DA 18-0601

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 221N

IN RE THE PARENTING OF B.J.L.,

A Minor Child,

TIFFANY P. WHELAHAN,

Petitioner and Appellant,

and

SETH LYDEN,

Respondent and Appellee.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DR-12-123
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jami Rebsom, Jami Rebsom Law Firm, PLLC, Livingston, Montana

For Appellee:

Kathryn E. Keiser, Kathryn Keiser Law, PLLC, Bozeman, Montana

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Submitted on Briefs: July 10, 2019

Decided: September 17, 2019

Filed:

Clerk

Justice Dirk M. Sandefur 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 This case involves a disputed parenting plan regarding B.L., a male child born in 2011, and his unmarried birth parents Tiffany P. Whelahan (Mother) and Seth Lyden (Father). Mother appeals the judgment of the Montana Sixth Judicial District Court, filed October 15, 2018, imposing a parenting plan that provides alternative primary residential custody schemes contingent upon Mother's choice of whether to continue to reside in proximity to Father in Montana or move to Michigan as contemplated.[1] We affirm.

¶3 Mother and Father have generally cooperated regarding parenting matters since B.L. was born despite difficulties in their personal relationship. After they had lived together for almost two years, Mother became involved with another man (Jimmy Haerr) in 2012 resulting in the parties' separation and a custody dispute over B.L. After moving out, Mother filed a parenting plan petition with an "emergency" *ex parte* motion for an interim order suspending Father's rights based on her allegations that he regularly abused prescription drugs and alcohol and did not maintain a safe home environment for the child.

[1] We previously affirmed a similar contingent parenting plan regarding B.L.'s half-sister (A.H.). *In re A.H.*, 2019 MT 118N, 396 Mont. 548, ___ P.3d ___.

The court granted the *ex parte* motion, temporarily placed the child with Mother, and provided limited supervised parenting time for Father pending further proceedings. In December 2012, the parties entered into a stipulated interim parenting plan providing for B.L. to live primarily with Mother, subject to a specified weekly day/overnight schedule with Father. On January 29, 2013, the court imposed a similar plan as the final parenting plan with Mother as the primary residential custodian and Father having the child on an alternating weekend schedule. Later that year, Mother accused Father of sexually abusing B.L. Upon subsequent hearing, the District Court found that Mother's allegation was false.[2]

¶4 In October 2014, Mother gave birth to B.L.'s half-sister (A.H.) as issue of her relationship with Jimmy Haerr. B.L. and A.H. thereafter have lived together in Mother's care and remain very close. Mother's grandmother and A.H.'s father provided daycare for B.L. and A.H. when Mother was working. Thus was the status quo into 2018.

¶5 On or about April 11, 2018, Mother obtained an "emergency" *ex parte* order temporarily suspending Jimmy Haerr's parenting rights to A.H. based on Mother's allegation that A.H. had been sexually abused while in his care.[3] Upon subsequent hearing in that matter, the District Court restored Haerr's parenting plan rights based largely on the independent testimony of the nurse practitioner who examined A.H. and the Park County

[2] *See also In re A.H.*, ¶ 6.

[3] *See In re A.H.*, ¶ 7.

Sheriff's deputy who investigated the allegation.[4] In a subsequent written order filed May 25, 2018, the District Court expressly found that Mother's allegation and supporting testimony was not credible.[5]

¶6 Six days later, Mother filed separate notices of intent and related motions for amended parenting plans to move to Michigan with B.L. and A.H. Her filings asserted that she could no longer afford to live in Montana, that her mother and other family live in Michigan, and that she had secured work there at a local floral shop with hopes of purchasing the business upon the anticipated retirement of the current owner. Father and Haerr opposed the intended move with their respective children. The court set hearings in each case for August 21, 2018.

¶7 At hearing in this case, Mother testified about her long hours and physically demanding work as the deli manager at a Bozeman grocery store. She testified that she had been affordably renting a two-bath, three-bedroom home in Livingston from her mother, but that her mother intended to sell the home and that similar housing was unavailable in Livingston or Bozeman for the same amount ($700 per month). Mother testified that she was earning about $50,000 per year with overtime in Bozeman, but that she could work less, earn more, have more time for parenting, obtain free daycare from her mother, and not have to pay rent in Michigan.

[4] *See In re A.H.*, ¶ 8.

[5] *See In re A.H.*, ¶ 8.

¶8 Mother testified that she and Father are both close to B.L. Contrary to her earlier allegations, she testified that Father has been a good father and that she had no concerns regarding his parenting of B.L.[6] Father testified that he and B.L. frequently spend time together and that they do everything together when B.L. is with Father. He testified further that, unlike Mother, he attends all of B.L.'s activities and school events. He emphasized that B.L. has been in the same school with the same kids for the last four years. Father testified that he has been gainfully employed at all times pertinent and that the District Court found no evidence indicating that he is not financially capable of caring for B.L.

¶9 Despite her stated difficulties with Father's mother, Mother acknowledged that B.L. also has a close relationship with Father's parents and that they spend a significant amount of time with him. Father's mother testified that she and B.L. are together three to four times per week, that they do many things together, that she helps as a volunteer at his school, and that she and her husband attend all of B.L.'s activities and school events. Father and his mother separately testified that the contemplated move to Michigan would be detrimental to B.L. because he is a shy child who doesn't do well with change. They

[6] When questioned in the *In re A.H.* hearing about her 2013 sex abuse allegations against B.L.'s father, Mother testified that she did not recall making any such allegation. In similar regard, the District Court found in *In re A.H.* that, in December 2015, Mother accused A.H.'s father (Haerr) of hitting B.L. and leaving a handprint on his back. The court noted, however, that Haerr denied the allegation at hearing and gave unrebutted testimony that he had not been around B.L. within ten days of the time that Mother discovered the alleged handprint. The court further noted that Father testified at hearing in this case that he did not believe Mother's allegation against Haerr. *In re A.H.*, ¶ 8 n.2.

testified that the move would take away his stability by uprooting him from his home, school, close family relationships, activities, and friends.

¶10 Father testified that B.L. has no connection to Michigan other than Mother's mother with whom he has spent little time and who has visited him only two to three times. He testified that he believes Mother is prone to erratic behavior based on an incident in which she allegedly punched and hit him in the family home when they lived together and her description of a 2015 incident wherein she threatened Haerr with a shotgun, resulting in her arrest and conviction for partner-family member assault.[7]

¶11 After hearing, as in *In re A.H.*, the District Court issued detailed written findings of fact, conclusions of law, and judgment on Mother's notice and motion for an amended parenting plan. *Inter alia*, the court found that Mother:

> has attempted to frustrate [Father's] parenting and has made false allegations of [him] sexually abusing B.L. . . . . The testimony and evidence shows a pattern of false allegations . . . against [Father] and [A.H.'s father] . . . .

The court further found that Mother has "clearly delegated the care of B.L. to her relatives," i.e., "boyfriend" and her 77 year-old grandmother of unsound health.[8] The court found that the "testimony regarding the relationship between [Mother], her mother, and her grandmother do not demonstrate that the child would benefit from being subject to the interactions and communication between and among them." As between staying in

[7] *See In re A.H.*, ¶ 3.

[8] The record indicates that Mother's referenced boyfriend was A.H.'s father (Haerr) who assisted with B.L.'s care when he and Mother were together.

Montana with his Father or moving to Michigan with Mother, the District Court ultimately found that it was not in B.L.'s best interest to remove him "from having frequent and continuing contact with his father and his father's parents" in favor of moving "to Michigan where he would be only in his mother's care with her mother and grandmother's assistance." The court also found, however, that it would be in the child's best interest "to remain in Montana and have frequent and continuous contact with both parents" if possible. Based on those findings, the court imposed two alternative parenting plan schemes—one in the event that Mother remained in the Livingston area and another if she ultimately elected to move. If Mother remained in the Livingston area, the plan provided for Mother and Father to equally co-parent B.L. on an alternating weekly schedule. However, if she elected to move to Michigan, the plan provided for the child to primarily reside with Father in Montana subject to a specified summer and holiday residential schedule with Mother in Michigan. Mother timely appeals.

¶12 District Courts have broad discretion to make and modify parenting plan determinations under the applicable standards of §§ 40-4-212, -217(2)(a), and -219, MCA. *In re C.J.*, 2016 MT 93, ¶ 13, 383 Mont. 197, 369 P.3d 1028. We review parenting plan determinations and modifications for an abuse of discretion. *In re C.J.*, ¶ 13; *Jacobsen v. Thomas*, 2006 MT 212, ¶ 13, 333 Mont. 323, 142 P.3d 859; *Czapranski v. Czapranski*, 2003 MT 14, ¶ 10, 314 Mont. 55, 63 P.3d 499. A lower court abuses its discretion if it exercises discretion based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or otherwise "acts arbitrarily, without employment of conscientious

judgment, or exceeds the bounds of reason resulting in substantial injustice." *In re D.E.*, 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586 (internal citations omitted). A finding of fact is clearly erroneous only "if not supported by substantial evidence, the court misapprehended the effect of the evidence," or, based on our review of the record, we have "a definite and firm conviction that the lower court was mistaken." *In re D.E.*, ¶ 21. "We review conclusions of law de novo for correctness." *In re D.E.*, ¶ 21.

¶13 Mother asserts that the District Court abused its discretion under §§ 40-4-212 and -219(1), MCA, by failing to make sufficient findings of fact and because several of the findings made are not sufficiently supported by the evidence. We disagree. Sections 40-4-212 and -219(1), MCA, set forth various criteria for modifying parenting plans in the "best interest" of a child upon a sufficient "change . . . in the circumstances of the child." Our review of the record indicates that the District Court made findings of fact pertinent to all materially disputed factual considerations under §§ 40-4-212 and -219(1), MCA, on the evidence presented by the parties. Our review further indicates that the disputed findings are supported by substantial record evidence. Mother has not demonstrated that the District Court misapprehended or was otherwise mistaken about the evidence in any material regard. At most, Mother has shown conflicts in the evidence that were within the court's discretion to resolve based on its determination of relative veracity, weight, and credibility. Under the particular circumstances of this case, the court's contingent alternative parenting plan manifests reasonable, conscientious judgment. We hold that the District Court's

findings of fact are not clearly erroneous and that the contingent alternative parenting plan was not an abuse of discretion under §§ 40-4-212 and -219(1), MCA.

¶14 Mother further asserts that even if the court did not abuse its discretion, the contingent parenting plan violates her constitutional right to interstate travel and relocation. We disagree. Custodial parents have a federal constitutional right to travel freely "throughout the United States" accompanied by the children in their care, including the right "to migrate, resettle, find a new job, and start a new life . . . ." *In re M.C.*, 2015 MT 57, ¶ 12, 378 Mont. 305, 343 P.3d 569 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 629-31, 89 S. Ct. 1322, 1328-29 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 671, 94 S. Ct. 1347, 1360 (1974)). However, counterbalancing that right, both parents generally have co-equal fundamental constitutional rights to co-parent their children to the extent reasonably possible under the circumstances. *Troxel v. Granville*, 530 U.S. 57, 65-67, 120 S. Ct. 2054, 2059-61 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651-52, 92 S. Ct. 1208, 1212-13 (1972); *In re A.R.A.*, 277 Mont. 66, 70-71, 919 P.2d 388, 391 (1996), *superseded in part by statute as stated in Kulstad v. Maniaci*, 2009 MT 326, ¶ 56, 352 Mont. 513, 220 P.3d 595; *In re Guardianship of Doney*, 174 Mont. 282, 286, 570 P.2d 575, 577 (1977), *superseded in part by statute as stated in Kulstad*, ¶ 56.

¶15 State law may not infringe on a parent's fundamental right to travel except as narrowly tailored to further a compelling state interest in balance with the competing constitutional right of the other parent. *In re M.C.*, ¶¶ 12-13*; In re Adoption of A.W.S. &*

K.R.S., 2014 MT 322, ¶¶ 16-18, 377 Mont. 234, 339 P.3d 414. Sections 40-4-212, -217, and -219(1), MCA, embody Montana's compelling interest in furthering and protecting the best interests of children by facilitating "the maximum opportunit[y] for the love, guidance[,] and support of both" parents to the extent reasonably possible under the circumstances. *In re M.C.*, ¶ 13 (quoting *In re Marriage of Cole*, 224 Mont. 207, 213, 729 P.2d 1276, 1280 (1986)). *See also Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989); *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S. Ct. 3348, 3354 (1982). However, only "legitimate, case-specific" application of relevant criteria under §§ 40-4-212 and -219(1), MCA, based on "case-specific proof" are a sufficiently narrowly tailored basis upon which to interfere with a parent's federal constitutional right to interstate travel. *See In re M.C.*, ¶ 14 (internal punctuation omitted).

¶16 Here, as manifest in the District Court's various findings of fact and contingent parenting plan, the criteria of §§ 40-4-212 and -219(1), MCA, implicated on the evidence presented largely balance evenly as long as both parents continue to live in proximity to each other in Montana. However, if Mother moves to Michigan as contemplated, the case-specific findings of fact aggregately tip the best interest balance in favor of the child remaining in the primary custody of Father subject to the summer and holiday visitation schedule specified by the court in that event.

¶17 Regardless of whether the evidentiary record may have supported different findings, the findings made are not clearly erroneous under the governing standard of review. The District Court's contingent alternative parenting plan furthers Montana's compelling

interest in effecting and protecting the best interest of B.L. in a manner narrowly tailored to balance the competing constitutional rights of both parents. We hold that the court's contingent alternative parenting plan does not violate Mother's federal constitutional right to interstate travel and relocation.

¶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 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE
/S/ INGRID GUSTAFSON