DA 20-0441

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 51N

IN RE THE MARRIAGE OF:

GRANT A. JAMIESON,

Petitioner and Appellant,

and

NATALIE M. PURSELL,

Respondent and Appellee.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DR 17-50
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Christopher J. Gillette, The Law Office of Christopher J. Gillette, PC, Bozeman, Montana

For Appellee:

Daniel J. Roth, Daniel J. Roth, P.C., Bozeman, Montana

Submitted on Briefs: January 20, 2021

Decided: February 23, 2021

Filed:

Clerk

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 Grant Jamieson (Father) appeals an order from the Sixth Judicial District Court, Park County, amending Natalie Pursell's (Mother) parenting plan. The court held the plan best served the "frequent and continuing contact with both parents," and therefore was in the child's best interest. We affirm.

¶3 Mother and Father married in June 2014. Father has been a self-employed general contractor in Bozeman, Montana, for eight years. Mother gave birth to their son, S.J., in April 2015, at which time she was studying for her entrance exams to medical school. After S.J. was born, Mother stayed home, full-time, for approximately six weeks to care for him. For the first 16 months, Mother was primarily responsible for S.J.'s daily nutritional and personal needs. S.J. started Montessori daycare at 16 months and Mother started medical school. Mother testified regarding numerous times when Father was absent during S.J.'s early years. One such instance occurred while Mother had a surgery that left her bed-ridden for two weeks; during that time, Father went on a fishing trip to Minnesota. Another instance occurred when S.J. was hospitalized for several days with respiratory difficulties due to pneumonia and several viruses. Mother stayed with S.J. the

entire time, while Father went to work during the days and visited with friends during the evenings, only making brief visits to S.J. Mother was responsible for registering S.J. for school, managing and scheduling healthcare and dental appointments, and taking him to those appointments, including some for physical therapy. Father testified he was present at all of S.J.'s appointments, except a few. He also testified to his extracurricular activities, including golfing and hockey.

¶4 Mother and Father separated when S.J. was two. Per the original parenting schedule, S.J. resided with Mother during the week and with Father on the weekends; however, Father was dissatisfied with the schedule because Mother's parents visited on the weekends, which impinged on his parenting time. When S.J. was almost four, Mother and Father agreed to a 2-5-5-2 parenting plan, which was adopted as the Interim and Final Parenting Plan in January 2019; at which point the District Court also dissolved their marriage. In May of 2020, Mother filed a Notice of Intent to Move from Montana to Plano, Texas to begin her residency training in anesthesiology on June 17, 2020. The training was not available in Montana. Mother filed an Amended Final Parenting Plan (Parenting Plan), which characterized the care for S.J. as "on an equal and shared basis." The Parenting Plan indicated that S.J. would live with Mother in Texas during the school year and Father would have parenting time during major holidays and summers in Bozeman. Mother also proposed Father could spend time with S.J. in Texas with notice. Father objected to S.J. relocating to Texas and proposed he be in his primary care in Bozeman with Mother having alternating holidays, and

summers except for two, ten-day blocks of time that Father would have in the summer. Father also proposed Mother could exercise parenting time in Montana during the school year, subject to his approval.

¶5 The District Court found that Mother provided for S.J.'s parenting needs to a greater extent than Father; Mother had primarily provided for S.J.'s day-to-day needs; and though they moved to a more equal parenting arrangement, Mother had a greater role in parenting S.J. than Father. The District Court additionally concluded if Mother were the primary residential parent of S.J., she was more likely to be reasonable about adjustments to the parenting schedule and granting parenting time to Father than if it were reversed. The District Court noted both parents acknowledged the strong positive qualities of the other and that S.J. was close with both of them and the extended families. The District Court approved and amended Mother's Parenting Plan, stating she could provide the stability and continuity of caring for S.J.'s academic and developmental needs. Father raises multiple issues on appeal.

¶6 This Court reviews the underlying findings in support of a district court's decision regarding a parenting plan under the clearly erroneous standard. *In re Marriage of Williams*, 2018 MT 221, ¶ 5, 392 Mont. 484, 425 P.3d 1277 (citing *Guffin v. Plaisted-Harman*, 2010 MT 100, ¶ 20, 356 Mont. 218, 232 P.3d 888). Conclusions of law are reviewed for correctness. *In re Marriage of Williams*, ¶ 5 (citing *In re Parenting of C.J.*, 2016 MT 93, ¶ 12, 383 Mont. 197, 369 P.3d 1028). "[J]udgments regarding the credibility of witnesses and the weight to be given [to] their testimony are within the

province of the District Court . . . ." *In re Marriage of Tummarello*, 2012 MT 18, ¶ 34, 363 Mont. 387, 270 P.3d 28. A factual finding "is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence or . . . the district court made a mistake." *Tummarello*, ¶ 21. Absent clearly erroneous findings, this Court "will not disturb a district court's decision regarding parenting plans unless there is a clear abuse of discretion." *In re Marriage of Williams*, ¶ 5 (citing *In re Parenting of C.J.*, ¶ 13).

¶7 Father first asserts the District Court erred in allowing Mother to relocate to Texas with S.J. and without giving proper weight to the best interest of the child factors, pursuant to § 40-4-212, MCA. "Cases involving a proposed relocation of a parent with a child are difficult as they are rarely amenable to compromise and involve balancing a parent's right to resettle in another location, protecting the best interests of the child, and the competing rights of the other parent." *Northcutt v. McLaughlin (In re G.M.N.)*, 2019 MT 18, ¶ 12, 394 Mont. 112, 433 P.3d 715. A court must "weigh the best interests of the [child] along with [the parent's] fundamental right to travel interstate." *In re Marriage of Thorner*, 2008 MT 270, ¶ 23, 345 Mont. 194, 190 P.3d 1063. This Court has specifically held:

> As a fundamental right, the right to travel interstate can only be restricted in support of a compelling state interest . . . [A]ny interference with this fundamental right must be made cautiously and may only be made in furtherance of the best interests of the child. To that end, we require the parent requesting the travel restriction to provide sufficient proof that a restriction is, in fact, in the best interests of the child.

In re Marriage of Thorner, ¶ 26 (citing *In re Marriage of Cole*, 224 Mont. 207, 213, 729 P.2d 1276, 1280 (1986)). Mother has a constitutional right to travel and relocate; however, this right does not outweigh Father's right to have regular and ongoing parental contact with the child nor does it outweigh the child's right to a relationship with Father. *See Collie v. Pirkle (In re M.C.)*, 2015 MT 57, ¶ 8, 378 Mont. 305, 343 P.3d 569. In these cases, "the Court must try to reconcile the interests of both parents with the best interests of the child." *In re G.M.N.*, ¶ 12.

¶8 Section 40-4-219(1), MCA, provides that a district court may:

> [A]mend a prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interest of the child.

Relevant factors for the district court to consider when determining the best interests of the child are set forth in § 40-4-212(1), MCA. The District Court addressed the best interest factors under § 40-4-212, MCA, in its order, and held that amending the existing Parenting Plan to provide that S.J. relocate with Mother to Plano, Texas for the school year, while providing Father frequent and continuing contact during the summer months and major holidays, was in the best interest of S.J.

¶9 Father also asserts the District Court's findings of fact were clearly erroneous; specifically those findings made by the District Court are: (1) "there is no possibility of [Mother] accomplishing her residency in Montana"; (2) "[f]or the first 16 months of S.J.'s life, [Mother] stayed home to care for him and was primarily responsible for S.J.'s

daily nutritional and personal care needs"; (3) Father was "frequently absent" and "refers to recreational activities or vacations that didn't include [Mother] or S.J."; (4) "When S.J. was 2 years old, [Father] and [Mother] separated. S.J. resided with [Mother] Monday through Friday and resided with [Father] on weekends"; (5) "[Father] testified that he did not like the schedule"; (6) "[Mother] was the 'default parent' who would drop everything if S.J. needed attention"; (7) the testimony of Dr. Sheri Conner admitting that it is a reality that there are an increasing number of mothers in residence programs; and (8) "despite the demands of her education en route to completing her ability to work [in] a position, [Mother] has provided for S.J.'s parenting needs to a greater extent than has [Father]."

¶10 Father asserts the incorrect standard for reversing the District Court's decision. Although Father presented evidence and testimony that might support alternative findings, the District Court based its findings on substantial credible evidence. The District Court specifically evaluated S.J.'s "frequent and continuing contact with both parents" and held Mother, as the primary residential parent, would be more likely to allow Father reasonable and liberal parenting access and communication—highlighting the testimony that Father often resisted Mother's attempts to arrange parenting time and the limiting parenting time for Mother that Father was proposing in his parenting plan. The District Court carefully considered all the evidence before it, acknowledging the sensitivity of its decision, and concluded that relocation with Mother was in the best interest of S.J. The District Court's findings of fact were not clearly erroneous.

¶11 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶12 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JIM RICE