IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA-21-0050

IN RE: THE PARENTING OF:

P.H.R. and P.H.R.

minor children,

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Leslie Halligan, Presiding.

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STATEMENT OF THE CASE

Mother filed for divorce in 2010. A final hearing was held on July 31, 2014. The Texas Court issued a final divorce decree and parenting plan January 22, 2015. Between January 22, 2015 and September 5, 2019, Petitioner and Appellee ("Father") initiated many proceedings regarding the parenting plan in Texas. The Texas court declined jurisdiction and dismissed the matter on September 5, 2019. On December 20, 2019 Father filed a Petition for Registration of Child Custody Determination. December 30, 2019 Father a Notice of Filing Foreign Judgment and Notice. From that date, the parties had many competing motions beginning with a *Motion for Order Requiring Respondent to Cooperate in Obtaining the Children's Passports or for an Order Designating Petitioner as the Sole Legal Custodian of the Parties' Minor Children for Passport Application*, filed on February 4, 2020 and then again on February 11, 2020 with an accompanying Affidavit. Mother responded on February 21, 2020. Father filed a Reply brief on March 6, 2020.

On February 21, 2020 Father filed a *Motion to Amend Parenting Plan and Brief in Support*; an *Affidavit of Petitioner/Father Marlen Russell in Support of Motion to Amend Parenting Plan*; and a *Proposed Amended Final Parenting Plan.* On March 10, 2020, Father moved for Default Judgment. Due to complications with Counsel's schedule and her leaving the country, Counsel requested Mother

file her own *Objection to Default Judgment and Motion for Extension* with an accompanying affidavit with a Proposed Order, which she did on March 16, 2020.

Mother's attorney was teaching in South Africa in early 2020, and was unable to return to the United States as planned due to COVID restrictions. Thus, Mother filed her Motion to Amend Parenting Plan on May 6, 2020. The parties mediated on May 29, 2020 and signed a stipulation relating to summer break, passports, international travel, and parental communication.

Over the next three (3) months, the parties filed many contested pleadings. The court issued an order on August 11, 2020 setting a hearing for August 31, 2020 and denied the parties' motions. On August 24, 2020 Father filed a *Motion for Order Requiring Parties to Attend Mediation and Motion to Continue Hearing for One Month*, Mother objected to both mediation and a continuance the same day. The court issued an order on August 25, 2020 denying Father's request. Father subsequently filed his *Reply in Support of Petitioner's Motion for Order Requiring Parties to Attend Mediation and Motion to Continue Hearing for One Month*, on August 26, 2020. On August 27, 2020, Father filed another motion to continue the August 31, 2020 hearing. The court held a scheduling hearing on September 2, 2020 which resulted in a hearing being reset for Thursday September 10, 2020.

The Court held a hearing on September 10, 2020; interviewed the children in Chambers on October 5, 2020; and issued its order on December 31, 2020.

Mother appeals provisions fifteen (15) "Parental Communication with Child," twenty-one (21) "Parenting Mediation," and twenty-three (23) "Tax Exemptions/Deductions/Credits" of the Amended Parenting Plan issued and adopted contemporaneously with the Order on Petitioner's Motion to Amend Parenting Plan and the requirement of family counseling with current husband indicated under number (2) in the Order.

ISSUES PRESENTED

I. Did the District Court err when it ordered mother's husband to engage in family counseling?

II. Did the District Court err when it modified the parties' parenting plan outside what was necessary to serve the best interest of the children?

III. Did the District Court err when it ordered future conflicts be subject to mandatory mediation?

IV. Did the District Court err when it awarded a dependency tax exemption to Father?

STATEMENT OF THE FACTS

Mother's Statement of the Facts is limited to those facts specifically applicable to this appeal. The parties have two minor children, P.H.R. and P.H.R. ages fourteen (14) and ten (10) years old, respectively. (*see* Resp't's Aff. ¶ 3, Mar.16, 2020; *see* Resp to Pet. Mot. to Amend Parenting Plan, p. 2, Apr. 3, 2020; *see* Resp't's Aff. ¶ 3, Jun. 10, 2020). The parties were married for over ten (10) years. (*see* R. generally). The Texas court issued a final divorce decree and parenting plan January 22, 2015 wherein Mother was awarded sole managing conservatorship. (*see* Final Divorce Decree, p.3, ¶ 1, Jan. 22, 2015). The final order was well-founded on evidence of domestic violence by Father. (*see* Resp to Pet. Mot. to Amend Parenting Plan, p. 2, Apr. 3, 2020; *see* R. generally). Extensive testimony was presented by multiple professionals regarding the Father's abusive behaviors at the final hearing on July 31, 2014. (*see* R. generally). Since the Final Divorce Decree, Father has filed multiple parenting plan actions and pleadings before the courts. (*see* Resp't's Aff. ¶ 4 (a-k), Mar.16, 2020).

The parenting plan provided Father with substantial continuing parenting time and provided an alternative parenting plan taking a parent's possible relocation into account. (*see* Final Divorce Decree, pp. 6-10, Jan. 22, 2015). Prior to the District Court's order, the parties' parented pursuant the parties' Final Decree of Divorce dated May 22, 2015. (*see* Final Divorce Decree, p.6, ¶ 1(c), Jan.

22, 2015). Father parented the children for forty-two days each summer; every spring break (last year being an exception due to COVID-19); and alternated taking the children for Thanksgiving and Christmas break. (*see* Resp't's Aff. p.2, 3 ¶¶ 5-7, 10, Jun.10, 2020; Final Divorce Decree, pp. 6-10, Jan. 22, 2015).

Father's communication expectations were often invasive and unreasonable. (*see* Resp't's Aff. pp.1-2 ¶ 4, Jun.10, 2020). Father would call Mother's phone at 7:25 a.m. and 7:25 p.m. seven days per week. (*see* Resp't's Aff. p.5 ¶ 5, Mar. 16, 2020; *see* Resp't's Aff. pp.1-2 ¶ 4, Jun.10, 2020; *see* TRO Hr'g TR. 162:23-25, 163:1-13, Sept. 10, 2020). If Mother did not answer, Father would call again, leave multiple voicemails, and typically send multiple text messages as well. (*see* TRO Hr'g TR. 162:23-25, 163:1-13, Sept. 10, 2020; *see* R. generally). This behavior caused Mother a significant amount of stress. (*see* TRO Hr'g TR. 162:23-25, 163:1-13, Sept. 10, 2020; *see* R. generally). Mother requested that Father call at alternative times or that he call less frequently, but he refused. (*see* R. generally). Eventually, following mediation, the parties signed a stipulation that restricted the constant phone communication. (*see* Stip. Regarding Summer Parenting, Passports, and International Travel, ¶ 6 May 29, 2020).

Through Affidavits and testimony at the hearing on September 10, 2020 Mother testified regarding the lack of child support and what it has done to her financially. (*see* Resp't's Aff. p. 3 ¶ 12, Jun.10, 2020). Mother testified that she has

been forced to sell property to afford attorney fees and had went without child support since October of 2019. (*see* TRO Hr'g TR. 178:21-25, 179:1-6, Sept. 10, 2020). Mother has paid tens of thousands of dollars in attorney fees. (*see* TRO Hr'g TR. 178:21-25, 179:1-6, Sept. 10, 2020). The court issued no specific findings regarding taxes and only limited findings on child support. (*see* Order on Pet. Mot. to Amend Parenting Plan, p. 13, Dec. 31, 2020).

At the hearing, Mother testified that while married to Father she endured significant abuse. (*see* TRO Hr'g TR. 159:1-15, Sept. 10, 2020). Father held Mother at gun point, raped her, bit her, and physically prevented her from leaving. (*see* TRO Hr'g TR. 159:1-15, Sept. 10, 2020). Mother suffered constant harassment and intimidation from Father. (*see* R. generally). Through testimony, her filings, and affidavits, it is evident that Mother still fears the Father and there continue to be substantial issues with power and control. (*see* R. generally).

After a hearing and an in chambers interview with the children, the district court modified the parties' parenting plan. (*see* Order on Pet. Mot. to Amend Parenting Plan, Dec. 31, 2020; *see* Amended Parenting Plan, Dec. 31, 2020).

STANDARDS OF REVIEW

A court's determination as to its jurisdiction is a conclusion of law, which is reviewed de novo to determine whether the court's interpretation of the law is

correct. *Bunch v. Lancair Int'l, Inc.*, 2009 MT 29, ¶ 15, 349 Mont. 144, 202 P.3d 784 (citation omitted).

"A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence or if, upon reviewing the record, this Court is left with the definite and firm conviction that the district court made a mistake." *In re S.T.*, 2008 MT 19, ¶ 8, 341 Mont. 176, 176 P.3d 1054 (citation omitted).

A district court's conclusions of law are reviewed de novo to determine whether they are correct. *Giambra v. Kelsey*, 2007 MT 158, ¶ 28, 338 Mont. 19, 162 P.3d 134 (citations omitted).

The Court reviews the underlying findings in support of a district's decision to modify a parenting plan under the clearly erroneous standard. *Guffin v. Plaisted-Harman*, 2010 MT 100, ¶ 20, 356 Mont. 218, 232 P.3d 888. If the underlying findings are not clearly erroneous, then the Court will overturn the district court only if there is a clear abuse of discretion. *In re D'Alton*, 2009 MT 184, ¶ 7, 351 Mont. 51, 209 P.3d 251.

SUMMARY OF THE ARGUMENT

The District Court does not have jurisdiction over Mother's husband. He is not a party to this case and is not subject to the court's order. The District Court

states in its order that "The Court GRANTS Petitioner's Motion to Amend Parenting Plan in that some amendments to the current parenting plan are warranted, but the evidence presented does not support changes to the existing custodial provisions. Therefore, [Mother] will continue to serve as primary parent, and the schedule providing for the children to spend time with [Father] in Texas during summer and vacations shall remain in place. However, because this case is now under the Montana Court's jurisdiction, the Court shall issue an Amended Parenting Plan which conforms to Montana law and Practice." This is not supported by caselaw and is contrary to the full faith and credit clause found in Art. IV, § 1, of the U.S. Constitution. Because Mother does not disagree with all of the District Court's amendments, she argues some of the modifications were not in the children's best interest, were contrary to its own findings, that the District Court reasonably suspected domestic violence and therefore could not force the parties to mediate future issues with this parenting plan, and that modifying the child dependency exemptions was made with no basis in fact or in law, was not in the children's best interests, and is contrary to the Internal Revenue Code and the parties' Texas divorce decree.

ARGUMENT

I. The District Court erred when it ordered Mother's husband to engage in family counseling.

Courts can only exercise power over those under the court's jurisdiction. *Reed v. Woodmen of World*, 94 Mont. 374, 381, 22 P.2d 819, 821 (1933). Prior to issuing an order compelling action by a person, the court issuing such an order must have jurisdiction over the person. *Cardneaux v. Cardneaux*, 1998 MT 256, P1, 291 Mont. 230, 231, 967 P.2d 410, 410 (1998). Generally, this power is confined to the parties to an action and for a person to be made a party to an action either they must appear voluntarily before the court or there must be legal service of summons. *Deich v. Deich*, 136 Mont. 566, 577, 323 P.2d 35, 41 (1958); *Howard v. Dalio*, 249 Mont. 316, 319, 815 P.2d 1150, 1152 (1991). Absent these circumstances, the court does not have jurisdiction. *Id.*

Here, the District Court abused its discretion by ordering not just Mother to attend counseling but also ordering her new husband to do so. Mother's husband is not a party to the dissolution case; further, he did not voluntarily submit himself to the jurisdiction of the court and was not served a summons. Therefore, Mother's husband is not within the scope of the District Court's jurisdiction in this matter, so any order the District Court makes regarding him is not enforceable. The District Court was aware of this fact but attempted to make an end run around this jurisdictional issue by directing its order at Mother by requiring her "and her husband" to attend counseling together.

Aside from the jurisdictional issues, requiring Mother's husband to attend counseling raises concerns regarding the enforcement of the order. Is Mother in contempt if her new husband—who is not a party in the case—fails to comply? The District Court only had jurisdiction over Mother. Presumably, the court could only attempt to enforce its order against Mother but to do so would be fundamentally unfair. Mother has no authority to force her new husband to cooperate with the court's order, all she can do is ask, but he can of course refuse. Further, section 9(f) of the amended parenting plan provides the court with the same result without specifically ordering the stepfather to engage in family counseling. Because of this lack of jurisdiction, the District Court's order should be reversed.

II. The District Court erred when it modified the parenting plan outside of amendments necessary for the best interests of the children.

As outlined in the District Court's order, Montana law generally makes parenting plans difficult to change once they are set in place. § 40-4-219, MCA, governs amendments to existing plans, and it lays out specific conditions under which a court has authority to revise a parenting plan. As applicable here, the statute provides:

"The court may in its discretion amend 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 interest of the child." (*emphasis added*). *Id.*

Section 15, Parental Communication with Child, provides that "The non-parenting parent shall have the opportunity to Skype, FaceTime, or call the children regularly." However, the Court found that "[Fathers] communication expectations are, for the most part, unreasonable given the children and [Mother's] schedules" and that "[Mother] has reasonably accommodated [Fathers] requests" (*see Order on Petitioner's Motion to Amend Parenting Plan*, p. 14). Further, the parties mediated and entered into a Stipulation on May 29, 2020. The sixth provision in the Stipulation provides the following:

> "*Father shall call P.R. (daughter) on her cell phone rather than through Mother's phone. Father shall be entitled to phone calls with P.R. (son) through Mother's phone on Monday, Wednesday, and Friday at 7:25 p.m. and shall cease calling Mother's phone at other times.*" (*see Stipulation Regarding Summer Parenting, Passports, and International Travel*, dated May 29, 2020).

To modify this agreement is contrary to the court's findings and is not in the best interests of the children. Therefore, it should be reversed and remanded.

III. The District Court erred in requiring continued mediation between the parties because Father has a long history of documented domestic violence against Mother.

Absent consent from all parties, courts may not require mediation in family law cases in which domestic violence is reasonably suspected. *Hendershott v. Westphal*, 2011 MT 73, 21, 360 Mont. 66, 253 P.3d 806

Here, there is a long history of domestic violence that is clear within the record. Mother was afraid to mediate with Father, and feared Father's actions, during the pendency of these proceedings. Mother's attorney strongly encouraged her to participate, and she did so, believing that over zoom, she would be protected from Father. As held by the District Court, the parties' first mediation only provided limited short-term success.

As stated in the District Court's order from March 24, 2020 the court encouraged Mother to accept Father's offer to mediate amendments. However, because the parties have a history of domestic abuse, Mother was not required to mediate. In the present case there are still significant power and control issues, even in the co-parenting relationship. The District Court held that "the Court also has some concerns with abuse at the hands of [Father] given [Mother's] accusations of [Father's] physical, verbal, and mental abuse against [Mother] and his threats to her upon their divorce…" The District Court indicated the evidence was not conclusive, but under the holding in *Hendershott*, the evidence does not

need to be conclusive. The Court only needs to "*reasonably suspect*" domestic violence (*emphasis added*) *Id.*

Given the extensive testimony given by Mother at both the divorce proceedings in the Texas and at the hearing held on September 10, 2021, regarding the abuse she endured, it was clearly erroneous to order the parties to mediate. Mother testified that she continues to feel threatened, harassed, and bullied. Mother feels intimidated and gets anxious, as well as has panic attacks at the mere thought of having to be in the same room with Father in this case, now and/or in the future. Mother's mental anguish is something no one should endure. Therefore, the District Court erred when it determined the parties must mediate future conflicts and therefore, it should be reversed and remanded to the court for an order consistent with its findings.

IV. The District Court erred when it awarded a dependency tax exemption to Father.

Because there is little caselaw on this issue, Appellant looks to the Administrative Rules of Montana, § 42.15.403, Exemptions for Dependents, which states "(1) Except as provided in (2), a taxpayer is allowed a dependent exemption for each dependent who receives over half of his or her total support from the taxpayer. This support test must be implemented like the support test in Internal Revenue Code § 152(d)(1)(C), (IRC), and all related U.S. Treasury Department regulations about qualifying relatives. These regulations support an allowance to

the primary parent based on who the qualifying relatives (the children in this case) live with the majority of the year." *Id.*.

Under ARM § 42.15.403(2) a dependent exemption is not allowed for an individual described in (1) if the individual has gross income of more than the exemption amount allowed under § 15-30-2114, MCA (not applicable in the present case), unless the individual is the taxpayer's "qualifying child," as defined in IRC § 152, and meets the support test for "qualifying child" under IRC § 152(c)(1)(D), which is discussed under federal taxes.

> Pursuant ARM § 42.15.401 (1) ""Child" means a son, stepson, daughter, stepdaughter, or legally adopted son or daughter of the taxpayer. The term does not include the following persons who are within the definition of "child" for purposes of determining dependent exemptions for federal income tax purposes:
>
> ...
>
> (c) A federal dependent exemption may be claimed for a person under a multiple support agreement exception even if the taxpayer does not provide over half of their total support. Because Montana does not provide a multiple support agreement exception, a dependent exemption is not allowed for any person who does not receive over half of their total support from the taxpayer. See the definition of "support," however, for special rules for determining the support of a child of divorced or separated parents. (*emphasis added*) *Id.*
>
> ...
>
> (4) "Support" has the same meaning as "support" for purposes of determining dependent exemptions for federal income tax purposes except as follows:

(b) If a decree of divorce or legal separation, or a binding written agreement between legally separated spouses or divorced former spouses, provides that the taxpayer may claim, and the other parent will not claim, a dependent exemption for a child for state income tax purposes, the taxpayer is treated as having provided over half of the child's support for Montana income tax purposes. If the taxpayer entitled to claim a dependent exemption under this rule is remarried, the taxpayer may claim the exemption on a joint return or, as provided in (4)(a), the taxpayer or taxpayer's spouse may claim the exemption." *Id.*

Here, we do not have a divorce decree or legal separation, nor do we have a binding written agreement between the parties. Therefore, the special rules for determining the support of a child of divorced or separated parents does not apply. From there, we must look at which taxpayer provides the children with over half of his or her total support. Which, in the present case, is Mother.

A qualifying child is described in Publication 504, and provides that in most cases, because of the residency test, a child of divorced or separated parents is the qualifying child of the custodial parent. Here, that would be Mother as the custodial parent of both children. Only when the custodial parent signs a written declaration, that he or she will not claim the child as a dependent for the year, and the noncustodial parent attaches said declaration to his or her return, is a Child treated as the qualifying child of his or her noncustodial parent (among other met conditions).

"1 . The child must be your son, daughter, stepchild, foster child, brother, sister, half-brother, half sister, stepbrother, stepsister, or a descendant of any of them.

2. The child must be (a) under age 19 at the end of the year and younger than you (or your spouse if filing jointly), (b) under age 24 at the end of the year, a student, and younger than you (or your spouse if filing jointly), or (c) any age if permanently and totally disabled.

3. The child must have lived with you for more than half of the year.

4. The child must not have provided more than half of his or her own support for the year.

5. The child must not be filing a joint return for the year (unless that joint return is filed only to claim a refund of withheld income tax or estimated tax paid). "

A child is not a qualifying child unless he or she meets items one (1) through five (5). If the child meets the rules to be a qualifying child of more than one person, only one person can treat the child as a qualifying child.

The custodial parent is the parent with whom the child lived for the greater number of nights during the year. The other parent is the noncustodial parent. If the parents divorced or separated during the year and the child lived with both parents before the separation, the custodial parent is the one with whom the child lived for the greater number of nights during the rest of the year. A child is treated as living with a parent for a night if the child sleeps: at that parent's home, whether or not the parent is present, or in the company of the parent, when the child doesn't sleep at a parent's home.

A. Federal Law Determines the Who May Claim Exemptions

Internal Revenue Code ("IRC") § 152(e) provides that only the "Custodial Parent" may claim the dependency tax exemptions when parents are divorced. The IRC defines "Custodial Parent" as "the parent having custody for the greater portion of the year." IRC § 152(e)(4)(a). The only exception applicable here is when the custodial parent releases claim to the exemption for the year by signing a written declaration that the custodial parent will not claim the child as a dependent and the noncustodial parent attaches that declaration to the noncustodial parent's tax return. IRC § 152(e)(2).

This definition raises the question of what, if any, power do state courts have to allocate dependency deductions between parties during dissolution proceedings. While this Court has on at least one occasion addressed this issue in *Milesnick*, it is perhaps time to revisit the question and readdress the issue more directly.

The decisions of other states are divided, with some concluding that a court may not allocate the dependency exemption, others finding that it may be allocated in child support matters, and still others deciding that it may be allocated in a property division matter or "divorce proceeding." *L.S. v. L.R.S.*, 2007 Del. Fam. Ct. LEXIS 199, *9, 2007 WL 4793935. While the majority of courts have held that IRC § 152(e) was not intended to divest states of the power to determine financial matters between parties to a dissolution, a number of states have held that IRC §

152(e) does divest state courts of such power in regard to taxes. See *Lorenz v. Lorenz*, 166 Mich.App.58, 419 N.W.2d 770 (1988); *In Re the Marriage of Vinson*, 83 Or.App.487, 732 P.2d 79 (1987), review denied, 303 Or. 332, 736 P.2d 566. Of note in this case, one of the states which has determined that IRC § 152(e) removed the ability of states to allocate dependency tax deductions is Texas, where the parties' dissolution action originally occurred. *In the Interest of A.M.*, 2017 Tex. App. LEXIS 3203, *5, 2017 WL 1337648 ("The question of income tax exemptions is clearly an area which has been preempted by the federal government and must be decided according to applicable federal statutes, rules and regulations. State courts have no power to interfere in this area.") See also *Kolb v. Kolb*, 479 S.W.2d 81, 82, 1972 Tex. App. LEXIS 2535, *2.

This Court addressed this issue in a case involving a court's decision not to make an award of the dependency deduction to either party. *In re Marriage of Milesnick*, 235 Mont. 88, 92, 765 P.2d 751, 753-754 (1988). In *Milesnick*, this Court agreed with the majority of states that IRC § 152(e) did not act to limit state court's power to distribute dependency deductions. *Id.* at 93, 765 P.2d at 754. This Court went on to acknowledge that a custodial parent would be required to sign a waiver and provide that waive to the noncustodial parent for the court's order to be effectuated. *Id.* While not faced with the situation head on, the *Milesnick* Court surmised that if the custodial parent refused or failed to sign such a waiver then the

noncustodial parent could seek enforcement through a contempt action in state court. *Id.*

It would be beneficial to litigants for this Court to address this issue directly and interpret if the plain language of IRC § 152(e) for limits this state's courts actions regarding assignment of federal tax dependency deductions. This is especially true considering the only remedy for noncompliance would essentially be a mandatory injunction, forcing a party to sign, against their will, a waiver of what is already awarded to them by the federal government.

Separately, in this case, the State of Texas already determined the division of tax deductions, when, in accord with its state's laws, the court ordered that "each party shall file an individual income tax return in accordance with the Internal Revenue Code." (see *Final Decree of Divorce, p. 28,* dated January 22, 2015). In Texas, the court need not say anything further as their common law has removed the authority of the courts to divvy up dependency tax deductions.

B. Even if the District Court had the authority, its ruling was an abuse of discretion

Operating under the authority found in *Milesnick*, a later trial court awarded the dependency deduction to a noncustodial parent. *In re Marriage of Schnell*, 273 Mont. 466, 471, 905 P.2d 144, 147 (1995). In doing so, the court ignored the

effect of making such an allocation would have on the parties and the children. *Id.* When the court removed the deduction from the custodial parent, the custodial parent lost the right to use that deduction when applying for other forms of assistance. *Id.* In *Schnell*, the child's health insurance and tuition were both adversely impacted by allowing the noncustodial parent to make the dependency deduction on a rotating basis. Ultimately, this Court determined that the lower court had abused its discretion by awarding the dependency deduction in a way detrimental to the child and custodial parent.

Here, this section states "The parents shall each be entitled to claim a child for purposes of their federal and state tax returns. To simplify this process, [Father] shall claim [daughter] until he can no longer claim her, and [Mother] shall claim [son]. When [daughter] can no longer be claimed, then the parties shall alternate claiming [son] for any available tax exemption, deduction, or credit..." (*see Amended Parenting Plan*, p. *11*). This modification to the parties' parenting plan had no basis in fact or law.

Montana caselaw does not support a finding that this modification is in the best interest of the children and there was no testimony regarding tax deductions at the hearing.

The District Court recognized Mother's testimony about Father of failing to pay any child support, and while child support has not been monitored by the court, at the hearing, Father could not demonstrate that he had paid. (*see Order on Petitioner's Motion to Amend Parenting Plan p. 13*). Since that hearing, there have been filings by both parties regarding child support and an order issued by the court. The District Court made no findings that would support this amendment to the parties parenting plan and the amendment is not in the best interests of the children. Further, this modification has large implications that reach far further than the parties parenting plan, such as health insurance, welfare, financial aid for college, and future child support.

C. Tax Deductions are Part of the Marital Estate, not Part of Child Support

As noted earlier, states are divided regarding whether the award of dependency tax deductions are properly part of the marital estate to be divided equitably or part of child support calculations. *L.S. v. L.R.S.*, 2007 Del. Fam. Ct. LEXIS 199, *9, 2007 WL 4793935. However, in this case only two states matter, Montana and Texas and both agree that the dependency tax deductions are properly part of the marital estate. See *In re Marriage of Williams*, 220 Mont. 232, 240, 714 P.2d 548, 553 (1986) (the award of tax deductions is one factor among many which the court considers in determining an equitable division of the marital

estate); *Kolb*, at 82 (upholding the agreement among parties to divide dependency deductions as a contract among the parties and not amendable later by the court). Further, while this is not part of the child support award, courts may consider this as a factor when determining child support because it affects the parties' income. *Milesnick*, at 93, 765 P.2d at 754.

Here, the Texas court determined the distribution of the marital estate and that order was not appealable in Montana courts or even before the court in this case. The Texas divorce decree could have included the tax deduction as part of the parties parenting plan, however it did not. The Texas divorce decree includes a very specific tax deduction section on page 28 and states "IT IS ORDERED AND DECREED that for the calendar year 2014 (the year the parties were divorcing), each party shall file an individual income tax return in accordance with the Internal Revenue Code. It follows between the sections "Attorney's Fees" and "Confirmation of Separate Property" this supports the intent that it be a part of the property settlement and not a part of the parenting plan.

There was simply no reason or authority for the court in this case to address the dependency deduction.

CONCLUSION

Because the District Court only has jurisdiction over Mother and not Mother's husband, this lack of jurisdiction, warrants the District Court's order

being reversed. Consistent with § 40-4-219, MCA, it was erroneous for the District Court to modify the parties parenting plan outside of those changes required or necessary to meet the children's best interest. Arbitrarily changing the parties parenting plan was in error and warrants reversal. Pursuant Texas law, Administrative Rules of Montana § 42.15.401 and § 42.15.403 and § 152(d)(1)(C) of the Internal Revenue Code the tax exemptions, deductions, and credit allotment should not have been modified.

Now that this issue is fully in front of this Court, it would be beneficial to litigants for the Court to evaluate further its holding in *Milesnick* and hold further that IRC § 152(e) preempts state court's determination regarding the assignment of dependency deductions. Should this Court determine otherwise, this Court should recognize the dissolution of marriage as it was completed under Texas laws. Additionally, Mother respectfully requests that this Court reverse the District Court's decision as an abuse of discretion because the court order is adverse to the best interest of the children and will have a continuing negative impact on both the Mother as the custodial parent and the children. Finally, Texas and Montana law agree that the dependency deductions are part of the marital estate and that was not before the court for any action and even it was, the court lacked authority to revisit it in this case.

Due to the aforementioned errors, Mother respectfully requests this Court reverse the *Order on Petitioner's Motion to Amend Parenting Plan* and remand this matter to the district Court to modify provisions fifteen (15) "Parental Communication with Child," twenty-one (21) "Parenting Mediation," and twenty-three (23) "Tax Exemptions/Deductions/Credits" of the *Amended Parenting Plan* issued and adopted contemporaneously with the *Order on Petitioner's Motion to Amend Parenting Plan* and the requirement of family counseling with current husband indicated under number (2) in the *Order* to be consistent with its findings, federal law, the Administrative Rules of Montana and the Internal Revenue Service requirements.

RESPECTFULLY SUBMITTED this 22nd day of April, 2021.

Scotti Ramberg, *Counsel for Appellant*

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately-spaced Times New Roman, typeface of 14 points; is double spaced except for lengthy quotations or footnotes, and does not exceed 10,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my Microsoft Word software.

DATED this 22nd day of April, 2021.

Scotti Ramberg, *Counsel for Appellant*

CERTIFICATE OF SERVICE

I, Scotti Lynn Ramberg, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-22-2021:

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