

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 18-0236

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On appeal from the Montana Fourth Judicial District Court

County of Missoula

Cause No. DR-15-27

Honorable Robert L. Deschamps, III, presiding

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IN RE THE PARENTING OF:

T.P.D.C.,

A Minor Child.

TAMI DISNEY,

Petitioner and Appellant,

vs.

BRANDON STAAT,

Respondent, Appellee and Cross-Appellant

Appearances:

Kathleen A. Molsberry, Matthew B. Lowy

Lowy Law, PLLC

2419 Mullan Road, Suite B

Missoula, MT 59808

1 (406) 926-6500

2 (406) 290-1889

3 Kathleen@LowyLawFirm.com

4 Matt@lowyLawFirm.com

5 Attorneys for Appellant, Tami Disney

7  
8 Andre Gurr

9 Garden City Law, PLLC

10 1917 S. Higgins Avenue

11 Missoula, MT 59801

12 Attorney for Appellee/Cross-Appellant, Brandon Staat

**TABLE OF CONTENTS**

Table of Authorities.....	4
Responsive Facts.....	6
Argument (Reply).....	8
Conclusion.....	20
Argument (Cross-appeal response).....	
Conclusion.....	
Certificate of Service.....	14
Certificate of Compliance.....	22

## **TABLE OF AUTHORITIES**

### **Cases**

<u>State v. Graves</u> , 272 Mont. 451, 901 P.2d 549 (1995).....	9
<u>Algee v. Hren</u> , 2016 MT 166, ¶ 7, 384 Mont. 93, 375 P.3d 386.....	16
<u>Touris v. Flathead County</u> , 2011 MT 165, ¶ 12, 361 Mont. 172, 258 P.3d 1.....	17
<u>In re the Adoption of A.F.M.</u> , 102 A.L.R. 5th 701, 15 P.3D 258 (Alaska 2001.....	18
<u>Simpson v. Simpson</u> , 2013 MT 22, ¶ 27, 368 Mont. 315, 294 P.3d 1212.....	19
<u>Scott v. Scott</u> , 283 Mont. 169, 175, 939 P.2d 998, 1001 (1997).....	21
<u>In re Marriage of K.E.V.</u> , 267 Mont. 323, 331, 883 P.2d 1246, 1251 (1994).....	21
<u>In re M.A.L.</u> , 2006 MT 299, 334 Mont. 436, 148 P.3d 606.. ..	22

### **Statutes**

Mont. Code Ann. § 45-5-501(1)(b)(i).....	8
Mont Code. Ann. § 45-2-101(41).....	8
Mont Code. Ann. § 45-2-101(56).....	9
Mont. Code Ann. § 45-5-503.....	11
Mont. Code Ann. § 45-5-501(1)(a)(ii).....	12
Mont. Code Ann. § 45-5-511(2).....	11
Mont. Code Ann. §45-1-205(1)(b).....	14
Mont. Code Ann. § 41-3-801 <i>et seq.</i> .....	15
Mont. Code Ann. § 1-2-109.....	22
Mont. Code Ann. §§ 41-423(2)(a).....	23

Mont. Code Ann. 41-3-609(1)(c).....	23
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## **Regulations and Rules**

Rule 901(b)(4), M.R.Evid.....	12
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Rule 1001(4) M.R. Evid.....	12
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Rule 106(a)(1) M.R. Evid.....	13
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Rule 8(c)(1) M. R. Civ. P.....	16
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1  
2                                   **RESPONSE TO APPELLEE’S FACTS**

3           Mr. Staat and Ms. Disney briefly associated in February and March of 2014. Staat  
4 subjected Disney to sexual intercourse without consent on February 19, 2014, causing the  
5 conception of T.P.D.C. Ms. Disney filed her termination petition on January 11, 2018.  
6

7           Prior to the filing of the termination petition, Ms. Disney and Appellee shared a  
8 court-ordered parenting plan to T.P.D.C implemented in 2016. For the majority of the  
9 time period during which the parenting action was being adjudicated, Ms. Disney  
10 proceeded *pro se*, as she did not have the financial means to secure counsel. An attorney  
11 provided her limited-scope representation during the mediation and signing of a  
12 stipulated parenting agreement. Response to Motion to Dismiss (D.C. Doc 117.) At the  
13 time Ms. Disney did not have the financial means to secure counsel to represent her at a  
14 termination proceeding, even if such a proceeding has been available to her under the  
15 laws that existed at the time. Id.  
16

17           When Ms. Disney entered the 2016 stipulated parenting plan, she was required to  
18 participate in family counseling with Cindy Miller. Ms. Disney informed Cindy Miller  
19 she was extremely intoxicated the night of T.P.D.C’s conception and this caused her grief  
20 in parenting with Mr. Staat. Trans. 41:2 (Mar. 2, 9, and 28, 2018).  
21

22           Prior to the assault of February 19, 2014, Ms. Disney and Mr. Staat went on a  
23 social outing to the Lucky Strike in Missoula on February 12, 2014. Contrary to  
24 Appellee’s assertions that Ms. Disney was not intoxicated that evening, Appellee Staat’s  
25  
26  
27  
28

1 purported exhibit of text messages contain a message allegedly by Ms. Disney stating she  
2 was nearly blacked out and uncomfortable with the interaction that had taken place  
3 between her and Mr. Staat the evening before. *Trans.* 215:11.

4  
5 February 19, 2014, the night the assault took place, Ms. Disney was intoxicated to  
6 the point where she was passing in and out of consciousness and did not know where she  
7 was or understand what was happening to her. TraNS. at 29:3—29:18, 32:17—33:17 At  
8 the time, she was under the influence of methadone, had not eaten much that day, and  
9 recalled drinking at least four Cold Smoke beers before her memory of that night became  
10 fuzzy due to her level of intoxication. Id. She was physically helpless when Appellee  
11 had sexual intercourse with her. Trans. 34:13—35:18.

12  
13  
14 After the assault of February 19, out of guilt, Ms. Disney attempted to continue her  
15 relationship with Mr. Staat for a brief period of time. Throughout this, Ms. Disney  
16 continued to be addicted to opioids and to consume excessive amounts of alcohol. Trans.  
17 22:21–25:8.

18  
19 Laura Kamura, Ms. Disney’s AA sponsor, testified that Ms. Disney struggled with  
20 alcohol for years and was addicted to alcohol during the time period she interacted with  
21 Mr. Staat. Trans. 164:11. Appellee’s assault worsened her alcohol abuse and Ms. Disney  
22 had to work through her associated resentment before being able to complete her AA  
23 sessions. Id.

24  
25  
26 Ms. Disney reported that she felt guilt, shame, and disgust from Mr. Staat’s rape.  
27 Trans. 73:23 Appellee asserts these feelings mean she is responsible for his act of rape  
28

1 while she was incapacitated. (Appellee's response brief, page 3.) Shame and disgust are  
2 typically exhibited by rape survivors.

3 Appellee asserts Ms. Disney did not tell Tammy Mercer she was sexually  
4 assaulted. Contrary to this assertion, Ms. Disney informed Ms. Mercer she did not recall  
5 the details of her sexual encounter with Mr. Staat due to her level of intoxication at the  
6 time. Trans. 81:24.

### 7 **ARGUMENT**

#### 8 9 10 **I. The District Court erroneously concluded Ms. Disney did not meet her burden** 11 **of proof to terminate Appellee's parental rights.**

12  
13 The district court erroneously found Ms. Disney had not met her burden of proof  
14 by clearing and convincing evidence T.P.D.C. was conceived by rape.

#### 15 **A. The trial court misapplied Montana law defining sexual intercourse** 16 **without consent when it denied Ms. Disney's termination petition.**

17  
18 Under Montana law, an individual intoxicated to the point of incapacitation cannot  
19 consent. “. . .[T]he victim is incapable of consent because the victim is mentally  
20 disordered or incapacitated . . .” Mont. Code Ann. § 45-5-501(1)(b)(i). Furthermore  
21 Montana law defines mental incapacitation as when “a person is rendered temporary  
22 incapable of appreciating or controlling the person's own conduct as a result of the  
23 influence of an intoxicating substance.” Mont Code. Ann. § 45-2-101(41).  
24  
25  
26  
27  
28



1 “Physically helpless” is defined as a person being unconscious or otherwise  
2 physically unable to communicate unwillingness to act. Mont Code. Ann. §  
3 45-2-101(56).  
4

5 The Montana Supreme Court has repeatedly held convictions for sexual  
6 intercourse without consent and sexual assault are sustainable based entirely on the  
7 uncorroborated testimony of the victim. State v. Graves, 272 Mont. 451, 901 P.2d 549  
8 (1995), (citing State v. Little, 260 Mont. 460, 477, 861 P.2d 154, 165 (1995)).  
9

10 Here, the trial court disregarded Ms. Disney’s clear testimony she was intoxicated  
11 to the point of incapacity during the incident of sexual intercourse. The trial court found  
12 the incapacitated Ms. Disney responsible for BOTH her intoxicated conduct and Appellee  
13 Staat’s conduct while Ms. Disney was intoxicated.  
14

15 Appellee’s reliance on text messages to argue Ms. Disney consented are inaccurate  
16 representations of the communications. Foremost, Ms. Disney established she had no  
17 specific recollection of them to lay proper foundation. Second, Mr. Staat had motive,  
18 means, and opportunity to alter the exhibits before presenting them. Third, Appellee’s  
19 supposition unsupported by the record people cannot text when severely intoxicated and  
20 blacked-out is wild, unfounded speculation; if Ms. Disney texted while blacked out it  
21 does not mean she was capable of consent when she was raped any more the manner of  
22 dress communicates consent.  
23  
24  
25

26 After February 19, 2014, Ms. Disney briefly attempted to maintain a relationship  
27 with Mr. Staat. Ms. Disney was still suffering from opioid and alcohol addiction at this  
28

1 time, impairing her ability to make decisions about her interactions with Mr. Staat.  
2 Additionally, women often respond to sexual assault by attempting to appease and  
3 befriend their attackers as a defense mechanism and to prevent further harm and violence  
4 being inflicted upon them.  
5

6 Montana law has been amended to remove the requirement rape victims resist their  
7 attacker. Mont. Code Ann. § 45-5-503 (SB 29, 65th Leg.). This change reflects the  
8 understanding victims freeze out of fear and often do not fight their attackers. Id. It is  
9 common knowledge sexual assault victims often continue interacting with the perpetrator  
10 after the assault; this behavior is not indicative no rape occurred any more than children  
11 will still love their parents after being abused.  
12  
13

14 **B. The district court erroneous classified the termination petition as a sub-**  
15 **part of the parties parenting matter**  
16

17 The erroneous classification of the termination petition as a subpart of the  
18 parenting action between the parties was not harmless error. The trial court relied on  
19 facts from the underlying parenting action during the termination hearing, reading into  
20 the record documents in the parenting action during the termination hearing. Trans.  
21 158:23.  
22  
23

24 After reviewing an affidavit from the parenting action, the trial court excluded  
25 testimony from Ms. Kamura about Ms. Disney's rape disclosure because the parenting  
26 action did not allege Mr. Staat's rape. Id. The contents of the parenting action  
27 impermissibly impacted the court.  
28

1 The Fourth Judicial District does not proceed uniformly. In contrast to this matter,  
2 Department Four refused to accept a termination petition in the same cause of action as a  
3 parenting matter involving the same parties; Department Four ordered the termination  
4 petition withdrawn and filed as a separate adoption. Petitioner's Motion to: Alter or  
5 Amend Judgment, or Grant New Trial and Brief in Support: 4:20. Different departments  
6 treating the same filings so differently creates disparate results.  
7

8  
9 In order for a petition for termination for sexual intercourse without consent to be  
10 an effective remedy for victims who have conceived children through rape, it must be  
11 classified as its own cause of action.  
12

13 **C. The district court should have applied Montana's Rape Shield Statute to**  
14 **the termination proceeding.**

15 "Evidence of the sexual conduct of the victim is inadmissible in prosecutions under  
16 this part except evidence of the victim's past sexual conduct with the offender or  
17 evidence of specific instances of the victim's sexual activity to show the origin of semen,  
18 pregnancy, or disease that is as issue in the prosecution." Mont. Code Ann. §  
19 45-5-511(2).  
20  
21

22 Here, the burden of proof on the petitioner was to prove the same elements of  
23 Mont. Code Ann. § 45-5-503. The trial court admitting evidence of subsequent sexual  
24 encounters, and even though these encounters were non-consensual, was illegally cited as  
25 support for the proposition Ms. Disney consented to be raped February 2014. Order,  
26 5:19. The final order finding Ms. Disney's rape assertion was not credible because of  
27  
28

1 subsequent contact with the offender is precisely result the rape shield statute prevents.  
2 Failure to apply Mont. Code Ann. § 45-5-511(2) as Ms. Disney prosecuted the same  
3 elements of Mont. Code Ann. § 45-5-503 is reversible error.  
4

5 **D. Appellee’s exhibit of text messages were improperly admitted, due to the**  
6 **fact they could not be authenticated, because they were not originals, and because**  
7 **they were an incomplete record of the communications between the parties.**  
8

9 The trial court’s admission of the text messages violated the Montana Rules of  
10 Evidence.  
11

12 *1. Text messages were not authenticated.*

13 Authentication may be accomplished by distinctive characteristics and  
14 circumstances, including “appearance, contents, substance, internal patterns, or other  
15 distinctive characteristics.” Rule 901(b)(4), M. R. Evid.  
16

17 The trial court admitted very few pages of text messages cherry-picked by Mr.  
18 Staat from a 4-inch binder. The majority of the binder was excluded. Trans. 217:1 The  
19 binder states many texts are missing and references other texts not included. Trans.  
20 216:16. The contents of the texts themselves state their inaccuracy.  
21

22 Ms. Disney had no recollection of sending the text messages. Trans. 25:49 She  
23 testified they could be true as they would have been composed four years ago and she  
24 was suffering from alcohol and opioid addiction at the time and could not recall what she  
25 had said and done during this time period. Trans. 221:1 Her statement is insufficient to  
26 authenticate the texts.  
27  
28

1           2.     *The original format was required*

2           “If data are stored in a computer or similar device, any printout or other output  
3 readable by sight, shown to reflect the data accurately, is an original.” Rule 1001(3) M.R.  
4 Evid.  
5

6           Here, the format the texts provided did not reflect the data accurately. The texts  
7 are incomplete and contained handwritten annotations. Mr. Staat had means, motive, and  
8 opportunity to alter them when he downloaded them into a word-processing document  
9 and made them susceptible to manipulation Trans. 201:14.  
10

11           These texts were offered to prove Ms. Disney consented to being raped February  
12 19, 2014. They were offered to prove the matter asserted and an original was required.  
13 Contrary to Appellee’s assertions, the admission of the texts was not harmless error: the  
14 trial court relied upon the texts finding the rape was consensual, specifically citing to the  
15 texts in its order. (Order, at 7:24).  
16  
17

18           3.     *Rule of Completeness*

19           “When part of an act, declaration, conversation, writing, or recorded statement or  
20 series thereof is introduced by a party: an adverse party may require the introduction of at  
21 that time of any other part of such item or series thereof which ought to be considered at  
22 that time . . . .” M.R.Evid. Rule 106(a)(1).  
23  
24

25           The binder of texts was incomplete when originally offered. The texts reference  
26 other texts not included within the binder. Trans. 216:16 Accordingly, the proffered  
27 exhibit was incomplete and should have been excluded as evidence.  
28

## **CONCLUSION**

Based upon the foregoing arguments, the district court's denial of Ms. Disney's termination petition should be dismissed, or alternatively, remanded for a new trial.

### **II. The district court correctly denied Appellee's Motion to Dismiss Ms. Disney's termination petition**

At the trial court level, Appellee attempted to argue Ms. Disney's petition was barred under a litany of legal theories including: statute of limitations, laches, res judicata, law of the case, collateral estoppel, judicial estoppel, equitable estoppel, and the applicability of retroactive application of Mont. Code Ann. § 41-3-801 *et. seq.*

The district court properly denied Mr. Staat's Motion to Dismiss Ms. Disney's Petition for Termination of Parental Rights (D.C. doc. 106) for the following reasons:

#### **A. Statute of Limitations**

The trial court properly denied Mr. Staat's Motion to Dismiss because there was no applicable statute of limitations that applied to a termination petition filed under Mont. Code Ann. § 41-3-801 *et seq.* and the termination petition was not time-barred.

If the State of Montana were proceeding against Mr. Staat in a criminal action, the matter would not be time-barred if the allegations had occurred within the last 10-years. Mont. Code Ann. §§ 45-5-503 and 45-1-205(1)(b). Were the State of Montana proceeding against Mr. Staat in a criminal action at this time, a

1 criminal prosecution would still be permitted by Montana law because the assault  
2 occurred less than 10-years ago.

3 In the present matter, Ms. Disney is pursuing termination of the parental  
4 rights to T.P.D.C. because of an incident of sexual assault that occurred in February  
5 2014 that caused T.P.D.C. to be conceived. Mont. Code Ann. § 41-3-801 *et seq.*  
6 This statute does not specify a time limitation or applicable statute of limitation.  
7

8  
9 Mr. Staat errantly and without legal authority asked the trial court to apply a  
10 two-year statute of limitation for civil sexual assault for tort claims. However, Ms.  
11 Disney's claim against Mr. Staat is not a tort claim — she is not suing for damages  
12 in tort but instead pursuing termination in T.P.D.C.'s best interests. The absence of  
13 legal authority linking a tort statute of limitations to a termination of parental rights  
14 proceeding is instructive that Ms. Disney's claim should not be time-barred.  
15  
16

17 Additionally, Mr. Staat's motion to dismiss should be denied as a matter of  
18 policy. Allowing a rapist father to have parental rights to a child conceived by rape  
19 gives imposes significant control over the victim mother and the child. Because  
20 Mont. Code Ann. § 41-3-801 *et seq.* does not require a criminal conviction for the  
21 termination petition to proceed, there is a remedy for rape victims forced to share  
22 parental rights with their rapists in circumstances when the rapist could not be  
23 convicted. This includes instances when a conviction was no longer possible  
24 because the criminal statute of limitations had already run. Rape victims should  
25 not have to share custodial rights to a child conceived by rape with the offender.  
26  
27  
28

1 In the present case, Ms. Disney is harmed every time she is forced to have  
2 contact with Mr. Staat, which under the terms of the court-ordered parenting  
3 arrangement is several times a week. T.P.D.C. is continually harmed by being  
4 parented by the offender and by exposure to the repeated traumatization of her  
5 primary parent and custodian. Imposition of a shorter statute of limitations than  
6 that of a criminal proceeding for sexual intercourse without consent would render  
7 Section 41-3-801 *et seq.* ineffective in many of the cases it was enacted to remedy.  
8 Furthermore, given this claim did not exist until enactment by the legislature on  
9 October 1, 2017, there is nothing stale about this termination petition.  
10  
11

12  
13 **B. Laches**

14 Applying the doctrine of laches in this instance would lead to an  
15 extraordinarily inequitable result.  
16

17 The doctrine of laches is an equitable remedy asserted as an affirmative  
18 defense under M. R. Civ. P. 8(c)(1) by which a court denies relief to a claimant  
19 who has unreasonably delayed or been negligent in asserting a claim and the delay  
20 or negligence has prejudiced the party against whom relief is sought. Algee v.  
21 Hren, 2016 MT 166, ¶ 7, 384 Mont. 93, 375 P.3d 386. Although time is a factor  
22 when determining laches elements, “laches is not a mere matter of elapsed time,  
23 but rather, it is principally a question of the equality of permitting a claim to be  
24 enforced. Id. citing Cole v. State ex. rel Brown, 2002 MT 32, ¶ 25, 345 Mont. 12,  
25 192 P.3d 186.  
26  
27  
28



1 In the present instance, Ms. Disney did not previously have a legal avenue to  
2 bring her civil claim: Mont. Code Ann. § 41-3-801 *et seq.* was not in force until  
3 October 1, 2017. Additionally, Ms. Disney has not previously raised her claim  
4 against Mr. Staat for fear of retaliation. Mr. Staat is an individual she is forced by  
5 court order to maintain contact with on a weekly basis; further, she is being court-  
6 ordered to remain in contact while the determination and appeal of her termination  
7 petition is pending.  
8

10 Furthermore, the application of laches is primarily a question of equity.  
11 Algee, ¶ 6. It is inequitable to force Ms. Disney to share custody of T.P.D.C. with  
12 the individual who assaulted her. It is also inequitable to T.P.D.C. and contrary to  
13 T.P.D.C.'s best interests to be parented by a rapist and to force T.P.D.C.'s mother to  
14 maintain ongoing contact with the offender. Application of the doctrine of laches  
15 in this instance would lead to an extraordinarily inequitable result.  
16

### 18 **C. Res Judicata**

19 Res judicata, otherwise known as claim preclusion, bars re-litigation of a  
20 claim that a party has already had the opportunity to litigate. Touris v. Flathead  
21 County, 2011 MT 165, ¶ 12, 361 Mont. 172, 258 P.3d 1.  
22

24 In the present instance, the doctrine of res judicata does not bar Ms. Disney's  
25 termination petition. The subject matter of Ms. Disney's current claim has not yet  
26 been litigated and is not the same as that of the past action between Ms. Disney and  
27 Mr. Staat to determine the custodial arrangement for T.P.D.C. The subject matter  
28

1 of the termination petition is whether Mr. Staat subjected Ms. Disney to sexual  
2 intercourse without consent and whether this caused the conception of T.P.D.C.  
3 The subject matter of the previous judgment was what parenting plan and custody  
4 arrangement was in T.P.D.C's best interests. The issue Mr. Staat's rape of Ms.  
5 Disney was not raised or addressed by any Court in any fashion whatsoever during  
6 the parenting action.  
7

8 Ms. Disney has had no previous opportunity to litigate this claim. Mont.  
9 Code Ann. § 41-3-801 et seq. was not in force until October 1, 2017 —  
10 approximately a year after the parenting plan was agreed upon. Ms. Disney was  
11 not previously able to petition for the termination of Respondent's parental rights.  
12

#### 13 **D. Collateral Estoppel**

14 As is the case with res judicata, the argument of collateral estoppel does not  
15 bar the Court from considering the rape leading to T.P.D.C.s conception and  
16 terminating Mr. Staat's rights.  
17

18 In In re the Adoption of A.F.M., 102 A.L.R. 5th 701, 15 P.3D 258 (Alaska  
19 2001), the mother petitioned to terminate the biological father's paternal rights on  
20 the grounds that the child, A.F.M., was conceived when the biological father raped  
21 her. The biological father alleged the mother's termination petition was barred by  
22 the doctrine of collateral estoppel because both parents had previously litigated the  
23 custody of A.F.M. Id., 15 P.3D at 267. At the time the custody issue was litigated,  
24 the mother did not assert either the biological father raped her nor seek to deny  
25  
26  
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1 visitation on those grounds. Id. Nevertheless, the AFM Court held the biological  
2 father's reliance upon collateral estoppel failed because the question of the  
3 biological father's rape had not been litigated in the previous proceeding. Id., 15 P.  
4 3D at 268.

5  
6 The present instance is analogous to In re the Adoption of A.F.M. Though a  
7 prior custody determination involving the same parties was adjudicated, the issue  
8 of Respondent's rape was not raised by the parties in any pleadings and not  
9 submitted to the trial court for determination. Mr. Staat's rape of Ms. Disney and  
10 the conception of T.P.D.C. as a consequence of the rape has not been litigated prior  
11 to the filing of the termination petition. Further, as Mont. Code Ann. § 41-3-801  
12 *et seq.* had not been enacted until October 1, 2017 — approximately a year after  
13 the final parenting plan was resolved — no legal avenue previously existed for Ms.  
14 Disney.  
15  
16  
17

18 Accordingly, the doctrine of collateral estoppel does not apply in this  
19 instance and this court must **deny** Respondent's motion to dismiss.  
20

### 21 **E. Judicial Estoppel**

22 Ms. Disney's present petition against Appellee is not barred by judicial  
23 estoppel. Judicial estoppel prevents a litigant from asserting an inconsistent,  
24 conflicting, or contrary position to the one previously asserted in the same or  
25 previous proceeding. Simpson v. Simpson, 2013 MT 22, ¶ 27, 368 Mont. 315, 294  
26 P.3d 1212.  
27  
28

1 Ms. Disney's present argument for the termination of Appellee's parental  
2 rights is not inconsistent with the position she took during her prior parenting plan  
3 adjudication. At the time this parenting plan was adjudicated, Ms. Disney did not  
4 have a legal avenue to terminate Respondent's parental rights as no statute  
5 allowing the termination of rapists' parental right in the absence of criminal  
6 conviction existed at the time. The law provided no protection for a rape victim  
7 forced to share custody with a rapist who was also the biological parent of her  
8 child.  
9

10  
11 In addition to the absence of the existence of Mont. Code Ann. § 41-3-801 *et*  
12 *seq.* until October 1, 2017, Ms. Disney did not have financial means to proceed  
13 against Appellee. Appellee misrepresents facts about the extent of Ms. Disney's  
14 legal representation during her prior parenting action with Appellee. Through  
15 much of the parenting plan action, Ms. Disney proceeded *pro se*; when an attorney  
16 gifted Ms. Disney limited assistance on her parenting contest *pro bono publico*,  
17 Mont. Code Ann. § 41-3-801 *et seq.* did not exist.  
18  
19  
20

21 Even if Mont. Code Ann. § 41-3-801 *et seq.* had existed, Ms. Disney did not  
22 have the financial resources and it is highly improbable a competent litigator  
23 would have assumed her termination case *pro bono*  
24

25 **E. Law of the Case**  
26  
27  
28

1 The law of the case is a doctrine of judicial intervention precluding courts  
2 from considering issues previously decided by the same court, or a higher court.  
3 Scott v. Scott, 283 Mont. 169, 175, 939 P.2d 998, 1001 (1997).

4  
5 Here, Respondent's rape of Ms. Disney that caused T.P.D.C's conception has  
6 not been previously considered by the Court. As is the case with issue preclusion  
7 and claim preclusion, the law of the case doctrine does not apply.

8  
9 **F. Equitable Estoppel**

10 The six elements of equitable estoppel are: 1) conduct that constitutes the  
11 concealment of a material fact, 2) the material fact is known to the concealing  
12 party at the time of concealment or else this knowledge may be imputed to the  
13 concealing party, 3) the truth of the facts is unknown to the party claiming the  
14 benefit of estoppel at the time of concealment, 4) the concealment is done with the  
15 intent that the other party will act upon it to his detriment, 5) the conduct must be  
16 actually relied upon by the other party, and 6) the reliance of the other party caused  
17 him to suffer some type of detriment. In re Marriage of K.E.V., 267 Mont. 323,  
18 331, 883 P.2d 1246, 1251 (1994).

19  
20  
21  
22 In the present instance, Appellee is taking a ludicrous position: he says he  
23 does not know that he raped Ms. Disney and she has concealed this material fact  
24 (his rape) from him until now. Mr. Staat was present when he raped Ms. Disney  
25 and knows the intercourse that conceived T.P.D.C. was nonconsensual. Ms.  
26 Disney is incapable of concealing his own conduct from himself, it would be  
27  
28

1 impossible for her to do so. Appellee cannot logically claim to be surprised or  
2 allege he is unprepared to be confronted with his own rape that he perpetrated.

3 **G. Retroactive Application**

4 Appellee's motion to dismiss on the basis retroactive application of the  
5 statute should not be applied is without merit as rape has always been illegal in  
6 Montana and Appellee's parental rights could always have been terminated for the  
7 rape he committed of Ms. Disney if a criminal conviction has existed.  
8

9  
10 A statute does not operate retroactively merely because it is applied to  
11 conduct occurring before its enactment. In re M.A.L., 2006 MT 299, 334 Mont.  
12 436, 148 P.3d 606. "Retroactive," for purposes of determining whether a statute  
13 applies retroactively, means a statute which takes away or impairs vested rights,  
14 acquired under existing laws, or creates a new obligation, imposes a new duty or  
15 attaches a new disability, in respect to transactions already past. Mont. Code Ann.  
16 § 1-2-109.  
17

18  
19 Rape is prohibited by Montana law. Mont. Code Ann. § 45-5-503. Parental  
20 rights may be terminated for rape. Mont. Code Ann. §§ 41-423(2)(a), 41-3-609(1)  
21 (c).  
22

23  
24 In the present matter, Appellee did not have the right to assault Ms. Disney  
25 and obtain parental rights to T.P.D.C. who was conceived from that rape prior to  
26 Mont Code Ann. § 41-3-801 et seq. coming into law October 1, 2017.  
27  
28

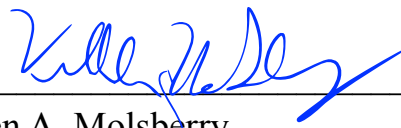
1 Rape was a crime before § 41-3-801's enactment. Mont. Code Ann. §  
2 45-5-503. Appellee's parental rights could have been terminated in the case of a  
3 conviction before Mont. Code Ann. § 41-3-801 *et seq.* was enacted October 1,  
4 2017. Mont. Code Ann. §§ 41-423(2)(a), 41-3-609(1)(c). The application of  
5 Mont. Code Ann. § 41-3-801 *et seq.* in this proceeding does not take away a right  
6 Appellee previously possessed or impose a new obligation upon him.  
7

8  
9 This Court must **deny** Appellee's motion to dismiss because a termination of  
10 Appellee's parental rights in accordance with Mont. Code Ann. § 41-3-801 is not a  
11 retroactive application of the statute merely because Appellee's assault occurred  
12 before October 1, 20-17 when Mont. Code Ann. § 41-3-801 *et. seq.* was enacted.  
13

### 14 CONCLUSION

15 Based upon the foregoing arguments, the theories espoused by Mr. Staat for  
16 denying the termination petition outright do not apply doctrine and the trial court  
17 appropriately **denied** Appellee's motion to dismiss.  
18

19  
20  
21 DATED this 11th day of March, 2019

22  
23   
24 Kathleen A. Molsberry  
25 Lowy Law, PLLC  
26  
27  
28

**CERTIFICATE OF SERVICE**

I certify that on the 11th day of March, 2019, I filed the foregoing with the Clerk of the Montana Supreme Court; and that I have mailed it to the Clerk of the District Court and each attorney of record as follows:

Andre Gurr, Attorney for Appellee  
Garden City Law, PLLC  
1917 S. Higgins Ave.  
Missoula, Montana 59801

and

Tami Disney, Appellant





**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief is proportionally spaced typeface of 14 points and does not exceed 5,000 words.



## **CERTIFICATE OF SERVICE**

I, Kathleen Anne Molsberry, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant Reply and Answer to Cross Appeal to the following on 03-11-2019:

Matthew Benjamin Lowy (Attorney)  
2419 Mullan Road  
Suite B  
Missoula MT 59808  
Representing: Tami Disney  
Service Method: eService

Andre Gurr (Attorney)  
1917 S. Higgins  
Missoula MT 59807  
Representing: Brandon Staat  
Service Method: eService

Electronically Signed By: Kathleen Anne Molsberry  
Dated: 03-11-2019