

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 20-0070

IN RE THE MARRIAGE OF:

SHAILYN J. SIMONSEN

Petitioner/Appellee,

vs.

RUSSEL A. SIMONSEN

Respondent/Appellant

APPELLEE'S RESPONSE BRIEF

On Appeal From
Montana Eighth Judicial District Court, Cascade County
The Honorable John A. Kutzman, Presiding

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STATEMENT OF THE ISSUES

- I. **Did District Court Err in Issuing its Final Parenting Plan Merely Because Russ Subjectively Believes the Conflicting Evidence Could Be Interpreted to Reach a Different Result?**
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- III. **Are Any of District Court’s “Lone Contempt” Orders Appealable When They Solely Address Russ’ Violation of a Lawful Judgment and Do Not Include an Ancillary Order Addressing the Substantial Rights of the Parties?**
- IV. **Did District Court Err by Holding Russ in Contempt When He Repeatedly Admitted Failing to Comply with District Court’s Order, Acknowledged That His Failure to Comply Was His Own “Fault,” and Offered to Pay Shari’s Attorney Fees Resulting from the Four (4) Hearings Necessary to Compel His Compliance?**

STATEMENT OF THE CASE

This is an appeal from a garden-variety dissolution of marriage action turned lengthy contempt action caused by Appellant, Russell Simonsen’s (“Russ”) erratic conduct, lack of candor, and repeated and admitted disregard for District Court’s orders regarding the division of marital property. The procedural and factual history is generally as follows:

Appellee Sharilyn Simonsen (“Shari”) filed her Petition for Dissolution of Marriage and Proposed Parenting Plan on April 24, 2018. Dkt. 1; Dkt. 2.

Shari served Russ with her Petition and Proposed Parenting Plan on April 25, 2018. Dkt. 4.

On May 4, 2018, Russ' attorney entered an appearance in this action but did not answer Shari's Petition until June 12, 2018. Dkt. 5; Dkt. 18.

District Court referred the matter to the Standing Master on May 10, 2018. Dkt. 7. On May 15, 2018, Shari requested the Standing Master order the sale of the marital home. Dkts. 9, 10, 11. Russ did not timely respond to Shari's motion. Dkt. 14. On June 5, 2018, the Standing Master granted Shari's motion. *Id.*

The Standing Master's Order was later set aside and the matter referred back to District Court and Judge Kutzman. Dkt. 16, 17, 20.

District Court denied Shari's motion to sell the marital home because Russ disputed that the marriage was irretrievably broken. Dkt. 22. Eventually, after several months, Russ agreed the marriage was irretrievably broken and agreed to assume the mortgage individually and remove Shari from the debt. App. 2, p.70:1-11.

Despite expressing his intent to refinance the marital home, Russ failed to take any meaningful action toward refinancing for nearly ten (10) months. Dkts. 58, 62, 65, 67, 69, 71, 75, 78, 80-81, 84-86, 88, 91.

In January 2019, the parties entered a Settlement Agreement, Waiver of Hearing and Consent to Entry of Decree dividing their marital property (“Settlement Agreement”). Dkt. 47. The parties later entered a Stipulation slightly reducing the equalization payment Russ owed Shari. Dkt. 50.

Russ’ flippant attitude toward District Court, Shari, and his obligations under the parties’ Settlement Agreement and Stipulation led to four (4) separate show cause hearings over the course of eight (8) months. Dkts. 67, 75, 84, 91. In each hearing, District Court prodded Russ to purge his contempt. App. 1, p.4.

Meanwhile, District Court considered the parties’ conflicting positions regarding the parenting of their minor children, J.W.S. and K.H.S. (the “Children”).

On December 19, 2018, at the conclusion of a contested hearing, District Court issued an oral interim parenting plan. App. 2, p.70-77.

On January 15, 2019, District Court *sua sponte* issued its Revised Interim Parenting Plan (emphasis in original). Dkt. 45.

The parties appeared for a final parenting plan hearing on February 21, 2019. At the conclusion of the hearing, District Court entered a decree of dissolution formally dissolving the marriage and incorporating the parties’

Settlement Agreement and Stipulation. Dkt. 52. It reserved ruling on a final parenting plan. *Id.*

District Court issued its Findings of Fact, Conclusions of Law, and Order regarding parenting (“Final Parenting Order”) on December 31, 2019. Dkt. 98.

Russ filed his Notice of Appeal on January 30, 2020 designating District Court’s Final Parenting Order as the only order for review. App.3.

STATEMENT OF THE FACTS

A. Parenting and Russ’ Erratic Conduct

Shari and Russ were married on July 31, 2004. Dkt. 1, p.2. They have two children - J.W.S. and K.H.S. App. 1, p.2.

Shari petitioned to dissolve the marriage in April 2018. App. 2, p.11 (12/19).

Russ did not want to terminate the marriage. Dkt. 18, p.1. When Shari moved to sell the marital home Russ claimed her request was “premature” because he believed the marriage could be saved. Dkt. 17.

Shari remained in the marital home until July 12, 2018 when she moved into her parents’ home. *Id.*¹ Russ, apparently unfazed by Shari

¹ Shari’s parents also live in Great Falls, Montana. App. 2, p. 17-18.

leaving, remained preoccupied with reconciliation. App.2, p.29. He continually asked Shari to “come home” and became angry when she refused. App. 2, p.29-31. He often retaliated and withheld the Children from Shari. *Id.*

Russ made sure Shari knew he was punishing her for leaving the marriage:

Since you have declined to come home and work this out. I am moving on because I have tried everything to make this work and I hear last night the marriage of 14 years has been horrible. The last 4 months and especially last week has proved that **we don't need you and we can survive. So good luck in your new life.**

Id. (Exh. 21) (emphasis added).

Russ did everything in his power to make the Children and his marriage a “package deal.” *Id.*, p.31. Shari disagreed with Russ’ leveraging. *Id.*

Nonetheless, Russ continually used the Children as pawns to manipulate Shari. *Id.*, p.32. Russ influenced the Children by telling them things like, “Your mom doesn’t want to be a family anymore. She decided to leave us, and she doesn’t want to be a family.” *Id.*, p.32; Dkt. 26, p.2; App. 1, p.5.

Russ’ conduct adversely affected the Children’s close relationship

with Shari. App. 2, p.33:10-25, Exh. 22-23; App. 1, p.8. They parroted Russ' narrative telling Shari that if she "wanted to see [them] more, come home" and if she "do[esn't] like this problem, then just come home." App. 2, p.33:10-25.

Shari described Russ as "using the children as pawns – often using lack of visits with [her] as a way to punish [her] for not reconciling with him." Dkt. 32, ¶ 3.

Russ purposely invited Shari to do things as a family in front of the Children. App.4, p.161-63. When Shari declined Russ' requests, he enlisted the Children to plead his case. *Id.*; App. 4, p.186-88; App. 1, p.10.

Russ routinely undermined Shari's parenting in front of the Children and in public places. App. 4, p.161-63. He demanded to know every detail of her plans. *Id.* Russ' conduct was irrational and alarming.

On July 26, 2018, Shari filed her Motion for an Interim Parenting Plan. Dkts. 25-27. Shari reported concerns about Russ "trying to limit [her] time with [the] Children and use them against [her]." Dkt. 26, p.1. She noted that Russ continually involved the Children and even told them "that some day they would learn that their mom is anything but an angel." *Id.*, p.1-2.

Russ' behavior was so concerning that Shari had to call law enforcement to intervene after he followed her and the Children to her parents' home, acted belligerently, and refused to leave. Dkt. 26, ¶¶ 15-19; App. 4, p.176-78.

Russ did not timely respond to Shari's Motion or dispute any of his conduct described therein.

Several months passed and on October 1, 2018, Russ filed an Amended Answer to Shari's Petition finally admitting the marriage was irretrievably broken. Dkt. 31. His conduct remained unchanged. Dkt. 32-33. He continued demanding reconciliation and correlatively refusing Shari's requests for parenting time. *Id.*

As a result, on October 5, 2018, Shari filed a Motion for an Emergency Parenting Plan. Dkt. 32-33. She described being "increasingly concerned with Russ' behaviors" because he was "very unpredictable." Dkt. 32, ¶ 3.

Even though Russ admitted their marriage was irretrievably broken, he continuously begged her to come home "for the sake of the kids." *Id.*, ¶ 5. Russ left flowers on Shari's vehicle when she was at work. *Id.*, ¶ 8. He sent her messages saying, "Good morning beautiful." *Id.* Russ made these

gestures even when Shari asked him to stop. *Id.*

Russ refused to work out a parenting schedule with Shari. *Id.*, ¶ 6. He told Shari that if she wanted to see the Children, she needed to come home. *Id.*

Just as before, Russ did not timely respond to Shari's Motion or dispute any of his conduct.

Another month passed, and on November 15, 2018, Shari filed her third affidavit advising that she was becoming "more and more concerned" about Russ' behavior. Dkt. 34, ¶ 3. She described Russ as being "physically and emotionally unstable." *Id.*

Russ continued unjustifiably restricting Shari's parenting time with the Children. *Id.*, ¶ 4. He kept telling Shari that if she wanted more time with the Children she needed to come home. *Id.*, ¶ 5.

Shari detailed numerous incidents of Russ' problematic conduct. *Id.*, p.4-24. She reported she was again forced to call 911 when he refused to leave her parents' home. App. 4, p.174-76.

On November 29, 2018, Russ finally responded to Shari's Motion for an Emergency Parenting Plan. Dkt. 36. Russ vaguely disputed some of Shari's allegations, but focused primarily on his demand for child support.

Id., p.2.

On December 18, 2018, Russ filed a hearing brief claiming to be the primary parent. *Id.* He used the Children as a lever claiming “the children want their family back together.” *Id.*

District Court held a hearing on Shari’s motions for an emergency and/or interim parenting plan on December 19, 2019. Dkt. 39. Family friend, Mendy Quinn, testified that Shari has a good relationship with the Children. App. 2, p.6-8. She explained that “Shari’s a good mom and loves her children.” *Id.*

Shari testified extensively. She described Russ’ tireless demands for reconciliation and his retaliation. *Id.*, p.11-17, 29-33.

She explained that once she moved out of the home, her contact with the Children was at the mercy of “Russ’s rules.” *Id.*, p.17. She testified that it had been almost two (2) months since Russ allowed the Children to stay overnight with her. *Id.*

Although Russ wanted District Court to believe the Children did not want to spend time with their mother, Shari provided District Court with several recent photographs of the Children appearing happy with her. *Id.*, p.19-23. She testified she loves the Children and “[t]hey are absolutely

[her] world.” *Id.*, p.23:18-25. Shari expressed genuine concerns about the Children parroting Russ’ fixation with reconciliation. *Id.*, p.32-34, 39.

Shari requested that District Court issue an interim parenting plan designating her as the primary parent with full custody. *Id.*, p.24:11-14. She had “serious questions” about Russ’ mental status and physical condition. *Id.*, p.25-28.

Russ admitted he “regret[s] saying” a lot of things after Shari sought to dissolve their marriage. *Id.*, p.53:10-18. He further acknowledged that his offers for Shari to visit the Children frequently involved his presence:

I’ve actually invited her to go pick out the costumes for Halloween. I’ve invited her to go trick-or-treating with us.

I’ve invited her to – I actually – we went to dinner – the first weekend that she was gone, we went to dinner together so that she would see the kids, I have made anything that we have to do, she’s welcome to come. I haven’t changed the locks on the house. I haven’t changed anything. She’s more than welcome to come and do that stuff. I – we go to football games together. We were – the first day of school, I actually took that picture of them on the first day of school. I mean, there’s no reason that we can’t get along and co-parent.

Id., p.60:2-15.

Russ admitted his goal was not to co-parent but was to reconcile with Shari. *Id.*, p.60, 63-65.

Although Russ claimed forcing the Children to visit Shari, he

conceded there was no friction in Shari's relationship with the Children before the split. *Id.*, p.66-67. He acknowledged their relationship would likely improve if she were able to purchase her own home and agreed she could not do that because he had not fulfilled his obligation to refinance the marital home. *Id.*, p.69:9-13, 70:1-17.

At the conclusion of the hearing, District Court orally issued interim parenting wherein the Children would live with Russ during the weekdays, and with Shari every other weekend. *Id.*, p.71:3-10. District Court explained that it was "not going to reverse the primary custody relationship, at least not yet," but also made clear that its interim order was "temporary." *Id.*, p.71-73.

On January 15, 2019, District Court *sua sponte* issued a Revised Interim Parenting Plan finding that, "upon further consideration of the record, hearing testimony, and reflection about the best interests of the minor children, the Court concludes its oral order following the hearing did not provide the children enough parenting time with their mother." Dkt. 45, p.2.

As a result, District Court ordered that Shari have visitation "**Every** weekend beginning Friday, December 21, 2018[.]" *Id.*, p.3 (emphasis in

original). Shari would have “**evening phone visits** with the minor children **twice a week at reasonable times**. Russell shall facilitate these phone visits with the minor children.” *Id.* (Emphasis in original).

On February 21, 2019, District Court held a final parenting plan hearing. Dkt. 49.2.

Shari testified that District Court’s Revised Order “made a world of difference” because it allowed her to “further rebuild” her relationship with the Children. App. 4, p.148-49.

Russ’ behavior remained unchanged. *Id.*, p.160-64. He relentlessly pushed Shari to do things “as a family” enlisting the Children as his messengers. *Id.*, p.160-63; App. 1, p.10. Russ undermined Shari’s parenting decisions in the Children’s presence when he did not get his way. App. 4, p.160-63.

Russ admitted involving the Children because he “do[esn]’t hide nothing from the kids. They know what’s going on.” *Id.*, p.212:4-6, 214:20-21.

The evidence showed Russ went to great lengths to alienate the Children from Shari. A few weeks before the final parenting hearing, Russ started taking the Children to counseling sessions with Bridget Hanson.

App. 4, p.86, 121. Russ did not tell Shari the Children were in counseling and he did not provide Hanson with Shari's contact information. *Id.*, p.118:6-17. When Hanson asked Russ whether Shari was aware of the Children being in counseling, Russ told her that "he didn't think [Shari] believed in counseling." *Id.* As a result, Hanson did not reach out to Shari to involve her in the counseling process. *Id.*, p.120:3-5.

During the Children's first visit with Hanson, Russ stayed in the room and provided his version of events. *Id.*, p.97-98, 121. Russ claimed to be concerned about the Children purportedly not wanting to "go to or stay at their Mother's residence." *Id.*, p.98:10-14.

Hanson claimed the Children "expressed a desire to spend more weekends with their Father." *Id.*, p.105. Hanson admitted the Children did not claim to enjoy their time with Russ more, but rather it was simply a matter of them liking "being in their own beds and in their own rooms." *Id.*, p.105:15-23. At the end of the session, Russ asked the Children in front of Hanson "who they'd like to live with" *Id.*, p.106:3-10. District Court ostensibly recognized Russ' nefarious intent:

Court: And at the end of the visit, he comes back in and asks them in front of you, who did they want to live with. Did I hear that right?

Hanson: Right.

Court: And you already heard that from them, true?

Hanson: How they wanted it arranged?

Court: Right.

Hanson: Right.

[...]

Court: Did it seem to you like he was trying to influence them when he asked them that question in front of you?

Hanson: I don't know. He did – he did say, and I have it noted that he said, "I don't care if it's with me or your mom. I just want to know where you want to be, that you're happy."

Court: *Did it seem odd to you to be trying to get that information from them about that in front of a therapist? I mean, he could have asked them that anywhere, right?*

Hanson: Right.

Court: *They spend a lot of time with him at his house, right? Did it look like a setup?*

Hanson: I don't know. I did ask – or the next session, I told him, "I don't want to talk about the custody stuff. I want to just focus on coping skills." And he said, "I try not to talk about it too much with them because it stresses them out." I don't know.

Id., p.123-25 (emphasis added).

Hanson admitted she had very few sessions with the Children and did not know whether Russ was contaminating their opinions. *Id.*, p.98-99. She refused to opine on whether the Children's opinions were consistent with their true feelings because she did not know Russ' intentions. *Id.*, p.98:18-25.

Shari was not only surprised to learn that the Children were in counseling, but was shocked when Hanson disclosed that J.W.S. made suicidal statements after the parties' split. *Id.*, p.102, 170-71. Russ never shared J.W.S.'s suicidal statements with Shari. *Id.*, p.170-71. Shari was upset by Hanson's revelation and felt that it was something she was entitled to know. *Id.*

Shari disputed Russ' representations that she did not "believe in counseling", explaining that she believed the Children "would benefit from talking with a counselor." *Id.*, p.170. She testified that she wanted the Children to be in counseling and felt it was important for her to be involved in the process. *Id.*, p.170-71.

Russ also sought to inaccurately depict Shari's relationship with the Children through their school counselor, Nikki Ritland. Ritland claimed to

have concerns about Shari, but admitted she did not have all of the necessary information to form any opinion about Shari's parenting decisions. *Id.*, p.131. She further admitted that the Children would do much better with visits if Shari had her own residence—a problem created by Russ' failure to timely refinance the marital home. *Id.*, p.133:16-24.

At least one witness described Shari as “a great mom” testifying about the positive relationships Shari shared with each of the Children *Id.*, p.136-39.

The parties agreed District Court would benefit from interviewing the Children. *Id.*, p.189. District Court interviewed each child individually. *Id.*, p.189, 194. The Children revealed conflicting feelings about their parents and what they wanted for a parenting plan. Neither child expressed an overt desire to spend all of their time with Russ. *Id.*, 193, 198-99.

For instance, J.W.S. advised District Court that after the Revised Order went into effect, his relationship with Shari was “[m]ostly on the calm side.” *Id.*, p.192-93. He told District Court he “wouldn't mind” spending time with Shari during the week. *Id.*, p.193:10-13. He felt more comfortable at Russ' house, but only because it was the home he has lived in “since [he] was one.” *Id.*, p.192:7-11. He did not express a preference for one parent

over the other. *Id.*

Likewise, although K.H.S. claimed she wanted only to spend time with Shari “every other weekend,” she did not give a verbal response when District Court asked if she wanted to live with Russ. *Id.*, p.195-96. In fact, K.H.S. told District Court she “would like it” if she had time with Shari during the week. *Id.*, p.198:14-19.

Russ’ feigned interest in co-parenting was short-lived. He admitted to not caring that his refusal to refinance the marital home was negatively affecting Shari’s relationship with the Children, claiming, “It’s not my choice. She’s an adult. She can make her own decisions.” *Id.*, p.217:2-8.

On December 31, 2019, after months of dealing with Russ’ erratic and contemptuous conduct, District Court issued its Final Parenting Order. App. 1.

District Court devoted eighteen (18) pages to justifying its decision. *Id.* It concluded that the evidence showed, “Russ has not effectively co-parented with Shari,” and adopted “what is most charitably described as a laissez faire attitude toward facilitating parenting time between Shari and the Children.” *Id.*, p.5-6. District Court recognized that “Russ’s anger and animosity towards Shari in the presence of the children has negatively

influenced the children's attitudes about spending time with Shari." *Id.*, p.8-9.

District Court further found, based on substantial evidence, that "the children desire an arrangement that includes parenting time with both parents during the week and on the weekends." *Id.*, p.11. It recognized that any expressed preference for spending time with Russ, had little to do with Russ and "more to do with the material comforts of not moving and with continuing to live where they always lived." *Id.*

As a result, and based on an analysis of each and every one of the factors in Mont. Code Ann. § 40-4-212, District Court's Final Parenting Order requires that the Children reside with Shari during the school year with Russ having parenting time every other weekend and for a few hours on Wednesday evenings. *Id.*

During the summer months the schedule is flip-flopped with Russ being the weekly parent and Shari having parenting time Wednesday evenings and every other weekend. *Id.* In other words, District Court issued what amounts to a 50/50 parenting schedule.

On January 2, 2020, Shari entered judgment pertaining to the Court's Findings of Fact and Conclusions of Law. Dkt. 99. Russ filed his Notice of

Appeal designating that his appeal stems from the Final Parenting Order. App. 3. Russ did not identify or designate any other District Court order for appeal. *Id.*

B. Russ' Admitted Contempt

For the first time in his opening brief, Russ disclosed that his appeal is also directed at his extensive and repeated contemptuous conduct. Not only is it impossible to determine what contempt order Russ is even appealing, but his failure to properly appeal any contempt order through his notice of appeal deprives this Court of jurisdiction to even review any issue relating to Russ' contempt.

Nevertheless, the irrelevant and non-appealed contempt facts are generally as follows:

On February 8, 2019, Russ and Shari filed their Settlement Agreement with District Court. Dkt. 47. Russ executed the Settlement Agreement which provided, in relevant part:

[...]

2. Russell shall receive the 2017 Ford Fusion and the debt associated with this vehicle. **Russell will remove Sharilyn from the debt associated with this vehicle on or before February 1, 2019;**

[...]

- c) Russell shall receive the marital home located at 116 36th Avenue NE, Great Falls, Montana. **Russell shall assume the debt on the home and refinance the home on or before February 1, 2019 to remove Sharilyn for the debt**[...]if the home is not refinanced by on or before February 1, 2019, the home shall be immediately listed and sold by Realtor, Rose Gehl.

[...]

- g) To balance the marital estate, Russell shall pay to Sharilyn cash in the sum of \$40,000 by or on or before February 21, 2019.

Id., p.4-5 (emphasis added).

During the February 21, 2019 final parenting hearing, District Court expressed impatience with Russ' lack of progress in refinancing the mortgage. App. 4, p.229:2-19. District Court bifurcated the property division from the parenting issues in an effort to move things along. Dkt. 52.

On February 22, 2019, the parties filed a Stipulation amending the terms of the Settlement Agreement reducing Russ' equalization payment from \$40,000 to \$39,122. Dkt. 50. District Court approved and ordered the Stipulation. *Id.*, p.2.

On February 25, 2019, District Court entered its Findings of Fact, Conclusions of Law, and Decree of Dissolution incorporating and ordering

the parties' Settlement Agreement and Stipulation. Dkt. 52.

In the months following the final parenting hearing, Russ failed to take any steps to refinance the marital home. Dkt. 58. As of April 11, 2019, Russ still had not refinanced his vehicle, had not refinanced the marital home, and had not paid Shari her \$39,122 equalization payment. *Id.* As a result, Shari sought to hold him in contempt. *Id.*

Russ responded by claiming that he was in the process of withdrawing money from his retirement account and would pay her equalization payment within thirty (30) days. Dkt. 62. He further claimed he was taking "necessary steps to get the refinancing process completed." *Id.* He then baselessly suggested his contempt did not matter because Shari was able to purchase her own home despite his inaction. *Id.*

District Court set a show cause hearing ordering Russ to appear in person. Dkt. 64. On the day of the hearing, Russ did not personally attend, but rather appeared only through counsel. App. 5, p.236:11-13. Russ' counsel read an email from Russ wherein Russ claimed he could not be at the hearing because, "I have to work. I am doing training and cannot miss. Plus, my boss is coming from Colorado." *Id.*, p.236-37.

District Court expressed frustration and noting the parties have "been

talking about getting [Shari] off the old loan for a long time.” *Id.*, p.237-245. It noted that removing Shari from the mortgage on the marital home had been in discussion for more than 11 months “with no discernable progress.” *Id.*, p.245:18-19.

District Court reluctantly agreed to give Russ more time to comply with his obligations but advised it was “at the end of the line here.” *Id.*, p.249:23-25. It ordered Russ to pay the equalization payment and complete the refinancing process on the home and his vehicle by August 1, 2019. Dkt. 69. District Court further ordered Russ to “provide written verification from his employer that [he] was unable to attend the last scheduled show cause hearing on May 31, 2019[.]” Dkt. 71.

Russ ignored District Court’s orders. On August 1, 2019, the parties appeared for a second show cause hearing. Dkt. 73. Despite having two (2) additional months, Russ still had not complied with his obligations under the Settlement Agreement and Stipulation. App. 6, p.257-58, 266.

Russ admitted his contempt. *Id.*, p.266-67, 277-290. He conceded he “screwed this up,” but sought to excuse his misconduct with a myriad of nonsensical excuses including one where he claimed Shari’s name was miraculously and inexplicably removed from the mortgage by the City of

Great Falls. *Id.*, p.266-67, 277-290. Russ failed to provide any supporting evidence. *Id.*

Russ' credibility tanked when he did not bring written justification from his employer regarding his absence from the first contempt hearing. *Id.*, p.274-76.

District Court found Russ "in contempt" and graciously gave him until August 30, 2019 to purge his contempt advising, "[a]ll traditional contempt sanctions are on the table. It might be incarceration. It might be a fine. It might be something else, if we think of something creative between now and then, but he's in contempt." *Id.*, p.297:8-24. District Court begged Russ to purge his contempt:

The only alternative I would have would be to ask, again, would you please obey my orders. And we have now reached a point where this is not about him and her anymore. This has really become about the system and this courtroom and this courthouse. Six months is more than enough time to get this done, and I'm not going to ask nicely anymore.

30 days. Get it done in 30 days, or there will be consequences, and they'll be painful.

Id., p.297-98; Dkt. 78.

District Court's begging prompted Russ to only partially comply. On August 29, 2019, Russ advised that he paid the equalization payment, but

once again needed additional time to refinance the home and his vehicle. Dkt. 80. He requested an additional three (3) weeks to purge his contempt. *Id.* Shari objected to Russ' request providing documents showing Russ was not making timely payments on the home or his vehicle. Dkt. 81.

District Court held its third contempt hearing on October 2, 2019. Dkt. 84. Russ still had not refinanced the home or his vehicle. App. 7, p.304:5-22.

Russ continued claiming he was in the process of refinancing without supporting evidence. *Id.*, 308:5-24. His attorney acknowledged Russ' failure to timely purge his contempt representing that Russ would "pay Mr. Ferguson's fees, but we don't – we don't need to throw him in jail, things like that, so that's my request, Judge." *Id.*, p.309:1-3.

District Court once again prodded Russ to purge his contempt and ordered him to submit a status report with supporting documents by Friday, October 4, 2019. *Id.*, p.317-19.

On October 3, 2019, Russ filed a Status Report with a letter from U.S. Bank indicating that his application was "waiting on the appraisal report." Dkt. 85, Exh. A. Russ also attached an email from the appraiser indicating that she could not complete the report because U.S. Bank placed

the appraisal order “on hold.” *Id.*, Exh. B.

On October 4, 2019, Russ filed an amended status report advising that the refinance process “may be further delayed” through U.S. Bank. Dkt. 86. He claimed he would be starting over with a different bank. *Id.*

The cycle of contempt continued and on November 25, 2019, Shari filed a motion for a status conference because Russ still had not refinanced the marital residence or his vehicle. Dkt. 88.

On December 11, 2019, District Court convened a fourth hearing regarding Russ’ contempt. Dkt. 91. District Court advised that Russ was “at the end of the road” giving him until Friday, December 20, 2019 to refinance the home and his vehicle. App. 8, p.328-30. Russ apologized about the delay admitting it was his fault:

And I’m sorry it’s taking so long. **And I apologized to Shari, and I sent her a text saying it was my fault.** I’ve worked my butt off trying to get this done. I’m sorry you’re not off yet. So I apologize for wasting people’s time. I am trying my due diligence to get this off.

Id., p.331-32 (emphasis added).

On December 19, 2019, Russ submitted a status report indicating that he finally refinanced the home and vehicle. Dkt. 95. Russ’ compliance took nearly ten (10) months and four (4) contempt hearings.

Russ filed this appeal on January 30, 2020. App. 3. As noted above,

Russ' Notice of Appeal does not attach or reference any order relating to his contempt. *Id.* Instead, Russ only appealed District Court's Final Parenting Order which has nothing to do with Russ' contempt. Dkt. 103.

STANDARD OF REVIEW

This Court reviews a district court's findings of fact supporting a parenting plan to determine whether they are clearly erroneous. *In re the Parenting of M.C.*, 2015 MT 57, ¶ 10, 378 Mont. 305, 343 P.3d 569. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if our review of the record convinces this Court that a mistake has been made. *M.C.*, ¶ 10. A district court's conclusions of law are reviewed for correctness. *M.C.*, ¶ 10.

District courts have "broad discretion when considering the parenting of a child," and this Court "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 (*quoting In re Marriage of Crowley*, 2014 MT 42, ¶ 44, 374 Mont. 48, 318 P.3d 1031). A district court's findings regarding parenting plans will only be disturbed when there is a clear abuse of discretion. *Woerner*, ¶ 12.

District court abuses its discretion if it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *Woerner*, ¶ 12.

A contempt order is ordinarily not subject to appeal. Mont. Code Ann. § 3-1-523(1). This Court recognizes a limited exception for contempt orders issued in family law cases, "only when the judgment or order appealed from includes an ancillary order that affects the substantial rights of the parties involved." Mont. Code Ann. § 3-1-523(2); M. R. App. P. 6(3)(j); *In re Marriage of Lutes*, 2005 MT 242, ¶ 7, 328 Mont. 490, 121 P.3d 561.

If a contempt order falls within this exception, this Court reviews the order to determine whether the district court acted within its jurisdiction and whether the evidence supports the contempt. *Novak v. Novak*, 2014 MT 62, ¶ 37, 374 Mont. 182, 320 P.3d 459.

SUMMARY OF ARGUMENT

District Court had broad discretion to evaluate the evidence and enter a parenting plan in the best interests of the Children. Its Final Parenting Order should not be reversed merely because Russ interprets the conflicting evidence differently.

Furthermore, Russ' ostensible appeal from an unspecified contempt

order is futile. Russ failed to properly designate any contempt order as subject to this appeal and therefore waived any appeal that might have existed. Likewise, even Russ had properly designated an order for appeal, District Court's contempt orders are "lone contempt orders" that do not "affect the substantial rights of the parties involved" and are not subject to appeal.

And, assuming Russ is somehow able to overcome the fatal procedural hurdles, his contempt appeal should be rejected because his failure to abide by District Court's orders is established by abundant evidence. Indeed, Russ routinely admitted his contempt, took all of the blame, and even offered to pay Shari's attorney fees as a result.

Russ' appeal is entirely unsupported by the law and the facts. District Court's Final Parenting Order should be affirmed and Russ' admitted contempt upheld.

ARGUMENT

A. District Court's Final Parenting Order is Supported By Substantial Credible Evidence. Russ' Subjective Interpretation of the Conflicting Evidence Does Not Warrant Reversal.

District Court's Final Parenting Order properly considers and weighs the evidence, makes findings of fact supported by that evidence, and

carefully and correctly applies the law by thoroughly examining each and every factor contained in Mont. Code Ann. § 40-4-212. App. 1.

Russ' vague and unsupported disagreement with District Court's interpretation of the evidence does not give rise to a reversible error.

Under Montana law, a district court is required to "determine a parenting plan in accordance with the best interests of the child," Mont. Code Ann. § 40-4-212. District Court had broad discretion to make a parenting plan under the applicable standards of § 40-4-212, MCA. *In re C.J.*, 2016 MT 93, ¶ 13, 383 Mont. 197, 369 P.3d 1028.

Section 40-4-212, sets forth specific factors a district court is required to consider when crafting a parenting plan. "[A]t minimum, the court must make findings sufficient for this Court to determine whether the trial court considered the statutory facts and made its ruling based on the child's best interests." *In re Parenting of D.C.N.H.*, 2020 MT 119, ¶ 15, 400 Mont. 59, 463 P.3d 445. District Court's Final Parenting Order does exactly that.

Although not required to do so, District Court thoroughly considered the evidence as applied to every factor contained in § 40-4-212. App. 1, p.12-15. It carefully weighed the evidence based on those factors and determined that an essentially equal parenting plan was in the Children's

best interests. App. 1.

Russ does not identify any specific factual findings that were unsupported by the evidence. Nor does he reference any incorrect conclusion of law. Importantly, Russ' arguments are completely devoid of any legal authority at all, let alone any citation necessitating reversal.

Russ' entire appeal is premised on short excerpts of testimony suggesting the Children want to reside with him. *Op. Br.*, p. 6. District Court observed and listened to the parties, interviewed each child in chambers, and heard the evidence. It expressed doubts about the genuineness of the Children's purported wishes explaining, "Russ's inability to date to co-parent with Shari without disparaging and alienating her from the children undermines the Court's confidence in their expressed desire to reside in the marital residence with Russ." *Id.*, p.17.

District Court further concluded it would not be in the Children's best interests to adopt Russ' proposed parenting plan by expressing concerns about his conduct:

Based upon the evidence and testimony presented, the Court is concerned that if the children were to reside with Russ, he would not consistently facilitate parenting time with Shari and would continue to speak negatively about Shari in present of the children. Events in this case to date strongly suggest Russ would allow, and even actively encourage, the children to opt out of a relationship with Shari if the

children felt like it.

Id., p.16.

District Court did not express the same concern about Shari, but rather concluded she would “provide a stable loving home for the children *while simultaneously encouraging and facilitating a positive relationship with the other parent*, which include frequent and continuing contact with the other parent.” *Id.* (emphasis in original).

District Court’s findings are supported by substantial evidence in the record and Russ does not argue otherwise. *In re Marriage of Williams*, 2018 MT 221, ¶ 23, 392 Mont. 484, 493-94, 425 P.3d 1277, 1284. It appropriately considered and weighed the evidence and the conflicting perceptions of the parties.

Russ’ confusing references to events occurring in July 2020, well after District Court issued its Final Parenting Order, are improper and should be ignored. *Op. Br.*, p.10-11. This Court condemns efforts to supplement the record or insert documents that were not before the trial court. *State v. MacKinnon*, 1998 MT 78, ¶ 13, 288 Mont. 329, 957 P.2d 23. “[P]arties on appeal are bound by the record and may not add additional matters in briefs or appendices.” *Id.* at ¶ 15.

Russ' desire for J.W.S. to be a "batboy" seven (7) months after District Court issued its Final Parenting Order are irrelevant.

The issue at hand is simple: "The question is not whether there was sufficient evidence to enable the lower court to reach a different conclusion, but rather whether the conclusion that it did reach is supported by substantial evidence." *In re Parenting of D.C.N.H.*, 2020 MT 119, ¶ 21, 400 Mont. 59, 463 P.3d 445. District Court was in the best position to determine the Children's best interests based on the conflicting evidence. Russ' subjective desire for this Court to substitute his interpretation of the "facts" in place of District Court's does not give rise to an abuse of discretion. *Id.*

"It is not this Court's role to reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence." *In re Marriage of Williams*, 2018 MT 221, ¶ 23, 392 Mont. 484, 425 P.3d 1277.

District Court's Final Parenting Order should be affirmed.

B. District Court Properly Held Russ in Contempt and his Fatally Flawed Appeal Should Be Rejected.

i. Russ Did Not Designate Any Contempt Order in His Notice of Appeal Thereby Depriving this Court of Any Jurisdiction to Hear His Arguments on Appeal.

This Court should decline to review any issues related to Russ'

contempt because he failed to designate any contempt order for review in his Notice of Appeal. App. 3.

Rule 4(c), M. R. App. P., provides, in pertinent part, that, "the notice of appeal shall specify the party or parties taking the appeal; and shall designate the judgment, order or part thereof appealed from."

Russ' Notice of Appeal states that he is appealing from, "the final judgment or order entered in such action on the 31st day of December, 2019,"— the date of District Court's Final Parenting Order. App. 3. He then specifically identified the Final Parenting Plan Order as the only order on appeal by attaching it to his notice. *Id.*, p.1, ¶ 2 ("Exhibit A").

Russ did not identify any other orders in his appeal. *Id.* District Court's Final Parenting Order is not a contempt order. App. 1. In fact, the Final Parenting Order only uses the term "contempt" once and merely as a means to warn the parties that future violations of the parenting plan would be "punishable by contempt of court." App. 1, p.16.

Russ' failure to designate any of District Court's contempt orders in his Notice of Appeal deprives this Court of any jurisdiction to even consider the issue. This Court has routinely held that it "will not consider an appeal from an order not designated in the notice of appeal." *Lewis v. Puget*

Sound Power & Light Co., 2001 MT 145, ¶ 27, 306 Mont. 37, 29 P.3d 1028, see also *State v. Delap* (1989), 237 Mont. 346, 350-51, 772 P.2d 1268, 1271.

For instance, in *Lewis*, the district court entered summary judgment on August 16, 1999. ¶ 10. It then issued a second summary judgment on other issues on March 3, 2000. *Id.*, ¶ 11. Lewis' notice of appeal only referenced the March judgment. *Id.* As a result, this Court rejected Lewis' attempt to have it to review the August 6, 1999 summary judgment order explaining, the Court "will not consider an appeal from an order not designated in the notice of appeal." *Id.*

This Court has similarly rejected a claim that a deficient notice of appeal could be salvaged by the appellant's intent stating, "[g]iven the importance of specifying orders/judgments being appealed from, we will not rewrite parties' notices of appeal for them." *Shull v. First Interstate Bank of Great Falls*, 262 Mont. 355, 358, 864 P. 2d 1268, 1270 (1993).

Russ' Notice of Appeal is limited to the issues determined by District Court's Final Parenting Plan order. Russ' after-the-fact attempt to inject issues related to his contempt are improper and should be rejected.

ii. District Court's Contempt Orders Are Not Appealable because they are "Lone Contempt Orders" and Do

Not Determine the Substantive Rights of the Parties.

Even if Russ had properly appealed District Court's contempt orders, his appeal should be rejected because each contempt order was a "lone contempt" order and are not directly appealable under Rule 6(3)(j).

Pursuant to M. R. App. P. 6(3)(j), a party can only appeal "a contempt judgment or order in a family law proceeding when, **and only when**, the judgment or order appealed from includes an ancillary order entered as a result of the contemptuous conduct which affects the substantial rights of the parties involved." (Emphasis added); *Marez v. Marshall*, 2014 MT 333, ¶ 25, 377 Mont. 304, 340 P.3d 520 (citations omitted).

In other words, "where a court finds one party in contempt but also acts within its jurisdiction in adjudicating ancillary matters between the parties vis-à-vis the contemptuous conduct (e.g., marital property division, maintenance, child custody, visitation, etc.)," the order becomes appealable under Rule 6(3)(j). *Grounds v. Coward*, 2000 MT 128, ¶¶ 5-6, 300 Mont. 1, 2 P.3d 822. A "lone contempt order" that does not address substantive rights may not be directly appealed. *Marez*, ¶ 25.

Here, although it is entirely unclear what contempt order Russ is even appealing, none of District Court's contempt orders between August 1,

2019 and December 31, 2019 (the date of the judgment on appeal) include an ancillary order addressing any substantive rights of the parties. Dkts. 67, 69, 71, 75, 78, 84, 91, 92.

District Court's contempt orders do not impose any penalty, nor do they change or alter any substantive rights which were not established in the Settlement Agreement and Stipulation. *Id.* Thus, based on the operative facts and law, District Court's contempt orders are not appealable because they are "lone contempt orders" designed at "prodding [Russ] to do as he had agreed." App. 1, p.4.

iii. Even if District Court's Contempt Orders are Appealable Russ' Appeal Fails Because He Repeatedly Admitted His Contempt.

Assuming this Court has jurisdiction to consider Russ' contemptuous conduct, his appeal should be rejected because the abundant evidence and Russ' admissions indisputably prove Russ' contempt.

This Court reviews a contempt order to determine whether the evidence supports the contempt. *Novak*, ¶ 37. "Disobedience of a lawful judgment of the court is grounds for contempt." *Id.* citing Mont. Code Ann. § 3-1-501(1)(e).

Russ' contempt is undisputed. District Court issued its Order adopting

the Settlement Agreement and Stipulation on February 25, 2019. Dkt. 52.

Russ' court ordered obligations were simple:

1. Refinance the marital home to remove Shari's name from the debt;
2. Refinance his vehicle to remove Shari's name from the debt; and,
3. Pay Shari an equalization payment of \$39,122.

Dkt. 47, 50, 52.

Russ does not disagree that he was required to refinance the marital home and his vehicle by February 1, 2019. Dkt. 47, p.4. Nor does he contest his obligation to pay Shari's equalization payment by February 21, 2019. *Id.* Russ fails to mention that it took him almost ten (10) months to complete the tasks he agreed to have done before District Court even ordered them. Dkt. 95.

Russ merely seeks to absolve his contempt in the same way he did in District Court: with a series of undocumented and unsupported excuses. The fact of the matter is that Russ' excuses are meaningless compared to his own admissions.

Russ routinely admitted his contempt. He admitted to "wasting people's time" and that it was his own fault. App. 8, p.331-32. Russ' counsel knew his contempt was inexcusable offering for Russ to pay

Shari's attorney fees. App. 7, p.309.

Russ' purported "difficulties" in complying with his court ordered obligations were of his own design. Russ skipped the first contempt hearing claiming a work conflict, but ignored District Court's order that he provide proof from his employer. App. 5, p.236-37; App. 6, p.274-76.

During the second contempt hearing, Russ admitted he had not taken any steps toward completing his obligations, claiming he was "busy" and "screwed this up." App. 6, p.288. He admitted the bank denied his attempt to assume the mortgage because he waited too long to complete the necessary paperwork. *Id.*, p.283:14-18.

By the third contempt hearing Russ claimed he had applied to refinance but did not offer any documentary proof of his progress. App. 7, p.305-06. It was not until Russ was given a firm deadline of December 20, 2019, in the fourth contempt hearing that he took meaningful action toward fulfilling his court ordered obligation. Dkt. 92; Dkt. 95.

The overwhelming evidence proves Russ' contempt. District Court should be affirmed.

CONCLUSION

District Court did not abuse its discretion in entering its Final

Parenting Order because the Order carefully considered the law and the facts. Russ' subjective discontent with District Court's Final Parenting Plan is not enough and should be rejected.

Similarly, Russ' newfound appeal related to his contemptuous conduct should not even be considered because: (1) Russ failed to properly designate it on appeal, (2) Russ' contempt is not appealable under Rule 6(3)(j), and (3) Russ repeatedly admitted his contempt in all four (4) contempt hearings.

Russ' appeal should be denied and District Court's orders affirmed.

Respectfully submitted this 8th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that pursuant to the Montana Appellate Rules of Procedure, Rule 11, this brief is proportionately spaced, 14 point font, and contains 7853 words, as counted by my word processing software, excluding any caption, Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance, or any appendix.

Dated this 8th day of October, 2020.

TERRAZAS HENKEL, P.C.

By: /s/ Dana A. Henkel

CERTIFICATE OF SERVICE

I, Dana A. Henkel, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-08-2020:

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