v. Stevens*, 2002 MT 181, ¶ 31, 311 Mont. 52, 53 P.3d 356.

Witness credibility and the weight of testimony are determined by the trier of fact – the trial judge. *In re B.J.T.H.*, 2015 MT 6, ¶ 16, 378 Mont. 14, 340 P.3d 557. The trial court is in the best position to determine the credibility and demeanor of the witnesses and their testimony. *Id.*

Evidentiary rulings are reviewed for abuse of discretion. *State v. Clemans,* 2018 MT 187, ¶ 4, 392 Mont. 214, 422 P.3d 1210.

Applicability of the rape shield statute is reviewed for an abuse of discretion. *State v. Colburn*, 2016 MT 41, ¶¶ 28-29, 382 Mont. 223, 366 P.3d 258. A court abuses its discretion by mechanistically applying the rape shield statute without weighing the defending party's right to present a defense and provide evidence going to the complaining party's veracity. *Id.*

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion when it denied Mother's petition to terminate since (1) substantial credible evidence supports the District Court's findings and decision, (2) Mother filed her petition to terminate in the parenting action, thus waiving purported procedural error, (3) the rape shield statue does not apply, (4) Mother's text messages were admitted with sufficient foundation and authenticity, and (5) the purported procedural and evidentiary defects amount to harmless error.

The District Court should have granted Father's motion to dismiss as a matter of law since (1) the Legislature did not authorize retroactive application of § 41-3-801 and (2) res judicata, collateral estoppel, and judicial estoppel bar Mother's termination petition.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MOTHER'S PETITION TO TERMINATE THE FATHER-CHILD RELATIONSHIP.

Effective October 1, 2017, the Montana Legislature authorized a private right of action to terminate a parent-child relationship as follows (in pertinent part):

> (1) A district court **may** order a termination of the parent-child legal relationship after the filing of a petition pursuant to this section alleging the factual grounds for termination as provided for in subsection (2).

(2) Grounds for termination pursuant to this section exist when the parent of a child:

(a) [omitted].

(b) at a **fact-finding hearing** is found by **clear and convincing evidence**, except as provided in the federal Indian Child Welfare Act, if applicable, to have committed an act of sexual intercourse without consent, sexual assault, or incest that caused the child to be conceived.

(3) The court's order must state the reasons for the decision.

(4) The victim of the crime or act may file a petition pursuant to this section…

(5)-(6) [omitted].

(7) There is **no right to a jury trial** at proceedings held to consider the termination of a parent-child legal relationship.

(8) [omitted].

§ 41-3-801, MCA (emphasis added).

Although devoid of scrutiny and opponent input, the Legislative hearings reveal intent to consider a child's best interest, insert the private termination statute within Title 40 (not 41), provide a defense to a perpetrator's petition for a parenting plan (not allow retroactive application to vitiate a parenting plan previously negotiated and ordered), and that termination petitions constitute a "civil proceeding" (not a criminal proceeding). *Transcriptions of Legislative Hearings re Senate Bill 22*, **Appx. 2 and 3**.

"The party seeking termination of an individual's parental rights has the

burden of proving by clear and convincing evidence that the statutory criteria for termination [was] met." *In re B.H.*, 2001 MT 288, ¶ 16, 307 Mont. 412, 416, 37 P.3d 736, 739. Clear and convincing evidence is a requirement that evidence be definite, clear, and convincing or an issue be clearly established by a preponderance of the evidence or by a clear preponderance of the proof. *Id.*

The term "may" at section 801(1) means the decision whether to terminate is a matter of judicial discretion.

Exercising discretion, the District Court found no clear and convincing evidence the child was conceived of non-consensual intercourse, and denied Mother's petition accordingly.

A. Substantial credible evidence supports the District Court's findings and decision.

The record includes substantial credible evidence supporting the District Court's finding T.P.D.C. was conceived of consensual intercourse and denial of Mother's petition to terminate the father-child relationship, including Father's testimony, other witness' testimony, Mother's text messages, the underlying record, and other evidence.

Mother argues the trial court erred in finding the child was conceived of consensual intercourse since Mother testified she was purportedly unable to consent due to her level of intoxication. *Appellant's Br.* 12-14.

Determination of whether intercourse is consensual is a function of judicial discretion. Whether a victim is "physically helpless" and unable to consent at any given moment is a question of fact. *State v. Stevens*, 2002 MT 181, ¶ 31, 311 Mont. 52, 53 P.3d 356. Witness credibility and the weight of testimony are determined by the trier of fact – the trial judge. *In re B.J.T.H.*, 2015 MT 6, ¶ 16, 378 Mont. 14, 340 P.3d 557. The trial court is in the best position to determine the credibility and demeanor of the witnesses and their testimony. *Id.*

After receiving testimony and evidence, the District Court expressly noted "There was a sharp contrast between the testimony of [Mother] and [Father] about the events on the evening of February 19, 2014." *FOF-COL Order,* ¶ 15 (D.C. Doc. 126).

After extensive hearings, considering witness credibility, and weighing the evidence, the Court found there was "at least" a preponderance of evidence the child was conceived of consensual intercourse. *FOF-COL Order,* ¶ *26* (D.C. Doc. 126).

The Court's assessment of the evidence and witness credibility should not be disturbed since substantial evidence supports its findings. Although Mother testified that she was too intoxicated to have consented to intercourse on February 19, 2014, Mother's contention she was "blacked out" is inconsistent with her contemporaneous text message to Father around

11:30 pm on the evening of February 19, 2014 coherently devising a plan to get away from Vinson so she could go home with Father.

Moreover, Mother sent numerous positive affirmation texts the next day: "you're a good guy, I kinda like you:)," "sorry things got a little farther than I was planning on last night but I am not gonna stress about it, I am 35 years old I can do what I want right?:)," "We should get a movie," "you seem super nice and I like the way you treat me," and "I feel good an safe when I am with you an in your arms and I like it." *Texts from Mother to Father* (Feb. 20, 2014), read and admitted into evidence as Exhibit A, *Hr. Tr.*, 50-52 and 265:5-6.

The intimate details of February 19, 2014 support the District Court's finding the relations where consensual. Father credibly testified and provided evidence Mother and he planned on a date that night, Mother did not appear intoxicated, Mother played darts really well that night ("whooping" Father), Mother expressed she wanted Father to take her home, Mother wrote coherent text messages to Father devising a plan to go home with him without her friend (Lyle Vinson) knowing, Mother was not stumbling or swaying or tripping when she walked to Father's truck, Mother entered Father's truck and seat-belted herself without difficulty, Mother navigated stairs without difficulty when walking from the truck to Father's home, Mother kissed Father on the lips and made affectionate

statements and gestures to Father when they arrived at Father's home, the couple joked and flirted while brushing their teeth together, Mother's speech was normal and coherent, Mother left Father in the bathroom and went into Father's bedroom on her own accord, Mother undressed herself and got into Father's bed on her own accord with only her bra and panties, the couple engaged in more kissing and small talk, Mother perfumed her pelvic region, Father gave oral sex to Mother, Mother expressed pleasure and encouraged Father to continue, Mother reciprocated with kissing down Father's body and giving oral sex, Mother mounted Father and intitiated penetration, the couple had intercourse for about one-hour; both climaxed, Mother wrapped her arms and legs around Father when he climaxed, the couple collapsed into one another's arms with more kissing, Mother described the encounter as a beautiful thing between two people when Father stated concern of no protection, and the couple slept in one another's arms. *Hr. Tr.*, 234:3-247:21.

Liz Master's testimony the couple were affectionate and Mother was not intoxicated during the sexual encounter Master's overheard provides further evidence of consensual relations. *Hr. Tr.* 93-101.

The District Court carefully considered the testimony and evidence in determining Mother was not credible when alleging she was "black-out" drunk, and there is substantial credible evidence supporting the Court's determination "at least" a preponderance of the evidence shows the encounter was consensual.

B. Mother filed her petition to terminate in the parenting action and waived any alleged procedural defect.

Although Mother filed her *Petition to Terminate* in the parenting cause, Mother assigns error to the District Court. Mother argues the trial court erroneously classified Mother's termination petition with T.P.D.C.'s custody matter as part of the same action, and erroneously considered an affidavit Mother filed in the parenting proceeding.

1. Section 41-3-801 does not specify a requirement for a separate cause number for termination petitions.

District courts are to ascertain what is contained in a statute, not to insert what has been omitted. § 1-2-101, MCA. Sections 41-3-801 through 803 lack clarity and detail (amongst other defects). Unlike § 40-9-101, MCA, which clearly requires grandparent contact petitions be filed as a separate proceeding, § 41-3-801 through 803 do not specify a requirement for a separate cause.

Besides Mother is the one who filed her petition to terminate in the parenting cause, Mother's assignment of error essentially criticizes the District Court for not inserting a procedural requirement that is not included in the petition to terminate statutes. Mother's assignment of error is inconsistent with the rules of statutory construction.

2. Mother waived any procedural defect.

Mother waived any procedural defect when she filed her *Petition to*

Terminate in the parenting proceeding and acquiesced to the hearing.

A person cannot take advantage of the person's own mistake. § 1-3-208, MCA. An experienced lawyer waives whatever right he might have had to purported procedural defects when he actively participates in hearing. *Niewoehner v. District Court of Fourteenth Judicial Dist. In and For Meagher County*, 142 Mont. 1, 11, 381 P.2d 464, 469 (Mont. 1963). In *Niewoehner*, an attorney represented himself in a contempt action. The district court did not supply a court reporter and denied Niewoehner's request for a court reporter. Niewoehner actively participated in the hearing without a court reporter being present despite a procedural requirement that a court reporter is present. Niewoehner then used the lack of a court reporter as a basis for appeal. The Supreme Court held Mr. Niewoehner could not later object to the lack of a reporter after actively participated at the hearing. *Id.*

Like *Neiwoehner,* Mother waived any purported procedural defect. Although Mother could have filed her *Petition to Terminate* as a separate cause, Mother chose to file her *Petition to Terminate* in the DR matter. Mother never requested the District Court assign a separate DN cause number for her *Petition to Terminate* and Mother actively participated in multiple hearings without objection. Further, Mother did not object when the Court referenced the underlying file, or when the

Court read into the record *Mother's Affidavit* filed in the parenting proceedings. *Hr. Tr.*, 159:1-164.

Mother cannot now benefit from her wrong-doing by assigning error due to a filing discrepancy Mother created, and Mother waived any purported procedural defect.

3. Any procedural defect is harmless.

Mother's assignment of error is a distinction of no consequence since the District Court effectively treated the *Petition to Terminate* as a separate proceeding from the parenting matter.

A matter will not be reversed unless substantial prejudice to the complaining party is shown. *Green v. Green*, 181 Mont. 285, 293, 593 P.2d 446, 451 (Mont. 1979).

No substantial prejudice to Mother occurred since the District Court treated Mother's termination petition as a separate proceeding. Standing Master Desmond had been handling the parenting proceedings. When Mother filed her *Petition to Terminate* in the parenting proceeding, Judge Deschamps stepped in and presided over the *Petition to Terminate.* At hearing, Deschamps expressly clarified he was not addressing the parenting issues, and was "only" addressing Mother's termination petition. *Hr. Tr.,* 8:10-11:24.

Moreover, Deschamps granted Mother's motion in limine to exclude

evidence regarding the child's best interests, rejected Father's argument the child's constitutional right to a father-child relationship requires consideration of the child's best interests, and expressly clarified the Court would focus on the narrow issue of Mother's termination petition. *Hr. Tr.,* 8:10-11:24.

In substance, the District Court treated Mother's petition to terminate as a separate proceeding. The law prefers substance over form. § 1-3-219, MCA. Any procedural defect is in form only and constitutes harmless error.

4. The District Court is authorized to take judicial notice of the parenting proceedings.

Mother misleadingly argues the Court erred by referencing the fact Mother made no suggestion of sexual abuse in prior proceedings, since the Court is authorized to take judicial notice of court records, including the paternity and parenting proceedings (which were consolidated).

The Court took notice of Mother's *Affidavit* (Feb. 23, 2015)(D.C. Doc. 18) wherein Mother extensively criticized Father. *Hr. Tr.*, 158:24-162:24. The Court noted Mother's serial attacks indicate "disdain" for Father but are void of any suggestion the child was the product of rape. *Hr. Tr.*, 162:22-24. Moreover, Mother's sworn statement reveals Mother judicially admitted "I want to support that relationship," (i.e. the relationship between Father and T.P.D.C.). *Hr. Tr.*, 162:6 (quoting *Affidavit* (Feb. 23, 2015)(D.C. Doc. 18)).

The District Court did not err by taking judicial notice of the parenting

proceedings and Mother's sworn statement. The District Court is authorized to take judicial notice of "records of any Court of this state." Rule 202(b)(6), M.R.Evid. The District Court also has authority to take judicial notice of facts not subject to reasonable dispute if the facts are "capable of accurate and ready determination by sources whose accuracy cannot be reasonably questioned." Rule 201(b), M.R.Evid. A court may take judicial notice of laws or facts on its own accord. Rules 201(c) and 202(c), M.R.Evid.

The District Court was not required to apply blinders to related proceedings involving T.P.D.C., nor Mother's sworn statements. Mother's assignment of error is misplaced.

Even if the Court had not been authorized to take judicial notice, its reference to the underlying proceedings is not necessary or essential to the findings that the February 19, 2014 intercourse was consensual since there is other substantial evidence supporting the Court's finding. Even if there had been error by taking judicial notice of the parenting proceedings, any such error constitutes harmless error.

C. The Rape Shield statute does not apply.

The District Court did not err when it declined to exclude evidence pursuant to the criminal Rape Shield statute at Title 45, Chapter 5, Section 5.

The Rape Shield Law is codified in Montana's criminal code, providing the

following (in pertinent part):

> **45-5-511. Provisions generally applicable to sexual crimes.**
> (1) [omitted]
> (2) Evidence concerning the sexual conduct of the victim is inadmissible in **prosecutions** under this part **except** evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.
>
> (3) If the defendant proposes for any purpose to offer evidence described in subsection (2), the trial judge shall order a hearing out of the presence of the **jury** to determine whether the proposed evidence is admissible under subsection (2).
>
> (4) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.
>
> (5) Resistance by the victim is not required to show lack of consent. Force, fear, or threat is sufficient alone to show lack of consent.

Section 45-5-511, MCA (emphasis added).

1. Mother's petition is not a criminal prosecution before a jury under Title 45.

The plain language of the rape shield statute confirms it is not applicable since the underlying matter is not a criminal prosecution before a jury under Title 45. Under subsection (2), evidence concerning sexual conduct of the victim is inadmissible "in prosecutions under this part". The underlying matter is a petition to terminate parental rights in a civil proceeding pursuant to § 41-3-801(2)(b). It is not a criminal prosecution under the referenced part, which is part 5 (Sexual Crimes) of chapter 5 (Offenses against the Person) of Title 45 (Crimes).

Subsection (3) requires evidentiary determinations regarding the admissibility of sexual conduct to be held outside the presence of the "jury." Further underscoring the inapplicability of subsection (2), there is no right to a jury trial in termination proceedings. § 41-3-801(7), MCA. The District Court did not err when it took notice the purpose of the rape shield statute is to protect against prejudicing a "jury." *Hr. Tr.*, 59:9-13.

Mother's argument the district court erred by not holding a separate hearing to determine the admissibility of evidence of Mother and Father's other sexual relations makes no sense. The reason for requiring a separate hearing is to avoid prejudicing a jury. In this matter, the judge is the fact finder. Holding a separate hearing would not shield the judge from any prejudice associated with hearing the evidence sought to be excluded.

The District Court correctly determined the rape shield statute does not apply. Mother's argument the Court was required to hold a separate evidentiary hearing outside the presence of the jury is nonsensical.

2. The Montana Legislature did not incorporate the rape shield law into § 41-3-801.

Mother's argument the rape shield statue applies runs afoul of well-established rules of statutory interpretation. When interpreting a statute, the trial court is to "simply ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted or omit what has been inserted." § 1-

2-101, MCA. The intention of the Legislature is to be pursued from the plain meaning of the words used; if interpretation can be so determined, the court may not go further and apply other means of interpretation. § 1-2-102, MCA; *State v. Trull*, 2006 MT 119, ¶ 332 Mont. 233, 136 P.3d 551.

When construing a challenged statute, a reviewing court must read and interpret the statute, without isolating specific terms from the context in which they are used by the legislative body. *State v. Lilburn*, 265 Mont. 256, 266, 875 P.2d 1036, 1041(Mont. 1994).

In order to adopt Mother's proposed interpretation of the rape shield statue, the District Court would have had to insert language into § 45-5-511, MCA to include civil proceedings under § 41-3-801. The District Court followed the rules of statutory construction when it refrained from doing so.

Nor did the Legislature incorporate the rape shield law into §§ 41-3-801 et. seq. "[W]hen the Legislature enacts or amends statutes, it is presumed to have acted with deliberation and with full knowledge of all existing laws relating to the subject addressed." *Ross v. City of Great Falls*, 1998 MT 276, ¶24, 291 Mont. 377, 967 P.2d 1103 (internal quotation omitted). Had the Legislature intended for §45-5-511 to apply to proceedings under § 41-3-801, it could have done so when it enacted § 41-3-801. The Legislature did not.

The District Court followed the rules of statutory construction when it declined to exclude evidence under the rape shield statute.

3. Even if the rape shield statute applied, the exception authorizes evidence of Mother and Father's other sexual encounters.

Mother argues the District Court erred by hearing evidence of Mother and Father's sexual conduct February 22, 2014. Mother's argument must fail for several reasons.

Even if the Rape Shield statute applied—which it does not—exceptions would apply. Subsection (2) expressly allows "evidence of the victim's past sexual conduct **with the offender** or evidence of specific instances of the victim's sexual activity to show the **origin of …pregnancy**…that is at issue in the prosecution."

Both exceptions would apply. The evidence was of Mother's sexual conduct with Father (*i.e.* the alleged offender).

Also, evidence of other unprotected sex between Mother and Father was offered to show the origin of pregnancy could have been from consensual intercourse February 22, 2014 (not February 19, 2014 which is the date Mother alleged the child was conceived of nonconsensual intercourse). This defense is implicitly authorized by § 41-3-801(2)(b) which requires Mother to provide clear and convincing evidence the alleged sexual intercourse without consent on February 19, 2014 caused the child to be conceived. Accordingly, the District

Court did not err when it allowed evidence related to this defense. *E.g.* see *Hr. Tr.*, 58:12 - 59: 24.

Further, Father had a right to present a defense and challenge Mother's credibility. *State v. Colburn*, 2016 MT 41, ¶¶ 28-29, 382 Mont. 223, 366 P.3d 258.

Even if the rape shield statue applied, evidence of other sexual encounters between Mother and Father were admissible under the exceptions and right to provide a defense (especially in a bench trial where the judge is well suited to decipher the evidence, and there is not a risk of prejudicing a jury).

4. The Montana Rules of Evidence appropriately protect against improper evidence of sexual conduct.

It is unnecessary to apply the criminal rape shield statute to civil termination proceedings under § 41-3-801, MCA since the Montana Rules of Evidence provide appropriate safeguards to prevent admission of improper evidence of sexual conduct.

The Montana Rules of Evidence apply to abuse and neglect proceedings. *In re M.N.*, 2011 MT 245, ¶18, 362 Mont. 186, 261 P.3d 1047. The Montana Rules of Evidence protect against admission of evidence that is irrelevant, prejudicial, misleading, or constitutes improper character evidence. Rules 402, 403, 404, M.R.Evid. The Montana Rules of Evidence thus provide appropriate means for district courts to exercise discretion and protect against evidence of sexual conduct

from being improperly admitted.

5. Any purported error in allowing evidence of Mother and Father's other sexual relations would constitute harmless error.

Even if the rape shield statute applied and precluded evidence of Mother and Father's other sexual encounters, allowing such evidence constitutes harmless error.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Rule 103, M.R.Evid. Mother does not deny she had sex with Father more than one time (*Hr. Tr.*, 58:12-13), she does not demonstrate a substantial right was affected by such evidence being introduced, and she does not argue a jury or fact-finder was prejudiced to perceive her as a loose woman.

Regardless, the evidence of Mother and Father's sexual relations February 22, 2014 is not necessary or essential to the District Court's finding that the sexual intercourse on February 19, 2014 was consensual since other substantial credible evidence exists supporting the District Court's findings and conclusions. Any error in refusing to exclude evidence of Mother and Father's other sexual relations would constitute harmless error.

D. The District Court did not abuse its discretion when it admitted printouts of Mother's text messages to Father into evidence.

Mother argues the District Court abused its discretion by admitting Mother's

text messages to Father into evidence. Mother alleges Father failed to lay sufficient foundation, and the original phone(s) were required in order to admit printouts of the 2014 text messages.

"A district court's evidentiary rulings are reviewed for an abuse of discretion." *Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶ 17, 367 Mont. 21, 289 P.3d 131. A district court possesses broad discretion to determine the admissibility of evidence. *Malcolm v. Evenflo Co.*, 2009 MT 285, ¶ 29, 352 Mont. 325, 217 P.3d 514.

Pertinent text communications between Mother and Father were admitted into evidence as Exhibit A. *Hr. Tr.*, 265:5-6.

The Court did not abuse its discretion in admitting Exhibit A since (1) Father laid extensive foundation (including his first-hand knowledge the text printouts are what they purport to be, and distinctive content and substance corresponding with the circumstances and alleged incident), and (2) printouts of digital data are treated as the original under the Montana Rules of Evidence.

1. Sufficient foundation and showing of authenticity.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), M.R.Evid.

Authentication or identification can be accomplished by testimony of a

witness with knowledge the item is what it is claimed to be. Rule 901(b)(1), M.R.Evid. Authentication may also be accomplished by distinctive characteristics and circumstances, including "[a]ppearance, contents, substance, internal patterns or other distinctive characteristics." Rule 901(b)(4), M.R.Evid. The rule does not provide a specific example for authentication of text messages. By analogy, however, the rule provides that telephone conversations may be authenticated when, "in the case of a person, circumstances, including self-identification, show the person answer to be the one called." Rule 901(b)(6)(A), M.R.Evid.

The Supreme Court confirmed long ago that "authenticity for admissibility can be demonstrated by direct or circumstantial evidence and the consistency of evidence for a foundation is within the discretion of the trial judge". *State v. Cooper*, 161 Mont. 85, 91, 904 P2d 978 (Mont. 1972).

The District Court did not abuse its discretion in admitting Exhibit A since the record includes direct and circumstantial evidence comprising adequate foundation to conform with the requirements of Rule 901. To start, Mother admitted she had extensive text communications with Father, did not dispute the text messages are Mother's communications to Father, agreed her memory of the alleged events would be more clear the day after the alleged incident February 19, 2014 than four years later, and expressly testified "**I am not denying that these messages are true**." *Hr. Tr.* 45:9 - 50:14 (emphasis added). Accordingly, the

Court noted "that seems like pretty much an admission that they are authentic." *Hr. Tr.*, 49:25 - 50:1.

Circumstantial evidence provides further foundation. The text messages correspond with the alleged incident February 19, 2014 in terms of time, content, substance and distinctive characteristics. For example, Mother's next day text refers to the February 19, 2014 sexual encounter, noting "I am 35 years old and can do what I **want**, right." *Hr. Tr.*, 51:13-16. The text messages also include distinctive characteristics, such as Mother's name and repeated use of emojis. *Hr. Tr.*, 51:10-18, 53:24, 268:12. Mother was also able to recall and identify "Liz Masters" was one of the "girls" referenced in the text messages. *Hr. Tr.*, 54:5-14. These circumstances, amongst others, further establish authenticity.

In addition to Mother's admissions, Father provided further direct and circumstantial evidence. Father testified that Exhibit A comprises text messages between him and Mother relating to the 2014 alleged incident, he got Mother's number from Liz Masters who was a roommate of Father's in February 2014 (*Hr. Tr.* 94:12-13), the text messages correspond with Mother's phone number, the text messages were received from Mother, Father received text messages from Mother on his phone, Exhibit A truthfully and accurately reflects text communications between Mother and Father, the text messages are what they purport to be, Father made no changes to the text messages, he used a SMS MS to e-mail application to

save the 2014 text messages, that he did not fabricate or doctor any text messages, he "lived through" the text messages (*i.e.* first-hand knowledge), the texts are consistent with communication and conduct between Mother and Father, and Exhibit A reflects the text messages he received from Mother "to the letter." *Hr. Tr.*, 197:22 - 202:17, 260:13 - 261:6, 269:9–15.

The District Court did not abuse its discretion when it determined there was adequate foundation for the admission of Exhibit A.

2. Original requirement satisfied.

Mother misleads the Court in arguing an original was required. The Montana Rules of Evidence only require an original "[t]o prove the content of a writing." Rule 1002, M.R.Evid. In this case, the text messages were not offered to prove the content of the text messages. Rather, Exhibit A goes to Mother's credibility, and demonstrates Mother's contemporaneous and next day text messages are inconsistent with her allegations of non-consensual intercourse. For example, Mother alleged she blacked out, but her texts show Mother was coherent, articulate, and capable at 11:30 p.m. February 19, 2014 when she devised and texted a plan to evade Lyle Vinson. *Hr. Tr.* 276:25 – 268:17. Further, Mother's next day text indicates knowledge, consent, and responsibility: "Sorry things got a little father I was panning on last night, but I am not going to stress

about it. I am 35 years old and can do what I **want**, right?" *Hr. Tr.* 51:13-18 (Emphasis added).

Moreover, Mother's next day affectionate affirmations impeach Mother's allegation she formed the idea she was raped the "day after it happened" (*Hr. Tr.* 37:23-25): "I like the way you treat me," "I feel good and safe when I am with you and in your arms and I like it," "your totally a dork but a very cute one and I love it." *Hr. Tr.* 51:13 – 52:24. The Court appropriately found Mother not credible. *FOF, COL, Order*, FOF ¶¶ 17, 18, 23, 24 (D.C. Doc. 126).

Mother misleads the Court in arguing an original phone was required. Even if an original was required, the Court did not abuse its discretion in admitting printouts of the text messages since printouts of text messages stored on an electronic devise (i.e. a cell phone or computer) constitute the original: "If data are stored in a computer or similar device, any printout or other output readable by sight, show to reflect the data accurately, is an original." Rule 1001(3), M.R.Evid.

Even if an original were required and printouts of electronic data were not originals, Exhibit A was admissible as a duplicate since Father's use of an application to save the texts constitutes an electronic re-recording: "A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography,…or by mechanical or electronic re-recording,

…or by other equivalent techniques which accurately reproduce the original." Rule 1001(4), M.R.Evid.

Mother alleges "a genuine question" exists as to the authenticity of the original, and Father "had the opportunity to alter". However, this was not a summary judgment. Rather, Father consistently and repeatedly testified he did not change or alter the text messages. *Hr. Tr.* 199:4-6, 201:14-17, 261:1-3, 269:13-16. The District Court was in the best position to determine Father's credibility. *In re B.J.T.H.*, 2015 MT 6, ¶ 16, 378 Mont. 14, 340 P.3d 557.

3. Mother disingenuously alleges the text printouts are not complete.

Mother misleadingly complains the text messages contained numerous hand-written annotations. Pursuant to Mother's request, pages with Father's hand-written notes were removed from Exhibit A. *Hr. Tr.* 261:7 – 262:5.

Mother disingenuously complains the printouts were not complete. Father initially offered a comprehensive thread of text messages, but the Court declined to "read hundreds of pages of text messages." [5] *Hr. Tr.*, 217:1-22. Father thus provided a revised exhibit containing pertinent communications close in time to the alleged incident. *Id.* Mother then requested additional pages be removed from

5 Father initially offered a comprehensive thread of text messages "to avoid ..an allegation that we did not provide a complete copy of the communications." *Hr. Tr.* 47:15-19. Father provided the District Court with a 3-ring binder containing the 250 pages of text messages. The Court declined to admit the 250 page version into evidence, but the 3-ring binder was retained by the Court.

Exhibit A. *Hr. Tr.* 261:7 – 262:5. Pertinent text communications between Mother and Father were admitted into evidence as Exhibit A. *Hr. Tr.*, 265:5-6. Mother did not object to removal of hundreds of text messages from the original version of Exhibit A offered, and expressly requested additional pages be removed. A person cannot take advantage of the person's own mistake. § 1-3-208, MCA. Mother waived such objection, and her assignment of error is disingenuous.

4. Any purported error in admitting text messages is harmless.

Finally, even if the Court had abused its discretion in admitting Exhibit A—which it did not—other substantial credible evidence sufficiently supports the District Court's ultimate findings and conclusions Mother failed to provide clear and convincing evidence the child was conceived of non-consensual intercourse. Because the text messages are not essential or necessary for the Court's ultimate findings and conclusions, any purported error in allowing Exhibit A would constitute harmless error.

The District Court did not abuse its discretion by admitting text messages between the parties.

II. THE DISTRICT COURT SHOULD HAVE GRANTED FATHER'S MOTION TO DISMISS MOTHER'S PETITION TO TERMINATE.

The District Court should have dismissed mother's petition for the reasons set forth in Father's *Motion to Dismiss* (D.C. doc. 106), which are incorporated by reference herein, and summarized as follows:

A. Retroactive application of section 41-3-801 is not authorized.

"[N]o law contained in any of the statues of Montana is retroactive unless expressly so declared. § 1-2-109, MCA. Section § 41-3-801 did not become effective until October 1, 2017. The Legislature chose to not expressly declare that § 41-3-801 may be applied retroactively. Accordingly, § 41-3-801(2)(b) may not be applied retroactively to alleged conduct or conception February 19, 2014.

B. Res judicata.

Res judicata bars Mother from attempting to terminate Father's rights since Mother already had an opportunity to litigate her allegations of nonconsensual intercourse in the parenting proceedings. *Rausch v. Hogan*, 2001 MT 123, ¶ 14, 305 Mont. 382, ¶ 14, 28 P.3d 460, ¶ 14.

Res judicata barred mother's petition since, in the paternity, parenting plan, and termination proceedings: (1) parties are the same, involving Mother, Father, and T.P.D.C.; (2) the subject matter is the same, regarding father-child relationship; (3) the issues are the same, in that § 40-4-212(1)(f) required consideration of purported sexual abuse by one parent against the other, which is the premise of Mother's petition to terminate; and (4) the capacities of the parties is the same with Mother and Father continuing to be the biological parents of T.P.D.C. *Kullick v. Skyline Homeowners Assoc.* 2003 MT 137, ¶ 17, 316 Mont. 146, 69 P.3d 225.

C. Collateral Estoppel.

Collateral estoppel bars Mother from terminating Father's rights since the issue of purported sexual abuse was necessarily considered and resolved in the parenting proceedings.

Collateral estoppel is a form of res judicata, barring the reopening of an issue actually or necessarily resolved in a prior suit. *Dowell v. Mont. Dept. of Pub. Health and Human Services*, 2006 MT 55, ¶34 331 Mont. 305, 132 P.3d 520.

Collateral estoppel bars re-litigation of the issue of purported sexual abuse since: (1) the issue of rape was necessarily decided in the parenting adjudication per § 40-4-212(1)(f), which is identical to issue presented in Mother's termination petition; (2) there was an adjudication on the merits regarding the father-daughter relationship when the Court entered the *Order Adopting Final Stipulated Parenting Plan* (Oct. 5, 2016)(D.C. Doc. 86); (3) the parties are the same; and (4) Mother was represented by counsel and afforded a full and fair opportunity to litigate purported rape before stipulating to the final parenting plan. *Dowell v. Mont. Dept. of Pub. Health and Human Services*, 2006 MT 55, ¶¶34-35, 331 Mont. 305, 132 P.3d 520.

D. Judicial Estoppel.

Judicial estoppel prevents a litigant from asserting an "inconsistent, conflicting, or contrary position to one that she has previously asserted in the same

or in a previous proceeding". *Simpson v. Simpson*, 2013 MT 22, ¶ 27, 368 Mont. 315, 294 P.3d 1212. Judicial estoppel binds Mother to her judicial declarations, and precludes her from taking a position inconsistent with her previous judicial declarations in a subsequent action. *Nelson v. Nelson*, 2002 MT 151, ¶22, 310 Mont. 329, 50 P.3d 139.

Judicial estoppel bars Mother's petition to terminate since: (1) Mother inherently had knowledge of the purported rape February 2014 when she agreed to the *Final Stipulated Parenting Plan* (Sep. 29, 2016)(D.C. doc. 85); (2) Mother successfully maintained her position that "I want to support [the father-daughter relationship]" (*Affidavit*, D.C. Doc. 18), admission the father-child relationship is in T.P.D.C.'s best interest, and "request" the District Court order the *Final Stipulated Parenting Plan* (D.C. Doc. 85); (3) Mother's current position that Father's rights should be terminated is inconsistent with Mother's previous sworn positions, and (4) Mother's original position mislead Father such that allowing Mother to now change her position would injuriously affect Father (and T.P.D.C.) by terminating the loving father-daughter relationship. *Fiedler v. Fiedler*, 266 Mont. 133, 140, 879 P.2d 675, 679–80 (Mont. 1994).

CONCLUSION

For these reasons, the Court should (1) affirm the District Court's denial of Mother's petition to terminate, and (2) enter an order clarifying the District Court

should have dismissed mother's petition to terminate as a matter of law.

Dated this 7th day of February 2019.

/s/ André Gurr, Esq.
Attorney for Appellee/Cross-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed in Times New Roman font, with proportionally spaced typeface of 14 points, is double spaced except for footnotes and quoted and indented material, has less then 10,000 words (9358 words as counted by the attorney's word processing software), excluding table of contents, table of citations, certificate of service, certificate of compliance, and appendix, if any.

Dated this 7th day of February, 2019.

/s/ André Gurr, Esq.
Attorney for Appellee/Cross-Appellant

APPENDIX

CERTIFICATE OF SERVICE

I, Andre Gurr, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee and Cross-Appellant to the following on 02-07-2019:

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