

IN THE SUPREME COURT OF THE STATE OF MONTANA

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|-------------------------|---|----------------------|
| IN RE Parenting of A.H. |) | |
| A Minor Child, |) | |
| |) | CAUSE NO. DA-18-0577 |
| EDWARD "JIMMY" HAERR, |) | |
| Petitioner/Appellee, |) | |
| vs. |) | |
| |) | |
| TIFFANY P. WHELAHAN, |) | |
| Respondent/Appellant. |) | |

REPLY BRIEF OF APPELLANT/RESPONDENT, TIFFANY WHELAHAN

On Appeal from the Montana Sixth Judicial District Court, the Honorable Brenda

Gilbert presiding, Cause Number DR-15-156

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FACTUAL BACKGROUND

In all pleading in District Court, Appellee referred to himself in court and in pleadings as “Jimmy”. Now on appeal, he refers to himself as “James”. Tiffany will continue to refer to Appellee as Jimmy herein as she had throughout this action for consistency. Jimmy’s Response Brief contains many statements and allegations that were not part of the record or misstated. As a result, Tiffany files this Reply Brief to address the inaccuracies.

In Jimmy’s Response Brief, he states without citation, “There were multiple vexatious parenting actions by Tiffany to interfere with, and inhibit parenting of A.H. by, from November 2015, to April 2018.” There is no record of any vexatious actions by Tiffany.

Jimmy fails to acknowledge he had an Order of Protection issued against him, limiting his parenting of A.H. in 2015. (Opening Brief, Exhibit 3). In January 2016, the Court heard Tiffany’s request for an Order of Protection. *Id.* The District Court issued the Order stating, “the Court finds Tiffany is in danger of harm, and Ordered the Protective Order to continue until September 1, 2016, prohibiting Jimmy from having contact with Tiffany, and the other statutory requirements of an Order of Protection. *Id.* The Court provided Jimmy with one overnight with A.H. every other weekend. *Id.* Jimmy’s parenting time was also to be supervised by Jimmy’s father. *Id.* Jimmy’s parenting time, would not commence until he engaged

1 in counseling for PTSD, and provided documentation to the Court of compliance.

2 *Id.*

3 The parties attended mediation, on April 7, 2016, and filed their
4 Stipulated Temporary Parenting Plan. (Opening Brief, Exhibit 2). The stipulated
5 plan provided Jimmy time with A.H. two overnights a month, and allowed for
6 holiday time. *Id.* Since January, 2016, Jimmy had not requested a final hearing. *Id.*
7 Jimmy himself never requested a final hearing for a Final Parenting Plan. The record
8 clearly shows Jimmy was happy to be the two overnight a month parent to A.H. until
9 Tiffany wanted to move out of the State. Tiffany's Proposed Parenting Plan gave
10 Jimmy more time with A.H. in the event A.H. was able to move with her. (Opening
11 Brief, Exhibit 11). The record proves there were not "multiple vexatious parenting
12 actions by Tiffany to interfere with and inhibiting parenting of A.H."

13 Jimmy himself only needed to request a hearing on the Final Parenting
14 Plan. The Rules of Civil Procedure did not require a party to request an amendment
15 to a Temporary Parenting Plan.

16 In Jimmy's Response Brief, page 6, he mentions his attached Exhibit
17 12. Tiffany objected to this exhibit as expressed in the transcript. (Trans. pg. 100,
18 ln. 6-15). The exhibit was admitted over Tiffany's objections, and consisted of a
19 typed sheet of Jimmy's account of the events of the action, to bolster his credibility.
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1 The record shows that Jimmy did not provide proof of his PTSD
2 counseling to Tiffany as Ordered by the Court, which is why she filed in 2016, to
3 suspend the interim parenting time. Tiffany was not aware Jimmy had filed proof of
4 his PTSD counseling with the Court, as he did not serve a copy on Tiffany.
5

6 Jimmy, in his Response Brief, pg. 7, states, “James was forced to defend
7 a civil suit brought by Tiffany in Justice Court.” Jimmy mentions this Justice Court
8 action, which had nothing to do with the parenting of A.H. Jimmy cites to
9 Appellant’s Exhibit 6, however, Exhibit 6 has nothing to do, nor is it associated with
10 Jimmy’s statements on page 7 of his Response Brief.
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13 Jimmy attempts to use this uncited action as an attempt to use it as
14 “vexatious action” interfering with his parenting. There is no evidence of this.
15 Furthermore, such action in Justice Court would have no bearing on Jimmy’s
16 parenting of A.H.
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18 Jimmy states at the end of 2017, he made several inquiries to Tiffany
19 about “amending the Parenting Plan”, yet only cites to his typed version of events in
20 his Exhibit 12 to support his statement. The record itself does not show any
21 vexatious actions. In fact, Jimmy never filed a request for Final Hearing on
22 Parenting Plan for A.H.
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25 Jimmy alleges on page 7 of his Response Brief, Tiffany accused Jimmy
26 of sexually abusing A.H., however, this is not true. Tiffany described A.H. making
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1 statements her grandpa touched her, and discovered injuries to her daughter's genital
2 area, and this clearly occurred during Jimmy's time with A.H. (Opening Brief,
3 Exhibit 5). Tiffany's motion and affidavit describe a mother's concern for her four-
4 year-old child, when she physically observed injuries to A.H., resulting in the nurse
5 reporting the abuse to law enforcement. *Id.* Tiffany did not state specifically Jimmy
6 had abused A.H., as she didn't know, but something happened to A.H. while in the
7 care of Jimmy. *Id.* Evidence indicated Jimmy's father may have been a cause of the
8 abuse. *Id.*

11 Jimmy claims Tiffany had previously accused Seth, B.L.'s father, of
12 sexually abusing the child. (Opening Brief, pg. 9). However, the medical record for
13 B.L. does not show Tiffany accused Seth of child sexual abuse, and in fact Tiffany
14 was called from work, like Seth when B.L. was being treated for an infection to his
15 genital area. (Lyden Opening Brief, Exhibit 11).

18 Jimmy argues on page 9, of his Response Brief, there was evidence of
19 Tiffany using alcohol daily, yet Tiffany denied this, kept a beautiful home, worked
20 full time and many weeks overtime to support her children, as Jimmy never paid
21 child support. (Trans. pg. 46, ln. 8-11, pg. 169, ln. 6-25, pg. 170, ln. 1-10, Opening
22 Brief, Exhibit 10). However, neither Seth, nor Jimmy had brought any concern
23 about Tiffany's alcohol use in years before Tiffany filed her Intent to Move.
24 Additionally, neither father had been in Tiffany's home for many years.

1 A.H.'s counselor never mentioned the child was behind
2 developmentally, yet Jimmy tries to claim the child did not know how to count to
3 ten, or know her colors, and must be behind developmentally. (Response Brief pg.
4 10). Jimmy relies on his girlfriend's mother's testimony, he calls the "registered
5 nurse" who only saw A.H. once a month during Jimmy's time with A.H. Tiffany
6 testified A.H. is intelligent, knows her colors and certainly can count to twenty.
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8 (Trans. Pg. 172, ln. 15-25).
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10 Recall, A.H.'s counselor, Hettie, described A.H. as very independent,
11 doesn't take no for an answer, curious, adventurous, strong-willed, bundle of joy.
12 (Trans. pg. 9, ln. 16-18). Tiffany described A.H. as a fireball, very social, athletic
13 and coordinated, communicates well, and is attentive to detail. (Trans. pg. 30, ln. 18-
14 23). A.H.'s counselor never testified A.H. had any developmental deficiencies, in
15 fact, she testified A.H. was curious, adventurous, and strong willed. (Trans. pg. 9,
16 ln. 17-19). In fact, Jimmy himself testified that A.H. is "extremely sharp, she picks
17 up on things as quick as any kid I've ever seen." (Trans. pg. 92, ln. 16-20).
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21 Jimmy claims the District Court, "implemented immediate requirements
22 for the child to attend school to remediate learning deficits", when in fact the District
23 Court actually stated, "Jimmy will be entitled to enroll A.H. in preschool as soon as
24 there is an opening". (Opening Brief, Exhibit 1). Recall, A.H. was only four years
25 old at the time of the hearing.
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1 Jimmy states, on page 10 of his Response Brief, “Tiffany employs a
2 victim mentality without taking responsibility for her own actions.” This is not
3 supported by any testimony or evidence at trial. Jimmy claims Tiffany can beat up
4 men and drink to excess daily, without any supportive evidence, when in reality, the
5 records showed Tiffany kept a structured, clean home, financially supported her two
6 children on her own, worked fulltime, and many hours of overtime to support her
7 children. (Opening Brief). Jimmy paraphrases and misstates the evidence.
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10 Jimmy ignores the medical records A.H. had physical injuries to her
11 hymen, and to the right of her clitoris. These are signs of abuse, as testified to by
12 A.H.’s counselor. Recall, A.H. told her counselor that Jimmy’s father touched her,
13 which supports the physical evidence.
14

15 A.H.’s counselor testified she did not believe the child was being
16 coached or that Tiffany was being dishonest with her. (Trans. pg. 18, ln. 7-10,
17 Trans. pg. 22, ln. 19-21). A.H. expressed to her counselor she was angry with
18 Jimmy. (Trans. pg. 10, ln4-6). A.H. spoke to Hettie about being touched by
19 Jimmy’s father. (Trans. pg. 10, ln. 6-7).
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22 A.H.’s counselor testified A.H. said Jimmy threatened to “kill Tiffany if
23 he had to pay child support.” (Trans. pg. 17, ln. 10-12). This is supported by the
24 fact Jimmy never paid child support after he and Tiffany separated. (Trans. pg. 36,
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1 ln. 11-15). Tiffany testified Jimmy does not pay for health insurance as ordered, and
2 she has A.H. insured by Montana Healthy Kids. (Trans. pg. 36, ln. 10).

3 Yet, Jimmy argues Tiffany did not research her employment in
4 Michigan in his Response Brief. Tiffany has worked in the grocery store field for 17
5 years. It stands to reason Tiffany would be able to get a job in that field. The major
6 reasons for moving were Tiffany's home was being sold, her mother had purchased a
7 home for Tiffany and the children in Michigan, and Tiffany had support of family in
8 Michigan. (Opening Brief, Exhibit 10).

9 Jimmy argued on page 9 of his Response Brief Tiffany did not
10 communicate well, yet Tiffany testified she and Jimmy have a very different
11 relationship than she and B.L.'s father have. (Trans. pg. 36, ln. 22-25). Tiffany and
12 B.L.'s father communicated almost daily and she could send him photographs of
13 B.L. *Id.* However, with Jimmy, Tiffany cannot communicate with him, and he does
14 not respond to photos she sends him of A.H. (Trans. pg. ln. 3-7).

15 Karl Bernstein, ex-boyfriend to Tiffany from 2016, testified Tiffany and
16 B.L.'s father, Seth Lyden, have had a good co-parenting relationship, and Tiffany
17 has always supported B.L. and Seth's relationship. (Trans. pg. 151, ln. 17-25). A
18 direct contradiction that Tiffany is negative regarding Jimmy in front of A.H. Karl
19 testified Tiffany encouraged B.L. to love Seth, and encouraged the father/son
20 relationship. (Trans. pg. 152, ln. 2-7). Karl testified if Tiffany said anything
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1 negative about Seth, the children were not present. (Trans. pg. 153, ln. 19-21).

2 Tiffany testified she did not speak negatively about Jimmy in front of A.H. (Trans.
3 pg. 170, ln. 11-16, pg. 171, ln. 14-25). Yet, the District Court directly contradicted
4 the testimony of Karl, and found, “comments regarding both children’s fathers was
5 demonstrated in front of them”. (Opening Brief, Exhibit 1, pg. 7, ln. 6-7).
6

7 CONCLUSION

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9 Tiffany’s proposed modified plan requested Jimmy’s time with A.H. be
10 three full weeks in summer months, a week in spring months, and a week in winter
11 months. (Opening Brief, Exhibit 11). Tiffany’s modified plan provided Jimmy with
12 more consecutive time with A.H., and increased his days with A.H. from two
13 overnights a month, totaling 24 days a year to 35 days a year. *Id.* It is clear from the
14 District Court’s findings that Tiffany was being punished, and the Court Order was
15 not in the best interests of A.H.
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18 The District Court’s findings were not supported by facts in evidence or
19 by substantial credible evidence, and it clearly abused its discretion when it denied
20 Tiffany’s request to move to Michigan with A.H. Jimmy is now using the District
21 Court’s mischaracterization of the facts and evidence in his Response Brief.
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24 By misconstruing the facts and evidence, the District Court did not act
25 with A.H.’s best interests in mind when it denied Tiffany’s move with A.H., and
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1 when it modified the parenting plan, limiting Tiffany's time with A.H. if she did or
2 did not move.

3 This case is similar to *In re the Marriage of Thorner*, 2008 MT 270, 345
4 Mont. 194, 190 P.3d 1063, as Jimmy has failed to pay child support, despite being
5 ordered to and Tiffany's request to move involved employment opportunities in
6 Michigan, the lower cost of living, as opposed to Montana, and Jimmy's time with
7 A.H. under Tiffany's proposed parenting plan provides him more time with A.H.
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9 *In re Marriage of Guffin*, 2009 MT 169, 350 Mont. 489, 209 P.3d 22,
10 the District Court may not penalize mother for exercising her right to travel by
11 removing her as the primary custodial parent of the children, and it was abuse of
12 discretion to do so. Any decision as to the custody of children must be based upon a
13 careful examination of what is in their best interests. *Id.* This is what the District
14 Court's Order did to Tiffany, punished her for the necessary move to Michigan when
15 she was the primary parent to A.H.
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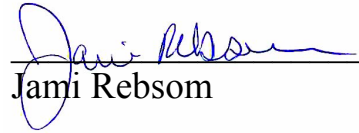
17 The case at hand shows the District Court punished Tiffany for wanting
18 to move. The Court had no reasonable grounds to take A.H. away from Tiffany, who
19 had been the primary parent, giving her very limited time with her daughter if she
20 moved, and giving Jimmy equal time if she did not
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22 The District Court acted contrary to the decision it made in *In Re S.E.L.*,
23 and against the Supreme Court of this State's precedent in family law cases where a
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1 mother desires to move for employment, and family support, and is the primary
2 parent to the child, who is young and has limited time with father. Each of the
3 District Court's findings were not based on credible evidence, or taken completely
4 out of context and mistakenly misconstrued. The transcript of the hearing proves it
5 was in A.H.'s best interest to move to Michigan with Tiffany.
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7 The District Court ignored the factors set forth in § 40-4-212, MCA, as
8 they related to the best interests of A.H. in this case. By limiting Tiffany's time with
9 the child in either event was an abuse of discretion and not in the child's best
10 interest. Consequently, the District Court's ruling must be reversed, and A.H. should
11 be allowed to move with Tiffany to Michigan.
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14 Submitted this 14th day of March, 2019.
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17 Jami Rebsom
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify this Reply Brief is written with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 2312 excluding the Certificate of Compliance and Certificate of Service.

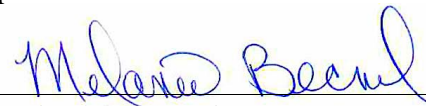
DATED this 14th day of March, 2019.

By 
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CERTIFICATE OF SERVICE

I hereby certify that I served a full, true and accurate copy of the foregoing document via E-Mail on the 14th day of March, 2019, to the following named person:

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I, Jami L. Rebsom, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-14-2019:

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