

DA 18-0491

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 169N

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IN RE THE PARENTING PLAN FOR N.C.D.,  
a minor child,

TIMOTHY KANE DAVIS,

Petitioner and Appellee,

v.

DEBORAH SUSAN SMITH,

Respondent and Appellant.

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APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. CDR-2015-380  
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Deborah S. Smith, Self-Represented, Helena, Montana

For Appellee:

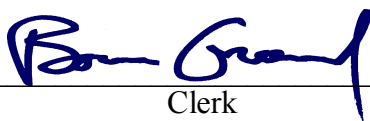
Robyn L. Weber, Weber Law Firm, Helena, Montana

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Submitted on Briefs: June 19, 2019

Decided: July 23, 2019

Filed:

  
Clerk

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Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Deborah Susan Smith (Mother) appeals from orders of the First Judicial District Court, Lewis and Clark County, regarding her parenting arrangement with Timothy Kane Davis (Father) for minor child N.C.D. We affirm and award Father his attorney fees and costs on appeal.

¶3 We already reviewed this parenting proceeding in *In re the Parenting Plan for N.C.D.*, No. DA 16-0592, 2017 MT 272N, 2017 Mont. LEXIS 670, and we accordingly set forth the factual and procedural background only as necessary to address this appeal. Six days following our affirmation of the parties' parenting plan on November 7, 2017, Mother filed motions with supporting briefs in District Court requesting the court immediately remove N.C.D.'s Guardian Ad Litem (GAL), Greg Daly (Daly); disqualify, sanction, and remove Father's counsel; and issue an order to show cause for contempt and for sanctions, attorney fees, and costs. Thereafter, Mother continued to file additional motions, all of which Father had to respond to.

¶4 In February 2018, the District Court issued an order denying Mother's various motions. The District Court also ordered Mother to pay Father's attorney fees for having to respond to (1) Mother's motion to disqualify, sanction, and remove Father's counsel

and award Mother attorney fees and (2) Mother's motion for an order to show cause for contempt.

¶5 On April 10, 2018, Daly filed a GAL report with his recommendations. Daly recommended N.C.D. reside primarily with Father and spend time with Mother at N.C.D.'s own choosing. On April 25, 2018, the District Court notified the parties it planned to interview N.C.D. by phone that afternoon at 4:30 p.m. The order clarified that the interview would be confidential. After the interview, the District Court issued an order temporarily suspending N.C.D.'s in-person visitation with Mother. The order provided for telephonic or other electronic contact at N.C.D.'s discretion. In May 2018, Mother filed a petition for a writ of supervisory control in this Court; we denied her request.

¶6 At the beginning of June 2018, Mother filed a motion to amend the parenting plan. The District Court subsequently issued an order on outstanding motions, finding many of Mother's motions vexatious and ordering Mother to pay Father's attorney fees for having to respond to the motions. The District Court held a two-hour hearing on June 29, 2018, regarding the parenting schedule, Daly's recommendations, and Mother's objections to Daly's recommendations. The court strictly permitted each party to utilize one hour in its examination and cross-examination of witnesses.

¶7 Thereafter, on July 18, 2018, the District Court issued its findings of fact, conclusions of law, and an amended parenting plan. The District Court found, "N.C.D.'s environment caused by her Mother's extreme litigation and threats of litigation to Father, to the school, and to the GAL and the Mother's unwillingness to engage in a team

approach is causing the greatest harm to N.C.D.” It further noted Father promotes stability in N.C.D.’s life, while Mother “promotes disorganization and anxiety through anger.” It recognized N.C.D.’s wishes: “N.C.D. wants to be able to leave her Mother’s environment. Threats, intimidation and stress should have no place in the process of advocating for a child’s best interest. The Court hopes the Mother will disengage from the high conflict and anger exhibited throughout this case.” Based on its findings, the District Court ordered an amended parenting plan, in which it permitted N.C.D. to choose how much time she spends with each parent: “N.C.D. may spend time with either of her parents as she shall exclusively determine. N.C.D.’s right to choose shall be year-round, and shall include school year, summer, and all holidays.”

¶8 Mother appeals, raising three issues which we address in turn. The crux of Mother’s first argument is that she disagrees with the District Court’s decision to keep certain portions of the proceedings confidential and with the court-ordered parenting arrangement. She formulates her challenge, however, as a constitutional argument in which she asserts the District Court violated her fundamental due process right to parent N.C.D. Mother identifies what she views as numerous issues, including: the District Court’s day-of notice to the parties that it would confidentially interview N.C.D. on April 25, 2018; the fact that the District Court will not allow Mother and Father to access the April 25, 2018 interview transcript; the District Court’s April 26, 2018 order temporarily suspending Mother’s in-person visitation with N.C.D.; and the District Court’s orders prohibiting Mother and Father from accessing N.C.D.’s mental health records.

¶9 District courts have “broad discretion when considering the parenting of a child, and we must presume that the court carefully considered the evidence and made the correct decision.” *In re the Marriage of Woerner*, 2014 MT 134, ¶ 12, 375 Mont. 153, 325 P.3d 1244 (citation and quotation omitted). Accordingly, absent clearly erroneous findings, we will not disturb a district court’s decision regarding a parenting arrangement unless there is a clear abuse of discretion. *Woerner*, ¶ 12. A district court abuses its discretion if it acts arbitrarily, without the employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *Woerner*, ¶ 12.

¶10 We conclude the District Court did not clearly error or abuse its discretion in making the above-listed decisions or in ordering the current parenting arrangement. The District Court’s decisions to interview N.C.D., keep that interview confidential, and prohibit Mother and Father from accessing N.C.D.’s mental health records are all supported by statute and by the long and contentious nature of this parenting proceeding. *See* § 40-4-216(5), MCA (“If the court finds it necessary that the record of any interview, report, investigation, or testimony in a parenting proceeding be kept secret to protect the child’s welfare, the court may make an appropriate order sealing the record.”). N.C.D. is now a teenager, and the District Court acted well within its statutory authority when it confidentially interviewed her about her wishes. *See* § 40-4-214(1), MCA (“The court may interview the child in chambers to ascertain the child’s wishes as to residence and parental contact.”); *see also* §§ 40-4-212(1)(b), -219(1)(c), MCA. When it temporarily suspended N.C.D.’s in-person visitation with Mother, the District Court carefully considered the evidence before it and exercised its broad discretion to formulate a

parenting arrangement consistent with N.C.D.'s best interests. The District Court's decisions do not violate Mother's fundamental due process right to parent—instead, the District Court appropriately exercised its discretion to protect N.C.D.'s best interests. We accordingly affirm its orders.

¶11 Second, Mother asserts the District Court abused its discretion by refusing to remove or replace N.C.D.'s GAL, Daly. She argues Daly has a conflict of interest as a GAL because he works for Lewis and Clark County as a caseworker and argues Daly retaliated against her after she filed an ethical complaint with the county against Daly. She also criticizes Daly's lack of professional licensing and asserts he lacks any other qualifications to serve as a GAL. She contends Daly's reports contain false statements and offensive language, Daly exhibits sexist bias against her, and Daly's recommendations are not in N.C.D.'s best interest. Mother asks us to reverse the District Court's order refusing to remove or replace Daly.

¶12 “The court may appoint a [GAL] to represent the interests of a minor dependent child with respect to the child's support, parenting, and parental contact.” Section 40-4-205(1), MCA. When reviewing a district court's decision to grant or deny a party's motion to remove a GAL, we consider whether the GAL performed his duties. *See* § 40-4-205(2)(a)-(e), MCA. Review of the record demonstrates that Daly performed his statutory duties: Daly conducted investigations he considered necessary to ascertain the relevant facts; interviewed and observed N.C.D.; made written reports to the court; appeared and participated in the proceedings to the degree necessary to adequately represent N.C.D.; and made recommendations concerning N.C.D.'s support, parenting,

and parental contact. *See* § 40-4-205(2)(a)-(d), MCA. Mother did not present any evidence to support her argument that Daly should be removed as GAL beyond her bald assertions that Daly’s recommendations were wrong (and, notably, not in her favor). Mother’s harassing behavior—such as continually criticizing Daly’s qualifications and filing an ethical complaint against Daly at his place of work—is completely inappropriate. Mother’s argument that the District Court should have removed Daly as N.C.D.’s GAL is without merit; we affirm its decision denying her motion.

¶13 Third, Mother argues the District Court abused its discretion when it ordered her to pay Father’s attorney fees and costs regarding five matters. If legal authority exists to award attorney fees, we review a district court’s decision to grant or deny the fees for an abuse of discretion. *Wohl v. City of Missoula*, 2013 MT 46, ¶ 29, 369 Mont. 108, 300 P.3d 1119. Mother argues that, before awarding attorney fees and costs to Father in this parenting proceeding, the District Court needed to consider the financial resources of both parties as required by § 40-4-110(1), MCA, prior to awarding Father his fees and costs.

¶14 What Mother fails to recognize, however, is that the District Court did not award Father his fees and costs pursuant to § 40-4-110, MCA, in the ordinary course of the parenting proceeding. Instead, the District Court awarded Father his fees and costs pursuant to § 37-61-421, MCA, which states, “[A] party to any court proceeding who, in the determination of the court, multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct.”

¶15 Review of the record convinces us the District Court did not abuse its discretion when it ordered Mother to pay Father’s attorney fees regarding the five matters. The District Court case register contains approximately 150 docket entries between this Court’s November 2017 Opinion and the filing of Mother’s second appeal. Father did not initiate one substantive pleading within that time period; all of Father’s pleadings were in response to Mother’s motions. Mother has continually, vexatiously filed unnecessary pleadings with the court, multiplying the proceedings and creating the contentious, unrelenting case that exists today. We accordingly affirm the District Court’s orders requiring Mother to pay Father’s attorney fees and costs.

¶16 After Mother filed her Reply Brief with this Court on May 30, 2019, Father filed a motion and brief to strike the portions of Mother’s Reply Brief that reference non-record facts and allegations and to strike the appendices attached to Mother’s Reply Brief. In deciding this appeal, we did not rely on the portions of Mother’s Reply Brief that Father takes issue with nor did we rely on any of the appendices attached to Mother’s Reply Brief. We, accordingly, do not reach the merits of Father’s motion to strike.

¶17 On appeal, Father asks this Court to sanction Mother and order her to pay his attorney fees and costs on appeal. M. R. App. P. 19(5) provides that this Court may “award sanctions to the prevailing party in an appeal . . . determined to be frivolous, vexatious, filed for purposes of harassment or delay, or taken without substantial or reasonable grounds. Sanctions may include costs, attorney fees, or such other monetary or non-monetary penalty as the [Court] deems proper under the circumstances.” We conclude that an award of sanctions to Father, the prevailing party, is appropriate on

appeal. Mother's appeal is frivolous, vexatious, clearly intended to harass Father and delay the proceedings, and taken without substantial or reasonable grounds. We conclude that, under these circumstances, it is proper to sanction Mother. We accordingly order Mother to pay Father's attorney fees and costs in defending this appeal.

¶18 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶19 We affirm the District Court's orders and, pursuant to M. R. App. P. 19(5), order Mother to pay Father's attorney fees and costs in defending this appeal.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH  
/S/ JAMES JEREMIAH SHEA  
/S/ DIRK M. SANDEFUR  
/S/ JIM RICE