IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0133

MEGAN SAYLER,
Petitioner/Appellee,

vs.

YAN SUN,
Respondent/Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court
Yellowstone County Cause No. DR 2020-949, Hon. Donald L. Harris Presiding

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QUESTIONS PRESENTED

I. Did the District Court err when it concluded that Appellee Megan Sayler is entitled to establish a parenting plan with Baby T.S.J.?

II. Did the District Court err by applying Montana law – instead of California law – to questions regarding Baby T.S.J.'s parentage?

III. Did the District Court err when it concluded that the parties' premarital agreement is valid and enforceable?

STATEMENT OF FACTS

Appellant Yan Sun ("Sonny") is a 26-year-old Chinese national. He left China for the United States in 2017—in part to pursue his studies at Auburn University, and in part to flee government persecution after his father was killed by Chinese police. (*Sun Aff.*, Dkt. 49, pp. 1-3, ¶¶ 1-7; *Tang*, 6/2/21 Tr., pp. 96-98). Auburn University's Global Pathway Program[1] was a good fit for Sonny because of the additional support it provides to international students. (*Sun Aff.*, Dkt. 49, p. 2, ¶ 3). Auburn Global's mission is to "promote international student success by providing English-language instruction, as well as support services to help students achieve their academic, personal, and professional goals." (*See Auburn Global Mission Statement*, https://global.auburn.edu/english-programs/, current through May 26,

[1] *See generally Auburn Global*, https://global.auburn.edu/, current through May 26, 2022.

2022). No English proficiency is required for admission to Auburn Global. (*Sun Aff.*, Dkt. 49, p.1, ¶ 3).

Sonny is his parents' only child. In the Chinese culture, children are adored in the family unit, and grandparents have a significant role in child rearing and support (*Tang*, 6/2/21 Tr., pp. 98,106). When he got to the United States, Sonny and his family sought surrogacy services, recognizing that a United States surrogacy might be Sonny's only opportunity to have a child. (*Sun Aff.*, Dkt. 49, ¶¶ 8, 9). Consistent with Chinese tradition, Sonny and his mother planned that she would come to the United States after the baby was born and help care for him while Sonny completed school. (*Sun Aff.*, Dkt. 49, ¶ 14).

Sonny became acquainted with Appellee Megan Sayler ("Megan") when the parties were matched through a California surrogacy agency with the intention that Megan would provide gestational carrier services for Sonny. The parties ultimately entered into a Gestational Carrier Agreement ("GCA") on February 15, 2019. (*See Mtn. in Alt.*, Dkt. 47, Ex. B., *GCA*; *Sayler*, 6/2/21 Tr., p. 54). Sonny lived and studied in Auburn, Alabama at the time. Megan resided in Billings, Montana. Baby T.S.J. was conceived of the parties' GCA, using Sonny's sperm and an anonymous donor egg. (*Sun Aff.*, Dkt. 49, ¶ 10). Megan received the embryo via medical procedure in California before returning to Montana, where she carried T.S.J. to term. (*Sun Aff.*, Dkt. 49, ¶ 14). Pursuant to the GCA, the Superior Court of California entered its

judgment establishing Sonny as Baby T.S.J.'s sole parent on December 20, 2019, while Megan was still pregnant with Baby T.S.J. (*Mtn in Alt.*, Dkt. 47, Ex. A, *Judgment*; *Sayler*, 6/2/21 Tr., p. 146).

The GCA is a 72-page document that was mutually negotiated by Sonny and Megan, with both parties represented by independent counsel. (*Mtn. in Alt.*, Dkt. 47, Ex. B, *GCA* ¶¶ 27-28; *Sayler*, 6/2/21 Tr., p. 54). The surrogacy agency provided Sonny with a Chinese-fluent social worker. (*Sun*, 6/8/21 Tr., p.10; *Sun Aff.*, Dkt. 49, ¶ 11). The GCA was executed following a protracted period of evaluation for both parties, complete with support and access to services from a wide array of well-versed surrogacy professionals. (*See generally Mtn. in Alt.*, Dkt. 47, Ex. B, *GCA*; 6/2/21 Tr., p. 54). In total, the gestational carrier process cost Sonny's family more than $200,000.00. (*Sun Aff.*, Dkt. 49, ¶ 11). Those fees paid for a Chinese-fluent social worker; egg donation, fertilization, and implantation; medical, legal, lost wages, and incidental expenses for the surrogate; legal expenses for Sonny; medical and legal background checks for all parties; a home study; and psychological screening for the surrogate. It also covered $53,500.00 in surrogate compensation that went directly to Megan in accordance with a schedule set by the agency. (*Mtn. in Alt.*, Dkt. 47, Ex. B, *GCA* pp. 24-34; 6/2/21 Tr., p. 54).

Baby T.S.J. was due to be born on January 16, 2019, but Megan went into labor early, and he was born in December of 2019. (*Sun Aff.*, Dkt. 49, ¶ 14). Upon

learning that Megan was in labor, Sonny immediately flew from Alabama to Billings, planning a brief stay in Montana while he and Baby T.S.J. got comfortable. (*Sun Aff.*, Dkt. 49, ¶ 14). As Sonny's mother tried to make her own travel plans, Covid-19 was beginning its spread through China. Due to Covid-related complications, Sonny's mother was not able to secure a travel visa. (*Sun Aff.*, Dkt. 49, ¶ 17).

During his initial stay in Billings following T.S.J.'s birth, Sonny stayed at a downtown Air B&B near the Billings medical corridor. Megan met Sonny there with T.S.J. upon their discharge from the hospital. (*Sayler*, 6/2/21 Tr., p. 85). At that time, she held herself out as a kind and caring friend to Sonny. (*Sun Aff.*, Dkt. 49, ¶ 18). Megan later testified that the seedy neighborhood and loitering vagrants at the Air B&B caused her to "fear for [T.S.J.'s] life." Megan told Sonny to stay with her until he could find a less scary Air B&B, and he agreed. (*Sayler*, 6/2/21 Tr., p. 85; *Sun*, 6/8/21 Tr., pp. 17-18). Sonny found Megan to be very kind, and their friendship seemed to grow. (*Sun Aff.*, Dkt. 49, ¶¶ 18, 20). As Sonny began to realize that his mother would not be able to meet him and T.S.J. in the United States, he confided to Megan that his original plans were falling apart. Hearing this, Megan proposed marriage to Sonny on January 5, 2020. (*Sun Aff.*, Dkt. 49, ¶ 21).

In terms of her proposition, Megan suggested that Sonny move to Montana and finish college in Billings. (*Counterpetition*, Dkt. 46, p. 4). She offered to help

with T.S.J. while Sonny completed his education in Billings, and to sponsor Sonny's application for a green card. (*Counterpetition* Dkt. 46, pp. 4, 5). Though the parties dispute the purpose and scope of the various monies that flowed from Sonny's family to Megan, it is generally agreed that some monetary exchange was contemplated. In a January 5, 2020, text message to Sonny regarding her proposal, Megan wrote: "Your mom can give me the amount she offered previously. Really I just want to be able to help you with [T.S.J.] so that you can finish school. Plus I want you to be able to stay in the US forever. (sic.)." (*Counterpetition*, Dkt. 46, pp. 4).

The following day, Megan suggested that the parties sign a premarital agreement. (*Mtn. in Alt.*, Dkt. 47, p. 5). She had already made an appointment with an attorney. Megan offered a number of quasi-legal opinions before suggesting that Sonny "find a family law/immigration attorney who can help with reviewing the paperwork and helping to complete all the green card application materials." (*Counterpetition*, Dkt. 46, Ex D, p. 3; *Mtn. in Alt*., Dkt. 47, p. 5). Sonny agreed, and the parties ultimately retained immigration attorney Jennifer Bensman. (*Counterpetition*, Dkt. 46, p. 5).

At the conclusion of the January 6, 2020, conversation in which Megan and Sonny discussed the terms of their marriage, Megan advised: "I don't want to overwhelm you. I just want everything to move quickly and smoothly."

(*Counterpetition*, Dkt. 46, Ex. D, p. 3). She next asked for Sonny's permission to pick up T.S.J. (*Counterpetition*, Dkt. 46, Ex. D, p. 3). Adoption was not discussed at any time (*Sun*, 6/8/21 Tr., p. 22; *Sayler*, 7/2/21 Tr., p. 12).

On January 20, 2020, Megan announced that she had a draft premarital agreement for Sonny to review. (*Mtn. in Alt.* Dkt. 47, p. 5). Sonny did not have his own counsel to review the premarital agreement, he did not have the chance to ask questions, nor did he meet the attorney who drafted it. (*Sun Aff.*, Dkt. 49, ¶ 22). Megan and Sonny signed the premarital agreement in front of a Wells Fargo notary on a Friday afternoon—the last business day before they were scheduled to marry. (*Sun Aff.*, Dkt. 49, ¶ 22). The premarital agreement generally consists of boilerplate language, with the exception of a single clause which reads: "It is agreed that Megan Sayler has a parent child relationship with [**T.Y.J.**] (sic) as that term is used under Section 40-4-211, MCA." (*Sayler*, 6/08/21 Tr., p. 139, Ex. 7, *PMA* p. 3). Baby T.S.J. is misnamed in the premarital agreement. (*Sayler*, 12/03/21 Tr., p. 84).

Sonny and Megan were married in a civil ceremony on January 27, 2020. They opened a joint checking account, into which Sonny paid a regular sum of $900 per month for Megan's "living expenses." (*Aff. Sayler*, Dkt. 36, ¶¶ 7, 8, 10). Sonny deposited additional funds at various times, including a large deposit of $100,000, which was made on July 20, 2020. (*Aff. Sayler*, Dkt. 36, ¶ 10).

The parties generally agree that a substantial portion of the $100,000 was intended to go toward the purchase of a family residence, and Sonny was not eligible to be on the mortgage. (*Sayler*, 6/2/21 Tr., p. 69-70). Sonny's mom signed two separate gift letters in supplement to Megan's mortgage application—one in the amount of $100,000, and the other in the amount of $83,500. (*Sayler*, 12/3/21 Tr., p. 86). The Sun family believed that the gift letters were necessary for the mortgage application, and that was "the only purpose." (*Sun*, 6/8/21 Tr., pp. 30-31). One of the two gift letters, written for $83,500, was admitted into evidence over Sonny's foundation objection. (*Yan*, 6/8/21 Tr., p. 83, 84). At closing, Megan withdrew over $98,000 from the joint account. (*Sayler*, 6/2/21 Tr., p. 70). Sonny later discovered that Megan rolled her auto loan into the mortgage. (*Sayler*, 12/3/21 Tr., p. 92). This resulted in a net loss of equity in the home, even though it sold for $48,200 over the purchase price. (*See generally* 12/3/21 Tr., p. 95, 97).

Megan was cooperative with the immigration process for several months into the parties' marriage. With assistance of counsel, she prepared the substantial documentation, and completed and filed her Petition for Sonny's green card. (*Sun*, 6/8/21 Tr., p. 24). Megan affirmatively cooperated with immigration requirements right through September 8, 2020—the day before she closed on the home loan. On that day, Megan sent an email to notify Attorney Bensman of the upcoming address

change, advising that "we are moving and close on our new home tomorrow." (*Sayler*, 06/02/21 Tr. p. 70).

After the home purchase was finalized, Sonny and Megan's relationship promptly turned sour. There were immediate disputes over living quarters. (*Zhenfan Aff.*, Dkt. 48, ¶¶ 20-22; *Sun Aff.*, Dkt. 49, ¶¶ 34-38). Sonny expected to share an upstairs room with T.S.J. Megan had different plans for the upstairs room and moved Sonny's belongings to the basement. (*Zhenfan Aff.*, Dkt. 48, ¶ 14; *Sun Aff.*, Dkt. 49, ¶ 35). In the following correspondences with Attorney Bensman, Megan abandoned her former support for Sonny's green card application, making several excuses as to why she could not or would not follow through. (*Counterpetition*, Dkt. 46, pp. 6-8; *Sun Aff.*, Dkt. 49, ¶ 41).

On Thursday September 17, 2020, Megan texted Sonny to advise that she had "an appointment with the attorney on Monday at 10 a.m. to get [Sonny] added to the deed of the house and amend our prenuptial agreement." (*Counterpetition*, Dkt. 46, p. 6; *Sayler*, 6/2/21 Tr., p. 71). The following Monday fell on September 21, 2020. Megan did not add Sonny to the deed or amend the premarital agreement on September 21, 2020. (*Sayler*, 6/2/21 Tr., p. 72). Rather, she made a final cash withdrawal of $2,600 from the joint account. (*Sayler*, 6/2/21 Tr., p. 72). She also called Billings Police to make a complaint against Sonny, alleging that he had threatened her by moving his gun from the common-area garage into his private

living quarters; asking police "if they could come remove the weapon from my house;" and detailing her concern that Sonny was engaged in "illegal and potentially deadly actions of having unprotected sex without disclosing his HIV status." (*Sayler TPO*, Dkt. 5, p. 20). Megan called 911 again on September 26, 2020, following another disagreement over rooms. Police declined to respond. (*Sayler TPO*, Dkt. 5, p. 21; *Sun*, 6/8/21 Tr., pp. 44-45).

Megan ultimately ejected Sonny and T.S.J. from the home after filing a Petition for Temporary Protective Order ("TPO") in Justice Court on September 28, 2020. (*See Sayler TPO*, Dkt. 5). Megan later moved for dismissal of the protective order. (*Counterpetition*, Dkt. 46, p. 8). Megan filed her Petition for Dissolution and Proposed Parenting Plan in the District Court on October 5, 2020. (*See* Dkt. 1, Dkt. 2).

Acting *pro se*, and with the assistance of limited scope legal services, Sonny filed responses to Megan's petitions on October 26 & 28, 2020. (*See* Dkt. 9-14). Sonny disputed Megan's claim to parental rights over T.S.J.; disputed the Temporary Protective Order; and requested spousal maintenance because Megan's actions had effectively rendered him and T.S.J. homeless. (*See* Dkt. 9-14). Sonny specifically moved to continue a pending hearing for interim parenting plan while he sought counsel. (*Sun Mtn.*, Dkt. 14, p. 1). In his motion, Sonny advised that he disputed Megan's claim of parental rights, requesting that the Court "first decide the issue of

parentage, which likely requires full briefing, before addressing whether to order an interim parenting plan." (*Sun Mtn.*, Dkt. 14, p. 1-2).

T.S.J. was in Sonny's sole custody from September 26, 2020, until an interim hearing was held on November 23, 2020. (*Int. Order*, Dkt. 39, p. 4, FN 1 (attached as App. 1)). Megan was represented by counsel at the interim hearing. Sonny proceeded *pro se*, with an advocate present and attempting to assist with communications. (*Minutes*, Dkt. 37). The District Court entered its written Order on Interim Matters on November 24, 2020. (*See* App. 2). The parentage dispute was not addressed in the interim order. The District Court found that "it is in the best interests of Baby [T.S.J.] for Petitioner/Mother to be the primary caretaker" because Sonny had testified that he did "not have enough money to provide for himself or Baby [T.S.J.];" and "Mother has a job, parenting experience, and can provide for Baby [T.S.J.] while this matter is pending." (App. 1, ¶¶ 1, 2).

Sonny was able to retain counsel following the interim order. Multiple motions were filed, and issues briefed by the parties. (*See* Dkt. 41-64). Hearings on the motions spanned three days. Sonny's mother testified as an interested party that "it is not possible" for Megan to be T.S.J.'s mother, and that she wants Megan to "leave Yan Sun and [T.S.J.] as much as possible." (*Tang*, 6/2/21 Tr., pp. 101-103) On August 1, 2021, the District Court issued its Findings of Fact and Conclusions of Law regarding the parties' motions. (*See FOFCOL*, Dkt. 73 (attached as App. 2)).

Sonny lost every motion. (App. 2, p. 8). The remaining issues were heard in a bench trial on December 3, 2022. The District Court issued its Findings of Fact, Conclusions of Law, and Final Decree on February 15, 2022, fully incorporating its prior findings and conclusions. (*FOFCOL*, Dkt. 88, p. 3, ¶ 8 (attached as App. 3)).

STANDARD OF REVIEW

The Montana Supreme Court reviews a district court's interpretation and application of statutes for correctness and findings of fact to determine whether the findings are clearly erroneous. *Kulstad v. Maniaci*, 2009 MT 326, ¶¶ 50-52, 352 Mont. 513, 220 P.3d 595. A finding is made in clear error "if it is not supported by substantial credible evidence, if the trial court misapprehended the effect of the evidence, or if a review of the evidence leaves this Court with a definite and firm conviction that a mistake has been made." *Puccinelli v. Puccinelli*, 2012 MT 46, ¶ 13, 364 Mont. 235, 272 P.3d 117. The Court confines review to "the determination of whether substantial credible evidence supports the findings actually made by the district court." *Grice v. Price* 2011 MT 50, ¶7, 359 Mont. 386, 251 P.3d 127.

SUMMARY OF THE ARGUMENT

The District Court erred when it awarded parental authority to Megan, infringing upon Sonny's fundamental due process right to parent his child. Megan did not have standing to petition for a parenting plan, and her October 5, 2020

petition for parenting plan should be dismissed, with prejudice, for lack of subject matter jurisdiction.

Even if Megan had formed a parent-child relationship with T.S.J. consistent with the factors contemplated in Mont. Code Ann. § 40-4-211(6), a parenting plan is not appropriate because Sonny has never acted contrary to the parent-child relationship, and it is not in T.S.J.'s best interest to be parented by Megan.

Even if Megan had standing to petition for a parenting plan, California law applies to all questions regarding regard the validity of the parties' Gestational Carrier Agreement. The parties' entire premarital agreement is unenforceable because was involuntarily entered into by Sonny, under both California and Montana law, and the "parent-child relationship" clause is unconscionable.

ARGUMENT

I. Awarding parentage to Megan violates Sonny's fundamental constitutional right to parent his child.

A parent has a fundamental right to the care and custody of his or her child, and fit parents are presumed to act in their child's best interests." United States Const. amend. XIV, § 1; *In re C.T.C.*, 2014 MT 306, ¶ 18, 377 Mont. 106, 111, 339 P.3d 54, 58. "The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children-- is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Kulstad*, *2009* MT 326, ¶ 115 (Rice, dissenting) (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147

L. Ed. 2d 49 (2000)). Any imposition upon a person's fundamental parental right is subject to strict scrutiny review. *Id.*

A nonparent third party may find standing to petition for a parenting plan only if she can first demonstrate by clear and convincing evidence that she has established a parent-child relationship with the child. *Armstrong v. Lane* (*In re M.M.G.*), 2012 MT 228, ¶¶ 11, 12, 366 Mont. 386, 389, 287 P.3d 952, 953. If the third party cannot establish a parent-child relationship, the District Court lacks subject matter jurisdiction to implement a parenting plan. *Id.* A motion to dismiss based on lack of subject matter jurisdiction may be raised at any time and by either party, or by the court itself. Once the issue is raised and it is determined that a court lacks subject matter jurisdiction, the only further action the court can take is to dismiss the case. *In re Marriage of Miller*, 259 Mont. 424, 426–27, 856 P.2d 1378, 1380 (1993).

A child-parent relationship is one that:

> (a) exists or did exist, in whole or in part, preceding the filing of an action under this section, in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education, and discipline;
> (b) continues or existed on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child's psychological needs for a parent as well as the child's physical needs; and
> (c) meets or met the child's need for continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home.

Mont. Code Ann. § 40-4-211(6).

If a third-party can satisfactorily prove with clear and convincing evidence that she has established a parent-child relationship with a child, the District Court may award a parental interest to the third party *only* if she can also show: 1) that the natural parent acted contrary to his child-parent relationship with the child; and 2) that it would be in the child's best interests to continue his child-parent relationship with the third party. Mont. Code Ann. § 40-4-228; *M.M.G.,* 2012 MT 228, ¶ 14. For a third party to be to be awarded parentage over a natural parent's objection, Mont. Code Ann. § 40-4-211 must be applied in conjunction with § 40-4-228. *Id.*

The Montana Legislature has long grappled with the heartbreaking problem of natural parents abandoning a child to a primary caregiver, only to later appear unannounced, wreaking havoc in the child's life by uprooting her from the only life she knows. To address this issue, it has made several attempts to craft third-party parenting statutes that can be harmonized with parents' fundamental right to parent their children. The policy underlying such legislation is set forth in Mont. Code Ann. § 40-6-601(1):

> The legislature recognizes that the right of parents to the custody and control of their children is based upon the liberties secured by the United States and Montana constitutions and that a parent's right to that custody and control is therefore normally supreme to the interests of other persons. The legislature also recognizes a growing phenomenon in which absent [parents] have temporarily surrendered the custody and care of a child to a [caretaker] for a lengthy period of time [who] offers continuity of care by providing a child a loving, stable, and secure environment [not] provided by a parent who temporarily abandons a child. [I]t is the purpose of the legislature to [create] a procedure,

> applicable in limited situations caused by the voluntary surrender of a child by a parent, under circumstances indicating abandonment, whereby a child in the care of a relative may remain with that relative while the issue of abandonment by the parent is reviewed and determined by a court of law. [The] legislature believes that this temporary infringement on the right of a parent to the custody and control of a minor child is justified [by balancing the child's constitutional rights against those of the parent].

In short, the legislative policy justifies only a "*temporary* infringement" on a parent's constitutional rights, only under circumstances of abandonment. Abandonment was essentially the controlling factor in determining whether a natural parent "acted contrary to the parent-child relationship" until 2009, when this Court departed from prior precedent and determined for the first time that a legal parent had "ceded her exclusive parenting authority to a nonparent by allowing the nonparent to help raise the children." *M.G.G.*, 2012 MT 228, ¶ 15 (citing *Kulstad,* 2009 MT 326, 352 Mont. 513, 220).

Kulstad involved a lesbian couple who raised two children together in a long-term domestic partnership. 2009 MT 326, ¶¶ 9-16. The case pre-dated the United States Supreme Court's 2015 opinion in *Obergefell v. Hodges*, a long-awaited ruling which first recognized that same-sex couples have fundamental family rights under the Fourteenth Amendment's Due Process Clause. 576 U.S. 644, 681, 135 S. Ct. 2584, 2607 (2015). When *Kulstad* was decided, same-sex couple adoption was illegal in Montana. Together, the parties adopted two children and raised them within a civil partnership together over the course of several years, but only Maniaci was

named as legal parent. 2009 MT 326, ¶¶ 9-16. Kulstad was awarded a parental interest on the theory that Maniaci had voluntarily relinquished exclusive authority over a protracted period due to the nature of the domestic partnership. Shortly following *Kulstad*, this Court applied the same reasoning in *Filpula v. Ankney* (*In re L.F.A.*), 2009 MT 363, 353 Mont. 220, 220 P.3d 391. The parties in *Filpula* were also a same-sex couple who raised children together in a long-term domestic partnership. 2009 MT 363, ¶ 5.

In a special concurrence to *Kulstad*, which he reincorporated in *Filpula*, Justice Nelson noted that the lawyers had ignored the "elephant in the room," which was "the *one issue* that makes this case uniquely important." 2009 MT 326, ¶ 99; 2009 MT 363, ¶ 25, (Nelson concurring) (emphasis added). The central question being avoided in *Kulstad* and *Filpula* was "whether homosexuals in an intimate domestic relationship each have the right to parent the children they mutually agree that one party will adopt (or, presumably, conceive)." *Id.*

Kulstad and *Filpula* stand apart from previous *and* subsequent authority in which some form of abandonment is the controlling factor in determining whether a legal parent has "acted contrary to the parent-child relationship." *See A.P.P.*, 2011 MT 50, ¶¶ 10-11, 23 (third-party parentage applied to stepfather after natural mother died and natural father was only sporadically involved); *M.M.G.*, 2012 MT 228, ¶¶ 4-7 (a parent-child relationship could be found where a natural mother voluntarily

handed her child over to a stranger at a convenience store and the stranger served as the child's primary caretaker for ten years). *See also Hovland v. Saylor* (*In re S.C.B.*), 2015 MT 19, ¶¶ 3-6, 378 Mont. 89, 91, 342 P.3d 46, 47 (venue is appropriate in county where child resided with a caretaker relative, and not in the home county of natural mother, when natural mother suffered from addiction and was frequently absent or institutionalized); *In re Weigand*, 2022 MT 30N, 502 P.3d 1087 (third-party parentage upheld as to stepparent after natural father had been mostly absent for eight years).

a. Megan did not have standing to petition for a parenting plan and this Court should dismiss her October 5, 2020, petition for lack of subject matter jurisdiction.

Here, Megan has attempted to bootstrap standing by virtue of an unenforceable premarital agreement[2] which misnames T.S.J., and states: "It is agreed that Megan Sayler has a parent child relationship with [T.Y.J.] (sic) as that term is used under Section 40-4-211, MCA." (*Sayler*, 6/08/21 Tr., p. 139, Ex. 7, *PMA* p. 3). Standing to petition for parental rights as provided in Mont. Code Ann. § 40-4-211 cannot be contracted. A child-parent relationship as defined in § 40-4-211(6) is a fact-intensive analysis. It is an equitable remedy, not intended to supplant legitimate adoption proceedings.

[2] In addition to the premarital agreement being insufficient to create standing for Megan, it is also unenforceable as a matter of law. This analysis is included below, in Section III of this writing.

T.S.J. was less than a month old when the void premarital agreement was signed by the parties. He was only nine months old when Megan filed her petition for parenting plan. Sonny immediately and repeatedly objected to Megan's assertion of parentage. (*See* Dkt. 9-14). Over Sonny's objections, the District Court ordered an interim parenting plan on November 23, 2020, naming Megan as T.S.J.'s mother, and placing T.S.J. in her primary custody. The District Court entered no factual findings pursuant to § 40-4-211(6). Given the brevity of the parties' relationship prior to Megan's filing, the consequences of the November 23, 2020, ruling have been devastating and absurd.

Sonny and T.S.J. only lived together with Megan intermittently in the nine months preceding Megan's petition. (*Sayler Aff.* Dkt. 36, p. 2). Between June and September of 2020, Megan usually stayed with her boyfriend while Sonny and his partner stayed home with T.S.J. (*J.H.*, 6/8/21 Tr., pp. 96, 100; *Zhenfan*, 6/2/21 Tr., pp. 111, 119-120). When the parties kept separate addresses, Megan did have frequent contact with T.S.J., but Sonny always remained his primary custodian. (*Sun Aff.*, Dkt. 49, ¶¶ 23, 26-28; *Zhenfan Aff.*, Dkt. 4, ¶¶ 10-12). T.S.J.'s medical records make clear that the parties consistently held themselves out as father and surrogate at medical appointments. (*MTD*, Dkt. 56, pp. 3-4). When the parties had their last fight over rooms in the new house on September 26, 2020, Megan rounded up her two children, M.P. and I.S., vacated the house, and petitioned for the protective order

which ejected Sonny and T.S.J. from the house. (*Sayler Aff.*, Dkt. 5, p. 21). T.S.J. remained in Sonny's sole custody from September 26, 2020 until November 23, 2020, when the District Court ordered "Baby T.S.J. shall be turned over to Mother at 5:00 p.m. on November 23, 2020." (App. 1, p. 1, ¶ 3). The hearing adjourned at 3:22 p.m. (*Minutes*, Dkt. 37). The interim plan gave Sonny less than two hours to prepare, and placed Baby T.S.J. in Megan's primary custody for the first time in his young life. This was a remedy that far exceeded Megan's request of four hours a day. (*Sayler Aff.*, Dkt. 5, p. 27).

After the interim hearing, Megan proposed a calendar which placed T.S.J. in Sonny's care during her work hours, and overnight on Saturdays. (*Sayler*, 6/2/21 Tr., pp. 74-78). Sonny agreed to Megan's proposal, which forced him to meet Megan at a gas station at 2:00 a.m., four days a week, to pick up his son. *Id.* He showed up for every exchange, but there were days that Megan could not be bothered to do the same, or even call. *Id.* This schedule persisted from November of 2020 until June 8, 2021, when it was revealed that Megan hadn't actually worked since March of 2021. (*Sayler*, 6/2/21 Tr., pp. 43-44, 76-78; *J.H.*, 6/8/21 Tr., pp. 93-94; *L.S.*, 6/8/21 Tr. 126-128). After the June 8, 2021, hearing, the parties were able to negotiate a more reasonable exchange time, but Megan remained T.S.J.'s primary custodian. (6/8/2021 Tr., pp. 163-164).

The parties attempted mediations following the interim hearing. Mediations failed, and substantial briefing followed. When the various motions were ripe, Sonny learned that Megan's counsel was preparing to leave the country for several weeks. (*E. Mtn.*, Dkt. 58, p. 5). Sonny filed an Emergency Motion to vacate the interim plan on May 4, 2021, which the District Court denied. Hearings on the motions were ultimately set for June 2, 2021; June 8, 2021; and July 2, 2021.

When hearings commenced, T.S.J. was still less than two years old. There were no education records; no extracurricular activities; no community connections; and certainly no "permanency or stability" in residence that could be attributed to Megan's influence in his life. Sonny brought every conceivable piece of evidence available to demonstrate that Megan had *not* formed a parent-child relationship with T.S.J. This resulted in an absurd line of questioning about Sonny's receipts for each and every purchase he had made for T.S.J., in effort to demonstrate that all substantial purchases had been made by Sonny. (*Sun*, 6/8/21 Tr., pp. 37-41). The District Court became exasperated and advised that the purchases were not relevant to the issues before it, and counsel moved on. *Id.* Nonetheless, in its August 20, 2021, FOFCOL, the District Court made a finding that Megan "has consistently provided T.S.J with food, shelter, clothing, toys, and medical care." (App. 2, p. 5, ¶ 16).

Two professionals gave sworn statements and testimony regarding their observations of Sonny's parental relationship with T.S.J. (*Morgan Aff.*, Dkt. 58, p. 31 ¶¶ 3,5; *Brown Aff.* Dkt. 57, ¶¶ 4-5, 8; *Morgan*, 6/2/21 Tr., pp. 36-38 (testifying as to Sonny and Zhenfan's mutual caregiving for T.S.J.); *Brown*, 6/2/21 Tr., pp. 14-15 (testifying that Sonny had only ever represented that Megan was T.S.J's surrogate)). At all times throughout these proceedings, Megan has been the sole witness to testify that Sonny had ever expressed a desire to cede to her his exclusively held constitutional right to parental authority over T.S.J.

The Court entered its first Findings of Fact and Conclusions of Law on August 20, 2021, and it set a trial date for December 3, 2021. (*See* App. 2). The Findings of Fact regarding T.S.J.'s parentage mostly consist of conclusory statements, even though evidentiary hearings spanned three days and eight witnesses were called. The final decree was entered on February 2, 2022. (*See* App. 3). Under the final parenting plan, Sonny has T.S.J. from 7:30 a.m. to 5:00 p.m., Monday through Friday, and overnight on Saturdays. (App. 3, ¶ 21). The decree names Megan as T.S.J.'s primary residential custodian. (App. 3, ¶ 21).

T.S.J. was only nine months old when Megan filed her petition for parenting plan without standing to do so, and the District Court lacked jurisdiction to order a parenting plan. Eighteen months have now passed since the interim parenting plan was entered, and for eighteen months, Sonny has been deprived of his *fundamental*

constitutional right to autonomy in his parenting decisions. Sonny wants to raise his son consistent with his cultural tradition, and he is entitled to do so. Sonny wants to return to Auburn with T.S.J. and finish school, near social supports, and with people who share his Chinese culture. (*Sun*, 12/3/21 Tr. pp. 16-17). He is entitled to do so. He wants to travel with T.S.J. and see his family. He is entitled to do so. Instead, he stuck in Montana, tethered to a woman who has taken everything.

Sonny has been isolated in a strange land, among people and institutions who do not understand his way of life, at a time when Asian hate is prolific. He cares for T.S.J. during business hours, so he cannot pursue work or education in a meaningful way because he cannot afford to lose one moment of parenting time with his child. And yet, even though he is a Chinese national, and his child has dual citizenship, Sonny has continuously submitted himself to the jurisdiction of a Montana court that has consistently ruled against him in every conceivable way—because he continues to believe in the American way of life.

This is not a case that is appropriate for reversal and remand. The uncontroverted evidence makes clear that Megan did not have standing to petition for a parenting plan on October 5, 2020. Section 40-4-211(6) is not a forward-looking statute, and the parent-child relationship it contemplates did not exist on October 5, 2020. Drawing proceedings out longer will only do more damage. In the *Kulstad* dissent, Justice Rice notes that "the burden of litigating a domestic relations

proceeding can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated." 2009 MT 326, ¶ 131. This is precisely such a case. T.S.J. can only hope to find any real stability when his sole parent's right to pursue life, liberty and happiness is fully restored.

For the reasons set forth above, Sonny respectfully moves this Court to ***dismiss*** Megan's October 5, 2020, petition for parenting plan ***with prejudice***.

b. Even if Megan had formed a parent-child relationship with T.S.J., a parenting plan is not appropriate because at no time did Sonny act contrary to the parent-child relationship, and it is not in T.S.J.'s best interest.

Although the record shows no facts under which Megan could prove a parent-child relationship existed between her and T.S.J. when she filed her petition for parenting plan, and the petition should be summarily dismissed with prejudice without the need for consideration of any additional factors, it bears noting that there is not a scintilla of evidence that Sonny has acted contrary to the parent-child relationship in any manner that would justify the any court in infringing on his fundamental right to parent T.S.J. Indeed, the District Court made no such finding. Mont. Code Ann. § 40-4-228 did not figure into the analysis at all. In entering the final parenting plan:

> . . . the Court ruled that a parent-child relationship has been established between Megan and T.S.J. under Mont. Code Ann. § 40-4-211(6) and

> that Megan had standing under Mont. Code Ann. § 40-4-211(4)(b) to *establish* a parenting plan.

(App. 3, p. 3, ¶ 8) (emphasis added). However, as noted above, Mont. Code Ann. § 40-4-211(4)(b) only confers standing to initiate proceedings. Once proceedings are initiated, a parenting plan may be entered over a natural parent's objection only if the natural parent has acted contrary to the parent-child relationship, and it is in the child's best interest for the relationship to continue.

On this set of facts, which are almost entirely undisputed (except for the question of the parties' intentions), there is simply no way to arrive at such findings. Contrary to every one of his own best interests, Sonny has abided in Montana, carrying on a ludicrous "parenting plan" that puts T.S.J. in his care seven days a week, while Megan has been deemed T.S.J.'s primary residential custodian. Meanwhile, Megan's influence has been erratic and disruptive to T.S.J., and downright abusive to Sonny and his family.

No credible evidence exists to show that Sonny acted contrary to his parent-child relationship with T.S.J., or that it is in T.S.J.'s best interest to be parented by Megan. A parenting plan is not appropriate, and Sonny reiterates that the only appropriate remedy is to dismiss Megan's petition for parenting plan with prejudice.

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II. Even if Megan could somehow find standing to petition for a parenting plan, California law applies to all questions regarding T.S.J.'s parentage.

When they negotiated the Gestational Carrier Agreement, Megan and Sonny agreed that "all questions concerning its validity, interpretation, and performance" are governed by California law. (p. 19, ¶ 32.1). They further agreed that it is a **material** term that the Agreement be "controlled by, construed, and enforced in accordance with, the laws of the State of California." (p. 19, ¶ 32.3) (emphasis added). California law was not considered in the District Court's analysis.

III. The parties' premarital agreement is void under both California and Montana law.

In its August 20, 2021, Findings of Fact and Conclusions of Law, the District Court acknowledged conspicuous provisions in the GCA that expressly divest Megan of any claims to parentage over T.S.J. (App. 2, p. 2, ¶ 2). However, the District Court concluded that Sonny and Megan validly amended the GCA pursuant to its own terms, and that "Sonny knowingly and voluntarily acknowledged in the premarital agreement that Megan had established a parent-child relationship with T.S.J." (App. 2, p. 7, ¶¶ 2, 3).

Even given that the GCA permits the parties to amend the agreement in writing, the parties are bound to apply California law in negotiating any such amendments. Regardless, the premarital agreement is unenforceable under both Montana and California law, and it cannot reasonably be deemed enforceable to

amend the GCA to void Megan's single most material obligation in performing under the GCA.

Under the Uniform Premarital and Marital Agreements Act ("UPMAA"), premarital agreement clauses which purport to define the rights or duties of the parties regarding parenting and custody are not binding on the court, and they are generally disfavored.[3] UPMAA § 10(c) (2012). A premarital agreement is unenforceable if the party's consent to the agreement was involuntary or the result of duress. UPMAA § 9(a)(1) (2012).

a. *The premarital agreement is void under California statutes*

Sections 1615 (c) and 1620 of the California Family Code both void the premarital agreement as it arguably applies to parentage of T.S.J. According to Section 1615, California Family Code, a premarital agreement shall be deemed involuntary unless a number of criteria are met including that:

> The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel. The advisement to seek independent legal counsel shall be made at least seven calendar days before the final agreement is signed.

§1615(c)(1), Cal. Fam. Code. A party can only validly waive representation if he "was fully informed of the terms and basic effect of the agreement as well as the

[3] "The basic point is that parents and prospective parents do not have the power to waive the rights of third parties (their current or future children), and do not have the power to remove the jurisdiction or duty of the courts to protect the best interests of minor children." UPMAA § 10(c) cmt. (2012).

rights and obligations the party was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in which the agreement was written." §1615(c)(3), Cal. Fam. Code. Critically, § 1620, Cal. Fam. Code, provides that "Except as otherwise provided by law, spouses cannot, by a contract with each other, alter their legal relations, except as to property."

Under California law, the premarital agreement fails. It was drafted at Megan's behest by an attorney Sonny never met. He was not represented in the matter, had no access to translation services, nor did he receive an electronic copy to review (despite requesting one). Megan happened to have the document on hand when the couple made a run to Costco on a Friday afternoon. Megan and Sonny stopped into the nearest bank to have the document notarized. They were married the following Monday. The premarital agreement is void.

b. The premarital agreement is void under Montana law because it was involuntarily entered into, and the "parental rights" clause is unconscionable.

A premarital agreement is not enforceable if the party against whom enforcement is sought proves that that party did not execute the agreement voluntarily. Mont. Code Ann. § 40-2-608(1)(a). A clause to an agreement is unconscionable when the weaker bargaining party had no meaningful choice in signing; the disputed clause unreasonably favors the drafter; and the disputed clause

falls outside of the weaker party's reasonable expectations. *Highway Specialties, Inc. v. State*, 2009 MT 253, ¶ 12, 351 Mont. 527, 530, 215 P.3d 667, 670.

"Voluntarily" is not defined in the UPMAA, but this Court has previously interpreted voluntariness in a substantially similar case in *Shirilla v Shirilla*, 2004 MT 28, 319 Mont. 385, 89 P.3d 1. Citing California case law, Justice Leaphart, writing for the Court, notes:

> The party seeking to avoid a premarital agreement may prevail by establishing that the agreement was involuntary, and that evidence of lack of capacity, duress, fraud, and undue influence, as demonstrated by a number of factors uniquely probative of coercion in the premarital context, would be relevant in establishing the involuntariness of the agreement.

Shirilla, 2004 MT 28, ¶ 13.

In *Shirilla*, a Russian immigrant, Natalia, challenged the enforceability of a premarital agreement with her American husband, Steve. Natalia spoke with a translator before signing, and Steve later paid for an attorney to represent Natalia in negotiating terms. *Id.* ¶ 7. The parties gave vastly differing accounts of the facts leading to the premarital agreement, but the disputed facts were not integral to the Court's analysis. *See Id.* ¶ 6 ("*As might be expected, given Natalia's difficulty with the English language, the parties relate different versions of the events . . .*").

Rather, the undisputed facts were sufficient to demonstrate that, "under duress, Natalia signed an agreement she did not understand in order to remain in the United States." *Id.* ¶ 15. Natalia's trial testimony showed that she didn't likely

understand the legal implications of signing the premarital agreement—when asked, she was not able to articulate her attorney's advice. *Shirilla* at ¶ 15. She had given up her previous life and journeyed to Montana with her son, in reliance on Steve's promise they would be "equal partners for life and enjoy a wonderful American life." *Id.* When Natalia signed the later-disputed agreement, she and her son were isolated in a strange country with limited resources, and they relied primarily on Steve. *Id.* at ¶ 16. Natalia did not want to return to Russia, and she potentially faced geopolitical threats if she had to return to her home country. *Id.* Based on those facts, the Court reasoned that "the circumstances amounted to such coercive pressure that Natalia cannot be said to have voluntarily agreed to be bound to the terms of the agreement." *Id.* ¶ 16.

The record here is replete with evidence that Sonny lacked both linguistic and cultural fluency sufficient to understand the implications of signing the premarital agreement. With some difficulty, Sonny admits that he failed remedial English courses at Auburn. (*Sun*, 12/3/21 Tr., pp. 17-18). Sonny's partner, Zhao, often provided day-to-day translation assistance. (*Zhenfan Aff.*, Dkt. 48, ¶ 3; *Sayler*, 6/2/21 Tr. p. 135). Briefing was delayed because Sonny was unable to clearly communicate the factual background to counsel, and the court reporter needed extra time for transcription because she couldn't understand Sonny's interim hearing testimony. (*Driscoll Aff.*, Dkt. 51; *E Mtn.*, Dkt. 58, p. 2; 6/2/21 Tr., p. 8).

A Riverstone Health social worker attempted to assist Sonny with communications at the November 23, 2020, hearing. (*Minutes*, Dkt. 37). She became upset and frustrated with the communication struggles at the hearing. (*Brown Aff.*, Dkt. 37, ¶ 9).

The hearing transcript reveals much about the state of Sonny's language and cultural fluency at that time. When asked about multi-figure numbers, Sonny struggled to comprehend. He could not speak the numbers in English, so he wrote them down for the Court. (*Sun*, 11/23/20 Tr., pp. 3-5). He did not understand certain questions, and he gave several unintelligible responses (*Sun*, 11/23/20 Tr., pp. 5-7; 12-13; 23-24; 27-28;). Interestingly, he knew the word "notarized" and could use it in context, but he did not understand the word "access." (*Sun*, 11/23/20 Tr., pp. 3-5). Sonny was not able to explain the simple concept that he and his mom were out of money because they had given it to Megan. (*Sun*, 11/23/20 Tr., pp. 5-7; 22). He believed that he could reasonably request a protective order declaring that Megan "cannot force me in basement." (*Sun*, 11/23/20 Tr., pp. 21-22). He seemed to believe that police are on stand-by to resolve civil disputes. (*Sun*, 11/23/20 Tr., p. 22). He did not understand opposing counsel's insinuations about Megan being somehow offended at the idea of cohabitating together with her husband and his boyfriend. (*Sun*, 11/23/20 Tr., pp. 20-21). And he still did not understand how dire the

relationship with Megan had gotten, even though police had been called several times. (*Sun*, 11/23/20 Tr., pp. 19-23).

After Megan moved to dismiss her order of protection, Sonny thought he could go back to the marital residence. He attempted to return on November 13, 2020, but he found that the locks had been changed. (*Sun Aff.*, Dkt. 23, p. 1). He filed an Emergency Motion for Housing Entry with the District Court (*Sun Mtn.*, Dkt. 22, p. 1). The body of the motion appears to be filled out by another person, and it refers to T.S.J. as Sonny's "daughter."

Critically, Sonny's various ruminations regarding his plans with T.S.J. reveal that he had not yet contemplated that he was obligated to share parentage of T.S.J. with Megan. (*See Sun*, 11/23/20 Tr., p. 16 (testifying that he didn't know that Megan would become T.S.J.'s mother as a result of the premarital agreement); p. 17 (reflecting that he could not take T.S.J. back to China, but he may be able to meet his mom in Japan or Thailand); p. 27 (saying he does he does not trust Megan with T.S.J. right now; and does not agree to "let my baby" live together with Megan's brother); p. 28 (answering that he does not trust Megan and her family with "my baby" after her brother "just kick me and the baby outside"); p. 23 (offering that if Megan returned some of his money, she and her children could stay at the marital residence; and Sonny and TSJ could rent their own place).

At trial, Sunny was able to adequately describe the ordinarily contemplated purpose of a premarital agreement:

> Well, like I said, my understanding of a pre-marriage agreement is that each party will be guaranteed that the person will still own whatever he or she owns after the divorce, and the agreement doesn't involve such things as you said.

(*Sun*, 6/8/21 Tr., p. 22, 23). Megan admits that she and Sonny did not discuss the terms of the premarital agreement prior to signing. (*Sayler*, 7/2/21 Tr., p. 9). When asked if she knew whether Sonny spoke with an attorney about the premarital agreement, Megan responded, "I didn't ask. He didn't tell." (*Sayler*, 7/2/21 Tr., p. 10). Megan further admits that even she has "no idea" what "Section 40-4-211, MCA" says. (*Sayler* 12/3/21 Tr., p. 84).

As in *Shirilla*, the undisputed facts here show that under duress, Sonny signed an agreement he didn't understand. Sonny was only 24 years old when he found himself alone in Montana with a newborn baby, stripped of the substantial professional and social supports he had enjoyed in Auburn. He was coping with the developing information that his mother would not be able to join him. In Chinese culture, this meant that the family unit was broken.

With only a limited understanding of local language and culture, Sonny heavily relied on Megan for support. Sonny believed that if he did not marry Megan, he and his newborn baby might be forced to return to China, where the male members of his family had endured ongoing harassment and violence at the hands

of police. With her undue influence substantially exerted, Megan effectively communicated that signing a premarital agreement was necessary in order to get married.

However, unlike Natalia, Sonny did not even have the benefit of reviewing the agreement with a translator or attorney before he signed it. As Justice Leaphart unequivocally writes in *Shirilla*, "these circumstances amounted to such coercive pressure" that Sonny "cannot be said to have voluntarily agreed to be bound by the terms of the agreement."

Also distinct from the facts in *Shirilla* is the unconscionable nature of the present premarital agreement. The agreement in *Shirilla* only addressed financials—items which are ordinarily expected to be found in a marital contract. There is no indication that the contract terms in *Shirilla* were unreasonably lopsided or unexpected. In this case, the clause in dispute represents a waiver of Sonny's fundamental constitutional right to parent his child in a way that he and his family see fit, consistent with their own culture and values, after they had spent nearly $250,000 so Sonny could realize the fundamental right to parent conferred to him by the United States Constitution. The "parenting" clause in the premarital agreement is unconscionable.

For the reasons stated above, based on the undisputed facts, the parties' premarital agreement is void in its entirety. It was not voluntarily entered into by

Sonny. Independent of the complete premarital agreement, the "parenting" clause is void because it is unconscionable. The premarital agreement is void in its entirety. Even if it was not entirely void, the parent-child relationship clause is void as unconscionable.

CONCLUSION

Appellant Yan Sun respectfully moves that Appellee Megan Sayler's October 8, 2020, Petition for Parenting Plan be dismissed with prejudice, because Megan does not have standing to petition. Appellant further requests that the parties' premarital agreement be deemed void in its entirety. Should this Court determine that additional findings are necessary, Appellant moves that any further analysis regarding T.S.J.'s parentage be made pursuant to California Law.

DATED this 2nd day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 8,451, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

DATED this 2nd day of June, 2022.

/s/ Melinda A. Driscoll
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CERTIFICATE OF SERVICE

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