IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA-21-0050

IN RE PARENTING OF:

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

Minor Children.

SARAH WILMON,

Respondent and Appellant,

v.

MARLEN DELANO RUSSELL,

Petitioner and Appellee

APPELLEE'S RESPONSE BRIEF

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

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APPEARANCES:

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STATEMENT OF THE CASE:

Appellant Sarah Willmon (hereinafter Appellant) has filed an appeal to this Montana Supreme Court for review of the "Order on Petitioner's Motion to Amend Parenting Plan," issued by the Honorable Leslie Halligan, Montana Fourth Judicial District Court, Missoula County. The Order was issued on December 31, 2020. Appellee Marlen Delano Russell (hereinafter Marlen) contests Appellant's requests and arguments, and requests sanctions against the Appellant for bringing this frivolous appeal.

STATEMENT OF THE FACTS:

The parties' marriage was dissolved by a Texas state Court on July 31, 2014. The Appellant moved from Texas to Montana with the children in 2016. On December 20, 2019 Marlen filed a Petition for Registration of Child Custody Determination with the Fourth Judicial District Court, as Montana was the home state of the children, and the Texas Court refused to hear any further evidence based upon jurisdiction.

On February 21, 2020 Marlen filed a "Motion to Amend Parenting Plan and Brief in Support," "Affidavit," and "Proposed Amended Final Parenting Plan."

On May 29, 2020 the parties voluntarily participated in mediation with Meri Althauser, Esq. serving as mediator. At no time leading up to the mediation, nor during the mediation process, did Appellant object or withhold her informed consent to proceed to mediation (see District Court Register of Actions). The parties had a productive settlement conference, and filed a "Stipulation Regarding Summer Parenting, Passports, communication provisions, and International Travel," as a result.

Following difficulties over the summer with his parenting time, Appellant's continual violation of Court Orders, and other concerns, Marlen filed a "Motion for Hearing on Motion to Amend Parenting Plan and Brief in Support" on June 8, 2020. The Court set a hearing, which was ultimately held on September 8, 2020.

The Court heard testimony from the Appellant and from Marlen, and from a therapist, Brooks Baer, who had seen the older child, P.H.P. on a few occasions.

The Court then took the matter under advisement. Following the hearing, the Court interviewed the children in chambers and reviewed all Department of Family Services (DFS) records, and had access to the court file from Texas. On December 31, 2020 the District Court issued its order. Appellant was the prevailing party with regard to this proceeding and Order. She was allowed to

continue to serve as the children's primary parent, despite Marlen's evidence to the contrary.

Marlen was shocked to learn that Appellant would be pursuing an appeal, and it is difficult to respond to her Opening Brief, in light of the fact that she prevailed on nearly every issue before the District Court. Marlen believes this appeal was filed merely as a delay tactic, as Appellant attempts to hold up a child support modification proceeding. Marlen asserts that this is a frivolous appeal and is subject to sanctions.

At the September 8, 2020 hearing the following facts were established through sworn testimony:

- Appellant's husband, and the children's step-father Andrew Willmon has been verbally abusive to both children. He has threatened the children. The younger child "indicated that he would expect to either be slapped or yelled at, or slapped in the head." Tr. at 24, ll. 15-21. Marlen further testified that this abuse occurs both when Appellant is present in the children's care and when she is absent, and that nothing has been done to address this violence. Tr. at 24, ll. 21-25.
- The District Court reviewed the extensive records from Shodair Children's Hospital concerning the older child, who was hospitalized for suicidal

ideation, self-harm, and drug and alcohol use/abuse. The District Court also agreed to review all DFS records pertaining to the children as well as Youth Court records, pertaining to the older child. Tr. at 27, ll. 1-21.

- Marlen specifically requested the Court Order that the children's step-father Mr. Willmon not be allowed to discipline the children. Appellant's counsel made no objection throughout the hearing to that request and cannot, for the first time, raise that issue on appeal. Tr. at 38, ll. 1-10.
- Despite vague references in pleadings leading up to the hearing, Marlen maintained that domestic violence did not occur in the underlying marriage. He testified that he was never charged with assaulting the Appellant. Tr. at 52, ll. 3-17. He further testified that he has never been charged with physically assaulting either child. Tr. at 52, ll. 18-21. Marlen also confirmed that Appellant had never spent time at a domestic violence shelter. Tr. at 52, ll. 22-25.
- Marlen testified that he had been present for the older child's middle school graduation on June 12, 2020. Tr. at 61, ll. 14-17. Marlen confirmed that there was no order of protection in effect that would prohibit any contact between himself and the Appellant. Tr. at 61-62, ll. 24-25, 1-2. He testified that at graduation, he stood right behind Appellant, and there were no issues. Tr. at 62, ll. 3-4.

- Appellant's counsel failed to perform a substantive cross examination of Marlen to attempt in any way to establish that domestic violence was a factor in this case. Tr. at 73-90.
- Interestingly, despite arguing that domestic violence was a central theme in the District Court proceeding, Appellant did not intend to testify, and her counsel moved for a "directed verdict" following the testimony of Appellant's only witness. See Tr. at 130-131. Ms. Ramberg stated:

> Yeah—I'm sorry your honor. At this time, we were going to stay talking to Mr. Willmon—or Mr. Russell and Ms. Willmon in an attempt to just not retraumatize or talk about the nitpicky things in the case, rather the big issues that need to be addressed and leave it up to your discretion as to talking to the children at your convenience and make your decision at that time.

Tr. at pp. 131-132.

- The District Court did not issue a directed verdict. Marlen's counsel requested to call Appellant as an adverse witness. Counsel argued:

> I do think it's necessary for the mother in this case to testify. She's raised a number of ugly allegations against my client [Marlen] that I believe deserve examination. And I would like to examine her as to what she's done to try and take care of these children and protect them from further harm.

Tr. at 135.

- Marlen called Appellant as an adverse witness. During her testimony, Appellant admitted that she has been contacted by the Department of Family

Services regarding issues with her and or her husband's parenting. Tr. at 138, ll. 5-14.

- When Appellant was asked what the biggest impediment to co-parenting with Marlen was, she answered: "a lack of flexibility, very hard to communicate." Appellant never stated that domestic violence was an issue. She merely complained that the parties had difficulty communicating. Tr. at 142, ll. 19-24.
- Appellant admitted that a specific phone conversation regarding the children's spring break, with Marlen in 2020, was "reasonable" and was not menacing or traumatic. Tr. at 144, ll. 14-19.
- Appellant admitted that she has never obtained an order of protection against Marlen, in either Texas or Montana. Tr. at 145, ll. 17-25. Appellant admitted that she had tried to obtain an order in Texas but that "because I could not display any physical marks on my body, they couldn't move forward with it [Order of Protection]." Tr. at 145-146, ll. 23-25, 1.
- Appellant admitted there were no police reports concerning domestic violence. Tr. at 146, ll. 3-8.
- The Appellant admitted that the Texas Court granted Marlen unsupervised and substantive parenting time with the children, despite her claims against Marlen. Tr. at 149, ll. 4-6.

- The Appellant admitted to voluntarily agreeing to participate in mediation with Marlen in Montana in 2020. Tr. at 149, ll. 11-17. Only later, after the successful first mediation, and after Ms. Ramberg joined Appellant's legal team, did Appellant ever cite domestic violence and object to participating in mediation. Tr. at 149, ll. 19-25.
- Appellant admitted that her husband, the children's step-father has yelled at the kids. Tr. at 151, ll. 2-3.
- Appellant also admitted, after first denying physical abuse, that her husband, the children's step-father has spanked the younger child, and Appellant could not tell the Court why Mr. Willmon had physically disciplined the child, despite her being present for the abuse. Tr. at 151, ll. 4-12.
- Appellant admitted that the decree of dissolution issued by the Texas Court which addressed parenting, made no mention of any findings of domestic violence. Tr. at 186, ll. 1-15. Appellant admitted that Marlen's parenting time was not restricted due to a finding of domestic violence. Tr. at 186, ll. 9-15.
- Appellant advised that she had no objection to the Montana District Court reviewing the transcripts of the Texas proceedings. Tr. at 186, ll. 18-23.
- No cross exam was provided to support Appellant's allegations of domestic violence by her counsel.

STANDARD OF REVIEW:

As this Court has held: "because the district court is in a superior position to weigh evidence, we will not overturn the court in child custody matters unless we determine there has been a clear abuse of discretion." *In re Marriage of Czapranski,* 314 Mont. 55, 63 P.2d 499 (2003) citing *In re Marriage of Bukacek,* 274 Mont. 98, 105, 907 P.2d 931, 935, citing *In re Marriage of Bolt,* 259 Mont. 54, 58, 854 P.2d 322, 324 (1993). Furthermore, "when reviewing the court's discretionary decision, we review its findings of fact to determine whether they are clearly erroneous." *Id.* citing *In re: Marriage of Fishbaugh,* 310 Mont. 519, ¶19, 52 P.3d 395 (2002), citing *In Re: Marriage of McKenna,* 299 Mont. 13, ¶14, 996 P.2d 386 (2000).

SUMMARY OF ARGUMENT:

Despite Marlen losing at the District Court level and now being required to file a response to the prevailing party's appeal, Marlen asserts that the District Court acted within its jurisdiction in making determinations, and that the narrow issues presented by Appellant, were within the District Court's discretion to enter. Marlen's proposed parenting plan amendments requested that the minor children reside with him during the school year. While he was disappointed by the District Court's decision and order in this matter, he also understands that the District

Court has wide discretion in these matters, and those decisions will not be overturned unless there is a showing of an abuse of discretion.

RESPONSE TO APPELLANT'S ARGUMENTS:

I. The District Court Did Not Err when it Ordered Mother's Husband, the Children's Step-Father to Engage in Family Counseling, when the Evidence Established that this Individual has Inappropriately Punished the Children.

The District Court has wide discretion to order any party to perform any task that will ensure the best interests of the children are met. Safety of the children is a central issue in the case, and the Court was well within its rights to order the mother to commence family counseling and include her husband, a man she agreed to add into her household and a man who she has allowed to discipline the children. While the step father is not a legal party to this proceeding, and could not be individually held in contempt of court should he refuse to attend family counseling with the Appellant, the Appellant has been tasked with ensuring that other adult members of her household are safe around the children. This is necessary and within the District Court's discretion and within the District Court's jurisdiction.

Montana Code Annotated §40-4-234 allows District Court to take any actions to protect a child's wellbeing and safety. This provision addresses the criteria of a final parenting plan, and provides in pertinent part,

(1) In every dissolution proceeding, proceeding for declaration of invalidity of marriage, parenting plan proceeding, or legal separation proceeding that involves a child, each parent or both parents jointly shall submit to the court, in good faith, a proposed final plan for parenting the child, which may include the allocation of parenting functions. A final parenting plan must be incorporated into any final decree or amended decree, including cases of dissolution by default. As used in this section, parenting functions means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child, which may include:

(a) maintaining a loving, stable, consistent, and nurturing relationship with the child;

(b) attending to the daily needs of the child, such as feeding, physical care, development, and grooming, supervision, spiritual growth and development, health care, day care, and engaging in other activities that are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;

(c) attending to adequate education for the child, including remedial or other education essential to the best interest of the child;

(d) ensuring the interactions and interrelationship of the child with the child's parents and siblings and with any other person who significantly affects the child's best interest; and

(e) exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances.

(2) Based on the best interest of the child, a final parenting plan may include, at a minimum, provisions for:

(a) designation of a parent as custodian of the child, solely for the purposes of all other state and federal statutes that require a designation or determination of custody, but the designation may not affect either parent's rights and responsibilities under the parenting plan;

(b) designation of the legal residence of both parents and the child, except as provided in **40-4-217**;

(c) a residential schedule specifying the periods of time during which the child will reside with each parent, including provisions for holidays, birthdays of family members, vacations, and other special occasions;

(d) finances to provide for the child's needs;

(e) *any other factors affecting the physical and emotional health and well-being of the child;*

(f) periodic review of the parenting plan when requested by either parent or the child or when circumstances arise that are foreseen by the parents as triggering a need for review, such as attainment by the child of a certain age or if a change in the child's residence is necessitated;

(g) sanctions that will apply if a parent fails to follow the terms of the parenting plan, including contempt of court;

(h) allocation of parental decision making authority regarding the child's:

(i) education;

(ii) spiritual development; and

(iii) health care and physical growth;

(i) *the method by which future disputes concerning the child will be resolved between the parents, other than court action; and*

(j) *the unique circumstances of the child or the family situation that the parents agree will facilitate a meaningful, ongoing relationship between the child and parents.*

(4) *The court may in its discretion order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding adoption of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency or court action.*

Emphasis supplied. In this matter, evidence presented established that Appellant's husband, the children's step-father, is a menacing figure in the children's lives. In this case, the Appellant admitted that her husband, the children's step-father has yelled at the children. Tr. at 151, ll. 2-3. Appellant also

admitted, after first denying physical abuse, that her husband, the children's step-father has spanked the younger child, and Appellant could not tell the Court why Mr. Willmon had physically disciplined the child, despite her being present for the abuse. Tr. at 151, ll. 4-12.

The District Court clearly had the ability to order the Appellant to participate in family counseling with her husband, a member of her household, who was found to have inappropriately disciplined both children. This particular order was set forth to address the children's physical and emotional health and wellbeing, as allowed under subsection 2(e). Clearly, the District Court having heard all of the evidence, had the discretion to order the Appellant to initiate and complete family counseling to address her husband's physical abuse/discipline of the children. The District Court is authorized specifically under Mont. Code Ann. §40-4-234 to take any necessary action to protect children. The fact that Appellant would appeal this portion of the order speaks volumes to the instability of her household as well as her refusal to protect her children and co-parent effectively. Should the Appellant be unable to abate the clear danger her current husband poses to the children, it is not in the children's best interests to remain in her custody. The District Court was well within its right to request a reasonable measure such as family counseling, to ensure the safety and wellbeing of the children.

Case law firmly establishes that: "this Court will not overturn the district court's findings unless they are clearly erroneous. Rule 52(a), M.R.Civ.P. In custody modification cases, it is particularly important for this Court to defer to the district court which personally evaluated the testimony." *In Re the Marriage of Ulland,* 251 Mont. 160, 823 P.2d 864, 870 (1992) citing *In Re the Marriage of Anderson,* 240 Mont 316, 320, 783 P.2d 1372, 1374-1375 (1989).

Furthermore, when the parties offer conflicting testimony, this Court has held: "resolving conflicts in testimony is the trier of fact's function." *Id.* Citing *In re: Marriage of Mitchell,* 48 St. Rep. at 354, 809 P.2d at 584. The standard in these appeals is as follows: "we will not substitute our judgment for that of the district court, unless the appellant shows an abuse of discretion." *Id.*

In this matter, the District Court reviewed significant briefs, and conducted a lengthy contested hearing, with regard to the issues brought up on appeal. None of the decisions made by the Court could be construed as having been clearly erroneous nor an abuse of Judge Halligan's discretion. Appellant's claims to the contrary are inconceivable. Appellant has failed to provide a single example of any clearly erroneous findings, nor any abuse of discretion in the District Court's Order.

II. The District Court Did Not Err when it Modified the Parenting Plan. While Marlen Does Not Agree with the Ultimate Decision, He is Not Appealing the Decision and therefore, the Amendments on Appeal, were Made in the Children's Best Interests.

This appeal is suspect and confusing. It is rare for the prevailing party to be the appealing party. Appellant states in her brief: "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 interests." App. Br. p. 13. A majority of the Court's determinations were clearly in the Mother's favor, primarily the finding that Mother should continue to serve as the primary residential parent. The Mother seems to be doing one of two things with this appeal. One, she is attempting to cause delay so that Marlen's persistent requests for a child support modification can continue to be stalled. Two, she is cherry picking minor details she is unhappy with in order to address her own needs and interests, rather than the children's needs and interests. Appellant's argument that the District Court's communication provision is improper, is short cited and not based upon the best interests of the children. During the evidentiary hearing, testimony was provided regarding Marlen's difficulty in communicating with his children. The District Court also met with both children in chambers, and the parties are not privy to the Court's conversation with the children. It was reasonable, however, for the District Court to determine that providing Marlen with a telephone call schedule is in the best interests of the children. Appellant

criticizes the District Court and demands that the District Court's order for Marlen to have regular communications with his children should be "reversed and remanded."

This particular portion of the appeal, highlights the vindictive nature of the Appellant, as well as Appellant Counsel's obvious desire to waste the Court's time and resources, while also causing obvious delay in a child support modification proceeding. This argument is a prime example of why Appellant's appeal should fail and why Appellant should be ordered to pay Marlen's attorney fees in being forced to defend himself, as the losing party to an appeal. How could any parent argue that the other parent should not be entitled to regular telephone contact with the children? Mont. Code Ann. §40-4-212 addresses the best interests of children and the factors a District Court may rely upon in entering a Final Parenting Plan. That statute provides in pertinent part:

> (1) The court shall determine the parenting plan in accordance with the best interest of the child. The court shall consider all relevant parenting factors, which may include but are not limited to:
>
> (a) the wishes of the child's parent or parents;
>
> (b) the wishes of the child;
>
> (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 interest*;
>
> (d) the child's adjustment to home, school, and community;

(e) the mental and physical health of all individuals involved;

(f) physical abuse or threat of physical abuse by one parent against the other parent or the child;

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

(h) *continuity and stability of care*;

(i) developmental needs of the child;

(j) whether a parent has knowingly failed to pay birth-related costs that the parent is able to pay, which is considered to be not in the child's best interests;

(k) whether a parent has knowingly failed to financially support a child that the parent is able to support, which is considered to be not in the child's best interests;

(l) *whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests* unless the court determines, after a hearing, that contact with a parent would be detrimental evidence of physical abuse or threat of physical abuse by one parent against the other parent or the child, including but not limited to whether a parent or other person residing in that parent's household has been convicted of any of the crimes enumerated in **40-4-219**(8)(b).

(Emphasis supplied). In this case, Marlen's relationship with his children is important. The children need their father, and pursuant to statute, it is considered to be in the children's best interests to have frequent and continuing contact with Marlen.

As previously established, the District Court has discretion to determine a final parenting plan in accordance with Mont. Code Ann. §40-4-234. In ordering a final parenting plan, the District Court is required to analyze the children's best interests, pursuant to Mont. Code Ann. §40-4-212. In this case, the District Court

held an evidentiary hearing. Based upon the evidence presented, as well as the record, the District Court entered an order almost entirely in favor of Appellant, save for the limited issues brought on appeal.

This Court has held that: "modification of physical custody within a joint custody arrangement is proper when the change is in the best interests of the child." This certainly includes modifying communication provisions so that the Court can ensue frequent and continuing contact between the father and the children. *Marriage of Ulland,* 251 Mont. 160, ___ 823 P.2d 864, 868 (1992). The Court further held: "this Court will not overturn the district court's findings unless they are clearly erroneous, Rule 52(a) M.R.Civ.P. In custody modification cases, it is particularly important for this Court to defer to the district court which personally evaluated the testimony. *Id* at 869 (citing *In Re: Marriage of Anderson,* 240 Mont. 316, 320, 783 P2d 1372, 1374-1375 (1989). There is nothing in the record that would suggest the District Court committed clear error when it ordered a schedule and provisions to ensure the father could talk with his children via phone.

III. The District Court Did Not Err in Requiring Mediation between the Parties. Appellant Voluntarily Participated in Mediation in 2020 and did not Establish Domestic Violence Exists in the Present Matter.

In *Hendershott v. Westphal,* the Court addressed the mediation statute found

at Mont. Code Ann. §40-4-301, and held:

> Section 40-4-301(1), MCA, grants a district court the discretion to require parties to participate in mediation of a family law proceeding:
>
> The district court may at any time consider the advisability of requiring the parties to a proceeding under this chapter to participate in the mediation of the case. Any party may request the court to order mediation. If the parties agree to mediation, the court may require the attendance of the parties or the representatives of the parties with authority to settle the case at the mediation sessions.
>
> Heidi first argues that this section allows the court to order mediation only where both parties consent. We disagree. The first sentence of the statute plainly gives the court authority to *require* mediation. In the alternative, a party may *request* mediation or both parties may *agree* to mediation. In the event mediation Occurs by agreement of the parties, the court nonetheless may *require* attendance of certain persons at the mediation. Subsection (1) does not limit the court's ability to order mediation. Because we find the statute to be plain, unambiguous, direct and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation. *Christian*, ¶ 12.

360 Mont. 66, 72, 253 P.3d 806 (2011). In addition, the statute addressing final parenting plan criteria also addresses the District Court's inherent ability to address and order mediation prior to initiating the court process. Mont. Code Ann. 40-4-234(4) provides:

> The court may in its discretion order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding adoption of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency or court action.

Mont. Code Ann. § 40-4-301 allows a District Court to order parties to participate in mediation. Subsection (2) makes an exception to court-ordered mediation as follows:

> The Court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party.
>
> This subsection's plain language prohibits court-ordered mediation where there is a reason to suspect abuse.

Hendershott v. Westphal, 360 Mont. 66, 71-72 (Mont. 2011). The Court in Hendershott reconciled the differing provisions set forth in 40-4-234 and 40-4-301 by holding:

> By allowing a court discretion to include a mediation provision in a parenting plan, the Legislature merely encouraged practitioners and courts to consider alternative dispute resolution for future conflicts. The discretionary language of § 40-4-234, MCA, as well as the legislative history, make clear the Legislature did not seek to override the exception in § 40-4-301(2), MCA, to mediation of parenting conflicts in instances of abuse. We therefore conclude that § 40-4-234(4), MCA, and § 40-4-301(2), MCA, are not in conflict. Instead, both provisions afford court discretion in ordering mediation, unless there is reason to suspect emotional, physical, or sexual abuse in the relationship.

Hendershott, at ¶ 29. In this case, the District Court heard the testimony of both parties, and considered all evidence. The District Court has the authority to determine the existence of abuse.

Importantly, in this matter, the Appellant voluntarily agreed to and participated in a settlement conference/mediation with Marlen on May 29, 2020 and never indicated any objection to the process, nor voiced any concerns regarding her "safety" when participating in mediation. Furthermore, as the evidence demonstrated, there is no Order of Protection in this matter, and the parenting plan provides for direct communication between the parties. Although the Court in *Hendershot* overturned the District Court's Order with regard to mediation, the Appellant in the instant matter cannot apply the facts of her case to *Hendershot.* A District Court is tasked with weighing each party's credibility, as trier of fact. Clearly, the District Court did not suspect actual abuse in this matter, and was presented with evidence of the parties' successful settlement conference/mediation held mere months before the final hearing.

Given the Appellant's complaint about the alleged amount she has spent on attorney fees, the parties in this matter should be expected to mediate their differences, if parenting disputes arise in the future. The District Court is certainly well aware of the statutes discussed above, and took those into consideration when determining how future disputes would be resolved. As the parties entered into a stipulation, as the result of voluntary mediation, on May 29, 2020, it is clear that the process was not "traumatic" for the Appellant. In fact, Appellant never complained about the process prior to submitting to voluntary mediation in May,

2020. Marlen asks that this provision of the Order stand. If necessary it will save the parties a great deal in attorney fees and the Court a great deal of time in not being required to hear any small issue in dispute in the future.

IV. The District Court Did Not Err in Providing the Dependency Tax Exemption to the Appellee/Father.

Appellant is disingenuous when representing that the Court has not determined the matter of a District Court's jurisdiction to address each party's ability to claim tax benefits related to the children at issue. This Court has directly addressed the issue that Appellant seeks to invent anew. In *In Re the Marriage of Schnell:* this Court held that District Courts have jurisdiction to address tax deductions in a parenting context. See 273 Mont. 466, 905 P.2d 144(1995). The Court further instructed that the matter of *In Re: Marriage of Milesnick* provides instruction on this topic, holding:

> We are persuaded that the 1984 changes (to U.S.C. Sec. 152(e) were enacted merely to promote administrative efficiency and **were not intended to encroach on the state's power to determine financial matters between the parties of a dissolution action.**
>
> The above report persuades us that the 1984 changes were not enacted to strip state courts of the power to allocate dependency exemptions between parties to a dissolution action.
>
> Having decided that the District Court had the jurisdiction to allocate dependency exemptions we must now determine whether the court abused its discretion in refusing to do so. We hold that the assignment

of dependency deductions is a factor the District Court can consider when ordering child support.

In Re: Marriage of Milesnick, 235 Mont. 88, ___, 765 P.2d 751, 755 (1988).

Next, Appellant's bold and unsupported argument that a child's tax dependency status is a martial asset rather than a child support factor is not worthy of addressing, other than to refute the statement, and restate that child support is a benefit to support the child, rather than a parent. Furthermore, Marlen again points to the clear meaning of Mont. Code Ann. §234(2)(d) which further provides that a parenting may include any provision to address: "finances to provide for the child's needs." It should be noted that by simply providing a standard tax credit to each party, Montana Child Support Services Division can further address this factor when determining an appropriate amount of child support. This portion of the District Court's Order should also stand.

V. Appellant's Appeal, as the Prevailing Party, is Nothing More than an Attempt to Delay Resolution of Child Support Modification and to Waste the Courts' Time and Resources. Appellant should be Ordered to Pay Marlen's Attorney Fees and Costs Incurred in Defending against this Appeal.

The Montana Rules of Appellate Procedure, Rule 19(5) provides in pertinent part:

> (5) the Supreme Court may. . . in a request included in a brief or sua sponte, award sanctions to the prevailing party in an appeal, determined to be frivolous, vexatious, filed for purposes of harassment or delay, or taken without substantial or reasonable grounds. Sanctions may include costs, attorney fees, or other nonmonetary penalty as the Supreme Court deems proper under the circumstances.

In this matter, Marlen has incurred tens of thousands in attorney fees up until the December 31, 2020 Order in this matter, and since. Marlen continues to incur attorney fees and costs with this frivolous appeal. The Appellant's appeal is without substantial or reasonable grounds. Appellant is appealing minor details of an Order in which she was the prevailing party. Appellant's arguments are not made on behalf of the children's best interests, but rather her own convenience. These arguments are also advanced in an attempt to harass Marlen and to delay the determination of a child support modification proceeding, Marlen has been attempting to pursue for over a year since losing his job. Appellant's appeal seems to miss the pinnacle statutes at issue, misinterprets case law, and misrepresents issues that are well-settled in case law. On these bases, Marlen respectfully requests that Appellant be sanctioned for bringing this appeal. The appeal submitted by Appellant does not establish any error made by the District Court. See *Byrun v. Andren,* 337 Mont. 167, 159 P.3d 1062 (2007).

As this Court has held: "it is important for the sake of the litigants and for the judicial system that litigation will at some time finally end." *In Re: the Estate*

of Boland, 397 Mont. 319, 342, 450 P.3d 849, 864 (2019). An appeal is determined frivolous when the arguments made are not in good faith. *Id.* In the case at bar, Appellant's arguments ignore well established statutes, statutory principles, and case law. Appellant has not alleged the District Court committed any errors which would justify her appeal, or uphold the continuation of this expensive and time-consuming litigation.

CONCLUSION:

The Appellant was the prevailing party at the District Court level, and the minor decisions made by the District Court, which she appeals, are improperly before this Court. It is well-established that the Montana Supreme Court will not disturb the findings of a District Court in a contested custody matter, unless a showing of clear error and an abuse of discretion is proven by the Appellant. In this case, the District Court as the trier of fact, made determinations with regard to: the need for family counseling, the need to establish a phone call schedule for Marlen, mediation provisions for future disputes, and tax credits. All four of these areas are within the District Court's discretion and jurisdiction to address. For these reasons, the Appellant's appeal should fail and Appellant should pay for all

of Marlen's attorney fees and costs in being forced to defend against this appeal.

DATED this 7th day of June, 2021.

LUCY HANSEN
Attorney for the Appellee

CERTIFICATE OF SERVICE:

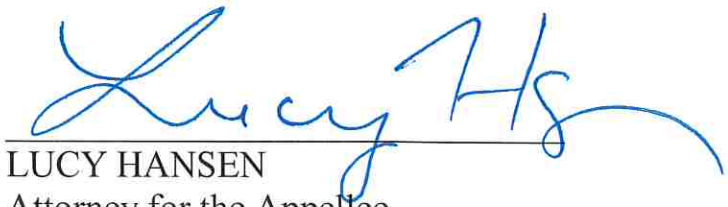
I hereby certify that on the 7th day of June, 2021, I caused a true and accurate copy of the foregoing Response Brief of Appellee and Request for Sanctions to be delivered via e-service to Appellant's counsel, at:

Scotti Ramberg
OPD
211 North Higgins Avenue, Suite 400
Missoula, Montana 59802

LUCY HANSEN
Attorney for the Appellee

CERTIFICATE OF COMPLIANCE:

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response brief is printed with proportionality spaced Times New Roman text typeface of 14 points, is double-spaced except for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding the certificate of service and certificate of compliance.



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CERTIFICATE OF SERVICE

I, Lucy W. Hansen, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-07-2021:

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Dated: 06-07-2021