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STATE OF MONTANA
Case Number: DA 21-0153

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 21-0153

BRYTANY ANNE CATTANEO

Respondent and Appellant,

v.

CHRISTOPHER J. WEIGAND,

Petitioner and Appellee.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Sixth Judicial District Court,
Park County, The Honorable Brenda R. Gilbert, Presiding

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SUMMARY OF ARGUMENT

Appellee has a fundamental misunderstanding of the issues on appeal before the Court. The threshold issue is whether the district court's final order establishing a parental interest in L.C.M. as a matter of law and then enforcing the 2018 Parenting Plan as it relates to L.C.M. based on that finding constitutes reversible error. When Appellant filed her *Motion to Strike Void Provisions,* she was not seeking to amend the 2018 Parenting Plan. Thus, any argument that Appellee makes regarding Section 40-4-219, M.C.A. is merely an attempt to detract from the actual issue. Indeed, if the 2018 Parenting Plan was *valid* as to L.C.M., the appropriate mechanism for any modification would be a motion pursuant to Section 40-4-219, M.C.A. Unfortunately for Appellee, that is not the case here. Rather, Appellant requested the district court to void the 2018 Parenting Plan as it relates to L.C.M. because Appellee is neither the biological nor legal father of L.C.M., and has never filed a petition to establish parental interest as is *required* pursuant to § 40-4-211, M.C.A.

In an interesting twist, Appellee then argues that even if the Sixth Judicial District Court of Montana had known about the 2012 Parenting Plan in Fergus County, the district court would have still approved of the 2018 Parenting Plan. This argument is completely without merit and Appellee fails to cite any applicable legal authority in support of this position because, quite simply, it does not exist.

Finally, no clear and convincing evidence was ever presented to the district court at a hearing *prior to* its approval of the 2018 Parenting Plan to establish (1) that Appellant acted contrary to the parent-child relationship, and (2) that Appellee had established a parent-child relationship *prior to* making an award of parental interest. Thus, the parties' signatures on the 2018 Parenting Plan cannot create a parental interest.

REPLY BRIEF

I. Neither the Sixth Judicial District Court, nor any other District Court in Montana, would have approved of a parenting plan of a minor child, that was simultaneously the subject of a pre-existing parenting plan in neighboring county.

First, Appellee seeks to equate Appellant's *Motion to Strike Void Provisions* to a motion to modify the parenting plan. Appellee's Brief, pp. 17-22. However, Appellant never sought a modification of the parenting plan as to L.C.M., which was made clear at the hearing. *See* Hr'g Tr. pp. 6:2-18. So there was no requirement by Appellant to show a change in circumstances pursuant to Section 40-4-219, M.C.A. for a modification that she never sought. But still, Appellee attempts to argue that informing the Park County District Court of the existence of the 2012 Parenting Plan in Fergus County does not present a change in circumstances of L.C.M.

Here, the district court's mistake of fact (i.e., not knowing the 2012 Parenting Plan already existed when it signed the 2018 Parenting Plan) caused the district court's improper approval of the 2018 Parenting Plan as it related to L.C.M., a non-

biological, non-adoptive child, without ever making a prior determination of parental interest by clear and convincing evidence. No district court of any county in Montana (or any state for that matter), would have subjected a minor child to two different, conflicting parenting plans, one of which excluded her biological father as a party to the parenting plan. Such an arrangement would certainly not be in the minor child's best interests. If a court were to erroneously approve of a parenting plan that it had no power to approve of in the first place by mistake or otherwise, the appropriate remedy is not a modification of the plan. The appropriate remedy is to strike the void provisions that are unenforceable. In this case, the provisions of the 2018 Parenting Plan that are unenforceable are those specific to L.C.M.

Secondly, Appellee argues that he did not know about the existence of the Fergus County Parenting Plan, and that Appellant "made a false representation." However, during the hearing on February 18, 2021, Appellee specifically stated, on the record, that he knew about the existence of the parenting plan in 2018.

Q: Can you, please, read that to the Court?

MS. WILLIAMS: Caitlin, do you have a copy for me?

MS. PABST: It's the petition for dissolution that's part of the record. I don't have another copy, unfortunately.

A: Yeah, the highlighted part says there's no parenting plan between the respondent and LCM's biological father, and LCM does not have any contact with her biological father. I

> suppose it should have said enforced parenting plan.

This exchange clearly indicates that despite Appellee's misrepresentation to the court in the petition for dissolution, he always knew about the existence of the parenting plan; it was just his *opinion* that it was not enforceable.

Further, Appellant never submitted a *verified* response to the petition for dissolution, which is required pursuant to § 40-4-105(3), M.C.A., which shows that Appellant never intended to confer a parental interest, let alone parental rights, on Appellee. She merely wanted to keep the nucleus of the children together. This is also consistent with Appellant's testimony that she never intended to remove Mr. Monochie from L.C.M.'s life or terminate their father-child relationship. Hr'g Tr. p. 155: 1-3, 15-16. Further, by Appellee's own admission, "[i]t was never a matter of legality, including [L.C.M.] in the parenting plan, it was always about her being my daughter in every way imaginable and her inclusion in my life." Hr'g Tr. pp. 104:3-5. So if it wasn't a matter of legality then, why is it one now?

Regardless, it does not change the fact that L.C.M. was – *and still is* - subject to a pre-existing, enforceable parenting plan in another county. A minor child cannot be subjected to two separate parenting plans, involving three or more parties.

a. Best Interests of L.C.M.

Appellee makes the argument that the district court is not prohibiting L.C.M.'s biological father, Mr. Monochie, from exercising parenting time, and that there has

never been any conflict. Appellee's Brief, p. 32. Basically, it is a "no-harm no-foul" argument, which fails. One need only compare the two parenting plans to see the inherent conflicts. With whom will L.C.M. spend Father's Day? According to the 2012 Parenting Plan, she is to spend it with her real father; according to the 2018 Parenting Plan, she is to spend it with Appellee. Both parenting plans provide conflicting, alternating holiday schedules. Subjecting L.C.M. to two different parenting plans creates the potential for a volatile environment, which is obviously not in her best interest.

Appellee then argues that "[e]ven though the District Court was unaware of the parenting plan between Mr. Monochie and Brytany at the time it adopted the subject parenting plan, that fact would not have altered the decision of the District Court." Appellee's Brief, p. 20. By that logic, one child can be subject to multiple parenting plans in multiple different jurisdictions. By way of example, Appellant and her wife, Barb, could sign and file a stipulated parenting plan in Gallatin County that includes Appellee's three minor boys he shares with Appellant. The Gallatin County District Court could then approve of the parenting plan, even if it knew about the 2018 Parenting Plan, without notice to Appellee. Undoubtedly, Appellee would be furious to learn that his sons' stepmother had equal parental authority over his three (3) biological children. Barb could then make health care decisions for the boys, have access to their protected healthcare information, claim them as tax

exemptions, etc. According to Appellee's argument, Appellant (the biological mother) can also cede her *and* Appellee's parental authority to Barb in a signed writing, thereby acting contrary to her parent-child relationship. Appellee's next solution would be to go to Lewis and Clark County, and sign and file a stipulated parenting plan for all three boys with his former nanny and ex-girlfriend, Kaylee Clemmons. Where would it end?

b. The Court's Award of Parental Interest Without Following Proper Procedure Resulted in a Substantial Injustice to Appellant.

Appellee also argues that because L.C.M. 's biological father hasn't consistently exercised his parenting time under the 2012 Parenting Plan, and left L.C.M. *in the care of her biological mother,* that he gave up his parental rights. First, Mr. Monochie is not a party to this case. Even so, one's failure to exercise parenting time does not automatically result in termination of one's parental rights. By this logic, every incarcerated parent in America no longer has parental rights, which is ludicrous.

Appellee attempts to argue that there was "no showing of substantial injustice" and, therefore, any error made by the district court was harmless. An argument that is borderline insulting. How does violating a parent's fundamental right to parent her child not result in a substantial injustice? By way of example, ordering a third-party to go to counseling sessions with a minor, who is not his child, with a counselor of his choosing, over the objection of both biological parents, is

most assuredly a substantial injustice. That is precisely what happened here. Thus, not only did the District Court fail to protect the best interests of L.C.M., but it also violated the constitutionally protected rights of her biological parents, and in doing so, caused a substantial injustice to Appellant.

II. No evidence was presented to the Sixth Judicial District Court, by a clear and convincing standard, to establish that Appellant acted contrary to the parent-child relationship with L.C.M.

First, Appellee argues that much like *Kulstad v. Maniaci*, (2009) 352 Mont. 513, 220 P.3d 595, Appellant acted contrary to her parent-child relationship by entering into a parenting plan with Appellee. Unfortunately for Appellee, *Kulstad* does not stand for such a proposition. Regardless, Appellant never intended to confer a parental interest, or parental rights on Appellee, nor did she ever cede any parental authority.

a. Kulstad v. Maniaci **Supports Appellant's Argument.**

Appellee argues (and the district court apparently agreed) that by stipulating to a final parenting plan and allowing him to jointly parent L.C.M., as any step-parent should, Appellant acted contrary to her parent-child relationship, thereby ceding her parental authority. Appellee's reliance on *Kulstad v. Maniaci* to support this argument is grossly misplaced, as *Kulstad* is vastly distinguishable.

First, *Kulstad* involved a common law marriage of a same-sex couple, who agreed to adopt a minor child seven years into their relationship. *Kulstad,* p. 516.

Because the couple was not married, only one of them was permitted, pursuant to Montana law at the time, to adopt a child. *Id*. Thus, only Maniaci adopted the child. *Id*. Approximately one year later (in 2003), Maniaci decided to adopt another child over Kulstad's objection. *Id*. Nevertheless, Kulstad and Maniaci each agreed that Kulstad would function as a parent to any child they adopted. *Id*. Over the next four years, Kulstad continued to support and co-parent the children; Kulstad lived with the children and functioned as a parent on a day-to-day basis, and even included Maniaci and the children in her will as beneficiaries. Both Kulstad and Maniaci claimed the children as dependents on tax returns. *Id*. at 516-17.

Secondly, prior to the appeal, the district court took extensive steps to determine Kulstad's parental interest in the minor children. It is interesting that Appellee cited this case, because Kulstad is a prime example of how a third-party non-parent should petition for a parental interest, and the painstaking steps a court should take to determine that parental interest, thereby preserving the best interest of the child. Appellee argues that he did, in fact, properly petition for a parental interest by filing the *Petition for Dissolution* in 2018. However, as is clearly illustrated by *Kulstad,* that is simply not the proper procedure. In that case, to initiate the process, not only did Kulstad file a petition for dissolution, but she also sought an order granting her a parental interest and an order implementing a parenting plan *in addition to the petition for dissolution*. *Kulstad*, at 518. Additionally, unlike the

present case, the minor children were not subject to an already existing parenting plan between their biological parents. Their biological parents rights had already been severed via the adoption process, well-before the dissolution action started.

The district court then appointed a *guardian ad litem*. *Id*. at 519. The district court conducted a two-day bench trial, during which it received testimony from four expert witnesses (doctors who testified as to whether or not it would be in the best interests of the minor children to continue their relationship with Kulstad). *Id*. at 520. Subsequently, the court awarded Kulstad a parental interest in the minor children. *Id*. at 523. Of particular note, two of the expert witnesses (Dr. Silverman and Dr. Miller) testified that the children would suffer irreparable harm should the court deny parenting time to Kulstad. *Id*. at 536. The Supreme Court upheld the district court's determination, as there was sufficient clear and convincing evidence in the record to do so. *Id*.

In the current case, there was never any determination of a parental interest, like there was in *Kulstad*. No hearing on the issue of parental interest ever took place, during which clear and convincing evidence was presented to the Sixth Judicial District Court, upon which it could base a decision. Before the very first hearing in this matter, which occurred on February 18, 2021, the court had already made up its mind. On February 16, 2021, the court issued its *Order Denying Motion to Quash Subpoena Duces Tecum*, in which it made a finding that Appellee had a

parental interest in L.C.M. No evidence had yet been presented to the court at a hearing, and there was no statutory authority, nor case law, upon which the court could justify its decision. It is clear that the court reached this conclusion based solely on the language in the 2018 Parenting Plan. Such a decision was not based on clear and convincing evidence. The specific language the district court used on page 15 of its Findings of Fact and Conclusions of Law and Order, issued March 30, 2021 states:

> F. Chris Clearly has a "parental interest" as to L.C.M., as a matter of law, given the parties' Stipulated Parenting Plan that granted him parenting time with L.C.M. that is equal to the parenting time of the Respondent. Moreover, the parties acted consistently with their recognition of Chris' "parental interest."

As much as Appellee would like, *Kulstad* does not stand for the proposition that stipulating to a parenting plan (which a district court did not have the authority to approve as it related to L.C.M.) is conduct contrary to a parent-child relationship. In fact, as noted above, *Kulstad* actually illustrates the proper procedure for a district court to determine whether or not to grant a third-party non-parent a parental interest.

b. Parental Interest Cannot Be Awarded Merely by Consent of the Parties.

Lastly, Appellant's intent by including L.C.M. in the 218 Parenting Plan was solely to keep the nucleus of the children together. It was not meant to confer parental rights or a parental interest to Appellee, or to sever L.C.M.'s relationship with her biological father. Appellant testified at the February 18, 2021 hearing that

it was meant "to keep the nucleus of the children together." Hr'g Tr. p. 155: 1-3, 15-16. She was never informed by her then-counsel or otherwise that by entering into the stipulated parenting plan, that she was giving away any custodial rights to L.C.M. Hr'g Tr. p. 155: 25 – p. 156: 3.

No Montana statute or case law provides that a parental interest can be conferred on a third-party non-parent merely by written consent of the parties. Furthermore, no statutory authority or case law exists providing that a court can consider consent of the parties as evidence to establish a parental interest. In fact, the legislature deliberately left that option out of the third-party parental interest statutes (M.C.A. §§40-4-211(6) and 40-4-228). Some statutes under Title 40 do provide for consent of the parties. For example, M.C.A. 40-4-219(a)(i) and (ii) state that when determining the potential impact of a modification on a minor child, a court may consider whether the parties agree to the amendment, or "consent of the parties." M.C.A. 40-4-208(2)(b)(ii) states that a modification to a maintenance or support obligation can be made upon "written consent of the parties." Thus, if the legislature intended for third-party non-parents to acquire a parental interest and rights over non-biological children simply by the consent of only one biological parent, it would have included that in the statute. Of course, such was never the intent of the legislature, and providing otherwise would be wholly inconsistent with the adoption and guardianship statutes, and would set a dangerous precedent.

III. The Sixth Judicial District Court did not find by clear and convincing evidence a parent-child relationship between L.C.M. and Appellee at the time of the dissolution in 2018

There was never a determination, nor evidence presented, as to the relationship between L.C.M. and Appellee *before the 2018 Parenting Plan was entered*. Section 40-4-211(6)(a) states that a "parent-child relationship" includes a relationship that existed, in whole or in part, ***before*** the filing of a parenting plan action. M.C.A. §40-4-211(6)(a); *see also Kulstad v. Maniaci* (2009) 352 Mont. 513, 532.

First, there was no hearing prior to the 2018 Parenting Plan to determine if there was a parent-child relationship between Appellee and L.C.M. such that she should be included in the parenting plan. Second, the evidence presented at the hearing, including Appellee's own self-serving testimony, included very few details as to their relationship pre-2018. Any testimony or evidence of support by Appellee towards L.C.M. (financially, physically, emotionally, etc.) was all post-2018.

During direct examination, Appellee described his relationship with L.C.M. He stated that when he started dating Appellant in 2012, L.C.M. was two years old, and they all started living together at the end of 2012, or beginning of 2013. Hr'g Tr. p. 87: 22 – p. 88: 3. Appellant and Appellee married in 2014, at which point L.C.M. was four years old. Hr'g Tr. p. 88: 7-12.

Throughout the hearing, and over Appellant's counsel's objection, the court allowed a litany of hearsay evidence into the record. The hearing transcript is littered with statements by the minor child, some statements made during therapy, which is privileged. Specifically, testimony was introduced that L.C.M. initially called Appellee "Tis" or "Gif" and then subsequently called him as "dad" or "daddy." Hr'g Tr. p. 78: 7-20. Appellee's counsel failed to identify any hearsay exceptions or exclusions to allow these statements in, yet the court overruled the hearsay objections anyways. The court should not have considered this evidence in determining whether there existed a parent-child relationship prior to 2018. Nevertheless, this fact does not in of itself establish a parent-child relationship.

Much of Appellee's testimony was spent discussing why he believes that Mr. Monochie was not a good father. Hr'g Tr. p. 89:5 – p. 90:12. When asked to describe his own relationship with L.C.M. during the marriage, Appellee simply stated:

> "While we were together, we were a loving family. [L.C.M.] was my daughter and I had my sons. There was no distinction between the two. We were a really good family, at the time."

Hr'g Tr. p. 90: 13-17.

This conclusory self-serving answer from Appellee is not the type of evidence that the legislature had in mind when it crafted Section 40-4-228, M.C.A., and is certainly not the clear and convincing evidence that a district court should be basing its decision on. If that were the case, a district court could easily grant third-party

parental rights to a live-in boyfriend or girlfriend based solely on his/her one-sided, biased testimony. There was hardly any testimony regarding Appellee's support of L.C.M. (or lack thereof) between 2012 and 2018. For example, Kaylee Clemmons' testimony was specific to Appellee and L.C.M.'s relationship *after* 2019. Tanya Boehm's testimony was also unreliable, as she had no knowledge of L.C.M.'s relationship with her biological father, and she had no knowledge of Appellee's relationship with L.C.M. outside of the workplace. Hr'g Tr. p. 84: 2-21.

Such testimony was certainly not sufficiently reliable for the court to make an ex post facto ruling based on *unclear* and *unconvincing* evidence that a parent-child relationship existed in 2018.

a. Limited Scope of the February 18, 2021 Hearing.

The purpose of the hearing on February 18, 2021 was for the district court to hear argument and testimony on all pending motions. Those pending motions were (1) Appellee's *Motion for Contempt, Sanctions and Expedited Hearing,* and (2) Appellant's *Motion to Strike Void Provisions*.

At the beginning of the hearing, the court specifically acknowledged that the scope of the hearing excluded any modification of the parenting plan. Hr'g Tr. p. 4: 18-21. Counsel cannot now equate the *Motion to Strike Void Provisions* with a motion to modify under M.C.A. § 40-4-219.

Yet, after the hearing, the court issued its order finding that Appellee "clearly has a 'parental interest' as to L.C.M., as a matter of law." FOFCOL, p. 15. That was not the purpose or scope of the hearing. The purpose of Appellant's *Motion to Strike Void Provisions* was to strike L.C.M. from the parenting plan because none of the statutory requirements for a third-party non-parent to be awarded a parental interest, much less parental rights, were ever followed. Thus, if the provisions regarding L.C.M. were void, then Appellant could not be in contempt of unenforceable provisions of a parenting plan.

b. Appellee Failed to Follow Procedure to Establish Parenting Interest Pursuant to § 40-4-211, M.C.A.

Appellee never filed (and still has not filed) a petition or a motion to establish a parental interest in L.C.M., as is required by § 40-4-211, M.C.A., yet the district court still *sua sponte* made a finding of a "parental interest as a matter of law." Appellant was provided with no notice that Appellee was seeking a parental interest in L.C.M. In fact, prior to the court's receipt of any testimony, counsel for Appellant attempted to address this glaring legal issue with the court, and was promptly prevented from doing so.

MS. PABST: Yes, your Honor, and I would like to reserve some time, this morning, to actually address the order that was issued, yesterday, pursuant to - it appears to be under 228, and I respectfully believe that there was not - that the proper procedure has not been followed in order to establish parental interests, and would like the opportunity to -

THE COURT:	Well, I realize that the whole hearing, today, in a sense, is based upon, from your perspective, the argument about whether there is a parental interest. So, I recognize that.
MS. PABST:	Correct, your Honor, but with the order, yesterday, the Court has apparently indicated that - the words parental interest was used.
THE COURT:	Yes, and that's the finding upon which I based my ruling on the subpoena duces tecum, the language in the parenting plan by which both parents agreed that Mr. Weigand was going to have parental rights over this child. So, this is a legal issue, and I'm not going to reverse my decision on the subpoena duces tecum, but I will hear whatever argument anybody wants to make to me regarding the law on that matter, but I see it more as a legal issue, but you can present testimony on that issue, as well.
MS. PABST:	And if I may, at this time, your Honor, present that legal argument, I would be happy to do so.
THE COURT:	We're not going to do that, now. We have, I think, four and a half hours for the hearing today [. . .]

See Hr'g Tr. pp. 7:3-25 to 8:21. It was clear that the court had already made up its mind. The court had already concluded, prior to any hearing, that not only did Appellee have a parental interest, but also parental rights, as to L.C.M. Absent any notice, Appellant's procedural due process rights were violated.

IV. The Appeal was timely filed.

Prior to March 30, 2021, there had never been a finding of parental interest that Appellant could appeal. On March 30, 2021, the district court made a finding

that Appellee "clearly has a 'parental interest' as to L.C.M., as a matter of law." This was the first time ever that any final order had been made awarding Appellee a parental interest. As such, the Decree of Dissolution, which incorporated the 2018 Final Parenting Plan by reference, was not appealable on the issue of parental interest. Rather, the March 30, 2021 Order was the first final and appealable order, which Appellant immediately appealed.

V. Equitable Principles do not apply.

Appellee has asked this Court to apply equitable principles, if it determines that the District Court erred in its application of law, and relies on *In re Marriage of K.E.V.* (1994) 267 Mont. 323, 883 P.2d 1246, which is misplaced. In *K.E.V.,* the father asserted equitable estoppel and the district court applied that doctrine to prevent the mother from claiming that he was not the father. *Id.* at 333-34. The case was appealed, and the Supreme Court affirmed the district court's decision to apply equitable estoppel. *Id.* at 334. However, that doctrine was invoked at the district court level, not in the Supreme Court.

That did not happen here, as Appellee did not ask the district court to apply any equitable doctrines and cannot ask the Supreme Court to apply them now. Even then, the district court would be in a better position to apply equitable doctrines. Furthermore, Appellee provides no compelling argument or authority as to why

Appellant's constitutionally protected rights should take a backseat to equitable principles in favor of a third-party non-parent.

The Court is not currently being asked to review the district court's failure to apply a doctrine of equity. Appellant has appealed the district court's failure to follow the necessary legislative procedure prior to awarding a parental interest to a third-party non-parent.

CONCLUSION

The district court set a very dangerous precedent by exceeding its authority and abused its discretion when it awarded a parental interest in L.C.M. to Appellee *sua sponte* in its *Findings and Conclusions* on March 30, 2021 without following the required statutory procedure. Accordingly, the award of parental interest should be reversed.

Further, since the district court's award of parental interest was improper, the provisions of the 2018 Parenting Plan relating to L.C.M. should be stricken and the district court's order finding Appellant in contempt reversed because one cannot be in contempt of an unenforceable court order.

Finally, any award of attorney fees or costs resulting from the finding of contempt should also be reversed, because the finding of contempt was improper as a matter of law and constitutes reversible error.

Dated this 4th day of November 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is proportionally spaced typeface of 14 points and does not exceed 5,000 words.

/s/ Caitlin T. Pabst______________
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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing APPELLANT'S REPLY BRIEF with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing upon the Clerk of the District Court and each attorney of record by e-Service or email as follows:

Dated this 4th day of November 2021.

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I, Caitlin Terese Pabst, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 11-04-2021:

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