ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0241

Jennifer Brick

Petitioner /Appellant,

vs.

Richard DuCharme

Respondent /Appellee.

APPELLANT'S BRIEF

On appeal from the Montana Judicial Eighteenth District Court,

County of Gallatin,

Cause No. DR-17-140A

Honorable Andrew Breuner Presiding

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Hooks v. *Hooks,* 771 F.2d 935,941 (6" Cir. 1985).

Girad v. *Williams,* 1998

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re E.W., 1998 MT 135, ¶ 12, 289 Mont. 190, ¶ 12, 959 P.2d 951, ¶ 12 (citing *In re R.B.* (1985), 217 Mont. 99, 103, 703 P.2d 846, 848)

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Brothers v. Surplus Tractor Parts Corp.(1973), 161 Mont. 412, 418, 506 P.2d 1362, 1365.

Brown v. Brown, 384 P. 3d 476 - Mont: Supreme Court 2016

Gahm, 722 P.2d at 1140.

In re Marriage of Arbuckle, 792 P. 2d 1123 - Mont: Supreme Court 1990

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Statement of the Case

The Decree of Dissolution of Marriage in this case was entered May 12, 2017, after self-represented mediation. The Decree implemented the Final Parenting Plan for the parenting of the children, S. D. and B. D.. The Final Parenting Plan entered by the District Court inadvertantly did not include the referenced Exhibit 1, which listed the ongoing financial directives including tax claiming, shared costs, life insurance, phone expenses, etc.,. Ms. Brick sought mediation directly with Mr. DuCharme to correct this error and a Motion was drawn up, yet this Exhibit 1 remained unfiled. As a non-litigious person, Ms. Brick

did not choose to initiate litigation to resolve this issue, and chose to accept the financial hardship.

From the years 2019-2021, aggressive litigation was initiated by Mr. DuCharme, while Ms. Brick defended, primarily pro se in large part due to the error with the missing Exhibit 1, and after having been the primary, full-time homemaker for 12 years. At the Hearing in April of 2022 Ms. Brick stated to the Court she wished she could have the services of an Attorney.

This litigation by Mr. DuCharme across two years included multiple allegations of Contempt alleging "withholding the children," and a subsequent Motion to Amend the Parenting Plan. This Motion, again based on vague and unsubstantiated allegations of "witholding," was filed immediately after the Contempt Citation Ordered against the Petitioner. The pro se Petitioner asserts she experienced lack of due process, hearing irregularities, and procedural errors over the course of two years while defending against the repeated litigation by the Respondent, and that she experienced similar lack of due process for an additional year while she attempted to have her Objections to the Order to Amend the Parenting Plan, and then her Petition to Modify the Parenting Plan in order to make facts known, addressed by the District Court.

Throughout the Case, while the Standing Master was presiding, the Petitioner experienced the following: (1) lack of service for two Contempt filings,

and lack of adequate notice for Hearings, Orders, and Filings, including only three-days notice of personal service for the first Contempt Hearing held Novemeber 19, 2019, (2) a Contempt Citation ordered despite no opportunity to testify and based on the insubstantial evidence of one email thread created by Mr. DuCharme, (3) opposing counsel entering a "Revised Propsed Amended Parenting Plan" during the beginning of the Hearing to Amend the Parenting Plan stating on the Record that he had indeed filed it the day prior, when in fact he had not, and instead he had in fact submitted it Ex Parte directly to the Standing Master's office the morning of the Hearing, (4) no pleadings specifying the numerous modifications written in their "Revised Proposed Amended Parenting Plan," (or the original "Proposed Amended Parenting Plan") nor how these modifications met the criteria of Montana Statutes for amending a plan, (5) no specific attention directed to, arguments for, evidence or testimony given at the Hearing to Amend the Plan for all of Mr. DuCharme's requested modifications, (6) Ms. Brick not being allowed to give an opening statement or to use notes or to use a phone/computer at a hearing to amend the Parenting Plan, while opposing counsel was allowed, (7) not being able to adequately testify pro se due to allegations by opposing counsel of "soliloquy," as well as due to his unfounded accusations of using "prepared notes," (8) modifications made by the Standing Master outside of the pleadings, (9) no filing of written findings of fact and conclusion of law for the Order to Amend

the Parenting Plan, (10) no oral findings that support the statutory requirements for modifying numerous directives of the parenting plan, (11) a denial by the Standing Master of the Petitioner's Objections to the modifications in the Order to Amend the Parenting Plan instead of by the District Court, (12) repeatedly being reprimanded, disrupted, threatened with "jail time," the opportunity to speak or see filings in advance squelched, and repeatedly feeling punished with the removal of the children for holiday time more than once, and then permanently separated from the children, via a modification, for most future holidays/vacations despite no pleadings, (13) having her right to follow Federal IRS Tax Law removed and financial directives issued, without any pleadings, arguments, evidence or financial assessment, and (14) changes in the Judges assigned to our case without having the status of our case addressed by each new Judge as requested by the Petitioner.

After the Standing Master recused herself, and then Judge Ohman and then Judge Breuner presided, Ms. Brick experienced: (1) no Hearing or Motion ever granted the Petitioner as she attempted to ask the Court to address her Objections regarding the modified tax and holiday/vacation directives, nor her allegations against Mr. DuCharme regarding his violations of the Plan and his hostile behavior towards her accepted, and instead (2) being held in Contempt while the Order Amending the Parenting Plan, with the tax modifications, was enforced, and then (3) being declared "vexatious" in her attempt to have her Request for a District

Court Case Review addressed by the District Court. In contrast, the Respondent and his counsel continued to be awarded hearings and had their motions and pleadings accepted.

Ms. Brick's Objections have yet to be addressed by the District Court despite her good faith effort to make facts known to the District Court over the course of one year; from January 2021 to April 6, 2022, with the most recent hearing held April 6, 2022, and a timely Appeal filed afterwards. Not only did Ms. Brick file Objections directly with the District Court immediately after the Hearing to Amend the Parenting Plan, which the District Court did not review, but since the Order Amending the Parenting Plan was entered January 14, 2021, Ms. Brick, while pro se, has made the following good faith effort to make corrections: (1) in February and June of 2021 she requested to mediate with the Respondent and opposing counsel directly, which followed the dispute resolution provisions of the final parenting plan, in order to address her Objections but she was ignored, (2) she filed a Motion to Amend the Final Amended Parenting Plan August 2, 2021 in order to make previous unknown facts known to the Standing Master as allowed by M.C.A. 40-4-219, since her Objections themselves had been denied by the Standing Master, and in order to defend against the second Motion for Contempt against her, (3) she followed the directive in the Order to Mediate filed by the Standing Master September 21, 2021 when she filed on October 12, 2021 her "Petitioner's Verified

Motion for Hearing..." immediately after the failed mediation - yet this filing was not responded to by the Court and instead the Standing Master filed an Order of Recusal on November 5, 2021, (4) following the oral recommendation of Judge Ohman at the December 29, 2021 Hearing for Contempt, she filed a Request for District Court Case Review on January 28, 2022, and a re-written Warrant for Contempt on January 31, 2022 but Judge Ohman instead Recused himself, and (5) immediately after Judge Breuner was assigned, she filed a Notice to the Court & Motion for Hearing on February 22, 22 and the first ever case management conference was scheduled for March 25, 2022. Ms. Brick felt she would finally be able to address parenting issues without instead defending against allegations of contempt. Yet instead, on March 23, 2022, this hearing was vacated and an Order Setting Show Cause Hearing as to why the Petitioner should be declared a Vexatious Litigant was filed by Judge Breuner. Therefore, each request and filing the Petitioner has made in this case, in order to address her Objections and to make facts known, was either left unaddressed, or dismissed as moot. No hearing has ever been granted the Petitioner, nor a District Court Review of her Objections.

The Order Amending the Parenting Plan has created a harmful, even absurd result. This Order has: (1) suddenly separated the mother and children on virtually all holiday/PIR/summer/vacation days through deceptive language which has historically been beneficial for the children, (2) removed Ms. Brick's right to

follow Federal IRS Tax Law and claim both children as the custodial parent, (3) established financial directives that do not match the income/assets of the parties and continue to be vague and detrimental to the Petitioner, and (4) removed historic time from the children with grandparents and relatives. These modifications were made with no pleadings, arguments, witnesses, testimony, and Ms. Brick attested they have primarily inflicted financial and emotional harm. There are no written or oral findings supporting these directives, nor conclusions of law as to how these modifications meet the standards of the Montana Statutes regarding a significant change in circumstances and the best interests of the children.

In fact, what began as confusion over "whose weekend was whose" and a Thanksgiving holiday interpretation dispute in the Fall of 2019, has led to protracted litigation for three years, and repetitive, punishing Orders against the pro se, custodial parent. A schedule dispute regarding weekend dates, and the historic pattern of the 5-day holiday split, does not in and of itself meet the threshold for "Contempt" or a "change in circumstances" necessary to rewrite a Parenting Plan or to make significant modifications. In fact Case Law, which will be shown later, supports the stability of the original plan unless there has been a significant change in circumstances. At the most recent hearing in April of 2022, while Ms. Brick was defending herself against being deemed a vexatious litigant,

she emphasized to the court that she wished she could have an Attorney, that she felt she has had no voice or equal access to justice in this case, and she asserted that this case has consisted of her defending against repeated disingenuous allegations, which has caused unresolved issues.

Statement of the Facts

The Final Parenting Plan, mutually agreed to after self-representation, was issued in May 8, 2017 and designated the mother, Jennifer Brick to be the primary, custodial parent of the children with the father having parenting time every other weekend, every Wednesday, and every other Monday. The PIR days, and "secondary" holidays were equitably shared. Christmas and Thanksgiving had a specific schedule based on historical pattern and practice and that would superceed the regular schedule. The spring breaks were reserved for the mother to continue the children's established pattern of traveling to visit their only grandparents who live in Florida. Each parent would have two, distinct 7-day summer vacations. The Parenting Plan was accepted by the Court despite the inadvertantly missing Exhibit 1, which listed the ongoing financial directives. Ms. Brick immediately requested to Mediate directly with the Respondent regarding the missing, Exhibit 1, for relief. Mediation took place in September 27, 2017, yet the Exhibit 1 remained unfiled afterwards.

In November 2019, Mr. DuCharme, with Attorney Scott Phelan, alleged Contempt and after this "win" at the Hearing held November 19th, 2019, he immediately followed by filing a Motion to Amend the Parenting Plan on January 17, 2020, which included an entirely rewritten parenting plan with numerous modifications. This Motion was missing specific pleadings in regards to each of their requested changes written into their Proposed Plan, and how each of these changes met the statutory requirements. The allegations of withholding in the pleadings by Scott Phelan matched no prior evidence, testimony, or findings of facts, ever filed with the court, nor were his pleadings backed up by the Respondent's concurrently filed affadavit.

Prior to this, when the Case was first opened with the Respondent's Contempt allegation filed October 22, 2019, personal service rules were not followed. Therefore, a Hearing was held on November 8th, 2019 unbeknownst to Ms. Brick, so she was not present. Another Hearing was scheduled only 11 days from that date, still unbeknownst to Ms. Brick. She was then personally served on November 13th, 2019, which was her first knowledge of the Contempt allegation, and this service was only three business days prior to the Hearing scheduled for November 19th. At the time she did not have an attorney retained, nor could she afford one. At this Hearing of Contempt held on November 19th, 2019 testimony of the Petitioner was not taken. The only evidence substantiating Mr. DuCharme's

allegations was one email thread created by Mr. DuCharme himself which appeared to attempt to discredit Ms. Brick. (Appendix, Exhibit A) During the Oral Findings of Fact and Conclusions of Law, when Ms. Brick attempted to speak to clarify the pattern and practice of the family's Thanksgiving Holiday, she was dismissed, and her 5-day Thanksgiving holiday, only days away, was instead removed by an oral directive. (R. at 71) A Contempt Citation was issued November 19, 2019, in which the Findings of Fact has no reference to the evidence or testimony showing the Petitioner willfully did not comply, or that she even did not comply at all, with the father's every-other weekend parenting time. It also does not state reasoning for the removal of the children for the 5-day vacation holiday. In fact the evidence entered contradicted the Facts and Findings as the Petitioner wrote she was following the Parenting schedule and questioned if the father would continue to be a "no show." (Appendix - Exhibit A) The parties were directed to mediate.

After failed mediation, Mr. DuCharme iled his Motion to Amend the Parenting Plan on January 17, 2020. In the language of the Proposed Parenting Plan there were additional, major changes not referenced in the pleadings. The Hearing was nonetheless granted and scheduled for December 8, 2020, 9 months away.

Ms. Brick hired an Attorney in January 2020, with borrowed family money, which was entirely used by the Attorney's preparation of the Response in Opposition to Respondent's Motion to Amend the Parenting Plan filed March 10, 2020. The services of this Attorney was therefore terminated afterward on June 15, 2020. January 2020 to June 2020 was the only time during the case when Ms. Brick had an Attorney.

Two weeks prior to the Hearing to Amend the Parenting Plan, on November 18, 2020, Mr. DuCharme's new counsel, Matt Dodd, filed an Expedited Motion to Enforce Parenting time alleging that Ms. Brick intended to not allow the the father's weekend visitation during the Thanksgiving Holiday week, the same unresolved dispute as the year prior. This filing by opposing counsel, which again alleged "atttempted withholding," suspiciously occurred two weeks prior to the Hearing to Amend the Parenting Plan.

At the opening of the Hearing to Amend the Parenting Plan, presided over by the Standing Master, on December 8, 2020, Mr. DuCharme's council, Matt Dodd, stated he had a "Revised Amended Parenting Plan" he would be arguing for that day which he stated he filed the day prior to the hearing, when in fact he had not. (R. 5) The Case Register shows no such filing on December 7th, 2020, and this was confirmed on the Record. The Clerk stated it had instead been submitted Ex Parte, directly to the Standing Master's office the morning of the Hearing. (R. at

6) The Standing Master stated she did not see this document and it's 1.5 page of pleadings prior to the hearing.

This "Revised Proposed Parenting Plan" presented at the Hearing included only a 1.5 page pleading which did not delineate all of the changes included in his written plan, nor were there arguments or evidence shared during the Hearing for how his changes met the prerequisites of §40-4-219(1) MCA and the statutory mandates for determining the best interest of the children. (Appendix, Exhibit B) The Petitioner could not read, prepare witnesses, evidence, testimony and arguments against this Plan while during the hearing itself. The pleadings with this revised plan primarily included vague accusations of "withholding." The pro se Petitioner, while under duress at the Hearing, and with only one hour of prior court experience, was not knowledgeable of recourse to try to halt the hearing.

The second matter in the opening of the Hearing to Amend the Parenting Plan, was when Mr. DuCharme's council testified as a witness, alleging Ms. Brick was utilizing the services of a lawyer, based on what he purportedly observed in the hallway. (R. at 7) Ms. Brick was thus reprimanded based on this unfounded testimony by counsel, despite no inquiry by the Standing Master. When Ms. Brick then asked to give an opening statement she was denied. (R. 10) Opposing council was given the majority of the allotted time of the Hearing. The Respondent was not required to point out or argue for each modification in the document. When Ms.

Brick attempted to cross examine, while pro se, regarding her safety concerns of Mr. DuCharme with the children (R. at 86), or financial matters, (R. at 83) she was ordered to stop by the Standing Master. The Petitioner had only the roughly the final 30 minutes to testify during the 3.5 hour hearing. (R. at 142) When Ms. Brick began her testimony opposing counsel alleged she was reading from "prepared notes" and repeatedly objected (R. at 143). ON the second day, the Petitioner was again reprimanded without asking for clarification and was then ordered to turn over her notes. (R. at 9) Ms. Brick was thus distracted and under duress by these accusations and disruptions.

During the Standing Master's delivery of the Oral Findings of Fact and Conclusion of Law, she stated she approved Mr. DuCharme's Revised Proposed Amended Parenting Plan primarily because the Petitioner did not want to change the original Plan (R. at 59) and because the Standing Master did not agree with the visitation schedule from the original Decree. (R. at 59) There was no oral reference as to how the numerous changes met the statutory requirements for significant changes in circumstances and how each change met the best interests of the children, in order to warrant the acceptance of new parenting plan. At this time numerous decisions were also made by the Standing Master outside the pleadings for the "Revised Proposed Amended Plan." During this time, while under duress, Ms. Brick was asked additional questions by the Standing Master.

Immediately following the Hearing, after opposing counsel shared his draft "Final Amended Parenting Plan" with her, Ms. Brick filed her Petitioner's Objections on December 28, 2020 stating she believed his edits misconstrued the Order by removing the majority of summer custody from the mother with vague, deceptive language, despite no Order at the Hearing to do so. In her Objections she also states facts unknown at the Hearing regarding taxes, financial directives, phone directives, holidays, scheduling, and other errors from the Hearing. However, the Standing Master denied Ms. Brick's Objections and then incorporated these Denied Objections in to her Order Amending the Parenting Plan on January 13, 2021. This Order did not refute the Petitioner's arguments in her Objections and instead referred only to an evidentiary technicality and that it was "premature." (Appendix, Exhibit C)

This Order Amending the Parenting Plan did not include written Findings of Fact and Conclusions of Law, nor were any ever filed. Ms. Brick, a pro se litigant, did not know how to proceed after her Objections were denied by the Standing Master herself, nor with no written Findings of Fact and Conclusion of Law filed or available. Nor at that time did she have the financial resources to purchase these oral findings via the transcripts.

Ms. Brick proceeded to make a good faith attempt to correct these errors, including her right as custodial parent to follow Federal IRS Tax Law, directly with

Mr. DuCharme and then his counsel in February 2021 and June of 2021, but was refused. Mr. DuCharme filed a Motion for Contempt on July 14, 2021 alleging Ms. Brick failed to sign away her federal tax right to claim both children, and alleged she was again "witholding."

Up until this point, Ms. Brick from October 2019 to August 2021 had never initiated any legal action, but now decided to file to make facts known and filed a Counter Motion of Contempt on August 02, 2020, a Motion to Amend the Final Amended Parenting Plan in accordance with the Montana Statute M.C.A. 40-4-219 in order to make the Court aware of facts unknown at the previous Hearing and to address her Objections, along with a Petition to Modify Maintenance due to no financial assessment having been conducted at the Hearing to Amend the Parenting Plan. On August 31, 2021 she filed for a Temporary Order of Protection due to what she described were ongoing, hostile actions by Mr. DuCharme. The Standing Master filed an Order for Mediation on September 21, 2021. In the Standing Master's Order for Mediate it was stated that either party could request a Hearing if the mediation failed. (Appendix, D)

Immediately after the failed mediation held on October 11th, on October 12th, 2021 Ms. Brick filed The Petitioner's Verified Motion for Hearing prior to the the October 15 tax extension deadline. She did not receive a response from the Court. The Standing Master filed an order of Recusal on November 5, 2021.

Judge Ohman acquired the Case, but there was no case status hearing, nor an undertaking of a District Court Review of her Objections, nor a Hearing for the Petitioner's Request for Hearing filed following the failed mediation. Instead, opposing counsel filed his third Warrant for Contempt on December 9, 2022, primarily regarding the tax issue. On the same day, Judge Ohman filed the Order RE Petitioner's Motion to Amend the Parenting Plan on December 9, 2021 which denied her an opportunity for a Hearing to address her Objections. The Petitioner filed a Counter Motion of Contempt on December 27, 2021. Yet the Hearing held on December 29, 2021 was held solely in regards to Mr. DuCharme's Motion for Contempt, and disregarded Ms. Brick's Counter Motion for Contempt. At this hearing Ms. Brick inquired about her Counter Motion for Contempt and the unresolved disputes arising from the errors from the Hearing to Amend the Parenting Plan, Judge Ohman at the Petitioner's request, stated he would consider the additional filings of a Warrant for Contempt and a Request for District Court Case Review after this Hearing, but he "did not have time" to address the Petitioner's issues now. Judge Ohman proceeded to enforce the Standing Master's existing Order Amending the Parenting Plan. The Petitioner was deemed in "Contempt" and ordered to sign away her federal right to claim one child or face jail time. Ms. Brick followed this Order. Follow Judge Ohman's oral recommendation Ms. Brick on January 28, 2022 made the additional filing of the

Request for District Court Case Review and on January 31 filed a Warrant for Contempt. However, Judge Ohman instead recused himself on February 17, 2022.

The Petitioner, filed a Notice to the Court and Motion for Hearing on February 22, 2022 when judge Breuner accepted the case. Ms. Brick's pleadings were reviewed and initially a case status Hearing was scheduled for March 25, 2022. However, on March 23, 2022, this was changed to a Show of Cause of why Ms. Brick should not be a vexatious litigant. In his Order of Show Cause, Judge Breuner states the Petitioner made over 30 filings, yet the number of filings by the Respondent was not mentioned. At this Hearing held on April 6, 2022, Judge Breuner enforced the Order Amending the Parenting Plan and deemed her a "vexatious litigant," despite the Petitioner's testimony explaining that she made these additional filings at Judge Breuner's oral recommendation, that she sought to fix the previous errors in the Order Amending the Parenting Plan, despite her requesting that Mr. DuCharme's numerous violations of the parenting plan be addressed, despite her citing Case Law as to why she does not meet the qualifications of being vexatious, and despite her Request for Relief filed just prior to the hearing. Instead, Judge Breuner dismissed her Contempt Motion and her Request for District Court Case Review despite no testimony or evidence. In the written Findings of Fact and Conclusion of Law Judge Breuner incorrectly states that Ms. Brick never filed Objections with the court, even though there was inquiry

to this affect at the Hearing. (Exhibit E) Judge Breuner also states in his written conclusion that the pro se litigant could have asked for a "continuance" at this Hearing to address parenting issues but she failed to exercise this. The Petitioner asserts she did not know this was an option.

Standard of Review

This Court reviews a district court's conclusions of law regarding sufficiency of service to determine whether they are correct. The Court reviews related findings of fact to determine whether they are clearly erroneous. **Cascade Dev., Inc. v. City of Bozeman**, 2012 MT 79, ¶ 8, 364 Mont. 442, 276 P.3d 862.

In reviewing a contempt appeal, this Court's standard of review is whether substantial evidence supports the judgment of contempt. **State ex rel. O'Connor v. Dist. Ct.**, 245 Mont. 88, 97, 799 P.2d 1056, 1062 (1990) (citation omitted). In civil contempt proceedings, the type, character, and extent of punishment rests in the court's discretion as measured by the showing made. **O'Connor**, 245 Mont. at 97, 799 P.2d at 1062.

Two standards of review are relevant in a case involving both a standing master and the district court: the standard the district court applies to the master's report and the standard we apply to the district court's decision. **In re the Marriage of Davis**, 2016 MT 52, ¶ 4, 382 Mont. 378, 367 P.3d 400. We review a district court's decision de novo to determine whether it applied the correct standard of review to a standing master's findings of fact and conclusions of law. **Davis**, ¶ 4. A district court reviews a standing

master's findings of fact for clear error, and its conclusions of law to determine if they are correct. **Davis**, ¶ 4.

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

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

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

M. R. Civ. P. 16 (Rule 16) generally addresses a district court's pretrial case management functions. Rule 16(a) authorizes a court, in its discretion, to direct attorneys and unrepresented parties to appear for pretrial conferences. Rule 16(b) specifically addresses scheduling orders which follow such conferences. **Stevenson**, ¶ 32 (citation omitted).

We review a pre-filing order entered against a vexatious litigant for abuse of discretion. **Boushie v. Windsor**, 2014 MT 153, ¶ 8, 375 Mont. 301, __ P.3d __ (citation omitted). The question under this standard is not whether we would have reached the same decision as the trial judge, but whether the trial judge acted arbitrarily without conscientious judgment or exceeded the bounds of reason. **Boushie**, ¶ 8 (citation omitted).

Summary of Argument

Montana Case Law is prevalent in addressing the three primary issues in this case, specifically in regards to: 1) due process rights of all citizens, 2) the procedure and threshold for amending of parenting plans, and 3) lenience for pro se litigants. Case law is also abundantly clear that parenting plans are established documents and they are not to be modified without evidence meeting a considerable threshold. In fact the burden for arguing for any modification, let alone dozens, is on the moving party, and must be described in pleadings that are timely served, and argued for with evidence and testimony at a hearing.

Similiarly the court is required to submit their findings of fact based on substantial, credible evidence, and to submit conclusions as to how each modification met the Montanta statutes. In fact the Montana Supreme Court has vacated Orders Amending a Parenting Plan when no findings of fact are filed, or when findings are stated orally yet absent evidence or reasoning for how the

modifications meet the threshold of the Montana Statutes. Additionally, as a check and balance, the District Court is mandated to oversee the rulings of Standing Masters, and a mechanism is in place to address Objections to Orders made by a Standing Master, which allows due process to litigants.

Argument

1. **The District Court violated due process by issuing a Contempt Citation when it did not give adequate notice of Hearing, nor did it take any testimony from the Petitioner, nor are the Findings of Fact and Conclusions of Law supported by substantial, credible evidence**

The Order of Contempt in November 2019 substantially impacted the rights of Ms. Brick and was significant in the district court's continuing jurisdiction over the rights of Ms. Brick. The Respondent immediately filed a Motion to Amend the Parenting Plan after the Contempt hearing and alluded to the Contempt charge in his pleadings as the main argument for a change in circumstances to amend the Parenting Plan. Therefore, due process is essential in any hearing regarding a family matter. It is well established that a parent's interest in the custody of their children is a very important interest. The Sixth Circuit Court of Appeals stated that "it is well-settled that parents have a liberty interest in the custody of their children. . . . Hence any deprivation of that interest must be accomplished by meeting the requirements of due process." *Hooks* v. *Hooks,* 771 F.2d 935,941 (6" Cir. 1985).

This Court recognized the importance of that interest when it stated "a parent's right to custody of his or her natural child is not merely a matter of legislative enactment, but is a fundamental, constitutionally protected right." *Giradv. Williams,* 1998MT231,716,966P.2d 1155,716,(citing*MatterofGuardianshipofDonej*~1,74Mont.282,286,570P.2d575(Mont.1077).

In *Irz Re Marriage of Huotari,* 943 P.2d 1295 (Mont. 19971,the court stated that "in marital cases, as in other cases, the essential elements of due process are notice and an opportunity to be heard." *Id,* at 1299.

Ms. Brick was personally served 3 business days prior to the Hearing, she was unaware of all procedures, including her opportunity to file a response, she did not know how to cross-examine, and she believed she would have a turn to share her "side" as testimony, especially in such a matter that could result in "jail time," as was threatened by the Standing Master. Yet she was never offered or directed for her opportunity to testify.

Finally, the only evidence offered by the Respondent alleging "withholding" was one email thread that he himself created. In fact, in the email thread the Petitioner states she is following the parenting schedule and then inquires if the Respondent is going to continue to be a "no-show." This questionable email, along

with no testimony taken by the Petitioner, does not appear to prove the Petitioner was willfully in Contempt. Instead it clearly demonstrates there was confusion as to "whose weekend was whose." Family law must follow the same evidentiary standards, and due process, as any other area of law. Case Law supports this when it found: A trial court must issue findings of fact and "the findings of fact must be based on substantial credible evidence." In *Re Marriage of Hogstad,* 914 P.2d 584, 587 (Mont. 1996).

2. **The District Court violated due process in modifying a Final Parenting Plan with no pleadings before the court specifying the specific modifications requested, nor how there was a change in circumstances, nor how each modification met the Statutory criteria set out in §40-4-219, MCA**

In this case the original pleadings in the Motion to Amend the Parenting Plan did not specify all of the modifications in their proposed parenting plan, nor demonstrate a change in circumstance The "Revised Proposed Parenting Plan," with 1.5 pages of pleadings, presented during the Hearing to Amend the Parenting Plan, did not specify all of the modifications in the accompanied plan, nor did it specify how each modification met the Statutory criteria .

In re TC, 37 P. 3d 70 - Mont: Supreme Court 2001, a natural parent's right to care and custody of a child is a fundamental liberty interest, which courts must protect with fundamentally fair procedures. *See In re E.W.,* 1998 MT 135, ¶ 12, 289

Mont. 190, ¶ 12, 959 P.2d 951, ¶ 12 (citing *In re R.B.* (1985), 217 Mont. 99, 103, 703 P.2d 846, 848). Due process requires that a party receive notice and be allowed the opportunity to be heard. *See In re A.E.*(1992), 255 Mont. 56, 62, 840 P.2d 572, 576 (citing *Byrd v. Columbia Falls Lions Club* (1979), 183 Mont. 330, 332, 599 P.2d 366, 367). Allowing a party to amend the pleadings creates a question of due process in cases where the defendant may not have had an adequate opportunity to prepare her case on the new issues raised by the amended pleadings. *See Brothers v. Surplus Tractor Parts Corp.*(1973), 161 Mont. 412, 418, 506 P.2d 1362, 1365.

Similarly, in Brown v. Brown, 384 P. 3d 476 - Mont: Supreme Court 2016 it is stated:

[T]he party requesting modification under § 40-4-219, MCA, bears a heavy burden because the statute's policy is to "preserve stability and continuity of custody for the children." Gahm, 722 P.2d at 1140. How can this be done when there are no pleadings, arguments, witnessed or testimony for the numerous modifications ordered in the Order Amending the Parenting Plan.

Moreover, any amendment to the parenting plan must comply with the applicable statutes. *See* § 40-4-201(2), MCA. In other words, John, as the movant, was required to submit a specific, proposed amendment to the parenting plan and an affidavit informing the District Court of the new facts that necessitated the amendment. *See* §§ 40-4-219(7) and -220(1), MCA. *In re Marriage of Arbuckle,*

792 P. 2d 1123 - Mont: Supreme Court 1990

19 A parent who seeks to amend a parenting plan must "submit, together with the moving papers, an affidavit setting forth facts supporting the requested plan or amendment." Section 40-4-220(1), MCA. It is not enough to simply file the motion without specifying how the parenting plan should be amended; the requested amendment must be included with the moving papers. Section 40-4-219(7), MCA. Taken together, these statutes impose a burden on the parent seeking an amendment to show, through affidavits submitted with the motion to amend, facts that were unknown to the court when the parenting plan was adopted or that have since arisen and that necessitate amendment of the parenting plan. Brown v. Brown, 384 P. 3d 476 - Mont: Supreme Court 2016

3. **The District Court violated due process in modifying a Final Parenting Plan when the Standing Master did not enter written Findings of Fact and Conclusions of Law, following M.R. Civ. P. 53(c)(2), (e)(1); § 3-5-126(1), MCA AND M.R. Civ. P. 53(e)(1); § 3-5-126(1), MCA, or oral Findings regarding a change in circumstances or the Statutory criteria set out in §40-4-219, MCA**

$3-5-126 and the Third Amended Standing Order of Reference, (Appendix - Ex. F) states that the Standing Master must file written Findings of Fact and Conclusions of Law. "Adequate findings and conclusions are essential for without them this Court is forced to speculate as to the reasons for the District Court's decision. Such a situation is not a healthy basis for review." *Jones v. Jones* (1980), 190 Mont. 221,

224, 620 P.2d 850, 852. *In re Marriage of Converse* (1992), 252 Mont. 67, 826 P.2d 937, illustrates this point. There was nothing in the record in *Converse* demonstrating that the statutory criteria for making custody determinations had been considered by the district court. We observed that "[i]f some or all of the factors were considered during the off the record conference between the trial judge and counsel for the parties, this is not reflected in the record. Even if the relevant factors had been considered, there was nothing in the trial court's findings indicating the basis for the custody decision in relation to the factors." *Converse*, 252 Mont. at 71, 826 P.2d at 940. Given that a district court's findings should, "at a minimum, set forth the essential and determining facts upon which the [court] rested its conclusion on the custody issue," *Converse*, 252 Mont. at 71, 826 P.2d at 939 (internal quotation marks omitted), we remanded the case to the district court "to receive evidence relative to the statutory factors necessary for a determination of custody and for *explicit* findings setting forth at least the essential and determining facts upon which the District Court rests its conclusion on custody," *Converse*, 252 Mont. at 72, 826 P.2d at 940 (emphasis added; internal quotation marks omitted). *See also In re Marriage of Keating* (1984), 212 Mont. 462, 467, 689 P.2d 249, 252 (observing that an award of custody cannot be upheld "[a]bsent an indication that the trial court considered all of the statutorily mandated factors" and remanding the case to the district court "for appropriate findings . . . .").

¶20 Our holding in *Converse* mandates the same result here. Given the absence in the record of *any* findings by the District Court—let alone the prerequisite finding of a change in circumstances—supporting its December 29, 2004, order, the court's purported modification of the parties' parenting plan is invalid.

In this Case the primary fact stated, and only stated orally at the Hearing to Amend the Parenting Plan, for making the numerous modifications to the Parenting Plan was that the court inferred that the mother did not want to change the original parenting plan, even after she had testified that this was because the original Plan was allowing the children to thrive and created stability for the children, which was in their best interests. Yet the Standing Master concluded then based on this finding, orally, that the father's time should therefore be expanded. (R. at 59) It appeared that the Petitioner wanting to maintain the stability of a successful Parenting Plan was a negative finding.

4. **The District Court violated due process with hearing irregularities including; when it modified a Final Parenting Plan by accepting a "Revised Proposed Parenting Plan" presented at the Hearing, without allowing the Petitioner to use notes or give an opening statement, by allowing opposing council to testify as a witness, and by making modifications outside of the pleadings**

Similar to aforementioned, the rights of every parent to due process in matters pertaining to their custody has been shown.

5. The District Court erred by not following M.R. Civ. P. 53(e)(2), § 3-5-126(2), MCA when the Standing Master denied the Petitioner's Objections, and the District Court did not undertake a Review

Montana statute clearly states in §3-5-126 (2), that any party may file Objections to an Order Amending the Parenting Plan. Furthermore, in the Third Amended Standing Order of Reference, filed September 21, 2017, (Appendix, Exhibit E) #5, it states that "the Standing Master shall file and serve written findings of fact and conclusions of law....thereby triggering the 10-day objections and district court review deadline under § 3-5-126(2), MCA" and "If objections are filed within the 10 days provided, then the case will proceed according to provisions of § 3-5-126(2), MCA.

In this Case the Petitoner filed her Petitioner's Objections. However, when the Standing Master did not file written findings of fact and conclusions of law, and the Standing Master incorporated the Objections into the Order itself, the Petitioner is unable to adequately comply with the substantive requirements for objections. Additionally, the Petitioner asserts that if her objections were filed "prematurely," then leniency should be granted by specifically directing the pro se Petitioner of the proper time to re-file these.

Case Law similarly states that ¶ 24 A party may object to a standing master's report within ten days after being served with notice of the filing of the report, and the district court must then hold a hearing on the objections. M.R. Civ. P. 53(e)(2), § 3-5-126(2), MCA. A district court reviews the standing master's findings of fact for clear error. *In re the Parenting of G.J.A.*, ¶ 19. A district court, "may adopt the findings and conclusions or order and may modify, reject in whole or in part, receive further evidence, or recommit the findings and conclusions or order with instructions." Section 3-5-126(2), MCA; *see also* M.R. Civ. P. 53(e)(2) ("After [a] hearing, the court may adopt the report, modify it, reject it in whole or in part, receive further evidence, or recommit it.

6. The District Court abused it's discretion by not conducting a Hearing for the Petitioner's October 12, 2021 Verified Motion for Hearing and Proposed Amended Parenting Plan in order to make facts known as allowed in §40-4-219, MCA

Montana Statute clearly allows a parent to Petition to Amend the Parenting Plan based on facts unknown at the previous hearing. In both her objections to the Order Amending the Parenting Plan, and her Petition to Amend the Parenting Plan, Ms. Brick cites substantial evidence and argument that facts were not known at the Hearing to Amend the Parenting Plan, regarding the financial, tax, summer and holiday directives.

7. The District Court violated due process when it changed the Petitioner's Request for a District Court Case Review, Request to Stay the Order Amending the Parenting Plan, and Motion for Contempt, to a Show of Cause Hearing as a Vexatious Litigant, and Denied her Request for Relief

Ms. Brick, a pro se litigant made a good faith effort to correct the issues in the Order to Amend the Parenting Plan. The District Court has a duty to oversee and to provide oversight, in accordance with Canon 3 of the Judicial Conduct which states: (5) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively, and (6) A judge should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code, that a judicial employee's conduct contravened the Code of Conduct for Judicial Employees, or that a lawyer violated applicable rules of professional conduct.

Similarly, in *Wagenman*, this Court concluded that Tammy, a pro se litigant, was blameless for failing to discover an issue, as the error was not due to her actions. *Wagenman*, ¶ 20. Because the District Court had a duty to inquire about the equity of the agreement, the Court did not fault Tammy as a pro se litigant who had little previous contact with the court system and who was relying on the marital dissolution statutes, and the court, to uphold their agreement.

Accordingly, the District Court's subsequent decision to deny her Rule 60(b)(6) motion was an abuse of discretion. The District Court's legal error prevented an

"accurate determination of the merits" regarding the property settlement agreement; thus, the Supreme Court reverse the District Court's denial of Tammy's Motion to Amend under Rule 60(b)(6) because it was an abuse of the District Court's discretion. *Wagenman*, ¶

Similarly in this Case, because of Ms. Brick's limited experience with the court, she relied on the District Court to address her Objections, and she asked for Relief. This is echoed in **In re** Marriage of Broere, 867 P. 2d 1092 - Mont: Supreme Court 1994 when it stated;

"Rule 60(b), M.R.Civ.P., states that a judgment may be set aside due to mistake, inadvertence, surprise, or excusable neglect. Mistake is defined as "some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence." Black's Law Dictionary 1152 (4th ed. rev. 1975). Defendants prove good cause by showing: they proceeded with diligence; their excusable neglect; that the judgment will be injurious to them if allowed to stand; and they have a meritorious defense to the plaintiff's cause of action. *Blume v. Metropolitan Life Ins. Co.* (1990), 242 Mont. 465, 467, 791 P.2d 784, 786.

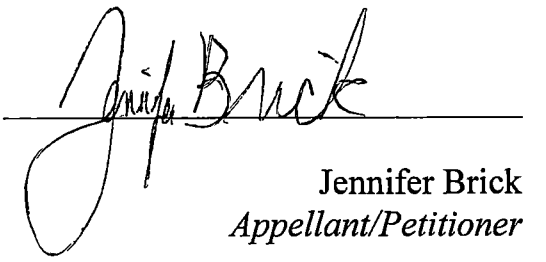
In re Marriage of Broere, 867 P. 2d 1092 - Mont: Supreme Court 1994.

Conclusion

The District Court erred in the following respects: (a) did not allow due process by not providing adequate notice, not taking testimony, relying on insubstantial evidence, in a Hearing for Contempt which had a substantial impact on the ongoing family law Case; (b) it modified an existing final parenting plan when there were no pleadings specifically referencing the numerous changes, it afforded insufficient time to prepare a defense, it filed no written findings of fact and conclusion of law showing that it considered the standard for a change in circumstance or that it considered the statutory factors regarding the best interest of the children standard and thus violated the Petitioner's due process; (c) it denied the Petitioner's Objections without a District Court Review of the Order Amending the Plan, (d) it violated the Petitioner's right to due process by denying a Hearing for Petitioner to Amend the Parenting Plan, allowed under M.C.A. 40-4-219, despite substantial pleadings and an accompanied Affadavit demonstrating that facts were unknown at the Hearing to Amend the Plan, (e) it denied a Hearing for the Petitioner despite the Order to Mediate in Oct. 2021 specifically stating a Hearing could be requested, (f) violated the Petitioner's right to due process when it denied her request for a District Court Case Review and a hearing for her Motion for Contempt citing over 20 violations of the parenting plan by Mr. DuCharme including safety issues with weapons and interferring with her parenting, and instead declaring the pro se litigant a "Vexatious Litigant" in her good faith effort

to correct errors and make facts known to the Court; and (g) in it's oversight of the Standing Master's case management, due process for a pro se litigant, application of the law, and adherence to procedures.

These errors constitute a violation of the Appellant's due process rights and constitute prejudicial error and they mandate vacating the Contempt Citation of November 19, 2019, vacating the granting of the Order Granting Respondent's Expedited Motion to Enforce Right to Parenting Time on November 24, 2020, and reversing the January 14, 2021 Order Amending the Parenting Plan. It therefore also mandates vacating the subsequent Order Re Contempt January 6, 2022, and the Order April 18, 2022 declaring the Petitioner a vexatious litigant. It is therefore appropriate to remand the Case to the District Court to receive pleadings, arguments, evidence and testimony regarding any requested modifications of the original Final Parenting Plan of 2017.

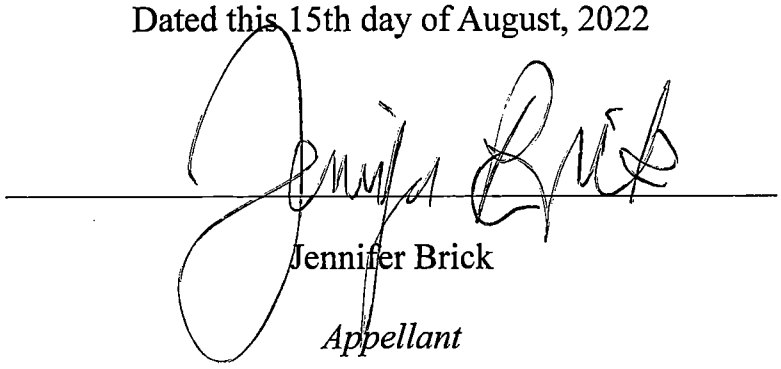
By: 

Jennifer Brick
Appellant/Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is proportionally spaced typeface of 14 points and does not exceed 10,000 words.

Dated this 15th day of August, 2022



Jennifer Brick

Appellant

CERTIFICATE OF SERVICE

with the Clerk of the Montana Supreme Court and that I have mailed or hand delivered a copy to each attorney of record and any other party not represented by counsel as follows:

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DATED this 15th day of August, 2022.

Jennifer Brick

[Signature]

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