

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Supreme Court Cause No. DA-25-0273

<p>DANIEL THOMAS WHITBY, Appellant,</p> <p>v.</p> <p>REINA IRENE CAZABAL-BOE, Appellee.</p>	<p><b>APPELLANT'S OPENING BRIEF</b></p>
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On Appeal from the District Court of the  
Thirteenth Judicial District of the State of Montana,  
In and for the County of Yellowstone,  
Before the Honorable Mary Jane Knisely

Clifford B. Irwin  
Irwin Law Office, P.C.  
P.O. Box 9437  
736 South 3<sup>rd</sup> St. West  
Missoula, MT 59807  
clifford.irwin@gmail.com  
Telephone: (406) 541-8533  
Attorney for Appellant/Respondent

Brianne E. Radovich  
Attorney at Law  
926 Main, Suite 9  
Billings, MT 59106  
office@radovichlaw.net  
(406) 259-4000  
Attorney for Appellee/Petitioner

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Exhibit A	<i>In re the Parenting of L.R.</i> , 2023 MT 235, ¶ 7, 414 Mont. 191, 539 P.3d 642.
Exhibit B	<i>Verified Affidavit of Daniel Thomas Whitby</i> , (doc. #56) (Oct. 2, 2024).
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Exhibit D	<i>Motion to Amend Parenting Plan and Brief in Support</i> (doc. #55) (Oct. 2, 2024).
Exhibit E	<i>Order Denying Motion to Amend Parenting Plan</i> (doc. #65) (Jan. 13, 2025)
Exhibit F	<i>Order Adopting Standing Master’s Order Denying Motion to Amend Parenting Plan and Finding No Cause For a Hearing</i> , (doc. #70) (Mar. 14, 2025).

## **ISSUES PRESENTED FOR REVIEW**

- I. **Did the District Court err in determining that a change in circumstances did not occur and therefore denied a hearing?**
- II. **Did the District Court err by refusing to amend a parenting plan for which there is no reasonable justification?**
- III. **Did the Standing Master and the district court err in issuing an award of attorney fees against Daniel.**

## **STATEMENT OF THE CASE**

Daniel Whitby (“Dan”) and Reina Cazabal-Boe (“Reina”) are the parents of A.M.B., a seven year old boy. Daniel has not met A.M.B. and does not have a relationship with A.M.B. Daniel was absent during the first parenting plan hearing and the Court issued a parenting plan that did not allow any contact between himself and the child. Daniel filed a motion to amend the final parenting plan which was denied without a hearing in June of 2019.

Daniel then waited until October of 2024 to again request to have contact with their son. Once again, the Court denied Dan’s motion without a hearing.

It is not in the child’s best interest to be denied all contact with his father. Daniel has never harmed their child. Although Daniel has engaged in criminal behavior in the past, he has rehabilitated himself and is not prone to violence.

Daniel articulated the significant changes that he has made in his life for the better. Daniel was also able to find out that Reina was no longer in a relationship with Alisha Burke. Reina and Alisha had lived together and been in a relationship together since A.M.B. was born.

The change in circumstances is significant. Daniel has turned his life around for the better. A.M.B.'s life is completely different since the inception of the current parenting plan in July of 2018, when he was less than one year old.

The facts of this matter are similar to *In re the Parenting of L.R.*, except worse. The father in *L.R.* at least had supervised contact with their son. Here, the Court has not allowed any contact with their son.

Despite the lack of contact, Daniel loves their son. Daniel is heartbroken. It is so odd to live in the same town as your child but not be allowed any contact whatsoever, even though Daniel has never done anything wrong with the child.

The Standing Master and the District Court Judge erred by denying Daniel's *Motion to Amend Parenting Plan and Brief in Support* without holding a hearing.

Dan has alleged the following changes in circumstances:

1. Change to Daniel's employment. Daniel is now gainfully employed by the city of Billings. Daniel has stable income and benefits such as health insurance. *Verified Affidavit of Daniel Thomas Whitby*, p. 5, ¶ 30, (doc. #56) (Oct. 2, 2024) ("*Aff. of Daniel Whitby*").

2. Change to Daniel's housing. Dan previously lived in his father's garage when he was assisting his father with maintenance and upkeep of his residence. Daniel now lives in a stable living situation. *Aff. of Daniel Whitby*, p. 3, ¶ 19.
3. Daniel has avoided involvement with law enforcement. Also, Daniel's brother Mathew Whitby recanted his statements that led to the criminal charges. *Aff. of Daniel Whitby*, p. 5, ¶ 33.
4. Daniel completed a psychological evaluation and no significant mental issues were identified. *Aff. of Daniel Whitby*, p. 4, ¶ 28.
5. Daniel participated in an addiction and recovery program and has been sober for two years. *Aff. of Daniel Whitby*, p. 4, ¶ 28. Daniel submitted to random UAs for twelve months which were all clean. *Aff. of Daniel Whitby*, p. 5, ¶ 29.
6. Daniel enrolled in counseling with Yuki Joy Brien and took a class from her called Criminal Thinking Errors. *Aff. of Daniel Whitby*, p. 5, ¶ 29.
7. Daniel completed an anger management course. *Aff. of Daniel Whitby*, p. 5, ¶ 34.
8. Daniel completed a chemical dependency evaluation. *Aff. of Daniel Whitby*, p. 5, ¶ 34.

9. A.M.B. is now 7 years old. He was a baby when the current parenting plan was issued. The developmental needs of A.M.B. have changed.

10. Reina married Alisha Burke. Reina and Alisha are no longer together.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11. Daniel has taken accountability for his transgressions in the past. *Aff. of Daniel Whitby*, p. 6, ¶ 39.

The lack of contact between father and son is extreme. They cannot share holidays or birthdays. They cannot share school events or activities. They cannot share meals together. They cannot share humor or sorrow together. There are no family dinners. They cannot cook together. They cannot enjoy the bounties of life together – fishing, camping, biking, hiking, sports, etc.

Daniel has never been deemed a risk of harm to A.M.B. Even if he had, the Court could have ordered supervised parenting time.

The District Court’s denial of Dan’s *Motion to Amend Parenting Plan and Brief in Support* (doc. #55) (Oct. 2, 2024) should be reversed and remanded and

Dan should be allowed to substitute the District Court Judge and the Standing Master.

### STATEMENT OF FACTS

Reina and Daniel are the biological parents of A.M.B. A.M.B. is seven years old, born in January of 2018. *Aff. of Daniel Whitby*, p. 1, ¶ 2. A.M.B. has resided primarily with Reina since birth. Daniel has not yet met A.M.B.

Reina filed a *Petition for Parenting Plan* on May 9, 2018 (doc. # 1). Daniel filed a *Counter Petition for Establishment of Parenting Plan* on June 21, 2018 (doc. # 8).

On July 25, 2018, Standing Master Melissa Williams held a parenting plan hearing. Daniel was unable to attend because of road congestion as a result of Vice President Mike Pence visiting Billings, Montana. *Aff. of Daniel Whitby*, p. 2, ¶ 6.

On August 17, 2018, the Court adopted Reina's proposed parenting plan as the final parenting plan. *Finding of Fact, Conclusions of Law, and Parenting Plan Order*, (doc. # 19). That parenting plan remains in place and has not been amended.

On February 21, 2019, Daniel filed a *Motion to Amend Parenting Plan* (doc. # 29). The Court set a hearing for April 3, 2019. At the hearing, the Court informed Daniel that Reina has filed a motion to continue and that it would be

granted. The Court stated to Daniel “I do anticipate at your hearing that there’ll be some provisions for you to be able to have contact [with A.M.B.]” Transcr. p. 3, lns. 5-7 (Apr. 3, 2019). The hearing was reset for May 6, 2019, and further continued until June 24, 2019. *Minute Entry*, doc. # 43; *Order Granting Motion to Continue Order to Show Cause*, doc. # 49.

On April 23, 2019, Reina, through counsel, filed a *Motion to Dismiss Petition to Amend Parenting Plan* (doc. # 46). Due to Daniel’s failure to respond to the motion, the Court denied his *Motion to Amend Parenting Plan* and vacated the hearing. *Order Granting Petitioner’s Motions to Dismiss*, doc. # 53 (June 12, 2019). Therein the Court stated that “[r]epeatedly bringing the same action in front of the court is a misuse of the courts [sic] resources and serves only to continue to harass Petitioner.”

Between June of 2019 and September of 2024, Daniel rehabilitated himself and saved money for an attorney.

On October 2, 2024, Daniel, through counsel, filed a *Motion to Amend Parenting Plan and Brief in Support* (doc. # 55).

On January 13, 2025, the Standing Master issued an *Order Denying Motion to Amend Parenting Plan*, doc. # 65. Therein the Court stated that Daniel failed to establish a change in circumstances that met the statutory criteria under Mont.

Code Ann. § 40-4-219. The Court further deemed Daniel's motion to be vexatious and issued an award of attorney fees against him.

On January 16, 2025, Daniel filed a *Notice of Objection to Standing Master's Order, Motion for Removal to District Court, and Motion for Hearing* (doc. # 66).

On March 14, 2025, the Judge Mary Jane Knisely issued an *Order Adopting Standing Master's Order Denying Motion to Amend Parenting Plan and Finding No Cause For a Hearing*, (doc. # 70).

Just as Tony had to do in the *L.R.* case, Daniel begs the Montana Supreme Court for relief. Otherwise Daniel will never have an opportunity to meet his son. It is not fair to Daniel, and it is not fair to A.M.B.

The District Court abused its discretion when denying Daniel's *Motion to Amend and Brief in Support*. At a minimum, it should have held a hearing. Daniel's assertion that parenting time is warranted is a change in circumstances that should preclude denial of his *Motion to Amend*. Also, Daniel's changes in his life, the changes in A.M.B.'s life and the changes in Reina's life should warrant an amendment to the parenting plan or at least a hearing.

Daniel asks the Montana Supreme Court to reverse the District Court's Order denying Daniel's *Motion to Amend and Brief in Support*.

## STANDARD OF REVIEW

The denial of an evidentiary hearing is reviewed for a clear abuse of discretion. *In re the Parenting of L.R.*, 2023 MT 235, ¶ 7, 414 Mont. 191, 539 P.3d 642. A district court’s assessment of the sufficiency of the evidence is a question of law which the Montana Supreme Court reviews *de novo*, regardless of the context of the court’s determination, because evidence is legally sufficient under applicable rules or it is not. *In re the Marriage of Clay and Hagedorn*, 2007 MT 228, ¶ 15, 168 P.3d 665. Thus, a District Court’s legal conclusion that the evidence was insufficient to establish a change of circumstances is reviewed for correctness. *Id.*

Furthermore, a district court abuses its discretion if it acts “arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in a substantial injustice.” *In re Marriage of Patton*, 2015 MT 7, ¶ 19, 378 Mont. 22, 340 P.3d 1242.

## SUMMARY OF ARGUMENT

Daniel does not have any parenting time or contact with A.M.B. Reina and Alisha Burke are no longer together [REDACTED]. [REDACTED]. A.M.B. is seven years old and has never been given an opportunity to meet his father. The circumstances of A.M.B.’s life have significantly changed and Dan should at least

be given an opportunity to have a hearing to show that it is in A.M.B.'s best interests to spend time with his father.

## ARGUMENT

### **I. Did the District Court err in determining that a change in circumstances did not occur and therefore denied a hearing?**

Yes. The District Court's conclusion that Daniel did not assert facts that would constitute a change in circumstances was incorrect. Daniel has met the burden of proof of establishing that a change of circumstances has occurred and that the District Court should hold a hearing to determine if an amendment to the parenting plan would serve the child's best interests.

A court may amend a prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan, that a change has occurred in the circumstances of the child and amendment is necessary to serve the child's best interests. Mont. Code Ann. § 40-4-219; *In re the Marriage of Clay and Hagedorn*, at ¶ 17; *In re the Parenting of L.R.*, 2023 MT 235, ¶ 9, 414 Mont. 191, 539 P.3d 642.

“Upon a parent filing an affidavit in support of a requested amendment and receiving an opposing affidavit, if any, the court shall set a hearing on the request for amendment if the court finds that adequate cause is established by the affidavits

based on the best interests of the children.” *In re Parenting of L.R.*, ¶ 9; Mont. Code Ann. § 40-4-220.

Daniel has significantly improved his stability in the community. A.M.B.’s relationship with Daniel is significantly impaired which has a detrimental impact on A.M.B.’s growth and development. A.M.B. is being denied relationships with extended family and friends associated with Daniel.

The vast majority of Daniel’s assertions are uncontested. The district court ignored the significant developmental changes A.M.B. has experienced in growing from a baby to a 7-year-old and the way in which those developmental changes have resulted in a substantial change in his circumstances. The district court also ignored the fact that the Montana Supreme Court has found that a parent’s change in circumstances can constitute a change in a child’s circumstances.

The district court distinguished the current matter from *In re the Parenting of L.R.*, based on the timing of the parent’s self-improvement. It found that while Tony (in the *LR* matter) had made significant improvements in his life, Daniel had evidence of regression based on the criminal charges that he had faced. However, the district court’s citations to the criminal charges were based on the sentencing and not the criminal acts. Contrary to the district court’s position, Daniel’s recent history consisted of stability and refraining from criminal activity.

As in *L.R.*, the parenting plan does not provide a “means to progress beyond supervised visitation and [does] not provide for [the child’s] needs as he matures and grows.” *L.R.*, ¶ 12.

The Montana Supreme Court also noted that “[t]he remote discord experienced between the parties does not support that L.R. should forever be deprived of an unsupervised relationship between himself and his father.” *L.R.*, ¶ 13. Similarly, the current evidence does not support that A.M.B. should forever be deprived of any relationship between himself and his father.

Reina and Alisha are no longer together. [REDACTED]

[REDACTED] Daniel has vastly improved his circumstances. These are the changes in circumstances contemplated by Mont. Code Ann. § 40-4-219. If these are not sufficient changes in circumstances, it begs the question of what would satisfy this statute?

**II. Did the District Court err by refusing to amend a parenting plan for which there is no reasonable justification?**

The Montana Supreme Court has reversed parenting plan orders for which there is no justification. *In re Parenting of G.M.O.*, 2017 MT 116, 378 Mont. 22, 340 P.3d 1242 (“*GMO*”). In *GMO*, the District Court held a contested parenting plan hearing and issued a final parenting plan. *Id.* at ¶ 6. The final parenting plan required the minor child to change schools between Missoula, Montana, and

Columbia Falls, Montana, twice each year. *Id.* at ¶ 7. The Montana Supreme Court reversed, and stated as follows:

[T]here is no justification – on this record or any that we can imagine – for a determination that requiring a child to switch schools between Missoula and Columbia Falls twice during the school year could be in the child’s best interest.

*Id.* at ¶ 14.

Here, there is no justification for issuing a parenting plan requiring no parental contact without any evidence that the parent has harmed the child or likely to harm the child. Even if such a circumstance warranted “no contact”, the parenting plan order would need standards or tests to prove that contact should begin or resume.

There is no justification for denying a motion to amend the parenting plan without holding a hearing.

There is no justification for determining as a matter of law that there is no change in circumstances when Daniel has asserted that the underlying basis for not having contact no longer exists.

The district court’s mishandling of this matter should earn far less justification than a parenting plan that requires a child to change schools twice per year. *G.M.O.*, at ¶ 14.

A district court abuses its discretion if it acts “arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting

in a substantial injustice. *In re Marriage of Patton*, at ¶ 19. Here, the District Court has acted arbitrarily resulting in substantial injustice to Daniel and their son.

Therefore, the District Court's *Order* on March 14, 2025, should be reversed. This matter should be remanded for further findings and a hearing on Daniel's *Motion to Amend*, and Daniel should have the right to substitute the judge pursuant to Mont. Code Ann. § 3-1-804(12).

**IV. Did the Standing Master and the district court err in issuing an award of attorney fees against Daniel.**

The Standing Master and the district court did not have grounds to award attorney fees against Daniel. Daniel is not a vexatious litigant. Daniel waited over 5 years prior to filing a Motion to Amend Parenting Plan. During those 5 years, he made significant changes in his life that should warrant a change to the parenting plan to allow at least some contact with their child. As a matter of law, a vexatious litigant should not be a parent with no parenting time who spends five years rehabilitating his/her life in an attempt to resume (or begin) parenting.

**CONCLUSION**

The district court's denial of Daneil's *Motion to Amend Parenting Plan and Brief in Support* constitutes reversible error. The district court incorrectly determined that a change in circumstances has not occurred. The district court, at a minimum, should have held a hearing.

WHEREFORE,

Appellant respectfully requests that this Court issue an order that:

1. Reverses the district court's *Order Adopting Standing Master's Order Denying Motion to Amend Parenting Plan and Finding No Cause For a Hearing* (Mar. 14, 2025) (doc. # 70);
2. Reverses the Standing Master's *Order Denying Motion to Amend Parenting Plan* (Jan. 13, 2025) (doc. # 65).
3. Reverses the district court's award of attorney fees.
4. Remands this matter for hearing on whether the current parenting plan should be amended;
5. Orders that the reversal and remand constitute grounds for substitution of district court judge pursuant to Mont. Code Ann. § 3-1-804(12);  
and
6. For such other and further relief as the court deems just.

### **REQUEST FOR ORAL ARGUMENT**

Daniel requests oral argument. The district court's approach to this matter is backwards. There are backstops in place to prevent District Courts from being too lenient on a parent, but not when a district court is overly harsh toward a parent. Oral argument would be the appropriate forum discuss this.

DATED this 18<sup>th</sup> day of September, 2025.

IRWIN LAW OFFICE, P.C.

By: /s/ Clifford B. Irwin  
Clifford B. Irwin

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Appellant's Opening Brief* is printed with a proportionately double-spaced Times New Roman text typeface of 14 points (exclusive of footnotes) and that the word count calculated by Microsoft Word Professional Edition is not more than 10,000 words excluding *Table of Contents*, *Table of Authorities*, *Certificate of Compliance*, and *Certificate of Service*.

DATED this 18<sup>th</sup> day of September, 2025.

IRWIN LAW OFFICE, P.C.

By: /s/ Clifford B. Irwin  
Clifford B. Irwin

## **CERTIFICATE OF SERVICE**

I, Clifford B. Irwin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-18-2025:

Brianne E. Radovich (Attorney)  
926 Main Street, Suite 9  
Billings MT 59105  
Representing: Reina Irene Cazabal-Boe  
Service Method: eService

Electronically Signed By: Clifford B. Irwin  
Dated: 09-18-2025