

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0307

IN RE THE MARRIAGE OF)
)
 JOSHUA ARNOLD BACON,)
)
 Petitioner/Appellant,)
)
 and)
)
 EMILY ANN BACON,)
)
 Respondent/Appellee.)
)
)

APPELLANT’S OPENING BRIEF

On appeal from the Montana First Judicial District Court, Lewis and Clark County,
 the Honorable Christopher D. Abbott, Residing
 District Court Cause No. DDR 2021-141

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err when it determined it was in the children's best interests to amend the Interim Parenting Plan only six weeks in advance of trial, allowing Emily to move to Utah from Montana, the only home the children had ever known?
2. Did the District Court err by entering a final Parenting Plan where Emily and the children lived in the basement of a home in Utah which was owned and occupied by Emily's step father, who was accused of sexual abuse by his biological daughter while she was a minor?
3. Do the Findings of Fact, Conclusions of Law and Decree of Dissolution provide for an equitable division of the parties' assets and obligations?

STATEMENT OF THE CASE

This is a marriage dissolution case involving two minor children, MB, born in July of 2015, (currently age 7); and, LB, born in October of 2017, (currently age 5). All of their children's lives, the parties resided together in a home they owned in Helena until Joshua filed the Petition for Dissolution Marriage on March 19, 2021. [Doc. 1]

In May of 2021, the District Court conducted a hearing on Interim Parenting Plan. Emily's proposed Interim Parenting Plan was to move with the children to Utah and reside in the basement of her mother and step-father's home. [Doc.16] The Court adopted Joshua's proposed Interim Parenting Plan where they alternate parenting weekly with Emily staying in the family home and Joshua moving in with his parents, a short distance away. [Doc.28]

Less than a month before the December 10, 2021 scheduled Merits Hearing, the Court Emily filed her Ex Parte Motion to amend the Interim Parenting Plan to move the children to Utah with her. [Doc. 45] The District Court granted her motion. [Doc. 75]

Emily came back for the Merits Hearing after which the Court adopted Emily's proposal that the Final Parenting Plan with the children to living in the basement of, and be cared for by, Emily's step-father, who without response, was accused in open court of having molested his biological daughter years earlier. [Doc. 112]

STATEMENT OF RELEVANT FACTS

On March 19, 2021 Josh Bacon filed a Petition for Dissolution of Marriage because he became aware of Emily Bacon's plan to move to their

children to Utah, away from the only home they had ever known. (Affidavit of Joshua Bacon) [Doc. 5, 4:21-26]

Josh and Emily met in helicopter school eventually married and were both working as helicopter pilots for the same company in Helena when their oldest child MB was born in 2017. They rotated work shifts and parenting. While one parent worked, the other cared for MB.

In 2018, after r to LB's birth, both Emily and Joshua no longer had their Helena based pilot job because the company they worked for was acquired and merged. Their positions no longer existed. (Affidavit of Joshua Bacon) [Doc. 5, 2:21-3:3]

Joshua found employment as a helicopter pilot in Butte, working a week on and a week off, with all of his earnings being put into a joint account for payment of the family living expenses. Emily stayed home with the children and paid the family's bills after Joshua's check was put into the party's joint account. (Affidavit of Joshua Bacon) [Doc. 5, 4:21-26]

The parties' family home near Helena is on 5 acres across from Joshua's parent's (Garrett and Becky Bacon) residence, which was also on a five acre parcel.

Joshua filed his petition as he and Emily had not been getting along, He was living in the basement and she upstairs in the family home. Joshua
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became aware of Emily's plans to move the children to Utah and was concerned she would move with the children and take up residence with her mother and step-father in Utah without giving him notice. . (Affidavit of Joshua Bacon) [Doc. 5, 4:21-26]

Josh had moved out of the family home and in with his parents across the street, proposing an Interim Parenting Plan where each would parent the children on an alternating weekly schedule, with Emily living in the family home. Emily was not working and Joshua's week on and week off work schedule allowed them to equally co-parent their children on this alternating weekly basis. [Doc. 6]

Emily opposed Josh's proposed interim parenting plan and proposed an Interim Parenting Plan where she would move the children to Utah and reside in the basement of her mother and step father's home. [Doc. 16]

After a two (2) day hearing on May 3 and 6, 2021, the Court adopted Josh's interim parenting plan for an alternating weekly parenting schedule. [Doc. 28].

On September 9, 2021, the District Court entered a Domestic Relations Order setting the Merits Hearing of this matter for December 10, 2021. [Doc. 34]

Less than a month before the Dec. 10, 2021 scheduled Merits Hearing, on Friday, November 19, 2021, Emily filed her Ex Parte Emergency Motion to modify the Interim Parenting Plan to immediately allow her move the children to Utah before the Merits Hearing. [Doc. 45]

The Court granted Emily's motion to Amend the Interim Parenting Plan to move the children to Utah to reside in the basement of her mother and step father's residence.[Doc. 75] The basis for Emily's emergency motion to move the kids to Utah, and the Court's rationale for granting it, was that she had obtained a work-from-home job in Utah. [Doc. 47]

This Amended Interim Parenting Plan required that in the middle of the school year, MB was to be taken out of Helena Christian School where she was thriving and enrolled in school in Utah. It provided Joshua would parent one weekend per month required Emily to bring the children to Helena after school on Friday from Salt Lake City and return them to Salt Lake City on Sunday. [Doc. 75]

The Court entered its Order amending the Interim Parenting Plan allowing Emily to move the children to Utah. [Doc. 75] The next day, without notice to Joshua, Emily packed up all of the parties' belongings from the family home that she wanted, put them in a large trailer her brother brought from Utah, and drove back to Utah with the children.

Emily and the children moved in with her mother and step father in a suburb of Salt Lake City. (Affidavit of Joshua Bacon) [Doc. 58]

Emily returned from Utah for the Merits Hearing was held on Feb. 16 and 28, 2022. At this Merits Hearing Josh put on testimony and evidence of his support proper and positive hands-on parenting of the children, their network of family and friends in Helena and the Children's familiarity and comfort with living in Helena as it was the only place they have ever lived. [Feb. 16, 2022; TT Joshua Bacon]

At the Merits Hearing on Feb 16, 2022, Nicole Faigl testified that she is the biological daughter of Bruce Lemon, Emily's step-father. Ms. Faigl further testified that during her youth, Bruce Lemon systematically sexually abused her for years, starting near the age of MB, the parties' now seven (7) year old daughter. Faigl stated the only reason she was testifying at the Merits Hearing was to prevent Bruce Lemon from abusing the Bacon children as he had done to her. [Feb. 16, 2022; TT, Nicole Faigl]

This allegation of sexual and violent abuse by Bruce Lemon was confirmed by the Merits Hearing testimony of Joani Depiolia, who is Nicole Faigl's biological mother. Ms. Depiolia testified that after her divorce from Bruce Lemon, her attorney had sent a letter to Bruce Lemon's attorney documenting the fact that Bruce Lemon had been accused of child

molestation by Nicole Faigl, their biological daughter, and that he should stay away from her. [Feb. 16, 2022; TT, Joani Depiolia] [Admitted Exhibit 1]

Emily put on testimony of her work from home job while living with the children in her mother and step father's home and that Bruce Lemon would be alone from time to time with MB while caring for her. [Merits Hearing TT Emily Bacon]

Susan Anderson, LSCW, testified as an expert at the Feb. 16, 2022 Merits Hearing that she was made aware of the allegations of Bruce Lemon's sustained sexual abuse by his now adult biological daughter and that in her opinion without having had any treatment, Bruce lemon was more likely than not to re-offend w, and the Bacon Children should not be living in his home nor left alone with him. [Feb. 16, 2022; TT, Susan Anderson]

On May 24, 2022, the Court entered Findings of Fact, Conclusions of Law and Decree of Dissolution along with a final parenting plan whereby Emily remained the primary residential parent living in her mother and step-father's basement. [Doc. 112 & 113]

Even though Emily removed the bulk of the party's valuable personal property from the marital home during the pendency of the case, without

notice to Joshua nor Court authorization, the Court adopted her valuation without proof other than Emily's saying so. [Doc. 113]

After the parties separation Emily had possession of the parties Ford Taurus. Before the merits hearing, as a partial settlement of this case, Joshua paid Emily for her interest in this car which was undamaged in working condition. Prior to Emily returning the car to Joshua while in Emily's possession, vandalism damage was done to the car before she turned it to Joshua. The District Court abused its discretion by holding Emily was not responsible for the cost to repair all of the damage. [Doc. 113]

STANDARD OF REVIEW

The Supreme Court reviews a District Court's findings relating to custody modification to determine whether the findings are clearly erroneous. Findings are clearly erroneous if they are not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if the Supreme Court's review of the record indicates that a mistake has been made. *In re Marriage of Olson*, 2005 MT 111, 327 M 82, 111 P3d 686 (2005), followed in *In re Marriage of Lawrence*, 2005 MT 125, 327 M 209, 112 P3d 1036 (2005). See also *In re Marriage of Johnson*, 266

M 158, 879 P2d 689 (1994), and *In re Custody of Arneson-Nelson*, 2001 MT 242, 307 M 60, 36 P3d 874 (2001).

The standard for reviewing a District Court's division of marital property is that the District Court has acted arbitrarily or has committed a clear abuse of discretion, resulting in either instance in substantial injustice. The same standard was applied to review of a District Court's valuation of marital property, articulated in *In re Marriage of Hall*, 228 M 36, 740 P2d 684, 44 St. Rep. 1321 (1987), is that the Supreme Court will reverse a District Court only. *In re Marriage of Anderson*, 230 M 89, 748 P2d 469, 45 St. Rep. 40 (1988).

SUMMARY OF ARGUMENT

The District Court erred in amending the Interim Parenting Plan shortly before the Merits Hearing because it was not in the children's best interests to remove them from the only home, school and community they had ever known, only to have to move back to Helena if the Court so decided after a full hearing on the merits.

The Court erred by adopting a Final Parenting Plan that allowed the children to live in Emily's Step father, Bruce Lemon's basement after learning of sexual molestation allegations against him and the likelihood of his repeating this behavior against the Bacon children in the future.

The District Court acted arbitrarily and has committed a clear abuse of discretion in failing to have a sufficient foundation for valuation of the personal property Emily removed during the pendency of the litigation without court approval or notice to Joshua and for failing to properly value the damage to the vandalized car while in Emily's possession before returning it to Joshua.

ARGUMENT

ISSUE #1:

1. *Was it err to amend the Interim Parenting Plan a few months before a full hearing on the Merits to allow Emily to move to Utah from Montana?*

The District Court erred when it granted of Emily's emergency ex parte motion to amend the interim parenting plan. Allowing Emily to remove the children from the only life they had ever known in Helena and move to Utah prior to a full Merits Hearing is clearly erroneous because such a move is not in the children's best interests and is not supported by substantial evidence. A review of the record indicates that a mistake has been made by the District Court, based upon the best interest factors set forth in 40-4-219 and 40-4-212, MCA, respectively.

Emily's emergency motion was not about the children's best interests. Rather, about her. Emily stated she did not want to emotionally damage the children by moving but did so anyway. Emily's testimony was not based upon substantial credible evidence when she stated she has tried, but was not able to find employment in Helena. A review of the record indicates that a mistake has been made.

With the merits hearing only months away moving the children to Utah is not in their best interests and is not supported by substantial evidence. A review of the record indicates that a mistake has been made when the Court indicated its ruling on the amended Interim Parenting Plan would not affect its ruling after a full Merits Hearing. [Doc. 75] To put the children in the situation where they would potentially move to Utah and back in a matter of months is not in the children's best interests and is not supported by substantial evidence.

Emily's affidavit testimony that requiring the children to move back to Montana from Utah if a full Merits Hearing so indicated would be less of a disruption for the kids than if they stayed in school in Helena before the Merits hearing is not supported by substantial evidence. [Doc. 47] (Emily's Affidavit page 3, paragraph 10)

Emily's affidavit tells us this move is not about the children's best interests but rather is really about her personal self interests, stating:

"I have been offered a career path job ...; This job is perfectly ideal for me ...; If I am not present.. I will lose the offer of employment;" "I have been attempting asking to move back to Utah where I was born and raised, ...; "I was born and raised in Utah, so moving back there will be"going home" to me;" " I have a large support system their family and friends;" "I am asking the court to allow me to move to Utah;" "it's not an option for me to leave the children Helena while we wait for next court date, and while I moved to Utah so I can begin work..."

Regarding the emergency amendment, neither Emily's affidavit nor her brief takes into consideration of the parenting standards of 40-4-212, MCA. [Doc. 46 & 47] Thus, it was not possible for the Court to make the required finding pursuant to 40-4-220(2)(b), MCA, which states:

"If the court finds from the affidavits submitted by the moving party that the interim parenting plan proposed by the moving party would be in the child's best interest under the standards of 40-4-212 and that the child's present environment endangers the child's physical, mental, or emotional health and the child would be protected by the interim parenting plan, ..."

There was no factual basis to show that the children's present environment endangers their physical, mental, or emotional health and the children would be protected by uprooting them from the only home they have ever known. Without such a factual finding the Court had no legal

basis to allow Emily to move to Utah with the children at that time. Such order amending the Interim Parenting Plan is clearly erroneous because such a move is not in the children's best interests and is not supported by substantial evidence.

The children would be leaving grandma/grandpa Bacon who have been a bigger part of these children's lives than anyone else. MB was taken out of Helena Christian School where she was thriving it was not in her best interests for her to abruptly leave the home, community and school she knows and loves. [Interim Parenting Hearing, TT; Garrett Bacon May 3, 2021, 10:1-20: 25]

Emily's last minute move away emergency ex parte motion gave her the basis to argue at the Merits Hearing that the children have already moved to Utah and it would be disruptive to move them back to Helena, which is exactly what she did. This further shows the Court's Order was is clearly erroneous as such a move is not in the children's best interests nor is it supported by substantial evidence.

Emily did not follow the requirements of 40-4-217, MCA before filing her emergency motion to amend the interim parenting plan to allow her to move the children with her to Utah. That code section requires a parent

who intends to change residence shall, unless precluded under 40-4-234, provide written notice to the other parent. [Doc. 45]

The best interests of a child outweigh a parent's fundamental right to travel. *In re Marriage of Robison*, 2002 MT 207, 311 M 246, 53 P3d 1279 (2002). See also *In re Parenting of N.P. v. Perkins*, 2006 MT 10, 330 M 293, 127 P3d 1035 (2006).

Issue #2:

2. *Was the Final Parenting Plan in the children's best interests when it requires the children live in the basement Emily's step father's home, with knowledge he was accused of sexual abuse by his biological daughter while she was a minor?*

The District Court erred in adopting Emily's proposed final parenting plan allowing the children to continue to reside in the basement of Emily's step father who was accused in open court of previously sexually abusing his biological daughter. This is especially true given the undisputed testimony that Bruce Lemon would be alone caring for the parties' minor children coupled with the expert testimony of LCSW Susan Anderson that Bruce Lemon, is likely to repeat the same behavior. . [Feb. 16, 2022; TT, Susan Anderson]

This ruling is clearly erroneous as putting the children in this environment without any response by Bruce Lemon, who has not responded to the allegation of his biological daughter who testified under oath that he systematically abused her sexually for many years when she was a minor, commencing when about the same age as is MB, the parties seven (7) year old daughter. [Feb. 16, 2022; TT, Nicole Faigl]

A review of the record indicates that a mistake has been made by the District Court, based upon the best interest factors set forth in 40-4-219 and 40-4-212, MCA. There was a clear abuse of discretion and a mistake made by the District Court in applying the parenting factors of 40-4-212, MCA.

40-4-212 (1)(a) *The wishes of the child's parent or parents;*

Josh desires the children stay in Lewis and Clark County and that the parties continue to follow an equal parenting schedule with the exchange being on Thursday evenings at 6:00 pm. There are employment opportunities in Montana in Emily's chosen field for which she is trained, being a helicopter pilot.

Emily desires to move the children to Salt Lake City where they will all live in a small home with Emily's parents and sibling. Although Emily has testified to having a opportunity for employment in Salt Lake City,

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there has been no specifics nor details regarding such employment. We don't know if she has a job, and if she does, what hours it entails and who attends to the children's needs and stability of care.

Emily has not lived in Utah in over 20 years, has no friends or real job opportunities there. Emily's step dad has been accused of child molestation and not allowed to see his own kids.

Bruce Lemon has not responded to the accusations of sexually abusing his biological daughter when she was a minor but none-the-less is allowed to be alone around the parties' children on a regular basis.

A review of the record indicates that a mistake has been made by the District Court, based upon the best interest factors set forth in 40-4-219 and 40-4-212, MCA, respectively.

40-4-212 (1)(c) The interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who significantly affects the child's best interest;

All of their lives the children have had regular and ongoing loving interaction with each other and with both Emily and Josh. In addition, the children's paternal grandparents have been active in every aspect of the children's lives, all of their lives. This built in grand parent support gives the children a sense of security and confidence. They have become

accustomed to it. Removing the children from this close relationship with their paternal grandparents is not in their best interests.

40-4-212(1)(d) The children's adjustment to home, school, and community;

The parties oldest child, MAB was been enrolled in the Helena Christian School in East Helena has good friends at school and is well adjusted to it.

It is without question that both of the children have adjusted well to their home and community in East Helena as it is the only home and community they had ever known.

It is in their best interests that the children have quality parenting time with each of their parents and also have the benefit of continuing to reside and thrive in the only community and home they have ever known.

40-4-212(1)(e) The mental and physical health of all individuals involved;

There is a negative impact on the mental and physical health of all who are involved, with the change and upset in the children's lives by moving to Utah, which has shown not to be in their best interests. Both Emily and Joshua should be parenting the children on a regular basis allowing their routines to continue, which is beneficial to the children and

thus in their best interests. That does not occur with the Court's Final Parenting Plan.

40-4-212(1)(h), The children's continuity and stability of care;

Keeping both parents equally in the children's lives as is possible is beneficial to their continuity and stability of care. Emily's move of the children to Salt Lake City, 500 miles from the only home, community and people they have ever known, with virtually no details about their life in Utah, is not in their best interests.

40-4-212 (1)(i) The developmental needs of the children;

The children's developmental needs will be better met when they have both of their parents in their lives on a regular and frequent alternating weekly schedule. This is especially true when compared to the children seeing their father, grandparents, family and friends in Helena a few times a year and a few weeks during the summer.

40-4-212(1)(l) Whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests.

Regular, frequent, ongoing contact with both parents is in the children's best interests. Here, there is no factual basis nor reason to believe that contact with either parent would be detrimental to the children.

Emily has said that all of their lives the children have had long distance contact with Emily's parents and sister in Salt Lake City. Moving their children a long way from the only home they have ever known is not their best interests.

The District Court abused its discretion in failing to have a sufficient evidentiary foundation for valuation of the personal property Emily removed during the pendency of the litigation without notice nor court approval. The Court erred when finding its division of personal property was equitable. [Doc. 113]

It was an abuse of discretion to accept Emily's valuation, without substantial evidence, of the damage to the vandalized car while in Emily's possession before returning it to Joshua.

CONCLUSION

Based upon the foregoing, Joshua Bacon respectfully requests the Supreme Court to reinstate the intimal Interim Parenting Plan and remand to the District Court for a full Merits Hearing.

Dated this 18th Day of November 2022.

_____/s/_____
David B. Gallik, Attorney for Appellant,
Joshua Arnold Bacon

CERTIFICATE OF COMPLIANCE

This brief is proportionately spaced using Georgia typeface, 14 point size and has 4,208 words. This document was typed using WORD processing software and the information set forth herein was obtained from, and relied upon such software.

Dated this 18th day of November, 2022

_____/s/_____
David B. Gallik
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CERTIFICATE OF SERVICE

I hereby certify that I am over the age of 18 years, and not a party to the within action. My business address is 1124 Billings Avenue, Helena, MT 59601.

On the day set forth below, I served the ***Appellant's Opening Brief*** on interested parties in this action by email to the following individual(s):

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I declare under penalty of perjury that the foregoing is true and correct.

Dated this 18th day of November, 2022.

_____/s/_____
David B. Gallik
Attorney for Appellant, Joshua Arnold Bacon

CERTIFICATE OF SERVICE

I, David B. Gallik, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-18-2022:

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Electronically signed by Marigail Schreiner on behalf of David B. Gallik
Dated: 11-18-2022