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.

REPLY 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.

Appearances:

Matthew Lowey
Kathleen Holsberry
Lowy Law, PLLC
2419 Mullan Rd., Suite B
Missoula, Montana 59808
documents@lowylawfirm.com
matt@lowylawfirm.com
kathleen@LowyLawFirm.com
Attorney for Appellant.

André Gurr
GARDEN CITY LAW, PLLC
1917 S. Higgins Avenue
Missoula, MT 59801
(406) 926-6996
andre@gardencitylaw.com
Attorney for Appellee/Cross-Appellant.

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SUMMARY OF REPLY ARGUMENT

As a matter of first impression, the newly enacted § 41-3-801, et. seq. lacks sufficient safeguards and timelines as drafted, requiring articulation of reasonable limitations by this Court to protect against misuse and absurd results. Polling by the undersigned indicates a virtual tsunami of denied § 41-3-801 petitions attempting to usurp appropriate parenting proceedings. Flippant misuse of § 41-3-801 will continue if this Court does not clarify appropriate limitations.

In this case, Mother's petition to terminate should have been dismissed since she alleged "rape" for the first time four-years after the child was born, after parentage proceedings, and after Mother negotiated and stipulated to a parenting plan. Montana's statutory scheme required the parties and court to consider alleged physical/sexual abuse when determining father-daughter contact was in T.P.D.C.'s best interest. § 40-4-212(1)(f), MCA. Rather than enabling Mother's changed position and attempt to vitiate the stipulated parenting plan, and forcing Father to expend substantial time and resources to debunk the stale (and false) claims, the District Court should have dismissed Mother's petition to terminate pursuant to the two-year statute of limitations for assault/battery, laches, res judicata, collateral estoppel, judicial estoppel, law of the case, equitable estoppel, and/or prohibition against retroactive application of laws not authorized to be applied retroactively.

REPLY ARGUMENT

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

A. Statute of Limitation.

Mother presents a red-herring argument her petition was not time barred because criminal prosecution would still be permitted by Montana law. Mother did not petition under § 41-3-801(2)(a), MCA following a criminal conviction for sexual intercourse without consent. Rather, Mother petitioned under § 41-3-801(2)(b), MCA alleging sexual assault in a civil proceeding. *Pet. To Terminate*, 1 (D.C. Doc. 106). There was no criminal charge, is no criminal charge, and the speculative possibility of criminal charges is irrelevant to whether the statute of limitations for civil actions applies. Mother's petition is purely civil, and based upon the civil proceeding prong of § 41-3-801(2)(b), MCA.

Mother misleads this Court by arguing there is no legal authority for applying the civil statute of limitation for actions based on assault or battery. Section 27-2-105 provides "[a]ll civil actions must be commenced within the periods prescribe in part 2 except when another statute specifically provides a different limitation." As Mother admits in her response brief, § 41-3-801 et. seq. does not provide a different limitation than set forth in Title 27 Part 2. Mother admits her petition to terminate is based upon an allegation of "sexual assault." *Appellant's Reply*, 15:4.

The statute of limitations for actions arising from assault/battery in Montana is two-years:

> (3) The period prescribed for the commencement of an action for liable, slander, assault, battery, false imprisonment, or seduction is within 2 years.

Section 27-2-204(3), MCA.

Battery is "an intentional contact by one person of another which is harmful or offensive," while assault is an intentional "threat" of harmful or offensive conduct." *Saucier ex rel. Mallory v. McDonald's Restaurants of Mont., Inc.*, 2008 MT 63, ¶62, 73 342 Mont. 29, 179 P.3d 481 (citing M.P.I.2d 9.01). In this case, Mother alleges offensive contact in the form of sexual intercourse which constitutes battery (if Mother's allegations were true).

Under Montana law, civil petitions for relief predicated on allegations of sexual intercourse are barred if not made under the two-year statute of limitations for assault/battery. *Taylor v. Rann*, 106 Mont. 588, 80 P.2d 376, 379 (Mont. 1938)(dismissing action for seduction since brought more than two-years after the first act of sexual intercourse between the parties as barred by two-year statute of limitations). Montana courts continue to apply the two-year statute of limitations to civil assault/battery claims predicated on sexual intercourse. *Beaver v. DNRC*, 1999 Mont. Dist. LEXIS 595 (Mont. 1st Jud. Dist. 1999).

Other jurisdictions likewise apply the two-year statute of limitations for assault/battery actions predicated on allegations of nonconsensual intercourse. *Merkwan v. Leckey*, 376 N.W.2d 52, 53 (S. Dak. 1985)(civil claim predicated on nonconsensual intercourse properly dismissed as barred by limitations since filed five-years after alleged intercourse and applicable two-year period of limitations).

The purpose of statutes of limitation is to ensure "basic fairness" to parties. *E.W. v. D.C.H.*, 231 Mont. 481, 484, 754 P.2d 817, 819 (Mont. 1988). "Statutes of limitations achieve the goal of suppressing stale claims." *Burley v. Burlington N. & Santa Fe Ry. Co.*, 2012 MT 28, ¶ 16, 273 P.3d 825, 828, 364 Mont. 77 (Mont. 2012). Forcing parties (like Father) to defend against stale claims is patently unfair when witnesses and documentation will inevitably be unavailable or lost after prolonged lapses of time.

The Uniform Parentage Act ("UPA") further supports application of the two-year statute of limitations. The UPA has a provision similar to § 41-3-801, MCA, allowing a mother to preclude parentage if a child is conceived of nonconsensual intercourse:

> (a) In this section, "sexual assault" means [cite to this state's criminal rape statues].
> (b) In a proceeding in which a woman alleges that a man committed a sexual assault that resulted in the woman giving birth to a child, the woman may seek to preclude the man from establishing that he is a parent of the child.
> (c) **This section does not apply if**:
> (1) the man described in subsection (b) has **previously been**

> **adjudicated to be a parent** of the child; or
> (2) after the birth of the child, the man **established a bonded and dependent relationship** with he child which is parental in nature.
> (d) Unless Section 309 or 607 applies, a woman must file a pleading making an allegation under subsection (b) not later than **two years** after the birth of the child. The woman may file the pleading only in a proceeding to establish parentage under this [act].

Uniform Parentage Act, § 614 (2017), attached as **Appendix 4**.[1] The legislative history reveals the Montana Legislature failed to consider these uniform safeguards, and provided no reason for ignoring the same. See *House and Senate Judiciary Transcripts* attached as **Appendix 2** and **Appendix 3** to *Brief of Appellee and Cross-Appellant* (filed Feb. 7, 2019).

Public policy considerations support applying the two-year statute of limitations and safeguards provided in the UPA to avoid absurdities and misuse of § 41-3-801, MCA. For example, without reasonable safeguards (whether by statute of limitations, collateral estoppel, non-retroactivity, or other safeguards), a mother could petition to terminate after 14 years of established father-child contact. This would facilitate an absurd result and and have catastrophic emotional and psychological effects on minor children if allowed. In this case, T.P.C.D. has a close and loving relationship with her Father, Mother noticeably failed to mention any allegation of sexual assault during the parentage proceedings

1 The numbering of Appendix 4 is a continuation of Appendices 1-3 at *Brief of Appellee and Cross-Appellant* (Feb. 07, 2019).

or parenting plan proceedings, and Mother judicially admitted the stipulated parenting plan is in the child's best interests. *Stipulated Parenting Plan* (D.C. Doc. 85). Besides the fact Mother's allegations are false, the child would be devastated by suddenly severing the father-daughter relationship. Allowing application of § 41-3-801, MCA without reasonable safeguards runs afoul of the public policy to safeguard family relationships. § 40-1-101, MCA.

Mother's four-year old stale allegation should have been dismissed as time-barred by the two-year statute of limitations, UPA safeguards, collateral estoppel, and other safeguards.

B. Doctrine of Laches.

Mother misrepresents she was unable to terminate Father's parenting rights prior to §41-3-801, MCA being enacted. If Mother had pursued criminal charges and obtained a conviction, Mother could have terminated Father's rights under § 41-3-609(1)(c) or as part of the criminal matter under § 45-5-503(8).

Moreover, Mother had the opportunity to allege physical/sexual abuse in the parenting matter prior to the passing of §41-3-801, MCA since "physical abuse…by one parent against the other parent" is a necessary consideration in determining the best interest of the child. § 40-4-212(1)(f), MCA. Mother had opportunity to raise her claim prior to the passage of § 41-3-801, MCA.

Mother did not allege father-daughter contact was "inequitable" or "contrary to T.P.D.C.'s best interests" until after the District Court denied Mother's petition for an Order of Protection ("OOP"). Before the District Court denied her petition for an OOP, Mother stated in her sworn *Affidavit*: "I want to support [the father-daughter] relationship." *Hr. Tr.* 162:5-6 (Mar. 2, 9, and 28, 2018)(quoting *Mother's Affidavit* at D.C. Doc. 18). Further, Mother's own *Affidavit* admits requesting Father take parenting classes so he could parent T.P.D.C. and Mother offered Father "at least weekly" parenting time. *Id*. at 160:13-16, 161: 6-7. Mother's representations where made prior to the District Court "forcing" Mother to maintain a parenting relationship with Father. Mother's sworn representations are telling.

Regardless, Mother's petition was barred by the doctrine of latches since Mother failed to timely make her allegations, the four-year passage of time prejudices Father's ability to defend against the stale claim, and the delay renders application of § 41-3-801 inequitable (and is especially inequitable to T.D.P.C. considering the long-established daughter-father relationship).

"Section 1-3-218, MCA, provides that '[t]he law protects the vigilant before those who sleep on their rights.'" *In re Marriage of Hahn*, 263 Mont. 315, 318, 868 P.2d 599, 601 (Mont. 1994). The doctrine of laches is the practical application of the maxim, "Equity aids only the vigilant." *Filler v. Richland County*, 247 Mont.

285, 290, 806 P.2d 537, 540 (Mont. 1994). The doctrine of laches is an equitable concept that applies when a person negligently fails to timely assert a right and there is an unexplained delay of such duration or character as to render the enforcement of the asserted rights inequitable. *Hahn*, 263 Mont. at 318, 868 P.2d at 601. A party is presumptively aware of his or her rights; where the circumstances of which he or she is cognizant are such as to put an ordinary and prudent person on inquiry. *Johnson v. Estate of Shelton*, 232 Mont. 85, 90, 754 P.2d 828, 831 (Mont. 1988).

The doctrine of laches applies when the passage of time prejudices the party asserting laches or has rendered the enforcement of a right inequitable. *Kelleher v. Bd. of Social Work Examiners*, 283 Mont. 188, 191, 939 P.2d 1003, 1005 (1997). Laches is not only a matter of elapsed time but is principally a question of the inequity of enforcing a claim. *Hunter v. Rosebud County*, 240 Mont. 194, 199, 783 P.2d 927, 930 (Mont. 1989).

Mother's delay in making her allegations prejudiced Father. Because of the four-year passage of time, the evidence was stale, including witnesses and documentation. Mother admits her memory is "fuzzy", and with four-years passage of time, Father was disadvantaged to debunk Mother's allegations with recent and precise recollection of details to demonstrate Mother's consent. Further, some witnesses had moved on, and were not available or/are were unable

to provide precise, meaningful, and reliable recollections. Likewise, some documentation was misplaced, lost, or otherwise unavailable due to the long passage of time. The four-year delay inherently prejudiced Father's ability to defend against Mother's scurrilous and vexatious accusation. Fortunately, Father was able to access digital copies of text messages in this particular case. Other Fathers may not be so lucky.

Mother had ample opportunity to bring a claim of nonconsensual intercourse against Father and failed to do so for nearly four-years. Mother could have raised her allegations when she initially filed her *Petition for Establishment of Permanent Parenting Plan* (D.C. Doc. 3), when she prepared and filed one of her many affidavits, during her multiple contacts with CFS, or when the parties negotiated the *Final Stipulated Parenting Plan* (D.C. Doc. 85). Mother never did.

Mother (and the District Court) were required to consider "physical abuse…by one parent against the other" in determining T.D.P.C.'s best interests and adopting the *Final Stipulated Parenting Plan.* § 40-4-212(1)(f), MCA.

Mother's explanation for her delay is she purportedly could not afford counsel and did not know her rights. *Affidavit of Tami Disney*, ¶3 (D.C. Doc. 108). Mother misleads the Court. Mother was represented by her attorney (then Lucy Hansen) when the parties engaged in settlement conference and Mother agreed to the *Final Stipulated Parenting Plan*, (Sep. 29, 2016)(doc. 85).

Furthermore, Mother's attorney signed and approved the stipulated parenting agreement. *Final Stipulated Parenting Plan*, ¶ 17 (Sep. 29, 2016)(D.C. Doc. 85).

The District Court should have dismissed Mother's petition to terminate pursuant to the doctrine of laches.

C. Res judicata.

When final judgment is entered on the merits, res judicata is an absolute bar to a subsequent action between the same parties, upon the same claim or demand. *Scott v. Scott*, 283 Mont. 169, 175, 939 P.2d 998, 1001 (Mont. 1997).

Res judicata applies when the following four elements are satisfied: (1) the parties are the same; (2) the subject matter of the present and past actions is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and to the issues. *Kullick v. Skyline Homeowners Association*, 2003 MT 137, ¶ 17, 316 Mont. 146, 69 P.3d 225.

Res judicata applies not only to issues that were raised, but also bars issues that could have been or **should have** been raised in the prior litigation. *Xu v. McLaughlin Research Inst. for Biomedical Sci., Inc.*, 2005 MT 209, ¶ 35, 328 Mont. 232, 119 P.3d 100 (internal citation omitted)(affirming summary judgment pursuant to res judicata and collateral estoppel where previous claims involving same parties and issues were dismissed with prejudice).

When considering whether to terminate parental rights, the court should also consider the best interest of the children. *In re J.W.*, 2013 MT 201, ¶ 26, 371 Mont. 98, 307 P.3d 274.

In this case, the elements for res judicata are satisfied. In both the parenting plan determination and Mother's petition to terminate: (1) the parties are the same, involving Mother, Father, and T.D.P.C.; (2) the subject matter is the same, involving parenting of T.D.P.C. and the father-daughter relationship; (3) the issues are the same relating to a determination of T.D.P.C.'s best interest, the father-daughter relationship, and purported concerns of abuse by one parent against the other (which §40-4-212(1)(f) required be considered when the *Stipulated Final Parenting Plan* was adopted and 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.D.P.C. and disputing their respective parenting rights.

Mother misinterprets Montana law arguing her claim has not been previously litigated so res judicata does not apply. True, Mother has not previously claimed T.P.C.D. was conceived as the result of a nonconsensual sexual act. However, res judicata applies if the party had the "**opportunity to litigate**" the allegations. *Touris v. Flathead County*, 2011 MT 165, ¶ 12, 361 Mont. 172, 258 P.3d 1. As outlined above, Mother had ample opportunities to raise her allegation,

and § 40-4-212(1)(f), MCA required her (and the District Court) to consider allegations of rape. Mother could have raised her allegations during the initial parentage and/or parenting plan proceedings, but did not. Mother's silence speaks volumes (especially since Mother demonstrated she knew how to raise alleged concerns by her pattern of doing so throughout the extensive litigation).

The District Court should have dismissed Mother's petition pursuant to res judicata.

D. Collateral Estoppel.

Collateral estoppel barred Mother from terminating Father's rights since the best interest of T.D.P.C. were litigated and resolved in the prior proceedings.

Collateral estoppel is a form of res judicata, and bars the reopening of an issue that has been litigated and resolved in a prior suit. *Dowell v. Montana Dept. of Public Health and Human Services*, 2006 MT 55, ¶ 34 331 Mont. 305, 132 P.3d 520. Collateral estoppel also prevents re-litigation of determinative facts which were actually or necessarily decided in a prior action. *Id.* (citing *Haines Pipeline Const. v. Montana Power*, 265 Mont. 282, 288, 876 P.2d 632, 636 (Mont. 1994).

The Montana Supreme Court applies a four-part test to determine if collateral estoppel bars re-litigation of an issue: (1) whether the issue decided in the prior adjudication was identical to the one presented in the action in question; (2) whether there was a final judgment on the merits in the prior adjudication; (3)

whether the party in the present action was a party to the prior adjudication; and (4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred. *Dowell v. Montana Dept. of Public Health and Human Services*, 2006 MT 55, ¶¶ 34-35, 331 Mont. 305, 132 P.3d 520; *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 18, 331 Mont. 281, 130 P.3d 1267.

All four elements of collateral estoppel apply in this case. First, the issue of T.D.P.C.'s best interests and the father-daughter relationship was decided on October 5, 2016, when the parties entered, and the District Court adopted, the *Final Stipulated Parenting Plan*. *Order Adopting Final Stipulated Parenting Plan* (Oct. 5, 2016)(D.C. Doc. 86).

Second, there was an adjudication on the merits regarding the father-daughter relationship being in T.D.P.C.'s best interest when the District Court adopted and ordered the parties' *Final Stipulated Parenting Plan* was in the best interest of T.D.P.C. *Order Adopting Final Stipulated Parenting Plan* (Oct. 5, 2016)(D.C. Doc. 86). The stipulation became binding on Mother by stipulation and District Court order, and Mother did not object, appeal, or seek to set aside the stipulation.

Third, Mother and Father are the same parties in both the original *Petition for the Establishment of Permanent Parenting Plan* and the current *Petition to*

Terminate.

Fourth, Mother had a full and fair opportunity to litigate issues or concerns relating to purported abuse. Section 40-4-212(1)(f) required that purported abuse by one parent against another be considered, and Mother was duly represented by capable counsel when she stipulated to the final parenting plan and the District Court adopted the proposed final plan.

Mother misleadingly argues collateral estoppel did not apply since her allegation of "rape" was not actually litigated. Whether the issue was actually litigated is irrelevant. It is the "opportunity" to litigate the purported issue or concern--and Mother's failure to do so—which bars her from belatedly alleging "rape."

Mother's reliance on *In re Adoption of A.F.M.*, 102 A.L.R. 5th 701, 15 P.3d 258 (Alaska 2001) is misplaced. To start, the decision is an Alaska case, and is not binding Montana precedent.

Second, Alaska's statutory scheme is very different than Montana's. The *A.F.M.* decision hinged on the lack of overlapping issues between Alaska's parentage law and adoption law. The *A.F.M.* decision held that collateral estoppel did not apply to bar allegations of nonconsensual intercourse in a subsequent adoption action, since the issue was not properly raised—or necessary—in a preceding parentage action.

The case at hand is distinguished from *A.F.M.* In this case, the underlying proceeding invoking collateral estoppel is a parenting proceeding (not a parentage proceeding). Unlike the parentage proceeding in *A.F.M.,* the underlying parenting proceeding in this case necessarily required consideration and determination of purported rape. § 40-4-212(1)(f), MCA. Whereas the underlying **parentage proceeding** in *A.F.M.* did not necessitate consideration of purported concerns of physical/sexual abuse by one parent against another, Montana's statutory scheme does necessitate consideration of purported concerns of physical/sexual abuse by one parent against another in the prior **parenting plan proceeding**. § 40-4-212(1)(f), MCA.

Collateral estoppel barred Mother from re-litigating the issue of purported physical/sexual abuse. The District Court should have denied Mother's petition to terminate the father-daughter relationship accordingly.

E. Judicial Estoppel.

Judicial estoppel bars Mother from attempting to relitigate the father-daughter relationship since Mother already had an opportunity to litigate her allegations and admitted the *Final Stipulated Parenting Plan* is in T.D.P.C.'s best interest:

> The parents agree that the Parenting Plan is in the best interest of their minor child and request that the District Court order it into full force and effect to govern the parenting of [T.D.P.C.].

Final Stipulated Parenting Plan, 1 (D.C. Doc. 85).

The doctrine of judicial estoppel seeks to prevent 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 a party 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 elements are: 1) the estopped party must have knowledge of the facts at the time the original position is taken; 2) the party must have succeeded in maintaining the original position; 3) the position presently taken must be actually inconsistent with the original position; and 4) the original position must have misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party. *Fiedler v. Fiedler*, 266 Mont. 133, 140, 879 P.2d 675, 679–80 (Mont. 1994).

The elements for judicial estoppel are satisfied: (1) Mother inherently had knowledge of the facts surrounding the February 2014 intercourse when she negotiated and agreed to the *Final Stipulated Parenting Plan* on September 29, 2016); (2) Mother successfully maintained her position that the father-daughter relationship is in T.D.P.C.'s best interest as demonstrated by the District Court

adopting and entering both the *Stipulated Interim Parenting Plan* and *Final Stipulated Parenting Plan*; (3) Mother's current position that Father's rights should be terminated is inconsistent with Mother's previous position that the *Final Stipulated Parenting Plan* is in T.D.P.C.'s best interest; and (4) Father relied on Mother's petition for parenting plan, stipulated interim plan, and stipulated final plan to his detriment by investing substantial time and financial resources to complete extensive testing and parenting courses (including the Safe Care program), participate in multiple mediations, to litigate T.D.P.C.'s best interests, and safeguard his established parenting rights.

Mother does not deny her original position in the parenting matter was the *Final Stipulated Parenting Plan* (D.C. Doc. 85) is in T.P.C.D.'s best interest (which allowed for continuation of the father-daughter relationship). Mother further confirmed her position by swearing under oath: "I want to support [the father-daughter] relationship." *Hr. Tr.* 162:5-6 (Mar. 2, 9, and 28, 2018)(quoting *Mother's Affidavit* at D.C. Doc. 18). Mother's *Affidavit* further states she demanded Father take parenting classes so he could parent T.P.D.C. and Mother offered Father "at least weekly" parenting time. *Id*. at 160:13-16, 161: 6-7. These offers took place prior to the District Court "forcing" Mother to maintain an ongoing relationship with Father. Prior to Mother filing her petition to terminate,

Mother judicially admitted the father-daughter relationship is in T.P.C.D.'s best interest.

The determinative factor for applying judicial estoppel in this matter is not Mother's failure to assert a termination proceeding which was not available under this action (but was available through other avenues discussed above). Rather, the issue for judicial estoppel is Mother asserting an inconsistent, conflicting, and contrary position that a father-daughter relationship is not in T.P.C.D.'s best interest (when she previously admitted the relation is in the child's best interest).

For these reasons, the District Court should have dismissed Mother's petition to terminate pursuant to judicial estoppel.

F. Law of the Case.

Law of the case bars Mother from requesting Father have no parenting rights since Mother initiated the parenting proceeding, stipulated to the final parenting plan, and the District Court adopted the *Final Stipulated Parenting Plan* (admitting the father-daughter contact is in T.P.D.C.'s best interests).

The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs, and "expresses the practice of courts generally to refuse to reopen what has been decided". *Scott v. Scott*, 283 Mont. 169, 175, 939 P.2d 998, 1001 (Mont. 1997). Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher

court. *United States v. Lummi Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014).

Mother argues that the law of the case doctrine does not apply since the issue of physical/sexual abuse was not actually raised and litigated. As discussed above, Mother had ample opportunity to raise the issue of purported physical/sexual abuse (but did not), and the parties and District Court necessarily considered purported physical/sexual abuse when determining the *Final Stipulated Parenting Plan* is in the best interest of T.P.D.C. *Order Adopting Final Stipulated Parenting Plan* (Oct. 5, 2016)(D.C. Doc. 86). The District Court was required to consider physical/sexual abuse by one parent against the other parent when deciding the best interest of the child standard under §40-4-212(1)(f), MCA.

For these reasons, the issue should have been treated as "fully and finally adjudicated on the merits", and Mother's petition to terminate dismissed accordingly.

G. Equitable Estoppel.

Equitable estoppel bars Mother's petition since Father will have relied on Mother's petition for a parenting plan, stipulated parenting plan, and *Final Stipulated Parenting Plan* to his detriment (if Mother's petition to terminate and request for hearing were allowed).

Equitable estoppel has long been recognized in Montana to prevent injustice and promote justice, honesty and fair dealing. *In re Marriage of K.E.V.*, 267 Mont.

323, 331, 883 P.2d 1246, 1251 (Mont. 1994).

Equitable estoppel applies when six (6) elements are met: 1) Conduct, acts, language, or silence amounting to a representation or concealment of material facts; 2) these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him; 3) the truth concerning these facts must be unknown to the party claiming the benefit of estoppel at the time it was acted upon; 4) the conduct must be done with the intent, or at least with the expectation, that it will be acted upon by the other party or under circumstances that it is both natural and probable that it will be so acted upon; 5) the conduct must be relied upon by the other party and, thus relying, he must be led to act upon it; and 6) he must in fact act upon it so as to change his position for the worse. *Id.*, at 332, 883 P.2d at 1252.

In this case, the elements for equitable estoppel are satisfied. First, Mother was silent as to any allegations of nonconsensual intercourse and therefore, concealed a purported material fact.

Second, Mother would have known of her allegation of nonconsensual intercourse prior to Mother filing her *Petition for Establishment of Permanent Parenting Plan* and when she agreed (with counsel) to the *Final Stipulated Parenting Plan.*

Third, Father denies the allegation that he had nonconsensual intercourse

with Mother and Father had no knowledge of Mother's allegation when Mother filed her petition to establish a parenting plan, prior to completing extensive parenting courses, prior to entering the *Stipulated Final Parenting Plan*, or prior to Mother's recent *Petition to Terminate.*

Fourth, Mother entered into the *Stipulated Final Parenting Plan* with the understanding (and advice of counsel) that Father would continue the father-daughter relationship.

Fifth, Mother's petition for a parenting plan and stipulations to the interim and final parenting plan led Father to rely on Mother's representations it was in T.D.P.C.'s best interest to continue the father-daughter relation.

Sixth, Father has expended substantial time and financial resources to his detriment (if Mother's petition to terminate were allowed), by completing extensive testing parenting classes, family therapy, and obtaining a family nurse based on Mother's representations that the father-daughter relationship is in T.D.P.C.'s best interest.

Mother argues equitable estoppel should not apply since Father was present during intercourse and purportedly knew he was raping Mother. Father steadfastly maintains (and the District Court agrees) Father did not rape Mother. As such, Father had no way of knowing Mother would bring such allegations against him. Mother concealed allegations against Father until such time it was

convenient for her (i.e. after the District Court denied her 2017 petitions for an OOP and to sever father-daughter contact).

The District Court should have dismissed Mother's petition to terminate pursuant to the doctrine of equitable estoppel.

H. Retroactive Application.

Mother's petition to terminate action should have been dismissed since § 41-3-801 et. seq. did not become effective until October 1, 2017 and the legislature did not expressly authorize retroactive application.

"[N]o law contained in any of the statues of Montana is retroactive unless expressly so declared." § 1-2-109, MCA.

The parties agreed, and the District Court ordered the *Final Stipulated Parenting Plan* October 5, 2017. *Order Adopting Final Stipulated Parenting Plan* (D.C. Doc. 86). Section 41-3-801 did not become effective until October 1, 2017. The legislature chose not to expressly declare that § 41-3-801 may be applied retroactively.

Mother misleadingly argues the application of § 41-3-801 would not take away previously possessed right. Mother misconstrues Father's rights under the retroactivity argument. Father is not claiming he had a "right to assault [Mother]" and outright denies any assault occurred. Rather, Father maintains he has a right to parent and spend time with his daughter (especially when the parties agreed that

Father having parenting time is in T.P.C.D.'s best interest).

The District Court previously determined parentage, confirming Father had the right to parent T.P.D.C.

Moreover, in 2016, the parties stipulated, and the District Court determined, that Father had a vested right to continued and frequent contact with T.P.D.C. *Final Stipulated Parenting Plan* (D.C. Doc. 85).

Mother misleadingly argues her petition to terminate did not seek to retroactively take away rights acquired under existing laws.

The District Court should have dismissed Mother's petition to apply § 41-3-801 to vitiate the stipulated parenting plan accordingly.

CONCLUSION

For these reasons, this Court should enter an order clarifying the District Court should have dismissed mother's petition to terminate as a matter of law.

Dated this 21st day of March 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 5,000 words (4995 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 21st day of March, 2019.

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

APPENDIX

Uniform Parentage Act, § 614 (UPA 2017)……..……. Appendix 4

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 03-21-2019:

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

Kathleen Anne Molsberry (Attorney)
2419 Mullan Road, Suite B
Missoula MT 59808
Representing: Tami Disney
Service Method: eService

Electronically Signed By: Andre Gurr
Dated: 03-21-2019