IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0441

IN RE THE PARENTING OF:
L.D.C.,
A Minor Child,

VALERIE L. CALF BOSS RIBS
Petitioner/Appellant,

vs.

DANIEL J. CORNELIUS
Respondent/Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Ninth Judicial District, Glacier County, the Honorable Robert G. Olson, Presiding.

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STATEMENT OF THE ISSUES

1. Whether the District Court erred when it refused to transfer the matter to the Blackfeet Tribal Court after a showing that the District Court no longer had continuing, exclusive jurisdiction under § 40-7-202, MCA.
2. Whether the District Court abused its discretion when it failed to relinquish jurisdiction to the Blackfeet Tribal Court as an inconvenient forum under § 40-7-108, MCA.
3. Whether the District Court abused its discretion when it amended the parties' parenting plan.

STATEMENT OF THE CASE

This case involves the parenting of a young boy, L.D.C., by his mother, Valerie Calf Boss Ribs, and his father, Daniel Cornelius. After extensive litigation, the District Court issued an *Order Denying Motion to Transfer Jurisdiction to the Blackfeet Tribal Court* (Doc. 127) and *Order Affirming Standing Master's Order to Amend Parenting Plan* (Doc. 129.) This appeal centers on the Ninth Judicial District Court's erroneous decision to rule on a child-custody matter in which it lacked jurisdiction.

In August 2018, Valerie filed a parenting plan petition in the Ninth Judicial District Court in Glacier County. (Doc. 3.) Daniel answered and requested an interim parenting plan, which was subsequently ordered. (Docs. 5, 6, 32.) The

parties entered into a *Stipulated Final Parenting Plan* in January 2019. (D.C. Doc. 64.)

In the summer of 2019, Valerie opened an action in the Blackfeet Tribal Court, which Daniel opposed. At the same time, multiple contempt actions were filed in state court. (Docs. 71, 72, 75.) On November 5, 2019, the court issued an *Order Resolving Contempt Motion.* (Doc. 78.) The court, in part, ordered Valerie to dismiss her tribal court action, but register the state court *Stipulated Final Parenting Plan* with the Blackfeet Tribal Court. (Doc. 78.)

On February 10, 2021, Valerie filed a *Motion for Contempt for Failure to Abide by Court-Ordered Parenting Plan* for Daniel's failure to return the child to Valerie for her parenting time. (Doc. 80.) Daniel responded in opposition. (Doc. 82). Three days later, Daniel filed a *Motion to Amend Parenting Plan.* (Doc. 83.) After briefing and a hearing on May 17, 2021, the Standing Master amended the parties' parenting plan, largely adopting Daniel's proposed amended plan. (Doc. 103.) Valerie filed an objection to the Standing Master's order. (Doc. 107). The Standing Master found Daniel in contempt for failing to comply with the parties' *Stipulated Final Parenting Plan*, finding Daniel had failed to provide Valerie with parenting time as ordered by the court and should not have resorted to self-help measures. (Doc. 114.)

On May 21, 2021, Valerie filed a *Motion to Transfer Jurisdiction to the Blackfeet Tribal Court.* (Doc. 106). Valerie argued none of the parties had resided in the state court's jurisdiction since 2019 and requested an evidentiary hearing on the issue of the court's jurisdiction over the matter. (Docs. 106 107,109,110.) Daniel opposed the motion. (Docs. 116, 122.) On June 11, 2021, the Standing Master issued an *Order Denying Petitioner's Motion to Transfer Jurisdiction to the Blackfeet Tribal Court.* (Doc. 118.)

On Valerie's motion, the matter was referred to the District Court. (Docs. 111, 120). Valerie objected to the Standing Master's jurisdictional findings and again asserted that the Ninth Judicial District Court in Glacier County no longer had jurisdiction over the parties. (Doc. 123.) On July 8, 2021, the District Court held a one-hour hearing on the issue of the state court's jurisdiction and Valerie's objections to the amended parenting plan. (July 8, 2021 Hearing (hereinafter 7/8/21).)

On August 10, 2021, the District Court issued its *Order Denying Motion to Transfer Jurisdiction to Blackfeet Tribal Court.* (Doc. 127.) The District Court found Valerie "consented" to the court's jurisdiction and waived her right to raise the issue of the court's jurisdiction. (Doc. 127.) The District Court further held that Valerie's claim of inconvenient forum was untimely. (Doc. 127.)

That same day, the District Court issued its *Order Affirming Standing Master's Order to Amend Parenting Plan.* (Doc. 129.) The District Court found all of the Standing Master's findings of fact were supported except for Finding No. 10, which the court disregarded. On September 7, 2021, Valerie filed a timely Notice of Appeal.

STATEMENT OF THE FACTS

Valerie Calf Boss Ribs and Daniel Cornelius are the parents of three-year-old L.D.C. In August 2016, the parties began a relationship after meeting on the Blackfeet Reservation. Valerie became pregnant with the parties' first child, M.C., who died from a genetic disorder in June 2017. (Doc. 110.) Valerie became pregnant again shortly thereafter and gave birth to L.D.C. in March 2018 (Doc. 110.)

Daniel is a member of the Oneida Nation and resides in Wisconsin, where he works at the University of Wisconsin-Madison School of Law and as a farmer. (Doc. 3; 5/17/21 Hr. at 192.) Daniel maintained ties on the Blackfeet Reservation where he works seasonally on the reservation in the summer and fall months. (Docs. 106; 110.) Both Valerie and L.D.C. are members of the Blackfeet Nation. (Doc. 28,Valerie's Affidavit, November 6, 2018) Valerie has deep roots on the Blackfeet Reservation and a vast family support system there. She has held various

jobs in the community, including for Blackfeet Tribal Housing and caregiving for her family.

In August 2018, Valerie filed a pro se *Petition for Parenting Plan* in Glacier County. (D.C. Doc. 3.) Valerie was residing in Cut Bank at the time. (5/17/21 Hr. at 114-115.) Daniel had returned to Wisconsin. (Doc. 3.) After an interim plan, the District Court issued a *Stipulated Final Parenting Plan* in January 2019. (Docs. 32, 64) The plan called for co-equal parenting time on a month on, month off basis. (Doc. 64.) Valerie completed treatment at Rocky Mountain Treatment Center in the spring of 2019 and engaged in out-patient at Crystal Creek Lodge. (Doc. 66.)

In the summer of 2019, Valerie relocated to Browning, MT, where she lived with her aunt, Toni Gilliam. (5/17/21 Hr. at 115.) On July 9, 2019, Valerie filed a petition for custody with the Blackfeet Tribal Court and Daniel sought dismissal of that action. Valerie also sought assistance of the domestic violence program in Browning and a temporary restraining order from the Blackfeet Tribal Court. (D.C. Doc. 72.) On July 18, 2019, Daniel filed a contempt action after an incident in which he involved Blackfeet law enforcement. (D.C. Doc. 71). Ultimately, it was resolved through court-ordered mediation at the show cause hearing and the parties reached an agreement that was incorporated into an order. (D.C. Doc. 78.) The *Order* provided, in part, that Valerie submit to three drug tests through the Blackfeet TERO office and provide Daniel with her treatment records. (D.C. Doc.

78.) The parties further agreed to use a counselor to resolve co-parenting issues in the months of June, July, August, and October, when Daniel was in Browning. (D.C. Doc. 78.) The court further ordered Valerie to dismiss her tribal court action, but register the state court *Stipulated Final Parenting Plan* with the Blackfeet Tribal Court. (D.C. Doc. 78.)

From December 2019 until January 13, 2020, Valerie worked temporarily at a gas station in North Dakota when faced with limited employment opportunities in Browning. (5/17/21 Hr. at 98-100.) Daniel refused to allow Valarie parenting time in North Dakota, so she ultimately returned to Browning, within the Blackfeet Reservation, where she resided with her cousin, Deanna Gillham DesRosier. (5/17/21 Hr. at 99, 101.) Valerie also resided with her grandmother, Myrna Hoyt, again remaining on the reservation. (5/17/21 Hr. at 115.) Valerie temporarily stayed at Kelly Fitzgerald's house in Cut Bank, but returned to the reservation, where she stayed with her aunt and her mother. (5/17/21 Hr. at 116,165.)

In March 2020, the COVID-19 pandemic hit. The parties continued to use the month-on, month-off parenting schedule, as provided for in their parenting plan. L.D.C. was with Valerie from late April to mid-July 2020. (5/17/21 Hr. at 60-61.) In July 2020, the parties had a difficult exchange at the gas station in Browning. Blackfeet law enforcement responded to the exchange, as they had previously. (5/17/21 Hr. at 27-29.) The July 2020 event culminated in Valerie's

arrest; however, no charges were filed. (5/17/21 Hr. at 105,107.) Daniel has utilized law enforcement on the reservation at least two other times. (5/17/21 Hr. at 112.) Valerie parented L.D.C. as planned from September 2020 to October 2020. (5/17/21 Hr. at 60-61.)

In October 2020, L.D.C. was with Valerie for her parenting time when Valerie contracted COVID-19 through work at the Blackfeet Tribal Housing. (5/17/21 Hr. at 62:16-17, at 94.) When Valerie was notified by tribal health services of her status as a close contact, she notified Daniel. (5/17/21 Hr. at 95, 123.) On October 16, 2020, Daniel picked up L.D.C. from Valerie in Browning for what was supposed to be an evening visit. (D.C. Doc. 1, affidavit of Valerie Calf Boss Ribs.) He did not return the child to Valerie for seven months, until he was ordered to by the Standing Master at the May 17, 2021 hearing. (Doc. 80; 5/17/21 at 196.)

In January 2021, Valerie moved out of her mother's home. (5/17/21 Hr. at 164-165.) At the time of the May 2021 hearing, Valerie was staying at the Edwards' residence on the Blackfeet Reservation. (5/17/21 Hr. at 116.) Valerie's frequent housing changes in the Browning community are explained by the caretaking role she has in her extended family. (5/17/21 Hr. at 169.) Valerie's mother, Teresa Calf Boss Ribs, testified that Valerie and her sisters take turns

caring for their grandmother, Mrs. Hoyt, who is bedridden. (5/17/21 Hr. at 169-170.)

In February 2021, Valerie moved to hold Daniel in contempt due to his continued failure to abide by the visitation terms of the parenting plan. (Doc. 80.) Daniel argued that COVID and travel restrictions on the Blackfeet Reservation made it no longer safe for him to travel with L.D.C. (Doc. 82.) Three days after Valerie's contempt motion, Daniel filed to amend that parties' parenting plan in which he represented that he was a resident of Wisconsin and Valerie was a resident of Browning. (Doc. 82, 83.) Daniel's proposed plan imposed a series of extreme conditions on Valerie's parenting time including requiring her to complete 90-day inpatient treatment, submit to random drug and alcohol testing at Daniel's request, attend anger management, and conditioned the resumption of parenting time upon the recommendation of her treatment providers. (Doc. 83.)

Valerie moved to dismiss the motion to amend. (Doc. 86.) She argued that Daniel's willful refusal to allow L.D.C. parenting time with his mother was contrary to his best interest and that Daniel should have used the proper legal procedures, as opposed to withholding parenting time, to address any concerns. She asserted that frustrating or denying contact between a parent and child is presumed to be against a child's best interest. The parties unsuccessfully

attempted to mediate the issue and appeared before Standing Master Westveer on May 17, 2021.

The court held a hearing on Valerie's contempt motion and Daniel's request to amend the parenting plan. (5/17/21 Hr.) Daniel's counsel admitted at the beginning of the hearing that Daniel had been withholding L.D.C. from Valerie since October 2020, which he believed was justified due to the COVID-19 pandemic and "other issues." (5/17/21 Hr. at 7:12-15.) Daniel testified that between January 2019 and October 2020, he made approximately 12 or 13 trips to Montana. (5/17/21 Hr. at 13.) Daniel testified that he understood the COVID pandemic to be particularly severe on the Blackfeet Reservation and that the severity caused him concern about L.D.C. spending time there with Valerie. (5/17/21 Hr. at 17:4-11.)

Daniel explained that he sought the amendment due to "a spiraling pattern of clear substance abuse, lack of stable housing, and violence" culminating in Valerie's arrest in Browning. (5/17/21 Hr. at 15.) He admitted that Mother had released her treatment records to him, but testified that he faced difficulty accessing those records because the treatment center wanted an order from the court. (5/17/21 Hr. at 24-25.) Daniel alleged that Valerie was intoxicated during phone calls with L.D.C., slurring her words while singing the ABCs. (5/17/21 Hr. at 30.) When the Standing Master questioned the appropriateness of ordering

Valerie to attend significant, inpatient treatment without a chemical dependency evaluation recommendation, Daniel testified that he believed Valerie "know[s] what to say so she doesn't get a recommendation for treatment." (5/17/21 Hr. at 45.)

Valerie testified that she sought the court's assistance through her contempt motion because Daniel had unlawfully kept L.D.C. from her for the past seven months. (5/17/21 Hr. at 91.) Valerie responded to Daniel's claims of substance abuse, testifying that she completed treatment at Rocky Mountain Treatment Center in 2019, was not abusing drugs or alcohol, and would complete another CD evaluation if necessary. (5/17/21 Hr. at 91;133;138.) Valerie disputed the claims that she was intoxicated and slurring the ABCs. (5/17/21 Hr. at 108, 146.) She explained that it was sometimes loud during their video visits because of the number of small children at her mother's house and denied calling L.D.C. from loud parties. (5/17/21 Hr. at 145.) Valerie provided a drug test for Daniel as requested, which was negative for any substances. (5/17/21 Hr. at 98.) Valerie did not receive any further requests for drug testing. (5/17/21 Hr. at 109.)

At the end of the May 2021 hearing, the Standing Master requested briefing on the contempt remedy. (Doc. 114.) The court indicated that it would likely adopt Daniel's proposed amended parenting plan, but could not rule from the bench. (5/17/21 Hr. at 188-189) The court ordered visits between Valerie and L.D.C. at

Teresa Calf Boss Ribs' home, with exchanges at Glacier Family Foods in Browning. (5/17/21 Hr. at 198.)

On May 21, 2021, the Standing Master issued his *Order Amending the Parenting Plan.* (Doc. 103.) The court found a substantial change in the child's circumstances based on Valerie's lack of a permanent residence, the "substantial impact" of COVID, and mother's alleged substance use. The order required Valerie to obtain a chemical dependency evaluation at a facility other than Crystal Creek Lodge, the treatment center run by the Blackfeet Tribe. (Doc. 103.) The court further directed Valerie to "use her best efforts to enter a facility other than Crystal Creek Lodge" if inpatient treatment is recommended. (Doc. 103.) The order conditioned Valerie's parenting time on the recommendations of her counselor, competition of anger management, and 90 days sobriety. (Doc. 103.) Finally, the *Order* limited Valerie's parenting time, as follows:

> Until Mother complies with the provisions of this amended parenting plan, Father shall parent the child from May 23, 2021 at 12:00 p.m (Noon) until mother has obtained stable housing, attempts regular employment seeking and employment once obtained and addressed her chemical dependency and anger issues as set forth above. (Doc. 103.)

Valerie subsequently filed a *Motion to Transfer to Blackfeet Tribal Court.* (Docs. 106,110.) Valerie alleged that the Glacier County state court no longer had continuing, exclusive jurisdiction under § 40-7-202, MCA. Additionally, Valerie alleged that the state court was an inconvenient forum and that the Blackfeet Tribal

Court was the proper court under § 40-7-108, MCA. Valerie requested an evidentiary hearing on the issue. (Docs. 107,109.) Valerie then filed a *Petition for Custody and to Accept Jurisdiction Over Matter* in the Blackfeet Tribal Court.

On June 11, 2021, the Standing Master issued his *Order Denying Petitioner's Motion to Transfer Jurisdiction to the Blackfeet Tribal Court.* (Doc. 118.) The court found that "Petitioner still resides in Glacier County." (Doc. 118.) Alternatively, the court found that even if Valerie "resides primarily in Browning, MT, that is merely 35 minutes from Glacier County seat located in Cut Bank, MT and still in Glacier County." The court found that it still had jurisdiction under § 40-7-202(1)(b), MCA and denied Valerie's request. Valerie filed objections to the Standing Master's findings on jurisdiction and amending the parenting plan and the District Court assumed the case from the Standing Master. (Docs. 106, 107, 109,110.)

On July 8, 2021, the District Court held a hearing on Valerie's objections. At the outset, the District Court informed the parties that this was not an evidentiary hearing. (7/8/21 Hr. at 5.) Valerie's counsel requested to put on evidence regarding the jurisdictional issue, as permitted by § 40-7-202,MCA, and asked to address jurisdiction first given the limited time for the hearing. (7/8/21 Hr. at 6-7.) The District Court denied her request. (7/8/21 Hr. at 7.) The District Court then held the following conversation with mother's counsel:

THE COURT: But we're starting with the merits. Jurisdiction, I can tell you that those factors come into play when there's a motion for jurisdiction and/or non-convenient forum properly before the court.

MS. DAWN GRAY: Yes.

THE COURT: No – my review of the record, does not show that any motion to transfer jurisdiction was made prior to the hearing, nor any motion claiming this was a non-convenient forum, was made prior to the hearing before the standing master--

MS. DAWN GRAY: --yes. Yes—

THE COURT: When those motions; when you don't get the finder of fact an opportunity to make a determination on those issues, you can't appeal those issues to a court, and claim that he did something wrong. And that's exactly what you're doing.

I feel comfortable concluding as a matter of law, that the motion to transfer jurisdiction and the motion for claiming this is a non-convenient forum where not properly preserved previously. And are something that this court is not going to grant, unless you can show me somewhere where those motions were made, prior to any hearing before the standing master.

MS. DAWN GRAY: Okay. So, with regards to bringing an issue of jurisdiction, I am fully aware that that can be raised at any level in the proceedings, including appellate proceedings.

THE COURT: Subject matter jurisdiction, you can –

MS. DAWN GRAY: --yeah—

THE COURT: --personal jurisdiction you can't.

MS. DAWN GRAY: Yeah, well I think that also includes subject matter jurisdiction in this case, but I would like to make that argument, too, Your Honor—

THE COURT: --and you're gonna have a chance, I'm just telling you-

> MS. DAWN GRAY: --appreciate that.
>
> THE COURT: You know, as where I'm at, and so that you can make a determination how to best use your time—
>
> THE COURT: --subject matter jurisdiction isn't an issue right now because your client is the petitioner and invoked the jurisdiction of this court. This court has exercised subject matter jurisdiction over this matter.
>
> So when you object to jurisdiction, the only possible objection would be personal jurisdiction, and that needs to be raised prior to hearing on the merits, not after.
>
> 7/8/21 Hr. at 8-10.

Counsel for mother then discussed each of the findings and conclusions Valerie contested. (7/8/21 Hr. at 26-54.) Counsel asserted that the parenting plan infringed on the Blackfeet Tribe's ability to govern itself and its members. (7/8/21 Hr. at 56.) Counsel again affirmed to the court that none of the parties had resided in Glacier County for years and the evidence concerning the child's care, the majority of the parenting time, exchanges, and disputes all took place within the reservation. (7/8/21 Hr. at 59.)

On August 10, 2021, the District Court issued an *Order Denying Motion to Transfer Jurisdiction to Blackfeet Tribal Court.* (Doc. 127.) The District Court found that Valerie had "consented" to the court's jurisdiction and could not assert "[a] defense of lack of personal jurisdiction under Montana Rules of Civil Procedure 12(b)." (Doc. 127.) The court further found Valerie's inconvenient forum argument to be untimely and denied her request to transfer on that basis. The

Order mentioned the UCCJEA but did not analyze its application. That same day, the District Court issued an *Order Affirming Standing Master's Order to Amend Parenting Plan.* (Doc. 129.)

SUMMARY OF THE ARGUMENTS

The District Court acted without jurisdiction and erred when it failed to transfer the case to the Blackfeet Tribal Court. The Ninth Judicial District no longer had continuing, exclusive jurisdiction under § 40-7-202, MCA as none of the parties resided in the state. The Blackfeet Tribal Court is uniquely situated in its ability to adjudicate this child custody matter involving Native American parents and an enrolled Blackfeet child. The District Court further erred when it failed to relinquish jurisdiction as an inconvenient forum under § 40-7-108, MCA.

Even if the District Court continued to have jurisdiction, the District Court erred when it amended the parties' parenting plan without a showing of a substantial change in circumstances under § 40-4-219, MCA. Daniel did not carry his burden of demonstrating a substantial change in circumstances necessary for the modification of the parties' plan. Finally, the parenting plan infringes upon the sovereign rights of the Blackfeet Tribe and its members to be ruled by the Tribe's laws.

STANDARD OF REVIEW

A district court's conclusion of whether it has jurisdiction over a child custody matter is a question of law, which this Court reviews de novo. *In re B.K.,* 2018 MT 217, ¶ 5, 392 Mont. 426, 425 P.3d 703; *In re Marriage of Sampley*, 2015 MT 121, ¶ 6, 379 Mont. 131, 347 P.3d 1281. This Court reviews a court's interpretation and application of statutes for correctness. *In re Sampley,* ¶ 6. This Court reviews a district court's determination regarding inconvenient forum and a request to decline jurisdiction for abuse of discretion. *Stoneman v. Drollinger*, 2003 MT 25, ¶ 10, 314 Mont. 139, 64 P.3d 997.

A district court's decision regarding modification of a parenting plan is reviewed for clear error. *In re Marriage of Solem,* 2020 MT 141, ¶ 5, 400 Mont. 186, 464 P.3d 981. A finding of fact is clearly erroneous if it is not supported by substantial evidence, the court misapprehended the effect of the evidence, or, the record shows a definite and firm conviction that the lower court was mistaken. *In re Bessette,* 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894. This Court reviews conclusions of law de novo for correctness. *In re Bessette,* ¶ 13. "The ultimate test for adequacy of findings of fact is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence presented." *In re Marriage of William,* 2018 MT 221, ¶ 5, 392 Mont. 484, 425 P.3d 1277.

ARGUMENTS

I. THE DISTRICT COURT ERRED WHEN IT FAILED TO TRANSFER THE CASE TO TRIBAL COURT AS REQUIRED UNDER THE UCCJEA.

Jurisdiction is essential to a court's authority to preside over a case. Whether a court has jurisdiction "considers a court's right to determine and hear an issue." *In re Marriage of Skillen,* 1998 MT 43, ¶ 12, 287 Mont. 399, 956 P.2d 1(overruled, in part, on unrelated grounds by *In re the Estate of Big Spring v. Conway*, 2011 MT 109, ¶ 45, 360 Mont. 370, 255 P.3d 121.) Jurisdiction "transcends procedural considerations and involves the fundamental power and authority of the court itself." *In re Skillen,* ¶ 12 (citing *Wippert v. Blackfeet Tribe,* 260 Mont. 93, 102, 859 P.2d 420, 425 (1993).)

Child custody jurisdiction is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Montana adopted the UCCJEA in 1999. Sections 40–7–101 to –317, MCA; *Stoneman,* ¶ 14. The UCCJEA is designed to "promot[e] cooperation of the courts by establishing uniform criteria for the state with the closest connections with the child to exercise jurisdiction." *Stoneman*, ¶ 12 (citing Sec. 1, Ch. 537, L. 1977).

Under the UCCJEA, a Montana court may only exercise initial child-custody jurisdiction if Montana is the child's "home state." Section 40-7-201, MCA;

Sampley, ¶ 23. Valerie does not challenge that the Glacier County District Court, in Cut Bank, Montana, had jurisdiction to make the initial child custody jurisdiction. Rather, her appeal centers on the fact that the District Court no longer had exclusive, continuing jurisdiction under § 40-7-202, MCA as neither her, the father, nor the child resided in that state court's jurisdiction for purposes of the UCCJEA.

Under the UCCJEA, a Native American tribe is to be treated as a "state." Section 40-7-135(2), MCA; See Also *Understanding the Uniform Child Custody Jurisdiction Enforcement Act,* Barbara J. Aaby, 23 AM. J. FAM. L. 11 (2009). Even if a tribe's physical territories fall within the state of Montana, the tribe is considered its own "state" for purposes of the UCCJEA. Therefore, the Blackfeet Nation is a distinct state, with its own judicial jurisdiction, even though its physical boundaries are within the Montana counties of Glacier and Pondera.

Valerie urges this Court to reverse the District Court for its failure to relinquish jurisdiction when there was undisputed evidence that neither the child nor either parent resided in Montana for purposes of the UCCJEA. If this Court concludes that the state court did have jurisdiction, Valerie asserts that the District Court abused its discretion when it declined to transfer the case to the Blackfeet Tribal Court under the inconvenient forum statute.

A. The District Court Erred When It Concluded Valerie Waived Her Right To Object To The Court's Jurisdiction.

As an initial matter, the District Court erroneously concluded that Valerie waived her right to contest the state court's jurisdiction over this matter by filing the initial petition in the District Court and participating in the case. (Docs. 127.) The District Court incorrectly applied the law to this issue.

It is well settled that subject matter jurisdiction cannot be waived. The issue of whether a court has subject matter jurisdiction may be raised "at any time and by either party, or by the court itself." *In re Estate of Big Springs,* ¶ 23; *In re Skillen,* ¶ 10 (citing Rule 12(h)(3), M.R.Civ. P.; *State v. Tweedy*, 277 Mont. 313, 315, 922 P.2d 1134, 1135 (1996); *Wippert,* 260 Mont. at 102, 859 P.2d at 425.) Importantly, a party cannot waive jurisdiction or stipulate to it "when there is no legal basis for the court to exercise jurisdiction." *In re Estate of Big Springs,* ¶ 23; *In re Skillen,* ¶ 10.

The District Court's conclusion that Valerie waived her right to object to the state court's jurisdiction is incorrect as a matter of law. It was proper for Valerie to raise the issue of the District Court's jurisdiction and the court erred when it concluded that she had waived the right to object. It is immaterial that Valerie filed the initial child custody petition in the state district court.

B. The District Court Did Not Have Continuing, Exclusive Jurisdiction Over the Case.

The District Court no longer had exclusive, continuing jurisdiction over this matter when none of the parties resided in Montana under the UCCJEA. Section 40-7-202, MCA. The court further erred when it failed to confer with the Blackfeet Tribal Court, where Mother had filed a request to accept jurisdiction. The District Court erred when it failed to relinquish jurisdiction to the Blackfeet Tribal Court upon undisputed evidence that none of the parties resided within its jurisdiction and there was no longer substantial evidence concerning the child there.

Pursuant to § 40-7-202, MCA, the court that made the initial child custody determination maintains exclusive, continuing jurisdiction over the matter unless one of the following two exceptions apply:

(a) a court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and person relationship; or

(b) a court of this state or a court of another state determines that neither the child, a parent, nor any person acting as a parent presently resides in the state.

Section 40-7-202, MCA(1)(a)-(b), MCA; *In re B.P.,* 2008 MT 166, ¶ 19, 343 Mont. 345, 184 P.3d 334.

In *In re B.P.,* this Court addressed the issue of whether Montana continued to have exclusive jurisdiction over the matter when none of the parties continued to reside in the state. *In re B.P.,* 2008 MT 166, 343 Mont. 345, 184 P.3d 334. In that case, the Department of Health and Human Services had removed children from their mother's care in Montana and placed the children with their father in California. Upon concluding that placement with father was proper, the Department informed the District Court that it no longer wished to pursue temporary legal custody of the children. *In re B.P.,* ¶ 5. The district court then issued an order detailing the permanent placement of the children with the father and limiting contact with the mother until she addressed her psychological disorders. *In re B.P.,* ¶ 5. The children continued to reside with their father in California and the mother moved to Minnesota. Years later, the mother moved the Montana district court to relinquish jurisdiction over the matter and her request was denied. *In re B.P.,* ¶ 5. The Montana Supreme Court reversed the District Court's denial of Mother's request. *In re B.P.,* ¶ 24. This Court held that the District Court erred when it failed to conduct the required analysis under § 40-7-202, MCA. *In re B.P.,* ¶ 23. The Court further held that when "none of the relevant parties resided in the state of Montana," the district court was required to

relinquish jurisdiction as it no longer had exclusive, continuing jurisdiction over the matter. *In re B.P.,* ¶ 23; ¶ 19 ("exclusive and continuing jurisdiction exists *until* a court in this state determines that none of the relevant parties reside in [the state].") (emphasis in original.)

District courts must follow § 40-7-202, MCA and relinquish jurisdiction when facts supporting either of the exceptions to continuing jurisdiction are present. The exceptions "are neither arbitrary nor confusing" and district courts must apply the clear language of § 40-7-202, MCA to determine whether the court may maintain jurisdiction or must relinquish jurisdiction to another court. *In re B.P.,* ¶ 19. Failing to make such a determination upon a clear showing that none of the parties reside in the state is grounds for reversal. *In re B.P.,* ¶ 24. The District Court erred when it denied Valerie's counsel request for an evidentiary hearing to allow the court to make a determination on the jurisdictional issue. (7/8/21 Hr. at 6-7.) Moreover, the clear evidence in the record establishes that the District Court no longer had jurisdiction under § 40-7-202, MCA.

None of the parties resided in Cut Bank, Montana after mid-2019. Daniel, a resident of Wisconsin has not resided in Cut Bank, Montana at any time during the pendency of the matter. Conversely, Daniel has made multiple trips each year to the Blackfeet Reservation and spent extended periods of time in the fall and

summer working within the physical territory of the Blackfeet Tribe. It is undisputed that Daniel does not reside in Montana.

Valerie has lived in the jurisdiction of the Blackfeet Tribal Court since at least January 2020 and as early as the summer of 2019 apart from her temporary time working in North Dakota. The undisputed evidence demonstrates that Valerie moved from Cut Bank to Browning during the summer of 2019 and has not resided in Cut Bank, MT since. The record shows that Valerie was employed in Browning through Blackfeet Tribal Housing and served as a caretaker to her elderly relative. Valerie utilized services on the Blackfeet Reservation including the Blackfeet Domestic Violence program, the Tribe's health services, and the Blackfeet TERO for drug testing required under the plan.

Since mid-2019, Valerie's parenting time with L.D.C. occurred within the boundaries of the Blackfeet Tribe. Until he was withheld by his father, L.D.C. enjoyed time with his mother and extended family on the reservation. He received medical care at Indian Health Services on the reservation and all exchanges occurred on the reservation. (Doc. 108, 110.) Daniel's pleadings and testimony support the conclusion that Valerie is domiciled in the jurisdiction of the Blackfeet Tribe. (Docs. 82,83 stating Valerie is a resident of Browning.) For example, in Daniel's response to Valerie's contempt motion, he described how he did not think he should travel onto the Blackfeet Reservation to exchange L.D.C. due to the

Tribe's stay-at-home order and the spread of the virus on the reservation. (Doc. 82.) Even the parties' custody disputes and difficult transitions occurred within the Blackfeet Tribe's territory and were responded to by the Blackfeet tribal police.

Valerie's multiple residences in Browning are immaterial to the determination of jurisdiction. Browning is located within the physical boundaries of the Blackfeet Reservation. Under Section 40-7-135(2), MCA, Browning is to be treated as located within the "state" of the Blackfeet Nation. The record establishes that Valerie resided at multiple residences in Browning, consisting primarily of family members. All parties admitted that Valerie had not been domiciled in Cut Bank, within the state of Montana, since 2019. So long as Browning continues to be located within the physical boundaries of the Blackfeet Tribe Valerie was not residing in Montana for purposes of the UCCJEA. Section 40-7-135, MCA. There was no evidence that Valerie's absence from Cut Bank was temporary. As such, neither Valerie, Daniel, nor their child were living in Montana at the time of the hearing.

As discussed in more detail in Section II, there was no longer substantial evidence regarding the care and custody of L.D.C. in the District Court's jurisdiction. Section 40-7-202(1)(a), MCA. All of L.D.C.'s medical, childcare, and familial relationships were in Wisconsin or the Blackfeet Reservation. No party has a significant connection with the state and there is no evidence regarding

L.D.C. in Glacier County's jurisdiction. Under Section 40-7-202(1)(a), the District Court no longer had jurisdiction.

The District Court also failed to consult with the Blackfeet Tribal Court. A judicial conference is an important way for courts to assess which court is better suited to handle the matter and discuss such things as "schedules, calendars, court records, and similar matters." Section 40-7-139(2),(3), MCA. "Communication between courts with participation of the parties is designed to reduce potential for courts to be issuing competing, inconsistent orders regarding jurisdiction." *In re B.K.,* ¶ 10. The parties requested that the District Court confer with the Blackfeet Tribal Court to determine which court was best suited to address the case, but there is no evidence that the District Court did so. (Docs.106, 122.) Given the tribal sovereignty issues as stake, it was especially prudent for the state court to consult with its tribal contemporary on the jurisdictional issue and failing to do so was clear error.

Finally, allowing the Blackfeet Tribal Court to exercise proper jurisdiction over this matter will not deny Daniel rights or necessarily result in the nullification of the District Court's order. As this Court pointed out in *In re B.P.,* Father could seek enforcement of the Montana parenting plan in Blackfeet Tribal Court. *In re B.P.,* at ¶ 21. The Blackfeet Tribal Court is well suited for deciding what is in

L.D.C.'s best interests and comity between the two court systems requires proper deference to jurisdictional principles.

The District Court did not have jurisdiction over the parties and erred when it refused to transfer the case. Given the record's clear indication that neither the child nor the parents lived in the state, the District Court erred when it refused to relinquish jurisdiction to the Blackfeet Tribal Court.

II. The Blackfeet Tribal Court is the Appropriate Forum to Decide this Child Custody Matter.

Valerie also sought a transfer to Blackfeet Tribal Court because that Court was the more appropriate forum to determine this child custody issue. Even if this Court determines that the Ninth Judicial District Court did not err when it concluded it had jurisdiction under § 40-7-202, MCA, this Court should reverse for the District Court's failure to transfer jurisdiction under the inconvenient forum provisions of the UCCJEA, Section 40-7-108, MCA.

Valerie's request for transfer as an inconvenient forum is timely under § 40-7-108, MCA. "A court may decline to exercise its jurisdiction at any time if the court determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum to make the child custody determination." *Stoneman,* ¶ 15(citing Section 40-7-108(1), MCA.) The question of whether a court is an "inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court." Section 40-7-108(1),

MCA. *Stoneman*, ¶ 20. The District Court abused its discretion and incorrectly applied the factors for inconvenient forum.

A. The Tribal Court Is Best Situated for Determining the Custody of L.D.C.

Tribal courts are uniquely situated to make custody determinations of Native American children. *In re Skillen,* ¶ 55. This Court has recognized the importance of children to the continued existence of tribes and the tribal court's involvement in child custody matters is a pillar of tribal sovereignty. *In re Skillen,* ¶ 12 ("our inquiry into the jurisdictional conflict between a tribal court and a state district court extends to the even more fundamental issue of the interaction between tribal and state authority.") Importantly, this Court has held,

> that in any matter so essential to tribal relations as a custody matter involving an Indian parent and Indian child who reside on Indian land, we must presume that the tribal court has jurisdiction and consider the potential state exercise of jurisdiction in terms of its infringement on tribal sovereignty.
> *In re Skillen,* ¶ 55.

This Court has discussed the application of the inconvenient forum to cases involving tribal jurisdiction of child custody. In a case involving a child who was an enrolled member of the Chippewa Cree Tribe, this Court noted that "state courts are to apply a 'modified doctrine of *forum non* conveniens, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodians, are fully protected." *Application of Bertelson,* 189 Mont. 524, 126, 617 P.2d 121

(1980). In *Bertleson,* this Court recognized that although the Indian Child Welfare Act does not apply to private custody disputes, the jurisdictional principles announced by Congress through ICWA are relevant in private custody actions. *Bertelson,* 189 Mont. 524, at 126 (noting that "a state court should respect federal policy and consider the rights of the child and the tribe in deciding whether to accept or decline jurisdiction.") In a subsequent case, *In re Marriage of Skillen,* this Court again discussed application of the jurisdictional principals of ICWA to private custody matters, noting that Congress had provided for "an emphatic federal policy of protecting the tribal role in proceedings involving Indian children." *In re Skillen,* ¶ 34 (internal citations omitted).

Internal and systemic bias, although an uncomfortable notion, is a reality for many tribal parents and is good cause for favoring a tribal court over a state court under an inconvenient forum analysis. This Court has acknowledged the need for a check on bias, noting state courts have "fail[ed] to consider the unique cultural and social standards of the Indian community." *Bertelson,* 189 Mont. at 128 (citing 25 U.S.C. § 1901(5).)

Here, L.D.C. is an enrolled member of the Blackfeet Tribe. A significant portion of his years have been spent in the tribe's traditional territories, absent the time his father withheld him from his mother. His mother and extended family members are all affiliated with the Blackfeet Tribe. His father spends considerable

time on the reservation and the parties' relationship began there. Given the strong preference for tribal court jurisdiction under the "modified doctrine of *forum non conveniens*" it follows that the Blackfeet Tribal Court would be the appropriate venue and best situated to determine this child custody matter.

B. The Factors of Section 40-7-108, MCA Require a Finding in Favor of the Tribal Court as the Appropriate Forum.

When evaluating the issue of inconvenient forum, the court must consider the factors listed in § 40-7-108, MCA. *Stoneman,* ¶ 16. Those factors include:

> (a) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (b) the length of time that the child has resided outside this state;
>
> (c) the distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (d) the relative financial circumstances of the parties;
>
> (e) any agreement of the parties as to which state should assume jurisdiction;
>
> (f) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (g) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (h) the familiarity of the court of each state with the facts and issues in the pending litigation.
>
> Section 40-7-108(2),MCA.

The District Court failed to correctly apply the inconvenient forum factors. The District Court concluded that Valerie had waived her right to assert that the Blackfeet Tribal Court was the more appropriate forum. (Doc. 127.) The Standing Master's order denying transfer concluded that the Glacier County District Court was not an inconvenient forum, citing the "almost 3 years of contentious litigation" and the relatively minor distance between Glacier County and Browning. (Doc. 118.)

Application of the relevant factors supports a conclusion that the Blackfeet Tribal Court was the more appropriate forum. One factor weighing heavily in favor of the Blackfeet Tribal Court is "the nature and location of the evidence require[d] to resolve the pending litigation, including testimony of the child." Section 40-7-108(2)(f), MCA. None of the parties reside in the state for purposes of the UCCJEA. The location of evidence related to L.D.C.'s care and custody including his schooling, medical records, relationships with extended family, and general wellbeing is within the Blackfeet Reservation or Wisconsin. There were no witnesses from the Ninth Judicial District in Cut Bank to provide evidence about the best interest of L.D.C. Rather, all possible witnesses reside on the Blackfeet Reservation or in Wisconsin.

L.D.C. has spent the majority of the year preceding the hearing in Wisconsin due to Daniel's f contemptuous conduct. Section 40-7-108(2)(b), MCA (second

factor considers how long the child has been outside the jurisdiction.) Daniel's violation of the parenting plan should not be used as evidence against tribal jurisdiction. See Section 40-7-109(1) ("Jurisdiction declined by reason of conduct.") Traditionally, courts have considered which court has "the most ready access to the child and can best promote the child's welfare." *Bertelson*, 189 Mont. 524, at 128. This Court noted that such an inquiry may be valid generally, but "in the context of an Indian child custody dispute, 'it ignores the inherent bias of non-Indian society against Indian culture, and fails to protect the Indians' right of self government." *Bertelson,* 189 Mont. 524, at 128. Rather, the focus should be on what is "the most appropriate forum rather than to the most easily accessible forum." *Bertelson,* at 128. Since August 2019, all of L.D.C.'s time is either spent with his dad in Wisconsin or with his mom in Browning. Evidence related to L.D.C.'s medical care, pre-school, and family relations is properly located in Browning, not in Cut Bank.

The third relevant factor examines the distance between the courts. Section 40-7-108(2)(c), MCA. There is less than 40 miles between Cut Bank and Browning. Daniel is already traveling to Browning for exchanges and parenting time. Daniel testified that he was coming to Montana frequently, estimating at least twelve time from January 2019 to October 2020. (5/17/21 Hearing at 13.)

The final factor is "the familiarity of the court of each state with the facts and issues in the pending litigation." Section 40-7-108(2)(h),MCA. The District Court referenced the extensive litigation in the state court forum to support its decision to retain the case. However, this Court has held that it may be appropriate to transfer a case even when the parties have litigated extensively in front of the original court. In *Stoneman,* the parties engaged in significant litigation over the course of five years in the Eleventh Judicial District. *Stoneman,* ¶ 41. The Montana Supreme Court "acknowledge[d] the extraordinary efforts" of the district court over the years of litigation, but nonetheless found that "the value the court attaches to retaining jurisdiction is misplaced." *Stoneman,* ¶ 41. This Court acknowledged the Washington court had also been exposed to a variety of the case facts and issues due to an order of protection that was before that court. Despite the years of litigation in Montana, the Montana Supreme Court found that it was not the appropriate forum and reversed. *Id.* ¶ 42.

In the present case, although the parties' case was initially filed in the Ninth Judicial District, the Blackfeet Tribal Court was well apprised of the case facts. Valerie filed a pleadings before the Blackfeet Court in 2019 and 2021. Daniel filed a *Response and Motion to Dismiss* in that court as well. The Blackfeet Tribal Court set a hearing on the motion and subsequently stayed the proceedings. (See Exhibit E.) The Blackfeet Court likely has significant familiarity with the mother and

L.D.C., as the family has deep roots in the community. The child receives medical care, would attend pre-school, and has extended family there. Even Daniel spends considerable time on the Blackfeet Reservation each year during the summer and fall months. The facts concerning parental disputes have all occurred within the Reservation. The Blackfeet Tribal Court has an inherent advantage over the state court in determining issues as it pertains to the welfare of L.D.C., a Blackfeet child within Blackfeet territory.

The court must also address each court's ability to "decide the issues expeditiously and the procedures necessary to present the evidence." Section 40-7-108(2)(g), MCA. There is no evidence in the record concerning either courts' calendar or ability to timely rule, or whether the District Court would be better suited to decide the issues expeditiously. Valerie did assert that the Blackfeet Tribal Court would be able to manage the case expeditiously and Daniel sought a judicial conference, though there is no evidence one occurred. (Doc. 106, 122.)

The final factor considers allegations of domestic violence and which court is best suited to protect the parties and the child. Section 40-7-108(a), MCA. Both parties have alleged acts of violence against each other. Mother has sought the assistance of a domestic violence program in Browning. Father has sought the assistance of Blackfeet Tribal police. The Blackfeet Tribal Court is best able to address the issues of intimate partner violence because its own tribal services were

called upon to assist the family. The parties are not availing themselves of state authorities; rather, all relevant evidence, witnesses, and services are linked to the Blackfeet Tribe and it follows that the Blackfeet Tribal Court should adjudicate this matter.

Under the factors enumerated in § 40-7-108(2), MCA, it was an error for the District Court to deny transfer to the Blackfeet Tribal Court under the inconvenient forum statute. The matter should be remanded with directions to the Montana court to decline jurisdiction as an inconvenient forum and hold that further proceedings should occur in the Blackfeet Tribal Court.

III. THE DISTRICT COURT ERRED WHEN IT AMENDED THE PARENTING PLAN.

A. The Amended Parenting Plan Infringes on The Tribal Sovereignty of the Blackfeet Tribe.

Even if this Court concludes that the state court's jurisdiction over the custody matter is proper under the UCCJEA, it impermissibly infringes on the rights of the Blackfeet Tribe to maintain control over the internal relations of its members and of its members to be governed by their sovereign. *Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269 (1959); *In re Skillen,* ¶ 41. Valerie is an enrolled member of the Blackfeet tribe, as is L.D.C. All of Valerie's parenting time occurs within the bounds of the Blackfeet Reservation and the Amended Parenting Plan impermissibly regulates her conduct as a tribal member on tribal land.

Principles of tribal sovereignty necessitate that tribes maintain exclusive authority over internal affairs unless specifically exempted by Congress. *Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943 (1976); *Kennerly v. Dist. Court of Ninth Jud. Dist. Of Montana,* 400 U.S. 423, 91 S.Ct. 480 (1971) (finding that Montana district court did not have jurisdiction over issues arising within the exterior boundaries of the Blackfeet Reservation); *In re Marriage of Wellman*, 258 Mont. 131, 137, 852 P.2d 559, 563 (1993) ("[C]ivil jurisdiction over activities of non-Indians as well as Indians on reservation land presumptively lies in the tribal court.".) This Court and the United State Supreme Court have repeatedly recognized that "Indian tribes maintain certain powers of self-government over reservation activities, such that states may not exercise jurisdiction regarding these areas of tribal government." *In re Skillen,* ¶ 13, ¶ 16; *Fisher,* 424 U.S. at 387-388.

A Tribe's authority to regulate and control activities occurring on its land is based on federal supremacy and tribal sovereignty. *In re Skillen,* ¶ 13. Tribal sovereignty has existed since time immemorial and is the source of a tribe's innate ability to exercise control over domestic relations. As the US Supreme Court has recognized, state-court jurisdiction in situations involving Indigenous litigants domiciled in Indian Country "plainly would interfere with the powers of self-government conferred upon the [tribe] and exercised through the Tribal Court."

Fisher, at 387. Such a usurpation of jurisdiction "would cause a corresponding decline in the authority of the Tribal Court." *Fisher*, 424 US at 387-88.

State courts may not usurp a tribe's ability to establish laws to govern its own citizens. *Williams,* 358 U.S. at 220, 79 S. Ct. at 271. *Fisher,* 4424 U.S. at 389. Tribes maintain authority over non-members in certain situations. Tribes retain their sovereign authority over domestic relations. *Montana v. United States,* 450 U.S. 544, 564, 101 S.Ct. 1245 (1981). *Montana* also recognized a tribe's authority over non-members when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S at 565. In a subsequent case, *Strate v. A1Contractors,* the United States Supreme Court clarified that the tribe's inherent power applies to actions "necessary to protect tribal self-government or to control internal relations." 520 US 438, 459, 117 S.Ct. 1404 (1997). The best interests of an Indigenous child and the conditions surrounding the parenting of that child are central to a tribe's "continued existence." *In re Skillen,* ¶ 60; See Also 25 U.S.C. § 1901(3). Child custody, as part of a tribe's internal affairs, is a critical part of tribal sovereignty. *In re Skillen,* ¶ 60; 25 U.S.C. § 1901(3).

The parenting plan ordered by the District Court impermissibly treads on the rights of Valerie to governed by the laws of her tribe and infringes on the Blackfeet Tribe's exercise of self-government and right to manage its own internal affairs.

The District Court's order amending the parenting plan violates the Blackfeet Tribe's right to maintain domestic relations authority over L.D.C. The Blackfeet Tribe has authority over Daniel as custody of L.D.C. has a direct impact on the health of the tribe as the future of the tribe is directly linked to the well-being of its children. *Montana,* 450 U.S at 565; *In re Skillen*, ¶ 60 (finding that children "represent the single most critical resource to the tribe's ability to maintain its identity and to determine its future as a self-governing entity.")

The conditions of the parenting plan directed at Blackfeet service providers infringe on Valerie's rights. The parenting plan inexplicably bars Valerie from obtaining a chemical dependency evaluation from Crystal Creek, the treatment center run by the Tribe. Moreover, the plan requires Valerie to "use her best efforts to enter a facility *other than Crystal Creek Lodge*" if inpatient treatment is recommended. (Doc. 103) (emphasis added). To resume parenting of L.D.C., Valerie must engage in a multitude of services, all of which will involve Blackfeet programing including Blackfeet Housing, Tribal Employment Rights Office (TERO) for drug testing, and Southern Piegan Health Center for mental health services.

A state court cannot exercise jurisdiction over activities and services occurring on Blackfeet land. To the extent the parenting plan conditions Valerie's time with L.D.C. on provisions (or prohibitions) of services provided by the

Blackfeet Tribe it violates the Tribe's inherent sovereign powers to control its internal affairs.

B. The District Court Erred When It Amended The Parties' Parenting Plan Absent A Showing Of A Substantial Change In Circumstances.

Parenting plans should be amended only in circumstances where the statutory criteria of § 40-4-219, MCA has been satisfied. If this Court concludes that the Ninth Judicial District Court had jurisdiction over this case and did not err when it refused to transfer the case as an inconvenient forum, this Court should still reverse and remand this case for the District Court's clearly erroneous amendment of the parenting plan.

A court may amend a prior parenting plan *only* if it finds "(1) a change in the circumstances of the child exists based on facts that have arisen since the prior plan or that were unknown to the court at the time the prior plan, and (2) amendment or modification is 'necessary to serve the best interests of the child." Section 40-4-219, MCA; *In re Bessette,* ¶ 16. This Court has stressed the "heavy burden" placed on the movant when seeking amendment of a parenting plan. *In re Bessette,* ¶ 19; *In re R.J.N.,* 2017 MT 249, ¶ 9, 389 Mont. 68, 403 P.3d 675; *In re Marriage of Oehlke*, 2002 MT 79, ¶ 17, 309 Mont. 254, 46 P.3d 49. The amendment process is properly seen as requiring "exacting procedural and substantive requirements." *In re Bessette, ¶ 19.* The objective of § 40-4-219, MCA is to "promote stability for … children and discourage unnecessary litigation over parenting plans." *In re R.J.N.,* ¶ 12; *In re*

Marriage of Oehlke, ¶ 17 (The statute's goal "is to preserve stability and continuity of custody for the children.")

The moving party must prove the threshold requirement of changed circumstances. *In re R.J.N.,* ¶ 9. Before a district court may evaluate the amendment's impact on the child's best interest, the moving party must satisfy this "jurisdictional prerequisite." *In re Oehlke,* ¶ 12; *In re R.J.N.,* ¶ 9. It is clearly erroneous for a district court to modify a parenting plan absent this finding.

Sections 40-4-212 and -219, MCA provide criteria for evaluating the best interests of the child in the context of amending a parenting plan.[1] Section 40-4-219, MCA provides that the court shall consider whether:

> (a) the parents agree to the amendment;
> (b) the child has been integrated into the family of the petitioner with consent of the parents;
> (c) the child is 14 years of age or older and desires the amendment; or
> (d) one parent has willfully and consistently:
> (i) refused to allow the child to have any contact with the other parent; or
> (ii) attempted to frustrate or deny contact with the child by the other parent.
> (e) one parent has changed or intends to change the child's residence in a manner that significantly affects the child's contact with the other parent.
> Section 40-4-219(1)(a)(i)-(iv), MCA

[1] The 2021 Montana Legislature amended § 40-4-219, adding criteria for consideration under subsection (e), now § 40-4-219(b)(i)-(iv), MCA. This became effective October 1st per § 1-2-201, MCA.

The district court must also consider the factors related to the best interest of the child, but only if the threshold question of "changed circumstances" has been satisfied. *In re Oehlke,* ¶ 12. Those factors are enumerated in Section 40-4-212(1), MCA.

The District Court erred when it concluded that there had been a substantial change in L.D.C.'s circumstances based on facts that were unknown at the time the parties' entered into the prior plan. Daniel pointed to the COVID-19 pandemic, allegations of substance abuse, and changes in Valerie's housing to sustain his motion to amend. Daniel did not seek amendment until Valerie filed to hold him in contempt for his withholding of L.D.C., in violation of the parenting plan. Daniel failed to establish that there was a change in circumstances and that amending the parenting plan was necessary to serve L.D.C.'s best interest.

COVID-19 should not be grounds for satisfying the threshold criteria of § 40-4-219, MCA. Prior to frustrating Valerie's parenting time, Daniel made multiple trips to and from the Reservation during the pandemic. The Blackfeet Tribe permitted travel for court-ordered parenting time. It is clearly erroneous to allow Daniel to use COVID-19 as the catalyst for amending the parenting plan and certainly does not justify the severe measures levied at Valerie through the amended plan.

There was no evidence establishing that Valerie had an active substance use disorder that "endanger[ed] the health, interpersonal relationships, or economic functions" of her or L.D.C. Section 40-4-212(1)(g) (referencing §53-24-103, MCA.) Apart from references by Daniel and his girlfriend about slurring during video calls, there was no evidence establishing that Valerie used drugs. Valerie provided a clean drug test when requested, completed treatment, signed releases, and was in recovery. Finally, lags in internet are common, particularly in rural areas like Browning, and would reasonably explain those noises. The severe limits on Valerie's parental rights are not justified by the record. Valerie is essentially barred from seeing her child until she completes intensive treatment, despite no evidence of an ongoing drug problem or a chemical dependency evaluation recommendation.

Valerie's housing situation is not a change in circumstances sufficient to amend the parenting plan. The record establishes that Valerie moved frequently, in part due to her family caregiving obligations. It is customary within Indigenous families to live with extended family. Such living arrangements are protected under the Fourteenth Amendment. *Moore v. East Cleveland,* 431 U.S. 494, 505 (1977) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.") Moreover, Valerie faced a housing shortage in her community. The District Court erred when it relied on Valerie's housing to justify

amendments significantly curtailing her parenting time. Absent a showing of a change in circumstances, it was an abuse of discretion to amend the parenting plan.

The amended parenting plan does not serve L.D.C.'s best interests. The amended parenting plan unnecessarily and severely limits L.D.C.'s time with his mother and extended family, all of whom are important relationships that "significantly affect the child's best interest." Section 40-4-212(1)(c), MCA. L.D.C. is entitled to a bond with his mother and the amended plan denies him that right. The parenting plan impermissibly denies Valerie and L.D.C. "frequent and continuing contact," which Montana law presumes is in a child's best interest. Section 40-4-212(1)(l), MCA. Moreover, the parenting plan is contrary to Blackfeet Tribal family laws and traditions which support fostering relationships between parent and child in a least restrictive manner while providing for the best interest of the child.

Finally, the District Court failed to properly consider Daniel's willful and consistent acts frustrating Valerie's contact with L.D.C. Section 40-4-219(1)(d), MCA. When a parent refuses a child contact with the other parent, it is presumed that the parent is acting contrary to the child's best interest. Section 40-4-219, MCA. Daniel improperly withheld L.D.C. from Valerie in violation of their parenting plan. Daniel only sought an amendment after Valerie brought his contempt to the court's

attention. The District Court failed to properly consider that Daniel denied L.D.C. contact with Valerie for months without cause, contrary to L.D.C.'s best interest.

CONCLUSION

Valerie respectfully requests this Court reverse the Order of the District Court and remand with instructions to relinquish the matter to the jurisdiction of the Blackfeet Tribal Court under § 40-7-202, MCA. If this Court determines that the District Court maintained exclusive, continuing jurisdiction, Valerie requests that this Court reverse and remand for failure to conclude that the Blackfeet Tribal Court was the more appropriate forum.

Valerie respectfully requests that this Court reverse the District Court's amendment to the parties' parenting plan for infringing on the tribal sovereignty of the Blackfeet Nation and failing to comply with the statutory requirements of 40-4-219, MCA.

Respectfully submitted this 17th day of December, 2021.

By: /s/ Dawn Gray
Dawn Gray

/s/ Kelly Driscoll
Kelly Driscoll

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double–spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding the table of contents, table of citations, certificate of service, and certificate of compliance.

By: /s/ Dawn Gray
Dawn Gray

/s/ Kelly Driscoll
Kelly Driscoll

APPENDIX

CERTIFICATE OF SERVICE

I, Kelly M. Driscoll, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-17-2021:

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