

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 21-0481

IN RE THE MARRIAGE OF
ROBYN M. RYERSON n/k/a
ROBYN R. MADISON,

Petitioner/Appellee,

v.

PATRICK S. RYERSON,

Respondent/Appellant.

APPELLEE'S ANSWERING BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County, Cause No. DR-09-749
Honorable John W. Larson

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STATEMENT OF THE CASE

Robyn Madison (“Robyn”) and Patrick Ryerson (“Patrick”) were briefly married and divorced in 2009. At the time of dissolution, Robyn was pregnant with the parties’ child. Following entry of the Decree, the parties had a daughter, MZR. Years of court proceedings regarding the parenting of MZR detail Patrick’s continuous unstable, threatening and violent behavior. Throughout the proceedings, Patrick’s visitations and communications were appropriately restricted due to his behavior and criminal actions. Patrick has been represented by a number of attorneys throughout these proceedings, including Joan E. Cook of Missoula, MT, Bradley J. Jones of Missoula, MT, Eric D. Mills of Great Falls, MT, Meghan Lulf Sutton of Great Falls, MT, Laura K. Buchholtz of Missoula, MT and Thane Johnson of Kalispell, MT.

The first filing relevant to this appeal was Robyn’s May 5, 2017 Request for Status Conference. (Doc. 78). She filed this after receiving a concerning Guardian Ad Litem report and abusive messages from Patrick on Our Family Wizard. On June 1, 2017, Judge Larson of Missoula County District Court issued an Order Amending the Parenting Plan. (Doc. 80). After reviewing Robyn’s evidence of Patrick’s abusive communications on Our Family Wizard and the Guardian Ad Litem’s report finding Patrick was likely to be similarly abusive to MZR if she were to displease him, Judge Larson found communication through Our Family Wizard was no longer

appropriate. One of the parenting factors identified in § 40-4-212, M.C.A., is the interaction and interrelationship of MZR with her parents. All communication was therefore appropriately suspended.

Patrick then filed several *pro se* motions which were properly and summarily dismissed as vexatious by the District Court. (*See, e.g.*, Docs. 82, 89, 92). However, on January 2, 2018, the District Court issued an Order allowing Patrick to have written communication with MZR sent through Robyn's counsel. (Doc. 97). Patrick now appeals Judge Larson's 2017 decision to suspend communication.

On September 2, 2020, Patrick filed a Motion to Modify Current Parenting Order (Doc. 128). Patrick based this motion on alleged changed circumstances and the purported best interests of MZR. Robyn filed her objection to the Motion on September 18, 2020. (Doc. 132). Robyn noted that Patrick did not meet his heavy burden to prove a change in circumstances and relied on outdated information. *Id.* Robyn argued that Patrick did not meaningfully engage in the court ordered treatment and instead referenced outdated and incomplete records. *Id.* Robyn further submitted that the only change in circumstance was Patrick's worsening behavior, evidenced by numerous new Orders of Protections, criminal charges, and violations of Court Orders since the Parenting Plan was ordered. *Id.* On August 30, 2021, Judge Larson denied a hearing on the motion because there was no change in circumstances. (Doc. 137).

The gravamen of Patrick's position is that he was entitled to a hearing on the Motion to Modify Parenting Plan because he complied with prerequisites outlined in Judge Larson's April 1, 2016 and June 1, 2017 Orders, and Dr. Baxter's recommendations of August 5, 2016. (Appellant's Opening Brief, page 17). This is simply untrue. While Patrick has taken some steps to complete some of the tasks he was ordered to complete, he has not met his burden. Patrick is unable to prove emotional stability and did not provide evidence of meaningful engagement in psychological treatment. Rather, Patrick provided some evidence of psychological treatment, none of which has been continuous, and Patrick's pattern of abusive conduct has never changed. Whatever treatment Patrick underwent was ineffective, as demonstrated by his conduct. Judge Larson reviewed ample evidence in rendering his decision. Judge Larson acted thoughtfully and met his statutory obligation when he denied Patrick's Motion to Modify Parenting Plan. This appeal presents no new arguments, no new facts, and no new law. This Court should affirm Judge Larson's decision.

STATEMENT OF FACTS

This case has a lengthy and highly contentious history. The parties ultimately divorced in 2009. (Doc. 10). After their dissolution, the parties' daughter MZR was born. At the time of MZR's birth, both parties resided in Missoula, Montana. They stipulated to a Final Parenting Plan, which was entered on December 9, 2009. (Doc.

5). The parties later reconciled and moved to Great Falls, Montana. They separated again in the Spring of 2014 and revised their Parenting Plan by Stipulation on July 7, 2014. (Doc. 11).

Robyn was forced to file a Motion for Civil No Contact Order on October 10, 2014, in response to Patrick's escalating and abusive behavior. (Doc. 15). The Civil No Contact Order was entered on November 12, 2014. (Doc. 19). It required the parties to communicate exclusively via Our Family Wizard, except in case of an emergency. *Id.* An Order of Protection was entered in Cascade County on April 17, 2015, which addressed Patrick's threatening and abusive communications, as well as his threatening and erratic behavior during parenting exchanges of MZR.

On March 18, 2016, Robyn filed a Motion for Ex Parte Parenting Plan and supporting Affidavit detailing Patrick's continued threatening and abusive behavior. (Docs. 24, 25). The parties' Parenting Plan was amended on an emergency basis on March 18, 2016 to address Patrick's continued threatening conduct. (Doc. 26). Patrick failed to adhere to the Civil No Contact Order and it was converted to an Order of Protection in Missoula County in 2016.

In open court on March 26, 2016, the parties agreed to a Parenting Evaluation by Sarah Baxter, PhD. (Doc. 28). At the time of this hearing, Patrick was represented by counsel. On April 1, 2016, the Court entered an Order Amending Parenting Plan and Ordering Parenting Evaluation. (Doc. 29). Additional evidence of Patrick's

continued threatening behavior is also detailed in Robyn's Motion and Brief to Amend Parenting Plan to reflect her pending move at the time to Helena, Montana. (Doc. 29.1).

Dr. Baxter completed her evaluation and provided it to the parties. (Doc. 39, Exhibit A). The parties subsequently stipulated to a Parenting Plan which adopted Dr. Baxter's recommendations. (Doc. 52). Dr. Baxter required Patrick to engage in individual therapy with a focus on "emotional regulation improving his judgment about coparent communications and on learning to compromise and communicate more appropriately." (Doc. 39, Exhibit A). Patrick's visitation with MZR was expressly contingent upon full engagement in this process. Dr. Baxter specified that a move towards supervised visits would take place if Patrick could not control his expressed anger. *Id.*

Patrick was extremely angry at Dr. Baxter's report and recommendations and began harassing her by calling incessantly late at night and leaving abusive voicemails. Dr. Baxter obtained an Order of Protection against Patrick on September 20, 2016. (*See* Montana Fourth Judicial District Court, Missoula County, Cause No. DR-16-720). Patrick's unhappiness with Dr. Baxter's report is also reflected in his Response to Adopt PP Eval Recommendations, for Order Approving Petitioner's Proposed Final PP & of Appointment of Guardian Ad Litem. (Doc. 40).

In response to Dr. Baxter’s recommendations, by Stipulation dated December 19, 2016, the parties agreed to engage Ric McLeod as a Guardian Ad Litem. (Doc. 76). Mr. McLeod’s report found that Patrick “is abusive in his communications and [McLeod] highly suspect[ed] that he is and will be with MZR. His behavior needs to be closely monitored.” McLeod further described Patrick as “antagonistic” and “demeaning” towards Robyn. (Doc. 78, Exhibit A).

On June 1, 2017, after reviewing the Guardian Ad Litem’s report and the parties’ Our Family Wizard communications, the District Court ordered that the Our Family Wizard communications be suspended. (Doc. 80). The Court properly found the suspension of communications was appropriate. *Id.* The Order of Protection was made permanent through the minority of MZR and full custody of the minor child was granted to Robyn with no visitation from Patrick. *Id.*

After the Permanent Order of Protection was entered, Patrick continued to engage in extremely abusive behavior. Both Judge Gregory G. Pinski and Patrick’s former counsel, Meghan Lulf Sutton, obtained Orders of Protection against Patrick. (Doc. 69.1; Doc. 89, Exhibit A).¹ Patrick was jailed for violation of the Order of Protection obtained by Judge Pinski.

¹ Attorney Meghan Lulf Sutton’s Order of Protection against Patrick can be found in the Justice Court of Record for the City of Great Falls, County of Cascade, under Cause No. CV-265-2018-760-OP. Hon. Judge Gregory G. Pinski’s Order of Protection against Patrick can be found in the Montana Eighth Judicial District Court, Cascade County, Cause No. BDV-16-800.

On August 2, 2017, Patrick filed a document entitled “Change of Current Family Plan Status.” (Doc. 82). Robyn timely filed her objection and on August 22, 2017, this Court responded to Patrick’s filing, finding that Patrick had not demonstrated any change in his behavior. (Doc. 85). The Order also found that due to Patrick’s antagonistic and demeaning communication with court personnel, he was prohibited from communicating by telephone with the Court’s Judicial Aide and any Court staff, including the Clerk of Court. *Id.* Following entry of the Order suspending all communications with Robyn and MZN, Patrick filed several more *pro se* documents which were properly and summarily dismissed as vexatious. (*See, e.g.*, Docs. 82, 89, 92). On November 14, 2018, Patrick filed a Motion to Disqualify Judge Larson. (Doc. 112). Robyn timely objected. Judge Larson denied Patrick’s Motion, and in his Order referenced Patrick’s contacts with the Clerk of Court by telephone, which constituted new violations of the Court Order of August 22, 2017. (Doc. 116). His Order included an Affidavit from Deputy Clerk of Court Michael Evjen. *Id.*

However, on January 2, 2018, the District Court issued an order allowing Patrick written communications with his daughter through Robyn’s counsel. (Doc. 97). Robyn’s counsel was selected to facilitate this after MZR’s counselor refused to be the communications liaison. The Court reiterated to Patrick that for him to credibly seek to modify the Parenting Plan, he must first meet his burden of proof

and comply with the Court's various Orders and Dr. Baxter's recommendations, as well as the recommendations contained within the other ancillary Orders of Protection.

On November 6, 2019, Patrick was criminally charged with five (5) counts of violation of privacy in communications, relating to his continued abusive, vulgar, and threatening messages regarding this case. (*See* Montana Fourth Judicial District Court, Missoula County, Cause No. DC-19-632 and Doc. 81 for details of the messaging and conduct; *see also* Doc. 134). On July 26, 2020, Patrick was involved in a domestic violence incident involving Rebekka Martinez ("Rebekka"), the mother of his infant daughter. Rebekka obtained a Temporary Order of Protection against Patrick that extended through August 2021. (Doc. 132, Exhibit A, pp. 12-26).

After years of continuous abusive behavior and no evidence of improved behavior, Patrick sought an Order from the District Court allowing him to be permitted telephone, Facetime and/or Skype conversations with MZR. Patrick filed his Motion to Modify the Parenting Plan on September 2, 2020. (Doc. 128). Robyn promptly filed her objection to this Motion given her ongoing and legitimate safety concerns for both herself and MZR.

Robyn submitted a Status Report and Notice of Issue to the District Court on April 5, 2021. (Doc. 134). Three (3) exhibits were attached. Exhibit A contained

cards and letters dated December 19, 2020 and February 1, 2021 that Patrick sent directly to Robyn's address, a clear violation of the District Court's Order that all communications be sent through Robyn's counsel. Exhibit B contained communications from Patrick to MZR that violated the District Court's Orders by discussing inappropriate themes, such as the ongoing litigation and Patrick's unfounded criticisms of Robyn, the undersigned and Judge Larson. Exhibit C was a call log showing that Patrick had contacted Robyn's mother. The Status Report also referenced Patrick's guilty plea for two (2) counts of violations of privacy in communications, a bench trial finding that Patrick was guilty of two (2) counts of felony violations of privacy in communications, Patrick's charge for intentional assault pending from a physical altercation with the mother of his other daughter, and another new Order of Protection obtained against Patrick. Patrick's continued volatile and abusive behavior is evident.

On August 30, 2021, Judge Larson properly denied Patrick's Motion to Amend the Parenting Plan without an evidentiary hearing because Patrick failed to sufficiently explain how circumstances had changed since the Plan now in effect was adopted. (Doc. 137). Judge Larson's Order cited Patrick's violations of multiple Court Orders, criminal charges and convictions, and the new Order of Protection, all of which demonstrate Patrick is still unstable and unsafe. *Id.* Given Patrick's continued misbehavior, Judge Larson was unable to find a change in circumstance

that would warrant granting Patrick additional communications, nor was he presented with any credible evidence that additional communications would be in MZR's best interests.

STANDARD OF REVIEW

Mont. Code Ann. § 40-4-219 (2021), governs the amendment of a prior parenting plan. This Court reviews Judge Larson's Order amending the prior parenting plan to determine if his findings are clearly erroneous. *In re G.M.O.*, 2017 MT 116, ¶ 8, 387 Mont. 390, 394 P.3d 913. A finding is clearly erroneous if not supported by substantial evidence, if Judge Larson misapprehended the effect of evidence, or if this Court's review convinces it he made a mistake. *Patton v. Patton*, 2015 MT 7, ¶ 18, 378 Mont. 22, 340 P.3d 1242. A District Court has broad discretion when considering the parenting of a child, and it is presumed the District Court carefully considered the evidence and made the correct decision. *In re G.M.N.*, 2019 MT 18, ¶ 11, 394 Mont. 112, 433 P.3d 715.

Absent clearly erroneous findings, this Court must affirm unless an abuse of discretion is identified. *Jacobsen v. Thomas*, 2006 MT 212, ¶ 13, 333 Mont. 323, 142 P.3d 859. The test is whether Judge Larson acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in a substantial injustice. *Id.*

Judge Larson's Order amending the existing Parenting Plan and his subsequent denial of Patrick's Motion to Modify are reviewed for an abuse of discretion. *In re C.J.*, 2016 MT 93, ¶ 12, 383 Mont. 197, 369 P.3d 1028.

SUMMARY OF ARGUMENT

Patrick's Opening Brief attempts to paint a picture that he was wrongfully thwarted by the judicial system despite his earnest efforts to improve his behavior and become emotionally stable. However, the record speaks for itself. The truth is that Patrick has simply not engaged in continuous meaningful treatment nor submitted any evidence to prove he is now a safe and stable parent. Both of Judge Larson's Orders were supported by sufficient findings of facts and complied with statutory requirements and due process.

On May 5, 2017, Robyn submitted a Request for Status Conference which contained evidence of Patrick's worsening behavior. (Doc. 78). The contents of the Request for Status Conference were reasonably calculated to put Patrick on notice that his communications with MZR were at stake. *Id.* The filing also served as sufficient evidence of a change in circumstance that impacted MZR's best interests. Judge Larson properly amended the Parenting Plan pursuant to Mont. Code Ann. § 40-4-219. *Id.* Judge Larson's June 1, 2017 Order made findings of fact sufficient for this Court to determine whether the court considered the statutory factors and made its ruling on the basis of the child's best interests. (Doc. 80). Judge Larson was not

required to hold a hearing because his Order was based on sufficient findings of facts and complied with Mont. Code Ann. § 40-4-219. Judge Larson's June 1, 2017 Order should be affirmed as there is no clear error.

Judge Larson's August 30, 2021 Order denying Patrick's Motion to Modify (Doc. 137) similarly did not violate Patrick's due process right to be heard because he was not entitled to relief. To be entitled to a hearing, the moving party must meet a heavy burden to prove a change in circumstance and that a modification is necessary to serve in the best interests of the child. Patrick's Motion and Affidavit provided incomplete, insufficient, and outdated evidence of his engagement in treatment. (Docs. 128, 129, 130).

Robyn's Response to Patrick's Motion supplied the court with credible evidence of Patrick's worsening behavior, including new criminal charges and violations of Court Orders. (Doc. 132). Judge Larson weighed each party's evidence and correctly found that Patrick did not meet the heavy burden to show a change in circumstance. Under Mont. Code Ann. § 40-4-220, the court is required to dismiss a motion to modify unless the moving party proves a change in circumstance and that a modification is necessary to best serve the child. Patrick did not meet the burden, and therefore Judge Larson was required to dismiss the Motion without a hearing. Patrick's right to a hearing and the possibility of increased communication with his daughter remain open when he decides to meaningfully engage in treatment

for his abusive and uncontrolled behavior. Judge Larson correctly denied the Motion and his Order should be affirmed.

ARGUMENT

I. Judge Larson's June 1, 2017 Order suspending Patrick's communication with the parties' minor child was proper.

A. Robyn's May 5, 2017 Request for Status Conference provided sufficient notice to comport with due process.

To comport with due process, notice must be reasonably calculated, under all circumstances, to inform parties of proceedings which may directly affect their legally protected interests. *Mont. Power Co. v. Public Service Comm'n*, 206 Mont. 359, 368, 671 P.2d 604, 609 (1983); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950). Due process is a flexible concept and should be tailored to the circumstances of each case in a manner that meets the needs and protects the interests of the parties involved. *Pickens v. Shelton-Thompson*, 2000 MT 131, ¶ 15, 300 Mont. 16, 3 P.3d 603.

Patrick claims his due process right was violated because he did not receive notice that would reasonably inform him of proceedings which may directly or adversely affect his legal interests. (Appellant's Opening Brief, page 10). His claim that he did not receive notice that would reasonably inform him of a change in custody is not supported by the record. Patrick received Robyn's May 5, 2017

Request for Status Conference via Certified U.S. Mail at his Reno, Nevada address. (Doc. 78).

The contents of Robyn's Request were not ambiguous. The Request included two attached exhibits. The Guardian Ad Litem's report detailing concerns about Patrick's communication and unwillingness to change was attached as Exhibit A. Exhibit B contained numerous abusive messages from Patrick to Robyn on Our Family Wizard. Given the type of filing and the contents of the exhibits, it is clear Robyn was concerned by Patrick's communication and seeking court intervention. The contents of the Request were reasonably calculated to put Patrick on notice that his communication with MZR was at stake.

Patrick's Opening Brief cites *Steab v. Luna*, 2010 MT 125, 356 Mont. 372, 233 P.3d 351, to support his argument that he was not given reasonable notice that his communication with MZR could be suspended. His reliance is misplaced due to material factual differences.

Steab is procedurally and factually more complex than the present case. In *Steab*, the father, John, filed an emergency motion requesting temporary custody of the child after allegations of sexual abuse occurring in the mother, Launa's, home. *Id.*, ¶ 7. John's motion failed to include a detective's exculpatory report. *Id.* Upon reviewing the detective's report, the Court granted Launa's motion for immediate rescission of the ex parte emergency order. *Id.*, ¶ 8.

The parties then stipulated to Dr. Walker conducting a parental evaluation. The evaluation affirmed that Launa should be the primary custodian, but that John should be granted more parenting time. *Id.*, ¶ 9. Based on these findings, John proposed modifications to the parenting plan that fully incorporated Dr. Walker’s recommendations. *Id.* John then requested a hearing on said modifications. *Id.*

At the hearing, John submitted his proposed findings of fact, conclusions of law and parenting plan, and stated that he was requesting a “switch in primary custodial parents from mother to father and to protect [K.S.] from the potential of more sexual abuse[,] based on the recommendations of Donna Hale.” *Id.*, ¶ 12. Launa was blindsided by John requesting a completely different modification than he had suggested in his request for the hearing. John’s counsel admitted that the first time a change of custody had been suggested was within the findings of fact submitted that day. *Id.*, ¶ 14. This Court found that Launa was deprived proper notice or opportunity because of John’s unexpected changes. *Id.*, ¶ 25. Launa was unable to adequately prepare for the hearing given the changes and therefore unable to meaningfully present her case.

Here, Patrick was not disadvantaged by surprise like Launa. Robyn sent a Request for Status Conference based on Patrick’s inappropriate communication. Judge Larson issued an Order to serve MZR’s best interests based on Patrick’s inappropriate communication. (Doc. 80). Robyn never changed her position nor did

she present new facts. Patrick was never deprived of notice that his communication with MZR was at stake.

Patrick also suggests that he was not given reasonable notice that his communication with MZR could be suspended because neither Robyn's Request for Status Conference nor the Guardian Ad Litem's Report recommended a change in visitation. (Appellant's Opening Brief, page 12). He characterizes Judge Larson's decision as *sua sponte*, yet Robyn's intent is clear in her filing. In the interest of preventing unnecessary litigation that would ultimately harm MZR, Robyn asks this Court to recognize that her desire to limit Patrick's communication with MZR was implicit in her Request.

Regarding the Guardian Ad Litem's Report, a District Court is not required to adopt and follow all recommendations of a guardian ad litem, and district courts are entitled to evaluate testimony and report and adopt recommendations it determines to be in child's best interests. *In re Marriage of Solem*, 2020 MT 141, ¶ 23, 400 Mont. 186, 464 P.3d 981. The fact remains that the contents of the Request were reasonably calculated to put Patrick on notice regarding his communication. Further, the text of Mont. Code. Ann. § 40-4-219 does not bind judges to act within the recommendations of a party or the guardian ad litem. The statute grants the judge the authority to modify the plan as they see fit to serve the best interests of the child if they are presented with new or unknown facts. The Guardian Ad Litem's opinion

on visitation is not controlling and therefore a deviation from it does not implicate due process notice requirements.

B. Judge Larson's June 1, 2017 Order was supported by sufficient evidence to show a change in circumstances occurred and that a modification was necessary to support the best interests of the parties' minor child.

Mont. Code Ann. § 40-4-219 allows the courts to determine whether the parenting plan is in accordance with the best interests of the child. The court must consider all relevant parenting factors, which may include, but are not limited to: the wishes of the child; the wishes of the child's parents; the mental and physical health of all individuals involved; continuity and stability of care; and the developmental needs of the child. Mont. Code Ann. § 40-4-212.

Pursuant to Mont. Code. Ann. § 40-4-219, the court may amend the 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 interests of the child.

Although specific findings as to each statutory best interests factor are not necessary, the court must set forth the essential and determining facts upon which its conclusions rest when modifying a parenting plan. Mont. Code Ann. § 40-4-212, § 40-4-219. *See also In re Marriage of Lawrence*, 2005 MT 125, 327 Mont. 209 112 P.3d 1036. Further, courts are not required to use statutory language in the

findings and conclusions if substantial change in circumstances that affect the child are implicit. *Jacobsen v. Thomas*, 2006 MT 212, ¶ 43, 323 Mont. 183 100 P.3d 106.

Patrick next claims that Judge Larson's Order "failed to make any findings with respect to what was in MZR's best interest." (Appellant's Opening Brief, page 14). Patrick likens Judge Larson's Order to the District Court order in *Jacobsen v. Thomas*. In *Jacobsen*, this Court reversed the District Court because it "did not take any testimony, receive any evidence or hear any arguments." *Id.*, ¶ 15.

Here, Judge Larson made sufficient findings. Patrick's increasingly aggressive behavior showed there was a circumstance impacting MZR. Judge Larson attached Patrick's appalling messages from Our Family Wizard to his Order as evidence. (Doc. 80). The substantial change in circumstances that affects the child is implicitly clear. Judge Larson was not required to use statutory language when Patrick's messages clearly demonstrate instability and abusive behavior. Patrick's messages to Robyn included, but certainly were not limited to:

- "Although I do think it'd be good for you to go ahead and admit that you are a cantankerous miserable person. Then you could potentially start working on improvement to becoming a better person. Seriously, you need help, therapy and a role model. I don't know how you function everyday being such a miserable person. So with that said, if I did say that to my daughter. Which I didn't. Would you prefer me bold faced lying to her and tell her you're a good person and a good mom? Because you're not." (Doc. 80, p. 3).
- "I want to be very clear that I think you are a miserable person who's going to end up getting someone disbarred." (Doc 80, p. 4).

- “I say this with all seriousness. Just so you are abundantly clear on my thought about you. I sincerely hope you get cancer.” (Doc. 80, p. 5).
- “And you think I ever cared what you thought. You manipulated the system. Ric will withdraw. As he should have in the first place. His bias report will be thrown out. I [*sic*] going to take everyone that professionally helped you along the way and I am going to burn the village.” (Doc. 80, p. 12).

These messages spoke for themselves when Judge Larson considered MZR’s best interests through “the mental and physical health of all individuals involved.” Mont. Code Ann. § 40-4-212(1)(e).

In addition to the messages, Judge Larson’s Order includes the Guardian Ad Litem’s Report. (Doc. 80, pp. 14-16). The report characterized Patrick as potentially psychologically and emotionally dangerous to MZR, antagonistic, abusive, and having no interest in changing his behavior. *Id.* Judge Larson considered the Guardian Ad Litem’s prediction that Patrick would send similar messages to MZR if she were to upset Patrick. Again, the incorporation of the Guardian Ad Litem’s Report to the Order implies the change in circumstance and negative impact on MZR.

While Patrick persists in characterizing the Order as a baseless whim, Judge Larson relied on ample evidence to justify the modification to the prior Parenting Plan. Judge Larson did not act arbitrarily or misapprehended the evidence. There is no clear error, nor any abuse of discretion. Judge Larson’s Order should be affirmed.

C. Judge Larson’s June 1, 2017 Order was based on sufficient facts, therefore Patrick was not entitled to a hearing and his due process right to be heard was not violated.

Parties are not guaranteed a hearing on modifications of parenting plans in all cases. *In re C.M.R.*, 2016 MT 120, 383 Mont. 398, 372 P.3d 1275. As discussed above, courts are empowered to amend parenting plans in accordance with the best interests of the child. Mont. Code Ann. § 40-4-212(1). The court must consider all relevant parenting factors in determining whether parenting time is in the child’s best interest. *Id.*

A hearing is not required when the facts are not in dispute, the court follows adequate procedure, and the parties receive proper notice. *In re C.M.R.*, ¶ 22. To follow procedure and notice, this Court requires that the District Court make findings of fact sufficient for this Court to determine whether the District Court considered the statutory factors and made its ruling on the basis of the child’s best interest. *Woerner v. Woerner*, 2014 MT 134, ¶ 15, 375 Mont. 153, 325 P.3d 1244 (citing *Jacobsen v. Thomas*, 2006 MT 212, ¶ 16, 333 Mont. 323, 142 P.3d 859). This requirement finds its roots in § 40-4-219(1), M.C.A., which provides that a District Court “may in its discretion amend a prior parenting plan *if it finds, upon the basis of facts* ... that the amendment is necessary to serve the best interests of the child.” (emphasis supplied).

In *Brown v. Brown*, 2016 MT 299, 385 Mont. 369, 384 P.3d 476, this Honorable Court held that the District Court did not abuse its discretion in denying the father's motion to amend the parenting plan without first holding an evidentiary hearing because he failed to sufficiently explain how circumstances had changed since the original parenting plan. This Court noted that the applicable statutes impose a burden on the parent seeking an amendment to show, through affidavits submitted with the motion to amend, facts that were unknown to the District Court when the parenting plan was adopted or that have since arisen and that necessitate amendment of the parenting plan. *Brown*, ¶ 19. See also *Newman v. Newman (In re R.J.N.)*, 2017 MT 249, 389 Mont. 68, 403 P.3d 675 (affirming the district court's dismissal of the mother's petition for parenting time modification as legally correct because the mother's pleadings failed to demonstrate a change in circumstances pursuant to § 40-4-219, M.C.A.).

Patrick's due process right to be heard was not violated when Judge Larson made his ruling without a hearing. As discussed in the previous two subsections, Patrick received proper notice and Judge Larson relied on sufficient findings of facts. While Patrick may not like the Guardian Ad Litem's Report, it was not in dispute. Neither were the messages he sent. Judge Larson followed the correct procedure and wrote an order that allows this Court to see he considered the statutory factors and acted in MZR's best interest. Judge Larson's Order cited to Patrick's inappropriate

communication with MZR and Robyn and the Guardian Ad Litem's prediction he would act violently toward MZR. (Doc. 80). A hearing was not guaranteed or necessary because Judge Larson had sufficient facts. Judge Larson's Order should be affirmed.

II. Judge Larson's August 30, 2021 Order denying Patrick's Motion to Modify Current Parenting Order was proper because Patrick did not meet the burden of proof that would entitle him to a hearing.

Under Mont. Code Ann. § 40-4-220, the moving party seeking an amendment to the existing parenting plan "shall submit, together with the moving papers, an affidavit setting forth facts supporting the requested plan or amendment and shall give notice, together with a copy of the affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, based on the best interests of the child."

Patrick claims the harm of the June 1, 2017 Order was compounded when he was denied a hearing on his Motion to Modify Current Parenting Order on August 30, 2021. (Appellant's Opening Brief, page 15). However, Patrick was never entitled to a hearing based on Judge Larson's statutory obligations. Under Mont. Code Ann. § 40-4-220, the presumption is that the District Court *shall deny* a motion to amend a prior parenting plan *unless* it finds that adequate cause for hearing the motion is established by the affidavits, based on the best interests of the child.

As explained above, Mont. Code Ann. § 40-4-219 grants courts the authority to modify prior parenting plans upon a showing of changed circumstances and that an amendment is necessary to serve the best interests of the child.

The finding of changed circumstances is a jurisdictional prerequisite, and without such a finding, a District Court may not modify an existing custody arrangement. *In re Marriage of Oehlke*, 2002 MT 79, ¶ 12, 309 Mont. 254, 46 P.3d 49 (citing *In re Marriage of Syverson* 281 Mont. 1, 16-17, 20, 931 P.2d 691, 701, 702 (1997) (citing *In re Marriage of Johnson*, 266 Mont. 158, 166, 879 P.2d, 689, 694 (1994)); *In re Marriage of Boyer* 274 Mont. 282, 286, 908 P.2d 665, 667 (1995) (“...[A] party seeking to modify a parenting plan pursuant to § 40-4-219, MCA, carries a heavy burden of proof.”). *See also In re Marriage of Gallagher* 266 Mont. 358, 361-62, 880 P.2d 1303, 1306 (1994) (citing *Johnson*, 266 Mont. at 166, 879 P.2d at 694); *In re Besette*, 2019 MT 35 ¶ 19, 294 Mont 262, 434 P.3d 894 (citing *In re R.J.N.*, 2017 MT 249, ¶ 9, 389 Mont. 68, 403 P.3d 675). The exacting procedural and substantive requirements of these statutes “promote[] stability” for children and discourage “unnecessary litigation over parenting plans.” *In re Besette*, ¶ 19.

Brown v. Brown is relevant and controlling. In *Brown*, this Court found the trial court was not required to hold an evidentiary hearing before denying the former husband’s motion to amend the parenting plan. *Id.*, ¶ 22. The trial court’s decision was upheld because the father’s affidavit attached to his motion to amend the

parenting plan did not contain facts that were unknown to the court when the parenting plan was adopted or that have since arisen and that necessitate amendment of the parenting plan. *Id.* The change in circumstance the father suggested was already considered by the plan in place. *Id.* Therefore, under Mont. Code Ann. § 40-4-220, the father was not entitled to an evidentiary hearing and his request was properly denied.

Like *Brown*, Patrick did not meet his “heavy burden” to prove that there has been a change of circumstances or that amending the plan to allow telephone, Facetime, or Skype communication would serve in MZR’s best interests at this time. In his Motion to Modify, Patrick referenced outdated and incomplete evidence in an attempt to show he complied with Dr. Baxter’s recommendations. (Doc. 128). Without a showing of changed circumstances, Judge Larson’s denial was appropriate and should be upheld.

Each of Patrick and Robyn’s arguments for changed circumstance are discussed in turn.

A. Patrick’s evidence of successfully completing an anger management course was outdated and proven ineffective.

In his Opening Brief, Patrick contends that his violation of Court Orders to not contact MZR directly is irrelevant because it occurred over 8 months ago. (Appellant’s Opening Brief, page 17). However, he found it appropriate to reference entirely outdated information, in most cases 2-3 years old, in his support of his

Motion to Modify Current Parenting Plan. (Docs. 128, 129, 130). Patrick submitted an Anger Management Course Certificate of Completion from The Logan Group, Intl. Patrick's certificate is dated February 4, 2017. (Docs. 73, 130).

As outlined throughout this brief, Patrick has demonstrated a clear and consistent history of being incapable of controlling his behavior since February of 2017. This fact is evidenced by his new criminal charges, new Orders of Protections, and violations of Court Orders since 2017. (Doc. 132). Patrick's behavior since 2017 shows that his anger management course was ineffective and there has been no meaningful change in circumstance. Judge Larson was justified in not finding this evidence sufficient to prove a change in circumstance.

B. Patrick's evidence that he engaged in mental health care was sporadic and incomplete.

In his Notice to Court and Motion to Set Hearing dated August 22, 2018, Patrick submitted a mental health evaluation from April 11, 2018. (Doc. 103). The evaluation recommended that Patrick follow up with a psychologist and maintain medication management with a psychiatrist.

On September 4, 2018, Robyn served Patrick her First Combined Discovery Requests. (Doc. 105). These discovery requests sought information regarding Patrick's on-going psychological and psychiatric treatment. Patrick objected to the production of most of the requested information. (Doc. 132, Exhibit C). A follow up letter was sent to Respondent's counsel of record at the time, Bradley J. Jones, on

October 11, 2018. (Doc. 132, Exhibit D). No follow up response was ever received. Mr. Jones withdrew as Patrick's counsel of record a few days later due to Patrick being "unwilling to heed the advice of his counsel." (Docs. 109, 110).

Judge Larson had no way of knowing whether Patrick's representations regarding his mental health treatment and adherence to the past recommendations he was given were truthful. At best, it appeared his adherence to recommendations was sporadic, and his conduct clearly demonstrated that he was not gathering information to assist in controlling himself to engage in safe parenting or communication. There was also no information that Patrick provided a copy of all pleadings in the corresponding cases to any of his treatment providers as was required. Again, the incomplete records did not meet the heavy burden to show a change in circumstance.

C. Patrick's evidence that he engaged in active counseling was insufficient.

Patrick submitted an Initial Evaluation from Dr. Christopher Charles from Psychiatry and Wellness in Reno, Nevada dated January 20, 2017. (Doc. 126, pp. 8-10). Dr. Charles' treatment plan included a Wellbutrin prescription and psychotherapy, among other recommendations. *Id.*

In November 2017, Patrick also represented that he was treating with Dr. Angie Charter Smith in Reno, Nevada. In his November 27, 2017 Motion to Send Updated Information and Request Status Update (Doc. 92), Patrick provided a letter dated November 11, 2017, in which Dr. Charter Smith states that Patrick was, in her

professional opinion, “at an intermediate stage of reaching the treatment goals as identified in the custody recommendations written by Sara Baxter.” *Id.*

In his October 31, 2019 Change in Family Status Plan (Doc. 122), Patrick represented that he was seeking the professional advice of Dr. Doug Malm, PsyD, LPC of Psychotherapy Innovations, PLC in Phoenix, Arizona. In his February 27, 2020 Re: Requested and Completed Court Orders (Doc. 126), Patrick represented that he has continuously attended therapy sessions since 2016 with Dr. Doug Malm and Dr. Julius Rogina, and provided letters from Dr. Malm dated October 19, 2020 and Dr. Rogina dated August 13, 2018 as verification of this treatment. Those letters did not indicate whether Patrick has consistently attended treatment nor did they demonstrate whether his providers have been provided copies of the pleadings in the corresponding cases as ordered.

Patrick refused to supplement his discovery responses with the documentation requested in order to verify that he was, in fact, actively participating in mental health treatment and following the recommendations of his individual therapists. Again, Patrick failed to meet his burden of proof and Judge Larson was justified in not finding a change in circumstance.

D. Robyn’s evidence that Patrick continued to engage in inappropriate parenting contact in violation of Court Orders was sufficient.

When Patrick filed his Motion to Modify Current Parenting Plan (Doc. 128), undersigned counsel had received a number of different cards or packages from

Patrick to MZR. Many of the cards contained direct and indirect references to the many court matters surrounding Patrick. Copies of these cards were attached as exhibits in Robyn's Response to Motion to Modify Current Parenting Plan. (Doc. 132, Exhibit G). Patrick's written communications with MZR were inappropriate and demonstrate his clear inability to separate his anger issues from his parenting responsibilities. In addition, Patrick continued to send letters directly to MZR in violation of Court Orders.

Patrick's written communication did not demonstrate that his ability to appropriately communicate with the parties' minor child had improved or changed. Based on this evidence, Judge Larson had reason to deny Patrick's request for more frequent and less restrictive communication.

E. Robyn's evidence that Patrick continued to engage in criminal behavior was sufficient.

In his Opening Brief, Patrick describes the Court's expectations as a "moving target." (Appellant's Opening Brief, page 17). Patrick feigns disbelief that new charges against him would indicate he was not in control of his behavior. When Patrick submitted his Motion to Modify (Doc. 128), he was facing criminal charges, probation violations, and new and extended Orders of Protections. Patrick's argument that it is unfair for the Court to consider his new criminal charges because criminal activity was not specifically prohibited in the Parenting Plan cannot be

sincere. This response is yet another example of Patrick showing his inability to take responsibility for his actions.

This Court has found that evidence of criminal conviction that could indicate possible future harm to a child is sufficient evidence to modify a parenting plan. *In re Marriage of Starks*, 259 Mont. 138, 855 P.2d 527 (1993). In *Starks*, the trial court found that change in circumstances necessitated modification of custody of the child, CS, from mother to father. *Id.*, 259 Mont. at 143, 855 P.2d at 530. The Court's decision was made to protect CS's wellbeing and was supported by substantial evidence. *Id.* The Court reviewed the mother's new partner's child molestation conviction and the fact that he had not been incarcerated as a result of the conviction. *Id.* The Court found that the potential existed for recurring contact between CS and the mother's new partner because the partner had visitation rights to the child, who lived with the mother and CS. *Id.*, 259 Mont at 143, 855 P.2d at 531. The potential for harmful contact to CS justified the court's decision to modify the parenting plan. *Id.*

While Robyn did not ask for a modification, *Starks* further supports her argument that Patrick's Motion to Modify was correctly denied. (Doc. 137). Like the father in *Starks*, Robyn submitted sufficient evidence of criminal behavior that could impact her child. In her Response to Patrick's Motion, Robyn included evidence of Patrick assaulting the mother of his other daughter in front of the child.

(Doc. 132, Exhibit A). This showed Patrick would be similarly capable of harming MZR.

Patrick's continued pattern of abuse towards his partners and children was additional evidence to show that Patrick had not made improvements. Patrick's continued criminal proceedings only proved that the circumstances and his behavior had worsened.

For the aforementioned reasons, this Court should affirm Judge Larson's decision that there has been no change in circumstances which would warrant an alteration of MZR's current contact with Patrick. Judge Larson's Order denying Patrick's Motion should be affirmed as there is no clear error.

CONCLUSION

There is no factual or legal basis to overturn any portion of Judge Larson's decisions. In 2017, Judge Larson followed statutory requirements, reviewed sufficient and credible evidence, and found that communication between Patrick and MZR was no longer in MZR's best interest. In 2018, Patrick was given leeway and allowed to communicate with MZR through written letters sent through counsel. Patrick again proved himself incapable of handling this privilege. He violated Court Orders by sending letters directly to MZR and continuing to mention court proceedings in his letters.

Despite these failings, in 2020, Patrick requested additional communication access to MZR. Judge Larson considered Patrick's violations regarding his written letters as well as numerous new criminal proceedings that clearly showed Patrick was not in control of his aggression. Without any other legitimate or relevant evidence of changed circumstance, Judge Larson appropriately denied the Motion to Modify.

Patrick is not a victim to an unfair system - he has simply not put in sufficient effort to make himself a safe parent. He refuses to take responsibility for his actions and instead blames Robyn, the court system and counsel for the position he finds himself in. Patrick remains entitled to a hearing when he can prove he has made meaningful progress to change his circumstances. Robyn respectfully asks this Court to uphold and affirm Judge Larson's decisions.

DATED this 12th day of January, 2022.

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By: /s/ Molly K. Howard
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DATED this 12th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, except for quoted and indented material; and, the word count calculated by Microsoft Word for Windows is 7,307 words, excluding Table of Contents, Certificate of Service and Certificate of Compliance.

DATED this 12th day of January, 2022.

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Datsopoulos, MacDonald & Lind, P.C., hereby certify that I have filed a true and accurate copy of the foregoing with the Clerk of the Montana Supreme Court, and that true and accurate copies of the foregoing were served upon each attorney of record, as follows:

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