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STATE OF MONTANA

Case Number: DA 20-0277

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 20-0277

IN RE THE MARRIAGE OF:

BRANDY J. PERSOMA,

Petitioner and Appellant,

and

TYLER S. PERSOMA,

Respondent and Appellee.

APPELLEE'S BRIEF

On Appeal from the Montana Fourteenth Judicial District Court
Musselshell County, The Honorable Randal I. Spaulding, Presiding
District Court Case No DR 15-13

APPEARANCES:

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I. STATEMENT OF THE ISSUES

1. Whether the District Court findings erred by not making specific findings for the best interests' factors under Mont. Code. Ann. § 40-4-212?

2. Whether the district court abused its discretion by summarily denying/addressing Brandy's post-trial motions?

3. Whether Brandy was denied notice and an opportunity to be heard?

4. Whether Brandy's motion for change of venue was properly denied?

5. Whether the District Court erred in denying Brandy's Motion for Parenting Investigation?

6. Whether Tyler should be awarded attorney fees on appeal?

II. STATEMENT OF THE CASE

Musselshell District Court Judge Randal I. Spaulding issued Findings of Fact and Conclusion of Law, and a Final Parenting Plan on April 16, 2020. Appellant Brandy filed a timely appeal. Appellee Tyler now files this Response.

III. STATEMENT OF THE FACTS

Tyler disagrees with Brandy's statement of the case and statement of facts. On appeal, Brandy misstates the occurrence of events and rulings in her attempt to argue the court erred.

The parties married February 18, 2012, separated on or about February 1, 2016, and their divorce was final on April 16, 2020. Together, the parties have one

child: 7-year-old B.J.P. Brandy has three sons adopted by Tyler on September 25, 2013: 18 year old N.J.P., 15 year old C.J.P., and 13 year old T.J.P.

Upon separating, Tyler filed an *ex parte* motion for interim parenting plan on the basis that the parties' sons were an imminent and severe threat to B.J.P. The court found that an emergency situation existed and it was in B.J.P.'s best interests to adopt Tyler's proposed interim parenting plan ("February 2016 Order").[1]

The February 2016 Order provided Brandy would be the primary residential parent of their sons and Tyler would be the primary residential parent for B.J.P. Tyler had parenting time with their sons as agreed by the parties. Brandy had scheduled parenting time of B.J.P. on Saturday and Sunday each week and as reasonably agreed between the parties. The court also ordered that there would be no contact between their sons and B.J.P. and no overnight visitations so long as their sons resided with Brandy or were present at her residence. The parties subsequently agreed to Tuesday and Thursday visits.

A hearing was held on September 15 and 27, 2016[2] and the court issued its Findings of Fact, Conclusions of Law and Order on January 19, 2017 ("January 2017

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[1] The claims stated in Brandy's brief as the reasons she requested an "emergency" interim parenting plan were not raised by her in the petition or proposed parenting plan. Brandy's actual purported reason for requesting an "emergency" interim parenting plan was Tyler's move from Roundup to Billings with B.L.P. resulting in her limited parenting time of B.J.P. Doc. #3 p. 5.

[2] The court set a show cause hearing for February 25, 2016. The parties desired to resolve the matter without a hearing and requested the hearing be vacated. On July 26, 2016, Brandy moved for a hearing on the matter and the hearing was reset.

Order"). Tyler had primarily parenting B.J.P. since birth and the court found she had undoubtedly become accustomed to Tyler, her surroundings, and their routine. Regarding their sons, the court found that the boys had displayed varying levels of behavioral and psychological problems. Both parties acknowledged that C.J.P. was a particularly trouble child. The court believe Brandy made poor choices relating to the best interests of the children including returning C.J.P. and T.J.P. to the care and custody of their abusive biological father. Adopting the interim parenting plan ordered on February 5, 2016, the court found even though Tyler's concerns were unfounded, drastically changing the parenting plan to 50/50 as Brandy requested, would have drastic consequences for B.J.P. and be contrary to her best interests.

On June 18, 2018, the parties apprised the court of an investigation into allegations of abuse and neglect on B.J.P. by Musselshell County Sheriff's Department and Montana Department of Public Health and Human Services, Child and Family Services Division. The court granted the parties requested the final dissolution trial be continued in hopes of receiving the results of the criminal and CFS investigations prior to trial. On July 25, 2018, approximately one week prior to the final dissolution trial, the State of Montana filed petitions in youth court based on allegations from B.J.P. that she had been sexually victimized by her half-brothers during Brandy's parenting time. The following day, Tyler brought an *ex parte* motion for another interim parenting plan requesting Brandy's parenting time be

supervised due to her failure to ensure C.J.P. had no unsupervised contact with C.J.P. The court granted the motion and ordered Brandy's parenting time be supervised ("July 2018 Order"). The final dissolution trial was held on August 2 and 3, 2018.

On April 16, 2020, the court issued its Findings of Fact, Conclusions of Law, and Final Decree of Dissolution of Marriage and Final Parenting Plan ("Final Order"), designating Tyler as the primary residential parent and granting Brandy unsupervised parenting time of B.J.P. every 1st and 3rd weekends and ordering Brandy shall ensure no unsupervised contact between B.J.P. and C.J.P. [3]

IV. STANDARD OF REVIEW

The Supreme Court reviews a district court's findings of fact supporting a parenting plan for clear error. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if the Court's review of the record leaves it firmly convinced that the district court made a mistake. Conclusions of law are reviewed for correctness. Trial courts have broad discretion when determining parenting, and the Court will not disturb the trial court's decision on appeal absent a clear abuse of discretion. A

[3] Since Brandy filed her appeal, the Montana Department of Health and Human Services has notified Tyler of an investigation of sexual abuse allegations of a female child in Brandy's home and C.J.P. and T.J.P. were the alleged perpetrators. MDHHS advised Tyler not to send B.J.P. to Brandy's home until completion of the investigation and determination that the home is safe for her. Tyler filed an *ex parte* motion for immediate suspension of Brandy's contact with B.J.P. and a show cause hearing was set. However, the court determined it did not have jurisdiction to oversee the alleged emergency and denied a hearing. D.C. Doc. 161.

court abuses its discretion when it acts arbitrarily without employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *In re the Parenting of M.C.*, 2015 MT 57, ¶ 10, 378 Mont. 305, 343 P.3d 569.

The Court reviews the trial court's discretionary rulings for abuse of discretion. The standard may be applied to rulings on post-trial motions, which "encompass the power of choice among several courses of action, each of which is considered permissible." *Steer, Inc. v. Dep't of Revenue* (1990), 245 Mont. 470, 474, 803 P.2d 601.

Violations of due process are questions of constitutional law and are subject to plenary review. *In re AS*, 2004 MT 62, ¶ 9, 320 Mont. 269, 97 P.3d 408.

The determination of proper venue is a question of law involving the application of Montana's venue statutes to the pleaded facts. The Court's review of a trial court's grant or denial of a change of venue is plenary; the Court merely determines whether the court's decision is legally correct. *In re the Parenting of S.C.B.*, 2015 MT 19, ¶ 7, 378 Mont. 89, 342 P.3d 46.

V.SUMMARY OF ARGUMENT

The court's failure to make specific findings on each relevant factor under § 40-4-212, MCA is not reversible error. The court's findings are sufficient for the Court to determine the court considered the statutory factors and based it's ruling on

the best interests of the child. The court weighed the conflicting evidence presented and issued findings supported by evidence.

The court properly exercised its discretion when ruling on Brandy's post-trial motions. Brandy's motion to amend or modify the parenting plan were premature because the court had not issued a final parenting plan. Assuming the court had issued a final parenting plan, Brandy failed to show a change in circumstances warranting a modification. Tyler was not in contempt of the July 2018 Order. Brandy's claim that Tyler was in contempt under § 40-4-219(7) and therefore, a modification of the parenting plan was necessary misconstrues the statutory requirements for medication of a parenting plan. The court ruled on Brandy's alleged emergency motions within one day. Brandy's post-trial motions were properly deemed denied as an operation of law. The court properly exercised its discretion in ruling on Brandy's post-trial motions.

Brandy received due process. The point of § 40-4-220, MCA is to provide due process. She attended the August 2-3, 2018 hearing after the court's issuance of the July 2018 Order. She presented testimony, examined and cross-examined witnesses and presented exhibits. She received the due process she was entitled to.

Brandy's constitutional right to parent was limited and conditioned based on allegations made by B.J.P. that her half-brothers had physically and sexually abused

her during Brandy's parenting time. Brandy was in violation of the July 2018 Order when she allowed contact between B.J.P. and C.J.P.

Brandy's motion to change venue filed more 2 years into the proceedings was untimely. She waived the defense when she failed to file her objection within 21 days of bringing her petition for dissolution or within 21 days of Tyler responding and counter-claiming. She incorrectly asserted the court was required to change venue under § 25-2-201, MCA, failing to take into consideration the specific jurisdiction statute of § 40-4-211(4)(b), MCA.

Lastly, the court properly exercised its discretion to deny Brandy's motion for parenting investigation. Brandy argument that the court lacked the information to make a parenting decision that could have been obtained in a parenting evaluation is without merit. The court should be affirmed.

VI. ARGUMENT

For several of the issues Brandy appeals, the analysis relies on a determination of the sufficiency of findings made by the district court. For this reason, this Brief will first address the sufficiency of findings, followed by the sequence of the other arguments made by Brandy in her Brief. [4]

A. The District Court Adequately Considered the Best Interests of B.J.P.

[4] In its Final Order, the court found that to the extent that the Court's January 19, 2017 findings and conclusions of law are not otherwise inconsistent herewith, they are adopted by reference as if fully set forth herein.

The preference of the Montana Supreme Court is for the trial court to make specific findings on each relevant factor under § 40-4-212, MCA, but the Court has repeatedly held that such findings are not required. *In re Marriage of Woerner*, 2014 MT 134, ¶ 15, 375 Mont. 153, 325 P.3d 1244 (citing *In re Marriage of Keating* (1984), 212 Mont. 462, 467, 689 P.2d 249 and *In re Marriage of Converse* (1992), 252 Mont. 67, 71, 826 P.2d 937.). The Court requires that the trial court make findings sufficient for the Court to determine whether the trial court considered the statutory factors and based it's ruling on the best interests of the child. *Jacobsen v. Thomas*, 2006 MT 212, ¶ 19, 333 Mont. 323, 142 P.3d 859.

It is not the Court's function to reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence for that of the trial court. *In re A.F.*, 2003 MT 254, ¶ 24, 317 Mont. 367, 77 P.3d 266. The ultimate test for adequacy of findings of fact is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence presented. *In Re Marriage of Wolfe* (1983), 202 Mont. 454, 457-58, 659 P.2d 259. Even when there is a conflict in the evidence, the Court will uphold the trial court's determination in the context of a dissolution proceeding where there is substantial credible evidence to uphold its findings of fact and conclusions of law. *Bock v. Smith*, 2005 MT 40, ¶ 27, 326 Mont. 123, 129, 107 P.3d 488.

In her Brief, Brandy states the relevant statutory factors and makes several arguments regarding the sufficiency of the findings including: the court's err to not consider the relevant statutory factors, the court's supposed reliance on one statutory factor, and the court misapprehended or disregarded evidence. Tyler addresses each statutory factor and Brandy's assertion as detailed in her brief.

a) wishes of the child's parents

The court found Tyler requested the interim parenting plan as modified [on July 26, 2018] continue as the final parenting plan, at least until resolution of the charges brought against their sons. Final Order, p. 5 ¶ 20, TR3 6:21-25, TR3 40:1 through 42:19, TR3 44:23 through 45:1.[5] On the other hand, Brandy desired the parenting plan to provide for equal parenting, alternating a weekly schedule. Final Order, p. 5 ¶ 21. She proposed exchanges of B.J.P. occur on Mondays at school as to limit contact between the parties and the parties have an alternating holiday schedule. TR2 36:9 through 42:25. She wanted a detailed parenting plan. TR2 42:4-21.

Although the court did not add the heading "wishes of the parents", the court addressed the wishes of the child's parents and the court's findings were supported by the evidence.

[5] "TR" refers to the Transcript of the hearings, followed by "page number: line number." TR15 refers to the September 15, 2016 hearing. TR27 refers to the September 27 hearing. TR2 refers to the August 2, 2018 hearing. TR3 refers to the August 3, 2018 hearing.

c) the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who significantly affects the child's best interests:

The purpose of Tyler filing *ex parte* motions for interim parenting plans was B.J.P.'s interaction with her half-brothers: first, based on his concern for B.J.P.'s health and safety and second, because of allegations by B.J.P. that her half-brothers had sexually and physically assaulted her. To claim that the court did not consider the relevancy of this factor ignores the allegations of B.J.P. and the significant amount of testimony regarding the sons' psychological and behavioral problems and the effect on their relationship with B.J.P.

Regarding B.J.P. and Tyler's interrelationship, the court found that the testimony established B.J.P. and Tyler have a strong and positive bond and a positive relationship. Final Order p. 6 ¶ 28.

Tyler testified that he and B.J.P. were "two peas in a pod" and did everything together. TR27 133: 23-24. Tyler testified to a typical day with B.J.P.: their schedule, making her meals, taking her to parks, walking the dog and attending counseling. TR27 100:13 to 101:19 The pair were busy and active. B.J.P. enjoyed including going hiking or fishing, or to a pool. TR3 8:21 to 9:19.

Tyler is close with his family. TR27-107:8-13. He grew up in Red Lodge and the surrounding areas of Billings and Yellowstone County as his father was from

Billings. Tyler lived down the road from his mother and B.J.P. loved to go to her house. TR27 84:8 to 89:11.

Brandy testified that Tyler was a good father to the boys. TR15 9:20-23. Brandy testified that Tyler told her that he thought C.J.P. was a danger to B.J.P. in the summer of 2015 and he raised the concern again in January 2016. TR15-23:16 to 24:1. He was concerned about C.J.P.'s sexually acting out and his violent behavior with the other kids. TR27 118:15 to 23.

C.J.P. had been diagnosed as sexually reactive. TR 15 14:14, TR15 179:3-14, C.J.P. engaged in sexually inappropriate behaviors including creating inappropriate sexual drawings and letters, making sexual comments to girls, and inappropriately touching a female classmate resulting in disciplinary action. TR15 70:6 through 77:25, TR15 169:21-25, TR15 174: 3 through 176:19, TR15 181:8 to 181:22, TR27 31:21 to 24, TR27 112:11-20, TR27 117:3-10. At one point, there was concern of oral sex between C.J.P. and T.J.P. TR15 49:6 to 50:22. The boys displayed varying levels of aggression and fighting between them as well. TR27 113:5 to 114:24, and TR 115:19-20.

The court found that, based on the affidavit of probable cause filed in support of the youth court petitions against each of B.J.P.'s siblings, on May 18, 2018, Tyler's mother, Sandy Persoma, notified Montana Department of Health and Human Services that B.J.P. had her half-brothers "touch my privates" while pointing to her

vaginal area. The incident alleged to occur approximately one month prior when B.J.P. was in Brandy's care. Final Order p. 8 ¶36. After an investigation including a forensic interview by the Billings Police Department, the Musselshell County Attorney filed petitions in youth court for charges of sexual assault. The petitions were dismissed by the court, at the request of the County Attorney, citing grave concerns for requiring B.J.P. to testify in three trials. Final Order p. 8 ¶ 36.

While the parties viewed the charges brought and their dismissal differently, the court found the allegations had not been proven. Final Order p. 10 ¶ 37.

e) the mental and physical health of the individuals involved:

Brandy drastically misstates the findings of the court and the evidence presented.

The court found Tyler's diagnosis of post-traumatic stress disorder (PTSD) with associated alcohol abuse was made in 2012. At that time, he reported suicidal ideation and significant occupational and social impairment. Due to his PTSD, Tyler was given a 70% disability evaluation. Tyler is determined to be 100% disabled for purposes of VA benefits and Social Security benefits. The court found Tyler denied that his mental health concerns adversely affected his ability to parent. January 2017 Order, p. 10 ¶20.

Brandy testified that Tyler had received disability that, to her understanding, was associated with alcohol abuse and suicidal ideation. TR15-7:22 to 8:1. She worried about B.J.P.'s safety because she felt he was unstable. TR15-38:22 to 39:8.

Tyler testified his disability was due to his PTSD, joint and hearing issues, and other issues that made him unemployable by the VA's standards. TR27-95:20 through 96:21. He suffered from anxiety, symptoms of PTSD, joint pains, and some social impairment. He attended counseling weekly with a VA licensed therapist. His therapist was responsible for making recommendations for medication and he followed any recommendations. He was not on any medication. TR27-96:24 to 98:4, 99:4 to 100:7, and TR27-217:11 to 218:16. He was still able to parent with his disability. TR27-96:22 to 97:8.

Brandy's reference to documents submitted regarding his diagnoses refers to an evaluation and a letter included in Tyler's VA disability determination. In the documents, Tyler self-reported increased anger, sleep disturbances, an inability to remain calm in stressful situations, among many other concerns. TR27-205:3 through 217:10. The court referenced the exhibits in its findings. January 2017 Order p. 10 ¶ 20. The court found the unrefuted evidence suggested Tyler regularly attended counseling and had an established support system through the VA and his family. January 2017 Order p. 12 ¶ 23.

The court also found that Brandy was not without her own mental health issues as she was previously diagnosed with PTSD, anxiety, and a dependent personality disorder. January 2017 Order p. 11 ¶ 22. Brandy acknowledged that Dr. Veraldi had diagnosed her with PTSD, anxiety, panic disorder, dependent personality disorder but she denied having any mental health issues. TR15-66:11 to 67:14. Brandy was not seeing a counselor for any of the noted diagnoses but was seeing a counselor to understand how to help the children cope with the separation and ongoing parenting issues. TR15-67:16 to 68:1.

Brandy alleges Tyler's behaviors of stalking and threatening reflect on his mental health. Brandy testified that Tyler drove by the boys' caregiver's home and the boys saw him. She also stated the caregiver's video surveillance recorded Tyler. TR15-89:23 to 91:18. Additionally, Tyler's ex-girlfriend testified as a character witness for Brandy. She testified Tyler constantly followed her, spied on her, stalked her while she was with him. She claimed that she and Tyler would go on stalking adventures to Roundup and at one point, Tyler belly-crawled on to the property of the marital home. He claimed he was going to kill Brandy. TR15-104:21 to 108:21.

The court found that Tyler did not deny, although he significantly downplayed much of the information in his ex-girlfriend's testimony. The court noted that Tyler's ex had befriended Brandy causing the court to question, somewhat the truth and veracity of the information submitted by Tyler's ex, even though she denied

testifying against Tyler out of spite. 2017 January Order ¶ 18. Finally, the court admitted concern regarding claims of stalking and threats, and found that Tyler had not followed through and it appeared to be "little more than male bravado and machismo in the midst of a highly emotionally charged custody battle." January 2017 Order p. 12¶ 23. The court's findings are supported by the record.

f) Physical abuse or threat of physical abuse by one parent against the other parent or the child:

Brandy drastically misstates the evidence presented and the findings of the court. Ms. Beley testified to physical discipline by their sons' biological father on N.J.P. which she described as "horrendous in nature." TR15-143:24 to 144:4. She also testified to Tyler's militaristic approach and C.J.P.'s fear of Tyler. TR15-176:20-23. However, Tyler denied allegations of physical abuse by him.

Brandy testified Tyler had been a good father to their sons. TR15-9:20-23. Brandy acknowledged Tyler had never harmed B.J.P. and in her proposed parenting plan, filed on February 1, 2016, she made no allegations of Tyler having inappropriate contact with B.J.P. or their sons. TR15-51:3 to 53.

Brandy's allegation that Tyler had a "Founded CFS" case in 2016 is contrary to the record. Brandy testified that in 2014, C.J.P. made a report at school that he was hit in the chest with a horse brush and Tyler hit his brothers three to four times a week. CPS performed a home visit and the report was unsubstantiated. TR15-

11:7 to 12:14. TR15-63:15-24. By Brandy's own account on the record, the report was unsubstantiated and she alleges the incorrect date.

Brandy presented conflicting evidence of allegations of physical abuse by Tyler. On one hand, she believed Tyler to be a good father and had no concerns of physical abuse by Tyler when she filed her proposed interim parenting plan. Contrarily, she alleged physical abuse at trial, then testified that the allegations were unsubstantiated. The district court was in the best position to weigh the conflicting evidence and presumably, did not include anything more than C.J.P.'s fear and Tyler's denial because the allegations were unsupported by the evidence. Brandy's complaint is without support.

g) Chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent:

Brandy draws to the Court's attention Tyler's felony charge for trafficking drugs, stating "The court also was aware [of the charge] at the time of filing of dissolution."

Tyler testified he was charged with trafficking marijuana and felony possession in 2015. He had his medical marijuana card and Brandy brought up the option of delivering marijuana from California to Montana for a family member of hers in exchange for payment. Tyler testified it was a bad decision and that he took responsibility for his actions. TR27 144:1 to 145:9.

There were no allegations Tyler abused drugs or his drug use affected his ability to parent. Brandy correctly asserts that he was charged and the court had knowledge of the charge. Considering the foregoing, the court acted within reason by not making a finding about the charge and its relevance to parenting of B.J.P.

h) Continuity and stability of care:

Brandy asserts the only finding adverse to her was the court's concern that Tyler had been the primary parent from February 5, 2016, and adoption of her proposed parenting plan would drastically change the parenting plan. Brandy also claims the court erred in using the same reasoning in the 2020 Order to find "stability of care" weighed in Tyler's favor.

Tyler had been the primary caretaker since 2016. TR2 18-20. Even by Brandy's account, he watched the boys all the time. TR15-20:3-8. During their marriage, Tyler viewed his job as the "kids and house" and cared for all of the children: caring for B.J.P., getting the boys up in the morning, picking them up at night, and responding to calls from the school for disciplinary actions with the boys. In the summer of 2015, he stepped back from caring for the boys when the boys' aggression and C.J.P.'s sexual display was not being curbed. TR27-105:14 through TR27 112:20.

Brandy testified that Tyler told her that he thought C.J.P. was a danger to B.J.P. that summer. TR15-23:16 to 24:1. He was concerned about C.J.P.'s sexually

acting out and his violent behavior with the other kids. TR27 118:15 to 23. He gave Brandy an ultimatum that they needed to find the boys help or another home, including therapy. Brandy chose to take C.J.P. and T.J.P. to their abusive father's home. TR27 118:15 to 119:25. During his time there, C.J.P. texted a girl that he wanted to have sex with her and had drawn pictures of female body parts. The arrangement was only temporary and the boys' father and his wife returned the boys in January 2016. TR27 273:17 to 278:2.

As previously raised in this Brief, Tyler testified that he and B.J.P. were "two peas in a pod" and had a busy and active schedule. *See factor c) above*. The determination by the VA and SS that he was 100 percent disabled allowed him unlimited time to parent and care for B.J.P. TR 97: 4-8.

Regarding her observance of B.J.P.'s schedule from July 2017 to August 2, 2018, Brandy testified that B.J.P. seemed to have fun at preschool and enjoyed it. TR2 155:22 to 156:5. Brandy acknowledged that she stated in her deposition that B.J.P. was doing well, she had a consistent schedule and consistency was important for her. TR2 166:5-14.

In discussing schooling, Brandy wanted B.J.P. to attend Elder Grove Elementary so that she and T.J.P. could attend the same school, even though she acknowledged there may be conditions placed on their contact. TR2 118:22 to 122:7. She wanted C.J.P. to be homeschooled. She assumed N.J.P. would be able to

graduate high school but she acknowledged the boys had struggled in school in 2017-2018 compared to two or more years earlier. Indeed, N.J.P. received at least 3 failing grades, had 126 absences, and 20 tardies; C.J.P. struggled in world history and failed science and had 109 absences; and T.J.P. missed 16.5 days and did not complete assignments. In fact, she was unsure what schooling arrangements would be for her children even though trial was three weeks prior to the start of the school year. TR2 125:10 to 129:13.

Finally, Brandy had not exercised alternating parenting time since at least February 1, 2016, and changing the parenting plan would result in significantly more parenting time than she had exercised over the two and a half years prior to trial. TR2 161:3-20.

Based on the evidence above, the court found that B.J.P. thrived under Tyler's care and the interim parenting plan. Final Order p. 5 ¶ 22. She was well-adjusted to her home, school, and community as well as the stability and routine in Tyler's home. Final Order p. 6. ¶ 27. Brandy also acknowledged the interim parenting plan provided consistency for B.J.P. and she appeared to be doing well. Final Order p. 5. ¶ 22. The court noted Brandy's poor choices relating to the best interests of the children specifically referencing Brandy's decision to return C.J.P. and T.J.P. to the home of their biological father, given her testimony that he abused her and their sons

extensively when living with him. January 2017 Order p 11 ¶22 and Final Order p.6 ¶ 31. The court's findings are amply supported by the record.

l) whether the child has frequent and continuing contact with both parents, which is considered in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests:

Two of Brandy's expert witnesses, Rochelle Beley and Lisa Hjelmstad, testified frequent and continuing contact with between B.J.P. and her half brothers was in the boys' best interests. TR15 135:12-15 and TR15 186:12-15. Ms. Hjelmstad testified that she believed it was in B.J.P.'s best interests to have frequent and continuing contact with Brandy. TR15 186:7-11. However, this testimony was taken prior to the allegations of sexual and physical abuse on B.J.P.

Considering the evidence detailed above, the court found the allegations were made and combined with C.J.P.'s sexual reactivity, the disruption to his life due to moving to a new home, school, and community, under Brandy's care, lead the court to conclude that unsupervised contact between C.J.P. and B.J.P. remains contrary to B.J.P.'s best interests. Final Order p. 16, COL8. The court's finding is supported by the evidence.

m) adverse effects on the child resulting from continuous and vexatious parenting plan amendment actions:

Brandy includes this factor but her analysis is largely her complaint that Tyler brought his ex parte motions for interim parenting plans to limit B.J.P.'s contact with

her and interfere in the sibling relationship of B.J.P. and her half-brothers, based on what she considers "ultimately on yet another unsubstantiated allegation." Appellant's Brief, p. 43 to 44. Interestingly enough, Brandy is the party constantly bombarding Tyler with motions to amend the parenting plan, filing 8 motions to amend since June 12, 2017 to April 16, 2020. D.C. Doc. 79, 117, 122, 129, 136, 143, 147, and 151. Although no finding was made, considering the record, the factor does not weigh in Brandy's favor.

B. <u>Delay in ruling on Brandy's post-trial motions was not an abuse of discretion and does not require reversal.</u>

The post-trial rulings referenced by Brandy that she claims were improperly denied include: *Petitioner's Motion for Emergency Telephonic Hearing on Interference of Visitation by Tyler Persoma With Affidavits of Brandy Persoma*, filed December 19, 2019, Petitioner's *Motion to Dissolve Temporary Order Interfering with Normal Child Visitation with Affidavit of Brandy Persoma*, filed December 21, 2019, *Motion for Contempt and Request for Amended and Final Parenting Plan*, filed April 8, 2019, *Verified 2nd Second Motion for Contempt and 2nd Request to Dissolve Temporary Order Interfering with Normal Parent Child Visitation and Request for Hearing*, filed September 13, 2019, *Verified Ex Parte Motion to Vacate Interim Parenting Plan and Request for Hearing on Final Parenting Plan*, filed January 23, 2020. D.C. Doc. 127, 129, 143, 147, and 151, respectively. Brandy's

motions can be divided into three categories: requests to amend or modify the parenting plan, motions to hold Tyler in contempt for violating an order, and *ex parte* motions requesting immediate relief.

1. The district court properly found that the parties' post-trial motions were dismissed by operation of law.

"It is well settled that ruling on a motion to reopen a case for taking further testimony is within the sound discretion of the district court, which will only be reversed on appeal for manifest abuse of that discretion." *In re Marriage of Kink* (1987), 226 Mont. 314, 316, 735 P.2d 311.

On motion and just terms, the court may relieve a party for relief from a final judgment, order, or proceeding. Mont. Rule Civ. Pro. 60. Additionally, a party may move for a new trial or to alter or amend a judgment. Mont. Rule Civ. Pro. 59. Either motion must be made within 28 days after entry of the judgment. Mont. Rule Civ. Pro 60(1) and R. 59(b). The motion is deemed denied if the court does not address the motion in a written order within 60 days from the motion's filing date. R. 59(f).

Brandy's post-trial motions requested relief from the July 2018 Order and, usually requested a hearing. On April 8, 2019, 248 days after trial, Brandy moved for contempt and requested to amend the parenting plan. D.C. Doc. 143. In her motion, Brandy claimed Tyler had interfered with her parenting time and the

interference warranted an amendment to the parenting plan. Brandy's motion was past the 28 days and she did not allege newly discovered evidence.

On September 13, 2019, 406 days after trial, she pled that the petitions against the boys had been dismissed and therefore, the July 2018 Order should be vacated and a hearing should be set on the final parenting plan. D.C. Doc. 147. Brandy's motion was past the 28 days. Furthermore, the petitions for sexual abuse allegations against the boys were not newly discovered evidence because they were the basis for the July 2018 Order.

On January 23, 2020, 538 days after trial, Brandy moved to vacate the July 2018 Order and requested a hearing. D.C. Doc. 151. She alleged the July 2018 Order was ordered "in response to yet another false allegation by [Tyler]" and the petitions had been dismissed. Brandy also requested a hearing on a final parenting plan. Brandy's motion was past the 28 days and alleged no new information for the court to consider.

Brandy's motions were not properly before the court because the motions were past the time permitted to move for relief from an order or proceeding, alter or amend a judgment, or for a new trial. Further, Brandy failed to allege newly discovered evidence. As the court noted in its Final Order, the alleged statements of B.J.P. that Brandy included in her motions, were made by B.J.P. prior to trial and

should have been offered at trial.[6] The district court did not abuse its discretion in failing to rule on Brandy's post-trial motions.

2. Brandy's motions requesting amendment or modification the parenting plan were not properly before the district court.

For the purposes of § 40-4-219(1), MCA, a "prior parenting plan" is defined as a court-ordered parenting plan constituting a final judgment of the court in a parenting proceeding. § 40-4-219(7), MCA, *In re Marriage of Hedges*, 2002 MT 204, ¶ 18, 311 Mont. 230, 53 P.3d 1273. The court has discretion to modify a prior parenting plan if it finds:

> "upon the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interests of the child."

§ 40-4-219(1), MCA. The motion must be supported by an *affidavit showing a change in circumstances and necessity for the modification to serve the best interests of the child* and *a proposed amended parenting plan*. § 40-4-220(1), MCA, § 40-4-219(1), MCA, and § 40-4-219(7), MCA (emphasis added). If the court finds adequate cause for a hearing, *demonstrated by the motion and supporting affidavit(s),* then the court must set a date for show cause hearing. Otherwise, the court "*shall deny the motion*." § 40-4-220(1), MCA (emphasis added). Brandy's

[6] Add reference to footnote by district court.

motions filed April 8, 2019, September 3, 2019, and January 23, 2020, requested the July 2018 Order be modified or amended. However, her motions ignored that there was not a parenting plan constituting final judgment until April 16, 2020.

Assuming *arguendo*, that there was a prior parenting plan to amend, her motions were deficient in demonstrating a change in circumstances. Brandy pled that the petitions against the boys had been dismissed and therefore, the July 2018 Order should be vacated and a hearing should be set on the final parenting plan. The petitions for sexual abuse allegations against the boys were not facts that had arisen since the prior plan because the petitions were the basis for the July 2018 Order. Furthermore, the court anticipated potential dismissal of the petitions.

Brandy also requested an amendment to the parenting plan citing § 40-4-219(7), MCA in her motions filed April 8, 2019 and September 13, 2018. D.C.Doc. 143 and 147. Section 40-4-219(7) is a possible reason for modifying a parenting plan however, the moving party must still make a showing of a change in circumstances. Brandy did not allege a change in circumstances. The district court properly exercised its discretion in summarily ruling on Brandy's post-trial motions to amend the parenting plan.

3. Tyler was not in contempt of an order.

Brandy claims Tyler was in contempt of an order and the district court's failure to find him in contempt was an abuse of discretion. As previously stated in

this Brief, the district court properly exercised its authority to condition Brandy's parenting time. The controlling order during the period of time that Brandy filed her post-trial motions referenced in her Brief was the July 2018 Order, requiring her parenting time be supervised.

District court is not bound to find a contempt of court where the facts do not support willful disobedience of a court order. *Grenfell v. Grenfell*, 1982, 200 Mont. 490, 652 P.2d 1170.

Brandy made few attempts to arrange supervised parenting time. Her attempts were limited to her request for Bonnie Bear Don't Walk and her demand that Family Support Network would provide supervision. Tyler objected to supervision by Bonnie Bear Don't Walk and objected to Brandy's, as he viewed it, demand for supervision services provided by Family Support Network. Brandy claimed Bonnie Bear Don't Walk "was the only provider" and subsequently claimed FSN "was the only provider." D.C. Doc. 143, 145, 147 and 148 Brandy presented no evidence that either provider was the only provider to available to supervise visits. Brandy had the opportunity for parenting time rather, she did not want to use or arrange a supervisor. Tyler was not disobeying the July 2018 Order but was asking Brandy to abide by it. Tyler was not in contempt of the July 2018 Order. [7]

[7] Brandy references Tyler being held in contempt. Between June 5, 2016 and issuance of the January 2017 Order, Tyler interfered with Brandy's parenting time by either: demanding her time be supervised, objecting to and unilaterally firing a supervisor, and eliminating the Tuesday

4. Rulings on post-trial motions are discretionary.

After trial, Brandy filed nine motions including the five referenced in her Brief. The district court ruled on two motions: those motions which Brandy requested immediately relief. The basis for *Petitioner's Motion for Emergency Telephonic Hearing on Interference of Visitation by Tyler Persoma with Affidavits of Brandy Persoma*, filed on December 19, 2018, was her desire to attend B.J.P.'s Christmas pageant and her assumption that Tyler would interfere. D.C. Doc. 127. The court properly denied the motion finding that her request for an emergency hearing the following day, denied Tyler notice and an opportunity to respond and her request did not dictate an emergency. D.C. Doc 128.

Brandy filed *Petitioner's Motion to Dissolve Temporary the Court's Ex-Parte Order Amending Interim Parenting Plan and Affidavit of Brandy Persoma,* on December 21, 2018, just two days after her previous motion, again asking for an immediate ruling. D.C. Doc. 129. She correctly notes the court immediately denied the motion. The court ruled a truly emergent situation might dictate denying Tyler notice and an opportunity to be heard but Brandy's request did not. D.C. Doc. 130.

The court properly exercised its discretion to rule on post-trial motions. The court noted that these motions filed by Brandy were *ex parte* and denied Tyler notice

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visits. Tyler's actions were not without consequence and he was found in contempt and he was admonished for his interference with Brandy's parenting time.

and an opportunity to be heard. Brandy alleged an emergency in each motion. On these motions, the court ruled within one day. The court exercised its discretion in ruling immediately on motions where Brandy alleged an emergency.

C. **The District Court Did Not Violate Brandy's Constitutional Right to Parent and Does Not Require Reversal.**

Brandy argues the court's delay in ruling on her post-trial motions violated her right to parent because the delay resulted in her receiving no parenting time. She claims she did not receive notice and an opportunity to be heard. As previously stated by Tyler in this Brief, Brandy's post-trial motions were properly denied.

1. Brandy received due process.

The intent of § 40-4-220, MCA is to provide due process. The statute provides:

> (1) A party seeking a temporary custody order or modification of a custody decree shall submit, together with his moving papers, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

In this case, Tyler moved for a temporary custody order with a supporting affidavit stating that B.J.P. had alleged that her brothers had touched her privates

while at Brandy's house, an investigation had been opened and the results of the investigation, the Musselshell County Sheriff had brought petitions against the sons for allegations of sexual abuse of B.J.P. Tyler included copies of petitions of criminal charges brought against the sons. Brandy's failure to supervise contact between C.J.P. and B.J.P. was a violation of the January 2017 Order. Tyler requested a hearing and asked that her parenting time be suspended pending a hearing. He also requested that her parenting time be supervised following the hearing. The court issued its July 2018 Order and set the matter to be heard on the previously scheduled trial date of August 2, 2018.

Brandy was served Tyler's motion and the court's July 2018 Order. The court held the hearing which she was present at, she examined and cross-examined witnesses and presented exhibits, and the court issued findings of fact and conclusions of law based upon the testimony and evidence.

A natural parent's right to the care and custody of his or her child is a fundamental liberty interest that must be protected by "fundamentally fair procedures." *Steab v. Luna*, 2010 MT 125, ¶ 22, 356 Mont. 372, 233 P.3d 351. Substantial compliance with the procedures in § 40-4-220(1), MCA is required to ensure all parties have notice and an opportunity to respond. *In re the Marriage of Stout*, 216 Mont. 342, 701 P.2d 729.

The court complied with the procedure requirements of § 40-4-220(1), MCA and the proceedings were fundamentally fair. The court entered its Final Order addressing all issues and superseding the July 2018 Order. Brandy received the hearing she was entitled.

2. The district court has the authority to limit or condition parenting time.

Brandy's parenting time was properly conditioned by the court upon a finding that Brandy failed to supervise contact between B.J.P. and C.J.P., in violation of the interim parenting plan, and B.J.P. made allegations of sexual assault on her by her bothers.

The district court has broad discretion to determine parenting and may require supervised parenting to protect children. *Kulstad v. Maniaci*, 2010 MT 248, ¶¶ 14, 31, 358 Mont. 230, 244 P.3d 722. If the court finds that in the absence of the order, the child's physical health would be endangered or the child's emotional development significantly impaired, the court may order supervised visitation by the noncustodial parent. § 40-4-218(2), MCA.

In its July 2018 Order, the court explained its authorization of the filing of criminal charges against the parties' sons for allegedly sexually assaulting B.J.P. Based on the probable cause determination, the assaults occurred while B.J.P. was in Brandy's care, in violation of the interim parenting plan. The court found contact between B.J.P. and her half-brothers was contrary to her best interests, at least until

adjudication of the charges. The court noted it was “very concerned” that Brandy, would engage in improper discussions with B.J.P. concerning the criminal charges, as she had previously denied the sons posed an unreasonable risk to B.J.P. The court ordered supervised visitation of Brandy’s parenting time, by a mutually agreed provider, or by Order of the Court. D.C. Doc. 119.

In this instance, the court was concerned for the physical health of B.J.P. due to the sexual assault allegations the child had made. The court was also concerned for Brandy would discuss the charges with the B.J.P., albeit “very concerned” because Brandy previously denied the risk to B.J.P. D.C. Doc. 119. Brandy denies any risk to B.J.P. by her sons to this day. The court acted within its authority to limit Brandy’s parenting time and its findings adequately demonstrated the need for supervision.

D. Brandy’s motion for change of venue was improper.

1. The district court would have been in violation of M. R. Civ. P. 12 if the Court had granted the motion.

Pursuant to Mont. Rule. Civ. Pro. 12(a)(1)(B) , a party must serve an answer to a counterclaim within 21 days after being served with counterclaim. A defense, such as improper venue, must be asserted in the responsive pleading if one is required. Brandy brought her petition for dissolution in Musselshell County, filed February 1, 2016. Tyler responded and counter-claimed on February 5, 2016.

Therefore, Brandy's motion for improper venue should have been filed on or before February 26, 2016. However, Brandy's motion for change of venue was filed June 5, 2017, a year into the proceedings.

A motion for change of venue must be made within the twenty-one days after the responsive pleading is filed. *In re the Marriage of Robert Alton Smith* (1993), 206 Mont. 406, 408, 860 P.2d 159. In *Smith*, the father filed a petition for parenting plan on June 5, 1991. The mother moved to change venue on March 13, 1993, approximately two years into the proceedings. The district court denied the motion, holding that the motion must be timely made. The Supreme Court affirmed.

Similarly, Brandy's untimely motion was properly denied and reversal is not required.

Brandy chose Musselshell County when she filed her Petition for Parenting Plan. Thus, she consented to this venue in her first pleading. She also failed to move to change venue within twenty-one days of filing her petition or twenty-one days following Tyler's response and counterclaim. Accordingly, she waived the defense.

2. Brandy's reliance solely on § 25-1-201, MCA is in error.

Brandy based her motion to change venue and her assertion of the district court's err on appeal on the mandatory transfer of venue pursuant to § 25-2-201, MCA.

Brandy correctly asserts that under § 25-2-201, MCA the court must change venue of the trial if the conditions listed are met. However, § 25-2-131, MCA provides if a specific statute, not within Title 25, Part 2, designates a proper place of trial, the specific statute controls. And, the Montana Supreme Court has repeatedly held that "when a general statute and a specific statute are inconsistent, the specific statute governs so that a specific legislative directive will control over an inconsistent general provision." *Betts v. Gunlikson,* 2019 MT. 183, ¶ 9, citing *Whalen v. Mont. Right to Life Ass'n*, 2002 MT 328, ¶ 9, 313 Mont. 204, 60 P.2d 972.

As this is a parenting proceeding, the specific jurisdiction statute of Title 40 must be considered. *In re Parenting of S.C.B.*, 2015MT 19, ¶ 7, 378 Mont. 89., 342 P.3d 46.

Section 40-4-211(4)(b), MCA states:

> A parenting plan proceeding is commenced in the district court:
>
> (a) by a parent, by filing a petition:
> (i) for dissolution or legal separation;
> (ii) for parenting in the county in which the child is permanently resident or found; or
> (iii) for custody under 40-6-411; or
> (b) by a person other than a parent if the person has established a child-parent relationship with the child, by filing a petition for parenting in the county in which the child resides or is found.

The analysis needed for the present case is similar to the analysis in *In re Parenting of S.C.B.*, even though the factual scenarios are different. The venue issue

in S.C.B. involved a non-biological caretaker, Grandmother Hoyland, having the ability to initiate a parenting plan within the county that Grandmother resided. Id., 2015 MT at ¶ 9. Mother wanted a change of venue to Hill County because she resided within Hill County for approximately a year prior to Grandmother's suit being filed. Id. at ¶ 6.

The Flathead County District Court allowed for a change of venue to Hill County reasoning that even though § 40-4-211, MCA, applies, § 25-2-201, MCA allows a district court to change venue when the county designated in the complaint is not the proper venue. Id. at ¶ 9. Furthermore, the Flathead County District Court stated the residence of the child under § 1-1-215, MCA is governed by the residence of the parent having legal custody. Id. Therefore, the Flathead County District Court reasoned the proper venue was Hill County, where Mother resided, not Flathead County, where the child and his caretaker, Grandmother, had been living for the past seven years. Id.

The Supreme Court disagreed because the Flathead County District Court did not properly apply § 40-4-211, MCA, which is specifically designed to determine proper venue in parenting plan cases. Id. at ¶ 11. Unlike the present case, the analysis focused on § 40-4-211(4)(b), MCA which governs when a non-parent caretaker can initiate a parenting plan in a county where the child resides or is "found." Id. at ¶ 11. However, § 40-4-211(4)(a)(ii), MCA (commencement of a

parenting action by a parent) allows for venue in the county in which the child is a resident or is found and is identical to § 40-4-211(4)(b), MCA.

The Court went on to say that when there are multiple counties where venue is proper, no motion to change venue can be allowed under § 25-2-115, MCA. The Court determined that when §40–4–211(4)(b), MCA clearly states a non-parent with a parent-child relationship with the child can initiate a parenting proceeding in the county where the child resides or is "found."

For the present case, *S.C.B.* shows that § 25-2-201, MCA does not apply because a parenting plan case that is governed by § 40-4-211, MCA for any change of venue issue. Brandy did not cite § 40-4-211, MCA or any case law interpreting that statute to support her Motion to Change Venue. Therefore, her motion was baseless and the court properly denied her motion to change venue.

E. <u>Brandy's request for parenting investigation was properly denied.</u>

Pursuant to § 40-4-215, MCA, the district court may, but is not required to, order a parenting evaluation. Again, the discretion lies with the district court. Even if the court had ordered a parenting investigation, the court is not bound to follow a court-ordered parenting investigation. *In re Marriage of Abrahamson*, 278 Mont. 336, 925 P.2d 1334 (1996).

Brandy alleges that a parenting evaluation would have gotten to the bottom of abuse concerns in both households. As previously stated in this Brief, by Brandy's

own testimony, she was not concerned about abuse by Tyler on the children. TR15-51:3 to 53. Brandy testified Tyler had been a good father to their sons. TR15-9:20-23. In her brief, she alleges Tyler had a "Founded CPS" case but her claim is unsupported by the evidence. TR15-11:7 to 12:14. TR15-63:15-24. Brandy alleges that the court acknowledged it lacked information to determine the validity of the allegations made by B.J.P. on her siblings. Brandy misapprehends the court's finding. She included hearsay statements made by B.J.P. in her post-trial motions that were available to be admitted at trial but they were not. Nor did the boys' hearsay statements get offered into evidence. Instead, the court relied heavily on the affidavits in support of motions for leave to file youth court petitions that had been attached to the July 2018 Ex Parte Motion.

In her motion and again on appeal, Brandy fails to explain a legitimate reason why such an investigation was necessary. The court heard testimony from a number of expert witnesses including Rochelle Beley, Lisa Hjelmstad, Dr. Dona Veraldi, Susan Frew and the court received evidence. Ms. Hjelmstad made recommendations for protective measures and constraints for C.J.P. TR15-88:13 to 89:8. The court was well-informed on the circumstances in the case and had previously issued findings of fact, conclusions of law and order from the prior hearing. The determination to order a parenting plan is not mandatory and is within the court's discretion. The

court properly exercised its discretion to deny Brandy's motion for parenting investigation.

The determination to order a parenting plan is not mandatory and is within the court's discretion. There were already experts involved in the case that could have suggested measures to assist C.J.P. in developing boundaries. The court properly exercised its discretion to deny Brandy's motion for parenting investigation.

F. Tyler should be awarded Attorney's Fees on Appeal

Tyler respectfully requests the Court award him attorney fees for having to defend this appeal. M.R.App.P., Rule 19(5) allows the Court to grant a sanction of costs, attorney fees, or such monetary or non-monetary penalty as this Court deems proper, for appeals determined to be frivolous, vexatious, or taken without substantial reasonable grounds. *Rintoul v. Rintoul* (2014),376 Mont. 319, ¶ 20, 330 P.2d 850. Furthermore, a shotgun approach to hit every possible issue without supporting those issues with proper analysis and legal authority is not acceptable. *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 92, 337 Mont. 411, 162 P.3d 106. Brandy argued every possible issue. She ignored the occurrence of events and filings, in an attempt to justify her claims. She misrepresented the court's findings and the evidence presented. Tyler should be awarded attorney fees.

I. CONCLUSION

Judge Spaulding adequately considered the best interests' factors. Judge Spaulding's findings and conclusions are supported the testimony and evidence presented at trial. Judge Spaulding exercised his discretion in ruling on post-trial motions and Brandy's motion for parenting investigation. Brandy's motion for change of venue was correctly denied. Brandy has not demonstrated any error or abuse of discretion. The case should be affirmed.

DATED this 11th day January, 2021.

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By: /s/ Desi Seal
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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and correct copy of the APPELLEE'S BRIEF with the Clerk of the Montana Supreme Court and that a true and correct copy of the APPELLEE'S BRIEF was served by mail upon all parties or opposing counsel of record at their address or addresses as follows:

Brandy J. Persoma
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DATED this 11th day January, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed:

1) with a proportionally spaced Times New Roman text typeface of 14 points; and is double spaced, except of footnotes and quoted indented material which have a line spacing of 1.0;

2) and the word count as calculated by WordPerfect is not more than 10,000 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, and appendix.

DATED this 11th day January, 2021.

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CERTIFICATE OF SERVICE

I, Desiree L. Seal, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-11-2021:

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