

FILED 07/17/2020
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
JUN 17 2020
Case Number: DA 20-0364

Handwritten signature: Karen J. Miller

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MONTANA FIFTH JUDICIAL DISTRICT COURT, MADISON COUNTY

IN RE THE MARRIAGE OF:

Cause No. DR-29-2018-23

DENIE JEAN AMBERSON,

Petitioner,

and

BLAKE WILLIAM AMBERSON,

Respondent.

ORDER ON MOTION FOR RELIEF

Before the Court is Respondent Blake William Amberson's (hereinafter "Blake") Rule 60(b) motion for relief from this Court's April 1, 2020 Order (hereinafter "April 1st Order") denying Blake's Verified Motion to Amend Final Parenting Plan or alternatively to set aside the Findings of Fact, Conclusions of Law and Final Decree of Dissolution of Marriage (hereinafter "Findings") dated February 19, 2020. Petitioner Denie Jean Amberson (hereinafter "Denie") responded on May 12, 2020. Blake replied on May 27, 2020. Blake is represented by Carrie R. Wasserburger and Denie is represented by Brad L. Belke. This matter is ready for decision.

EXHIBIT 1

1 **BACKGROUND**

2 This action was originally filed on October 1, 2018 with both parties setting forth
3 proposed parenting plans. On December 12, 2018, the parties presented to the Court a Stipulated
4 Parenting Plan which was signed and ordered by the Court on December 17, 2018. Blake's
5 attorney had withdrawn at that time and he was acting pro se. The case then laid dormant for
6 approximately a year.
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9 The parties attended mediation on February 12, 2020 and were successful in reaching a
10 Marital and Property Settlement Agreement and submitted proposed Findings of Fact,
11 Conclusions of Law and Decree of Dissolution of Marriage (hereinafter "Proposed Findings").
12 The Proposed Findings were adopted by this Court on February 19, 2020 in its Findings. The
13 mediator's report notes parenting issues were discussed during mediation but no resolution was
14 reached. Both parties were represented by counsel.
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16 The parties filed a Joint Affidavit Waiving Final Hearing (hereinafter "Joint Affidavit")
17 on February 14, 2020. The Affidavit notes "we have reached a voluntary resolution of all matters
18 related to the dissolution. . ." and "[c]ontemporaneously with the filing of this Joint Affidavit, we
19 are submitting proposed Findings of Fact, Conclusions of Law and Decree of Dissolution, which
20 has been approved as to substance and form by both of us." Joint Aff. Waiving Final Hearing, ¶¶
21 2, 4, Feb. 14, 2020.
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24 Blake filed his motion to amend the Stipulated Parenting Plan on February 28, 2020
25 asserting an amendment is necessary because at the time it was negotiated he did not fully
26 understand what he was agreeing to and new facts had arisen constituting a change in A.A.'s
27 circumstances necessitating an amendment to serve her best interests. Verified Mot. to Amend
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1 Final Parenting Plan & Req. for Hearing, 8, Feb. 28, 2020. Denie replied on March 16, 2020,
2 arguing the Court had adopted the Stipulated Parenting Plan in the Findings on February 19,
3 2020, days before Blake filed his motion to amend, circumstances had not changed, and Blake
4 filed his motion to amend in retaliation. Resp. to Mot. to Amend, 2—3, Mar. 16, 2020. This
5 Court found in its April 1st Order that there had been no change in circumstances giving Blake
6 grounds to request an amendment to the Stipulated Parenting Plan ordered on February 19, 2020.
7 Order, 3, Apr. 1, 2020. The Court also found an amendment was not contemplated by the
8 documents jointly filed by Blake and that the plan was not confusing. *Id.*, at 2—3.
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11 Blake subsequently filed his motion for relief from the April 1st Order under Rule
12 60(b)(1) or (6), or alternatively, to set aside the Findings under Rule 60(b)(1) or (6) and Mont.
13 Code Ann. § 40-4-135.
14

15 DISCUSSION

16 1. Motion for Relief from April 1st Order & Findings Pursuant to Rule 60(b)

17 Under Montana law, a party may seek relief from a judgment by motion to have it set
18 aside. *Schmidt v. Jomac*, 196 Mont. 323, 326, 639 P.2d 517, 519 (1982) (citing *Olson v. Olson*,
19 175 Mont. 444, 574 P.2d 1004, 1006 (1977)). Montana Rule of Civil Procedure 60(b) allows a
20 court to relieve a party from a final judgment, order, or proceeding for the following reasons:
21

- 22 (1) Mistake, inadvertence, surprise or excusable neglect;
- 23 (2) Newly discovered evidence that, with reasonable diligence, could not have been
24 discovered in time to move for a new trial under Rule 59(b);
- 25 (3) Fraud, misrepresentation, or misconduct by an opposing party;
- 26 (4) The judgment is void;
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1 (5) The judgment has been satisfied, released, or discharged; it is based on an earlier
2 judgment that has been reversed or vacated; or applying it prospectively is no longer
3 equitable; or

4 (6) Any other reason that justifies relief.

5
6 It is the movant's burden to prove she is entitled to Rule 60(b) relief. *Whitefish Credit Union v.*
7 *Sherman*, 2012 MT 267, ¶¶ 16—17, 367 Mont. 103, 289 P.3d 174. A Rule 60(b) motion is not a
8 substitute for appeal. *Donovan v. Graff*, 248 Mont. 21, 25, 808 P.2d 491, 494 (1991).

9 Rule 60(b)(1) requires mistake, inadvertence, surprise, or excusable neglect on the part of
10 the litigant or his attorney. Mistake is defined as “some unintentional act, omission, or error
11 arising from ignorance, surprise, imposition, or misplaced confidence.” *In re Marriage of*
12 *Shoenthal*, 2005 MT 24, ¶ 33, 326 Mont. 15, 106 P.3d 1162 (citing *In re Marriage of Broere*,
13 263 Mont. 207, 209, 867 P.2d 1092, 1094 (1994)). A mistake of law is not the type of mistake
14 that will support relief under Rule 60(b)(1). *Schmidt*, 196 Mont. at 326—27, 639 P.2d at 519
15 (citing *Rieckhoff v. Woodhull*, 106 Mont. 22, 75 P.2d 56 (1937)). Mere carelessness or ignorance
16 of the law does not justify Rule 60(b)(1) relief. *Karlen v. Evans*, 276 Mont. 181, 188, 915 P.2d
17 232, 237 (1996) (citing *Lomas & Nettleton Co. v. Wiseley*, 884 P.2d 965, 967 (7th Cir. 1989)).
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19
20 Relief is afforded under Rule 60(b)(6) only in extraordinary situations, such as when
21 circumstances go beyond those covered by the first five subsections or when a party in whose
22 favor judgment was entered acted improperly. *Shoenthal*, ¶ 33 (citing *In re Marriage of Castor*,
23 249 Mont. 495, 499—500, 817 P.2d 665, 667—68 (1991)). The Rule 60(b)(6) motion must show
24 something prevented an accurate determination on the merits of the case and for reasons of
25 fairness and equity redress is justified. ¶ 35 (citing *Lussy v. Dye*, 215 Mont. 91, 93, 695 P.2d 465,
26 466 (1985)). A successful Rule 60(b)(6) motion requires the movant to demonstrate (1)
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1 extraordinary circumstances; (2) the movant acted to set aside the judgment within a
2 reasonable period of time; and (3) the movant was blameless. *Wagenman v. Wagenman*, 2016
3 MT 176, ¶ 12, 384 Mont. 149, 376 P.3d 121 (citing *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007
4 MT 202, ¶ 25, 338 Mont. 423, 166 P.3d 451).

5
6 In *Wagenman*, the Court found each of these elements to be present and thus reversed the
7 district court's denial of the former wife's Rule 60(b)(6) motion to amend the final divorce
8 decree. In their petition for dissolution, the parties agreed on property distribution
9 and had memorialized their agreement in a separate document which they attached to the petition
10 as Exhibit A. ¶ 3. Per Mont. Code Ann. § 40-4-201(2), the terms of the separation agreement
11 between the parties are binding on the district court unless the court finds them to be
12 unconscionable. ¶ 14 (citing *Tanascu v. Tanascu*, 2014 MT 293, ¶ 14, 377 Mont. 1, 338 P.3d
13 47). In *Wagenman*, the district court failed to abide by the parties' property distribution
14 agreement in Exhibit A without finding unconscionability. The court did not incorporate Exhibit
15 A into the final decree and proceeded, on its own, to distribute the marital home and mortgage
16 debt to the former husband. ¶ 5. Thus, the Court found legal error in the district
17 court's substitution of its own property settlement in place of the parties' agreement and
18 violation by the district court of Mont. Code Ann. § 40-4-201(2). ¶ 18. This constituted an
19 extraordinary circumstance. The wife was blameless because the error was made by the district
20 court and the parties were pro se at the time, so there was no way for them to know a mistake had
21 been made. ¶ 21. The Court found the elements for Rule 60(b)(6) relief were met.

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25 In his motion for relief, Blake asserts that by agreeing to the Proposed Findings he only
26 agreed to the existence of the Stipulated Parenting Plan and deliberately rejected the inclusion of
27 any language that he agreed to the Stipulated Parenting Plan in order to preserve his right to
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1 amend. Resp't's Verified Mot. for Relief from Order or to Set Aside Final Decree, 3, May 1,
2 2020. He argues he would not have agreed to the Proposed Findings had he known it would
3 preclude him from seeking an amendment to the Stipulated Parenting Plan. *Id.*, at 3—4. Blake
4 asserts that although he wanted to file a motion to amend the Stipulated Parenting Plan after the
5 dissolution proceedings were reinitiated in November 2019, he was precluded from doing so
6 until participating in mediation as required by the Stipulated Parenting Plan, which took place on
7 February 12, 2020. *Id.*, at 7. Thus, Blake asserts he is entitled to Rule 60(b)(1) relief due to
8 mistake, inadvertence, surprise, and/or excusable neglect or Rule 60(b)(6) relief due to
9 extraordinary circumstances. *Id.*, at 8.
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11
12 In response, Denie argues there is no support under Montana law for allowing a party to
13 amend a court ordered parenting plan within days of a decree of dissolution. Resp. to Mot. for
14 Relief, 2, May 12, 2020. The rationale behind this is finality and stability prioritized by Montana
15 law. *Id.* Denie argues Blake has failed to allege a change in the circumstances of the parties'
16 child or that it would be in her best interest to amend the Stipulated Parenting Plan. *Id.*, at 3—4.
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18 In reply, Blake asserts the Marital and Property Settlement Agreement and Findings do
19 not specifically address parenting or otherwise constitute Blake's consent to the Stipulated
20 Parenting Plan but were intended to resolve property issues. Resp't's Reply to Resp. Opp. Mot.
21 for Relief, 5, May 27, 2020. He argues this Court should consider the circumstances surrounding
22 the parties' execution of the Marital and Property Settlement Agreement, including
23 communication between counsel for both parties prior to mediation. *Id.* Blake argues the
24 Findings should have no bearing on his ability to seek an amendment to the Stipulated Parenting
25 Plan because a parent's ability to seek an amendment to a parenting plan is absolute if the criteria
26 of Mont. Code Ann. § 40-4-219 is met, regardless of when a final decree is entered. *Id.*, at 6—7.
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1 He argues he and Denie's failure to follow the Stipulated Parenting Plan and their unsuccessful
2 attempt to reconcile created a change in circumstances justifying amendment of the Stipulated
3 Parenting Plan. *Id.*, at 7.

4 Mont. Code Ann. § 40-4-108(1) provides that a decree of dissolution of marriage is final
5 when entered, subject to right of appeal. Here, the parties reached a voluntary resolution of all
6 matters related to the dissolution and submitted their joint Proposed Findings, which stated "[t]he
7 Court finds that a Stipulated Parenting Plan was adopted by this Court on the 17th day of
8 December 2018." Joint Aff. Waiving Final Hearing, at ¶ 2; Findings of Fact, Conclusions of Law
9 & Final Decree of Dissolution of Marriage, 2, 3, Feb. 19, 2020. The Court adopted the Proposed
10 Findings and Stipulated Parenting Plan as requested by the parties on February 19, 2020. Mont.
11 Code Ann. § 40-4-219(1) provides a court may amend a parenting plan if the moving party
12 shows a change in circumstances of the child and an amendment is necessary to serve the child's
13 best interests. It is not clear to this Court that the circumstances Blake points to, that he and
14 Denie failed to follow the Stipulated Parenting Plan after the Court ordered it on December 17,
15 2018 and that they unsuccessfully attempted to reconcile, are changes in circumstances of the
16 child justifying amendment to the Stipulated Parenting Plan. However, even if they were, these
17 circumstances occurred prior to the Court ordering its Findings on February 19, 2020. As this
18 Court found in its April 1st Order, Blake failed to allege a change in circumstances of the child
19 occurring after the Court adopted the Stipulated Parenting Plan in its February 19 Findings.
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24 Rule 60(b)(1) relief is not appropriate if the mistake by a party is a mistake of law, nor
25 does mere carelessness justify Rule 60(b)(1) relief. The Montana Supreme Court has said Rule
26 60(b)(1) relief is not appropriate in cases where default judgment was entered against a party for
27 the party's failure to answer a complaint due to inattention to their mail, a party committed a
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1 mistake of law in assuming the district court would take judicial notice of a transcript of an
2 earlier case which supported the party's motion for summary judgment, or where an attorney
3 miscalculated the time to file a motion or appeal. *Roberts v. Empire Fire & Marine Ins. Co.*, 277
4 Mont. 519, 524, 923 P.2d 550 (1996); *Donovan*, 248 Mont. at 25, 808 P.2d at 494; *Shoenthal*, ¶
5 34. Here, Blake's mistake may have stemmed from mere carelessness in agreeing to the
6 Proposed Findings without fully understanding it and assuming this Court would interpret his
7 acknowledgement of the Stipulated Parenting Plan as an acknowledgement of its existence rather
8 than agreement to it. Additionally, it was a mistake of law for Blake to believe he could amend
9 the parenting plan days after it was ordered in the Findings without showing a change in
10 circumstances had occurred after it was ordered. Thus, Rule 60(b)(1) relief is not appropriate
11 here.
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14 Blake has also not demonstrated that Rule 60(b)(6) relief is appropriate here. He has not
15 shown that Denie acted improperly or that anything prevented an accurate determination on the
16 merits and that he was blameless, as was the case of the former wife in *Wagenman*. The alleged
17 harm Blake seeks relief from stems from his voluntary agreement to the Stipulated Parenting
18 Plan by jointly filing the Proposed Findings. He has failed to show extraordinary circumstances
19 exist entitling him to Rule 60(b)(6) relief to set aside this Court's April 1st Order or its Findings.
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22 2. Motion to Set Aside Findings Pursuant to Mont. Code Ann. § 40-4-135

23 Blake alternatively argues the Findings should be set aside pursuant to Mont. Code Ann.
24 § 40-4-135, which provides that a final judgment may be set aside for fraud, duress, accident,
25 mistake, or other grounds recognized at law or in equity. Blake has not alleged that there has
26 been an accident, fraud, duress or other grounds entitling him to relief, nor does this Court find
27 these grounds exist here. He alleges mistake, but we have determined his mistake was a mistake
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1 of law or mere carelessness on his part. Although an unpublished decision, the Court in *Carr v.*
2 *Dodson-Carr* discussed setting aside a decree of dissolution for mistake pursuant to Mont. Code
3 Ann. § 40-4-135. 2015 MT 236N, 381 Mont. 543, 357 P.3d 336. The Court found mistake
4 justifying setting aside the decree of dissolution per Mont. Code Ann. § 40-4-135 in the district
5 court's calculation of the amount of funds in the former husband's retirement account that
6 accrued during the marriage and the district court failing to specify whether the former wife's
7 maintenance award would be derived from the former husband's net or gross monthly benefit. ¶
8 13. While we cannot rely on *Carr v. Dodson-Carr* as precedent, it is instructive absent other
9 cases on this matter. We have determined that the mistake here does not lie with the Court, but
10 with Blake's mistake of law or mere carelessness. Blake is not entitled to have the Findings set
11 aside pursuant to Mont. Code Ann. § 40-4-135.

14 3. Attorney Fees

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16 In her response, Denie asks for her attorney fees and costs incurred in responding to
17 Blake's motion. Resp. to Mot. for Relief, at 5. Montana follows the American rule that, in
18 general, a party cannot recover attorney fees in a civil action absent statutory or contractual
19 authority. *Wittich Law Firm, P.C. v. O'Connell*, 2013 MT 122, ¶ 29, 370 Mont. 103, 304 P.3d
20 375 (citation omitted). Mont. Code Ann. § 40-4-219(5) provides for attorney fees and costs
21 against the moving party if the movant seeks frivolous amendment that is vexatious and
22 constitutes harassment. The Court does not find that Blake's motion was meant to harass Denie
23 but was simply made under an incorrect belief he is entitled to *an amendment of the Stipulated*
24 *Parenting Plan at this time and with these facts*. Denie does not point to any other contractual or
25 statutory authority entitling her to attorney fees or costs. Nor does she bring a separate motion
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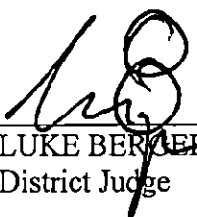
1 for sanctions under Rule 11. Thus, Denie's request for attorney fees and costs incurred in
2 responding to Blake's Rule 60(b) Motion is denied.


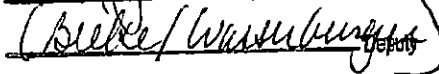
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4 For the foregoing reasons,

5 **IT IS ORDERED as follows:**

- 6 1. Blake's Rule 60(b) Motion is DENIED.
7 2. Blake's motion to set aside the Findings under Mont. Code Ann. § 40-4-135 is
8 DENIED.
9 3. Denie's request for attorney fees and costs incurred in responding to Blake's Rule
10 60(b) Motion is DENIED.
11 4. The Clerk of Court will please file this Order and distribute a copy to all parties.

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13 DATED this 16th day of June 2020.

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17 LUKE BERGER
18 District Judge

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21 **CERTIFICATE OF SERVICE**
22 This is to certify that the foregoing was duly served by mail,
23 fax, or email upon the parties or their attorneys of record at
24 their last known address.
25 Done this 16th day of June, 2020
26  Clerk
27  Deputy