IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CASE NO. DA22-0500

IN RE THE PARENTING OF:

H.R.H.-H.,
A minor child,

CULLEN JAMES HOSKIN

Petitioner/Appellant

and

ROBBYN LYRE HERGENRIDER,

Respondent/Appellee

RESPONSE BRIEF OF RESPONDENT/APPELLEE

On appeal from the Montana Thirteenth Judicial District Court
Yellowstone County, Cause No. DR21-0641
Honorable Ashley Harada presiding

APPEARANCES:

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STATEMENT OF THE CASE

Father appeals from evidentiary decisions made by the district court when adopting a final parenting plan and child support order. Following a three-day trial, where the district court heard testimony from 9 witnesses and considered 40 exhibits, the district court entered a twenty-page Findings of Fact and Conclusions of Law adopting a final parenting plan and child support order. (See Tr. 1, 2, 3, and Doc. 88.)[1]

Father has not challenged any of the district court's individual findings on appeal, but instead argues that the district court made erroneous evidentiary decisions and inappropriately considered evidence when adopting the final parenting plan and imputing income to him for child support purposes.

STATEMENT OF THE FACTS

A. Best Interest Factors

The parties were never married and have never resided together. (Doc. 88: 2.) Appellant, ("Cullen" or "Father") resides in Bridger, Montana and Appellee ("Robbyn" or "Mother") resides in Billings, Montana (Doc. 88: 2.) The minor child was born in January 2021. (Id.)

[1] Tr. refers to the Trial Transcript. Doc. refers to Documents in the District Court record.

Cullen expressed little interest in parenting during the child's first year of life. (Doc. 88: 2.) As of the last date of trial, Cullen had paid none of the birth-related expenses and he had failed to provide any child support, even unreimbursed medical expenses for the child. (Doc. 88:10.)

Cullen claimed that Robbyn had unreasonably limited his parenting time and had made parenting difficult for him. The district court questioned Cullen's credibility and found Cullen's claim unfounded. (Doc. 88:10-15.)

The district court found numerous reasons to doubt Cullen's credibility. First, the district court found that a journal Cullen had submitted as part of his discovery contained numerous inaccuracies and misleading information. (Doc. 88: 14-15.) Although Cullen claimed he was responsible for all journal entries, it appeared that entries in the document had been drafted by another person, albeit someone close to Cullen. (Tr. 187-86.) Cullen also provided the district court with a certificate that he completed a parenting course just days before the trial. (Doc. 88: 9.) When questioned, however, Cullen could not provide the district court with even minor details from the course. (Tr. 165-67.) This prompted the district court to ask Cullen whether he suffered from a "memory problem." (Tr. 186.) Finally, during his testimony at trial, Cullen admitted that multiple facts contained in an affidavit he had previously submitted under oath were not true. (Tr. 193-94.)

The district court's findings contradict Cullen's claim that Robbyn denied him parenting time. (Doc. 88: 10-15.) The district court's findings express in detail the extensive efforts made by Robbyn to provide Cullen with frequent and continuing parenting time. (*Id.*) The district court also found that Robbyn had provided parenting time consistent with the recommendations of an expert, Lorrine Burke, MMFT, LCPC, who had recommended a parenting schedule based on the developmental needs of the child. (Doc. 88: 8-9.)

The district court determined that Cullen had a distorted perception Robbyn was trying to withhold the minor child from him. (Doc. 88: 7.) The district court also noted that the parties and their extended families had significant ongoing conflict. (Id.) This made a positive co-parenting relationship impossible and supported awarding a primary residence for the child with Robbyn. (Doc. 88: 7-8.) The conflict also led the district court to limit third parties who could be around the child unsupervised by a parent. (Doc. 88: 7-8.) The district court entered findings on all factors contained in Mont. Code Ann. § 40-4-212 and adopted a parenting plan that was in the best interests of the minor child. (See Doc. 88.)

B. Calculation of Child Support

Cullen works very long hours as a self-employed farmer. (Doc. 88: 3-4.) Cullen's farming activity is extensive and he farms over 1000 acres. Cullen farms

with his father and they raise malt barley, corn, sugar beets and alfalfa. (Tr.92-105.) They also run 180 cow-calf pairs. (Id.)

Cullen presented evidence that an appropriate income level for him was $20,843.00 a year. (Tr. 198.) Cullen's tax returns showed the following gross income:

2019: (negative) -$588.00
2020: $3,215.00
2021: $555.00

(Doc. 88: 15.)

Cullen presented testimony from his accountant as to his income, but there were multiple reasons to discount her testimony. First, the accountant admitted that another person had prepared Cullen's taxes. (Tr. 35.) The accountant admitted that Cullen had not provided her with any documentation of his expenses. (Tr. 35-36.) Finally, the accountant agreed that Cullen had provided the total for any income not associated with a 1099 to her—without any verification.

The accountant testified that in 2019, Cullen reported gross income of $232,596.00 and only $338.00 in farm profit. (Tr. 37). In 2020, Cullen reported gross income of $362,080.00 and a net profit of just $6,078.00 (Tr. 37-38). In 2021, Cullen reported gross income of $315,969.00 and a net profit of $213.00 (Tr. 38).

The accountant acknowledged that the 2021 tax return included a deduction

of $12,198.00 for Cullen's personal home, but she did not have verification whether Cullen had deducted any amount for his personal use of the home. (Tr. 39.) Similarly, the accountant was unable to verify that other deductions claimed by Cullen, such as deductions for gas, fuel or oil, did not include his personal expenses (Tr. 40). The accountant acknowledged that Cullen and his father operate the farming operation together and that they make decisions on which individual will be allowed to claim deductions. (Tr. 42).

Cullen had his accountant recalculate the depreciation expense contained in his tax returns to determine a straight-line depreciation. (Tr. 19.) The accountant admitted that the depreciation calculations admitted into evidence by Cullen contained mistakes and were not accurate. (Tr. 42-45.)

Cullen engaged in discovery abuse throughout the course of the case, and ultimately, he was ordered to pay attorney fees incurred by Robbyn because of the abuse. (Doc. 88: 18-19.) Despite being repeatedly admonished by the district court to provide discovery, Cullen still had not provided full and complete discovery, including detailed information about his farming contracts, at the time of trial. (Tr. 196-197.)

Cullen was deposed prior to trial, and at that time testified because he had a commercial driver's license, he could work as a truck driver if he so desired. (Tr. 198-99). The district court found that Cullen had skills that would allow him to

earn $50,130.00 a year, which was an amount he could earn as a commercial truck driver, according to wage statistics published by the United States Department of Labor. (Doc. 88: 15-16.)

Cullen admitted that after being aware he would owe child support, he purchased a tractor for $107,000.00, a baler for $40,867.00, and a trailer for $14,013.00 (Tr. 200). These expenditures were claimed as deductions on Cullen's taxes, not his father's. (*Id.*) Cullen also purchased an expensive surveillance camera. (Tr. 45.). Cullen testified that the cost of the camera was "Ball-park, maybe 4 to 5 thousand dollars" until he was confronted with his credit card records showing the cost to be $ 7,122.72. (Tr. 145-46.) Cullen testified that his father was responsible for one-half of this purchase, but the entire amount for the equipment appeared on Cullen's credit card receipt. (Tr. 146.)

After considering the evidence presented at trial, the district court found that it was appropriate to impute income to Cullen in the amount of $ 50,130.00. (Doc. 88: 15.) This resulted in Cullen having a child support obligation of $804.00 per month. (Doc. 88: 17.)

Additional facts are contained in the argument sections below.

SUMMARY OF ARGUMENT

This Court has repeatedly stated that a district court is in a better position than this Court to observe the credibility and demeanor of witnesses. See e.g.,

Double AA Corp. v. Newland & Co., 273 Mont. 486, 494, 905 P.2d 138, 142 (1995). Therefore, this Court will not second guess the district court's determination regarding the strength and weight of conflicting testimony." *Id.*

On appeal, Cullen argues that the district court committed error when imputing income to him and when admitting or considering evidence of an unsigned and abusive letter sent to Robbyn. No other issues were appropriately raised or briefed in Cullen's first brief, and he should not be allowed to add or expand arguments in his reply. Issues not appropriately raised or briefed in Cullen's first brief should not be considered by this Court.

The district court did not abuse its discretion when imputing income to Cullen because he failed to provide satisfactory proof of his income and because he admitted to being qualified for employment as a commercial truck driver. The district court also did not abuse its discretion in admitting an unsigned and abusive letter sent to Robbyn. The letter was not admitted for its truth—and so by definition—was not hearsay. Finally, the district court did not abuse its discretion in considering the lay opinion testimony of Robbyn, who provided the district court with a summary of the similarities she personally observed when comparing the abusive letter with entries made in Cullen's journal. If there was error in the admission of this evidence, and in view of the overwhelming evidence that the

final parenting plan adopted by the district court was in the best interests of the child, any error was harmless.

Cullen's arguments on appeal are not supported by the law. Especially in view of the deferential standard of review, this appeal was taken without substantial and reasonable grounds. The district court's final parenting plan and child support order should be affirmed, and Cullen should be responsible for attorney's fees and costs Robbyn has incurred in responding to this appeal.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR WHEN IMPUTING INCOME TO ESTABLISH CHILD SUPPORT

A. Standard of Review

This Court reviews a child support order for an abuse of discretion. *In re Marriage of Tummarello*, 2012 MT 18, ¶ 21, 363 Mont. 387, 270 P.3d 28. "A presumption exists in favor of the district court's determination of child support and this Court will not overturn its findings unless the court abused its discretion." *In re Marriage of Haberkern*, 2004 MT 29, ¶ 31, 319 Mont. 393, 85 P.3d 743 (citation omitted). This Court will not find an abuse of discretion unless the court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason, resulting in substantial injustice. *In re Marriage of Jackson*, 2008 MT 25, ¶ 9, 341 Mont. 227, 177 P.3d 474.

This Court reviews factual findings in child support orders to determine if they are clearly erroneous. "A finding is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence, or if review of the evidence convinces this Court that the district court made a mistake." *In re Marriage of Crilly*, 2005 MT 311, ¶ 10, 329 Mont. 479, 124 P.3d 1151.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to official publications. Mont. R. Evid. 902(5). Determining the adequacy of the foundation for admission of evidence is a matter within the sound discretion of the district court. *State v. Pol*, 2008 MT 352, ¶ 11, 346 Mont. 322, 195 P.3d 807.

B. The district court did not err when imputing income to father.

Montana's child support guidelines promote the principle that "parents have the first priority to meet the needs of their children according to their financial ability." *In re Marriage of George & Frank*, 2022 MT 179, ¶ 77, 410 Mont. 73, 517 P.3d 188. Support of children rises to the level of a social obligation that a parent owes not only to their children but to the state as well. *Schmitz v. Engstrom*, 2000 MT 275, ¶ 15, 302 Mont. 121, 126, 13 P.3d 38. The law does not look favorably upon those who fail to make a good faith effort to comply with their child support obligations. *Id.*

A district court is required to determine a child support obligation by applying the standards in Mont. Code Ann. § 40-4-204 and the Montana Child Support Guidelines published in the Administrative Rules of Montana. The guidelines instruct what can be considered "income" for purposes of determining child support. Admin. R. M. 37.62.105(1) states: "Income for child support includes actual income, imputed income as set forth in Admin. R.M. 37.62.106, or any combination thereof which fairly reflects a parent's resources available for child support." "Imputed income" means "income not actually earned by a parent, but which is attributed to the parent" based on: (a) the parent's recent work history; (b) occupational and professional qualifications; and (c) existing job opportunities and associated earning levels in the community. Admin. R.M. 37.62.106(1) and (3)(a)–(c). Under the guidelines, income should be imputed whenever a parent is unemployed or underemployed, fails to produce sufficient proof of income or has an unknown employment status. Admin. R.M. 37.62.106(2)(a)–(d). Imputing income is not a variance from, but rather is an application of, the child support guidelines. See *In re Marriage of Syverson*, 281 Mont. 1, 12, 931 P.2d 691, 697 (1997).

Cullen claims the district court committed reversible error by imputing income to him and by disregarding testimony of his "actual income" as a self-employed farmer and rancher. (Appellant's Brf. at 17.) When determining income

under the guidelines, a court must consider the disposable income of the parent, not just income reflected on a tax return. See *In re Marriage of Gray*, 242 Mont. 69, 73, 788 P.2d 909, 912 (1990). A district court is not limited to only considering a parent's tax return, especially if the court has reason to doubt the accuracy of the return. See *In re Marriage of Everett*, 2012 MT 8, ¶ 20, 363 Mont. 296, 268 P.3d 507.

Cullen presented evidence that an appropriate income level for him was $20,843.00 a year. (Tr. 198.) Cullen's tax returns showed the following gross income:

2019: (negative) -$588.00
2020: $3,215.00
2021: $555.00

(Doc. 88 at 15.)

Despite his accountant acknowledging that the amounts she had calculated contained errors (See Tr. 42-45), Cullen represents on appeal that his net farm income for the past three tax years was "Tax Year 2019 = -$13,917.00 (negative); Tax Year 2020 = $53,102.00 (positive), and Tax Year 2021 = -$18,342.00 (negative). (Appellant's Brf. at 15.) Averaged, Cullen represents that his yearly net farm income is $6,953.00 a year, or $579.00 a month. Cullen claims he only makes $579.00 a month, despite his testimony of extensive farming activities and the long hours he spends in farming and ranching pursuits. Cullen claims he only

makes $579 a month, despite proof that he recently purchased expensive equipment, including a tractor for $107,000.00, a baler for $40,867.00, and a trailer for $14,013.00 (Tr. 200). Cullen claims he only makes $579.00 a month, despite proof he had also purchased an expensive surveillance camera for over $7,000.00, putting the entire amount on his credit card. (Tr. 145-46). The district court did not disregard Cullen's evidence of income, it just did not find it to be credible.

A parent has an obligation to provide sufficient evidence for the district court to correctly determine income. Here, the district court noted Robbyn's extreme difficulty in obtaining discovery from Cullen. (Doc. 88 at 18-19.) In fact, the district court awarded Robbyn her costs and attorney's fees incurred because of Cullen's discovery abuse. (*Id.*) At trial. Cullen continued to be coy about his income, failing to provide full and complete documentation of his beet contract. (Tr. 196-197.)

The facts of the present case are similar to those in the case of *In re Marriage of Carter-Scanlon & Scanlon*, 2014 MT 97, ¶ 28, 374 Mont. 434, 443, 322 P.3d 1033, 1039. In *Carter-Scanlon*, the district court imputed income to the father for two reasons. *Id.* The district court found that the father was underemployed. *Id.* The district court also found that the father had failed to produce sufficient proof of income. *Id.*

Under the child support guidelines, a parent is "underemployed" when the parent is:

> employed less than full time, when full-time work is available in the community or the local trade area, and/or earning a wage that is less than the parent has earned in the past, or is qualified to earn, when high paying jobs are available in the community or the local trade area, for which the parent is qualified.
>
> Admin. R.M. 37.62.103(15).

In *Carter-Scanlon*, the district court did not give any weight to evidence presented by the father that he was not underemployed, finding it incredible that father would "concentrate his time on pursuits that do not generate a reasonable amount of income." *Id.* at ¶ 28. The district court also concluded that father failed to sufficiently prove his income for child support purposes. The district court concluded that father's failure to provide sufficient proof of his income was his own fault due to his inadequate record keeping. *Id.*

Here, the district court did not abuse its discretion when deciding to impute income to Cullen. A parent is "underemployed" when the parent earns a wage less than the parent is qualified to earn. Cullen agreed that, if he wanted to, he could obtain employment and he was qualified to work as a commercial truck driver. The fact that the district court was not presented with evidence he had actually worked as a truck driver is immaterial.

C. The district court also did not err when using a government publication detailing wage statistics for Montana when determining the amount of income to impute.

The district court also did not err in imputing the amount of income to Cullen. In doing so, the district court relied on Trial Ex. W., which was a page setting forth wage statistics published by the United State Bureau of Labor Statistics, a division of the United States Department of Labor. (See Trial Ex. W.) The Occupational Employment and Wage Statistics are maintained and published at www.bls.gov/oes and are published by the United States Bureau of Labor Statistics, a division of the United States Department of Labor. (See Tr. Ex. W.) The specific publication admitted by the district court was for the State of Montana, as is reflected in the title "Montana-May 2021 OEWS State Occupational Employment and Wage Estimates located at the top of the page. (*Id.*) The date and time of accessing the publication was noted on the exhibit. (*Id.*) Citing to no authority, Cullen asserts that the district court erred in admitting this evidence in the absence of a proper foundation. (Appellant's Brf. at 19.)

Determining the adequacy of the foundation for admission of evidence is a matter within the sound discretion of the district court. *State v. Pol*, 2008 MT 352, ¶ 11, 346 Mont. 322, 195 P.3d 807. Montana Rule of Evidence Rule 901(a) states that the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 902

addresses documents that are "self-authenticating." Official publications, books, pamphlets or other publications purporting to be issued by public authority are self-authenticating and admissible under Mont. R. Evid. 902(5).

Montana Rule of Evidence 902(5) contains language nearly identical to its federal counterpart; thus, federal interpretation has persuasive application to the Montana rule. See e.g., *Faulconbridge v. State*, 2006 MT 198, ¶ 51, 333 Mont. 186, 142 P.3d 777. Federal courts routinely consider records from government websites to be self-authenticating under Rule 902(5). See e.g., *Williams v. Long*, 585 F.Supp.2d 679, 686–88 & n. 4 (D. Md. 2008) (collecting cases indicating that postings on government websites are inherently authentic or self-authenticating). According to the court in *Williams*, this "common-sense provision" is based upon the notion that official publications seldom contain serious mistakes and that official publications are likely to be readily identifiable by simple inspection. *Id.*

Here, Trial Ex. W contains the internet domain address from which the information was printed, as well as the date on which it was printed. It is published on an official government web site and is published by an agency under the United States Department of Labor. The document was self-authenticating, and it was not an abuse of discretion for the district court to admit Trial Ex. W or consider it when determining an appropriate amount of income to impute to Cullen. If anything, the amount imputed understates Cullen's earning capabilities, it does not

overstate it.

A district court is not required to accept evidence of income that it does not find credible. See *In re Marriage of Everett*, 2012 MT 8, ¶16, 363 Mont. 296. 268 P.3d 507 (finding father's evidence of his yearly income to be "fundamentally unbelievable.") The district court sits in the best position to judge the credibility of testimony and proffered evidence, and this Court defers to the district court's resolution of conflicting evidence. *In re Marriage of Frick & Perina*, 2011 MT 41, ¶ 23, 359 Mont. 296, 249 P.3d 67. The district court properly imputed income to Cullen based upon his underemployment and based upon his failure to provide credible evidence of his income. The district court's child support order should be affirmed on appeal.

II. THE DISTRICT COURT PROPERLY ADMITTED TRIAL EXHIBIT H OVER THE HEARSAY OBJECTION OF FATHER.

A. Standard of Review

Evidentiary rulings are reviewed for an abuse of discretion. *State v. Hicks*, 2013 MT 50, ¶ 14, 369 Mont. 165, 296 P.3d 1149. A trial court abuses its discretion when it "acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *Hicks*, ¶ 14. To the extent that the court's ruling is based on an interpretation of an evidentiary rule or statute, this Court's review is de novo. *State v. Derbyshire*,

2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 811. Error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected. Mont. R. Evid. Rule 103(a). In other words, "a reversal cannot be predicated upon an error in admission of evidence, where the evidence in question was not of such character to have affected the result." *Green v. Green*, 1979, 181 Mont. 285, 593 P.2d 446, see also Mont. R. Civ. Pro., Rule 61.

"Trial courts have broad discretion when considering the parenting of a child," and this Court will not disturb a district court's adoption of a final parenting plan absent a clear abuse of that discretion. *In re M.C.,* 2015 MT 57, ¶ 10, 378 Mont. 305, 343 P.3d 569. A court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *Id.*

B. The letter was not admitted for the truth of the matter asserted and so was properly admitted as nonhearsay.

Robbyn presented the Court with an unsigned letter received by her in the mail on April 30, 2022. (Letter, admitted as Ex. H, Tr. 286; see also Appendix A attached to Brief of Appellee, hereinafter App.) The letter was a two and one-half single spaced typed document personally addressed to Robbyn and sent in an envelope postmarked from Casper, Wyoming. (App. A., Tr. Ex. H, H-1, Tr. at 292.)

The letter contains comments critical of Robbyn's parenting skills and her supposed failure to provide Cullen with parenting time. (App. A., Tr. Ex. H.) The letter is abusive and is extremely hostile in tone. *Id.* The letter contains numerous expletives, and it references intimate details known only to the parties in the case, including information about Robbyn's mother dying and details about the parenting plan proceedings. *Id.* The letter claimed that Robbyn did not "deserve a child" *Id.* The letter told Robbyn: "**You are uncaring and unfit to be a mother**. *Your mom would be ashamed of you.*" (*Id.*, emphasis and double emphasis in original). The letter threatens Robbyn that "[t]here are many people in the community that will make sure [the child] know (sic) exactly who you are and what the hell you have done and put her and her dad through." *Id.* The letter disparages Robbyn for the amount spent on the parenting plan proceedings and tells Robbyn to "**Get a F****** PARENTING PLAN before SUMMER!!**" (*Id.*, emphasis in original). The letter concludes with a comment that "[p]eople really hate you" and that there is "probably a petition going around about you or something[.]" *Id.*

Discussion about Exhibit H first came up when Cullen was asked during cross-examination if he knew who had authored the letter. (Tr. 161.) Cullen insisted that neither he nor any of his family members had drafted the letter. Id.

Discussion of the letter also took place when the district court was trying to determine Cullen's plan for taking care of his daughter while he was working. (See Tr. 213.) As a self-employed farmer, Cullen worked very long hours. When discussing childcare arrangements, Cullen said he had not explored any, because "I don't know why, I guess in my mind, that you would want to put the child in day care versus being with a family member." (Tr. 213.) It was in this context, the district court said:

> THE COURT: Somebody with intimate information wrote that letter, and we are going to get to the bottom of it, because if it wasn't you, and you have sworn under oath that it wasn't you, then it's somebody else who has access to information regarding this case, and whoever wrote that would be a terrible influence around this child, this vulnerable child. We are going to get to the bottom of it.
>
> (Tr. 213-14.)

Cullen raised several objections to the admission of the letter. He first argued that the letter should not be admitted because it was hearsay. (Tr. 286.) Cullen argued that since the letter was anonymous, there was no way to determine its author. (Tr. 286-87.) At one point, Cullen even theorized that the letter was written by his former best-friend in a ploy to get back at him and to influence the judge in Robbyn's favor in the parenting plan case. (Tr. 404-405.)

The district court responded that it appeared to be a family member who wrote the letter and stated that whoever wrote the letter was not going to be allowed to be around the child "without having therapy." (Tr. 288.) After hearing

more details about the letter and how it was received, the district court admitted Exhibit H over the objection of Cullen. (App. A., Trial Ex. H, Tr. 292.)

On appeal, Cullen stubbornly repeats his argument that the letter was inadmissible as hearsay. (Appellant's Brf. at 21-26.) Cullen also claims the district court improperly relied on the letter when establishing the final parenting plan. (*Id.*) Cullen claims that it was error to admit the letter "because there was no evidence presented at trial as to who the alleged author of the letter might be. " (Appellant's Brf. at 25.) Finally, Cullen brings a new argument, not raised below, that the letter was more prejudicial than probative under Mont. R. Evid. Rule 403.[2] (Appellant's Brf. at 23.) None of Cullen's arguments are supported by the law and all should be rejected by this Court.

First, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mont. R. Evid. 801. While it is true that hearsay is generally not admissible at trial (see Mont. R. Evid. 802) an out-of-court statement offered to prove something other than the truth of the matter asserted is not hearsay and is generally admissible. See e.g., *State v. Laird*, 2019 MT 198, ¶ 73, 397 Mont. 29, 447 P.3d 416. A statement is hearsay only when the immediate inference the

[2] Robbyn will not address Cullen's 404(b) argument on appeal as it was not raised below and Robbyn could find no cases where the rule was applied during a bench trial, not a jury trial.

proponent wants to draw is the truth of the assertion on the statement's face. *Laird*, ¶ 73. If the proponent can demonstrate that the statement is logically relevant to any other theory, the statement is nonhearsay. *Id.*

An example is illustrative. In *City of Billings v. Nolan*, 2016 MT 266, ¶ 28, 385, Mont. 190, 383 P.3d 219, the defendant objected to the officer's testimony that the car was registered to the defendant's mother as hearsay. This Court did not agree. This Court said the testimony was not offered to prove the truth of the matter asserted, or that the car was registered to Sherry Nolan. Instead, the testimony was offered to explain how the officer proceeded with the investigation and how he came to positively identify the defendant from a prior booking photo. *Nolan*, ¶ 28. This Court concluded that a nonhearsay statement "offered for the purpose of showing that the statement was made and the resulting state of mind is properly admitted." *Id.*

Here, the letter was not admitted for its truth and so by definition, was not hearsay. The letter was not admitted to prove the disparaging remarks about Robbyn were actually true. This point was made when the district court asked Robbyn, "Did you write this letter to yourself, saying how much you hated yourself and what a terrible parent you are?" (Tr. 289.)

Instead, the letter was admitted to show its effect on the recipient. Robbyn testified to the extreme emotional distress she experienced upon receiving the

letter. Robbyn expressed concern that whoever wrote the letter should not be allowed around the child unsupervised. Whoever wrote the letter displayed extreme animosity towards her. According to threats in the letter, the author was likely to say terrible things about Robbyn to the child, which would negatively impact her parent-child relationship and ultimately, be emotionally damaging to the child. The letter was not admitted for its truth and so was properly admitted over a hearsay objection.

C. Robbyn provided an adequate foundation for the admission of the letter.

Cullen is also wrong when stating that there was no evidence presented at trial to establish who was the author of the letter. Again, authentication under Mont. Rule of Evid. 901(b) is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication or identification may be accomplished by a witness' testimony that a matter is what it is claimed to be. Mont. Rule Evid. Rule 901(b)(1). The applicable test is not whether the evidence of genuineness "induces a belief beyond a reasonable doubt" that the document "is the handiwork of its alleged drafter," but whether, "if it is uncontradicted, a reasonable mind might- though not necessarily would-fairly conclude favorably to the fact of authorship." See e.g., *United States v. Sutton*, 426 F.2d 1202, 1207 (D.C. Cir. 1969).

Authorship of writings may be shown by circumstantial evidence. *Id.*, see also *State v. Cooper*, 161 Mont. 85, 92, 504 P.2d 978, 982 (1972)(authenticity for admissibility can be established by direct or circumstantial evidence.) Under Rule 901, there is a wide variety of extrinsic and circumstantial proof that may be used to authenticate evidence. See e.g., *United States v. Hunt*, 534 F. Supp. 3d 233, 255 (E.D.N.Y. 2021)(referencing authentication of facebook pages under the Fed. Rule of Evid. 901.) Proponents of evidence may authenticate an item through several methods including, "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." *United States v. Young*, 753 F.3d 757, 773 (8th Cir. 2014); Fed.R.Evid. 901(b)(4). A proponent of evidence may use circumstantial evidence to satisfy this standard. *Kaplan v. Mayo Clinic*, 653 F.3d 720, 726 (8th Cir. 2011) *Id.* Once the proponent satisfies this burden, the trier of fact determines any further questions as to the evidence's authenticity. *Id.* Again, the contents of the writing may be considered to authenticate it. *United States v. Helmel*, 769 F.2d 1306, 1312 (8th Cir.1985). Notes and other documents may be admitted despite the author's anonymity, especially when the writings demonstrate the author's intimate familiarity with the events in question. *Id.*

Here, Robbyn testified as to receipt of the letter in her post office box shortly before one of the original trial dates. (Tr. 284, 285, Tr. Ex. H.) The letter

contained intimate details known only to the parties, or their extended families. (Tr. Ex. H.) The letter contained details related to the parenting plan proceeding and talked about the death of Robbyn's mother. (*Id.*) The letter was very critical of Robbyn's parenting skills and alleged that Robbyn was keeping the child from Cullen and his family. (*Id.*) The letter contained a threat that the child would be told about Robbyn's actions during the parenting plan proceedings and that the child would then hate her mother. (*Id.*)

The district court properly admitted the letter. Testimony about the contents of the letter and the circumstances under which it was received provided its foundation. The district court also admitted the letter for a very narrow purpose. It was not admitted for its truth, but rather as a basis for limiting the third parties that could be around the child unsupervised by a parent. (See Doc. 88: 7-8.) The district court correctly noted that whoever wrote the letter "would be a terrible influence around this child, this vulnerable child." (Tr. 214.) The district court also correctly noted that both parents had a responsibility to ensure that the child would not be left alone with anyone who would speak poorly of either parent in the presence of the child. (Doc. 88: 7-8.)

The admission of the letter was not error. The weight to be given the letter is a matter appropriately vested with the trier of fact – here, the district court. The district court did not explicitly rely on the letter when establishing the parenting

plan, but even if it had, there was other evidence to amply support the district court's discretion that the final parenting plan was in the best interests of the child. The district court's order adopting the final parenting plan should be affirmed on appeal.

III. THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN RELYING ON THE LAY OPINION TESTIMONY OF ROBBYN OR IN ADMITTING A SUMMARY OF HER TESTIMONY.

A. **Standard of Review**.

The determination regarding the ability of a witness to testify is in the sound discretion of the trial court. *State Highway Comm'n v. Bennett,* 162 Mont. 386, 513 P.2d 5 (1973). Its determination will not be disturbed on appeal unless the appellant shows an abuse of discretion. *State v. Smith*, 220 Mont. 364, 715 P.2d 1301 (1986).

B. Robbyn's testimony was properly admitted as opinion testimony by a lay witness under Mont. Rule of Evid. Rule 701.

Montana Rule of Evidence Rule 701 which allows for the admission of opinion testimony by lay witnesses, provides as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Robbyn was asked to compare the contents of the unsigned abusive letter (App. A, Tr. Ex. H.) with other documents she had received in the case, primarily Cullen's journal. (Tr. 293.) Robbyn testified that she had observed similarities between the two, in terms of subject-verb agreement errors, repetitive words, missing words, run-on sentences, the use of bold, italicized and all caps words, fragments and common punctuation errors. (Tr. 296.)

Cullen objected to the admission of Robbyn's testimony at expert testimony. (Tr. 294.) Robbyn responded that her testimony was based on her observation of the punctuation and grammar used in the two documents. (*Id.*) She was not offering her testimony as an expert, but rather it was based on similarities she observed as "an adult person who speaks and writes the English language[.]" (*Id.*)

The district court properly overruled Cullen's objection and ruled that Robbyn's testimony was admissible. (Tr. 294-95.) Contrary to what Cullen asserts on appeal, the district court explicitly ruled that Robbyn would not be allowed to testify as an expert witness. (Tr. 295.) The district court said Robbyn would only be allowed to testify as to what she personally observed. (Tr. 294.) The district court commented that it also was not an expert, but "commonsense tells me that it would be prudent for me to note if there are any similarities." (Tr. 294.) The district court ultimately concluded that the writing in the journal and the letter were very similar. (Doc. 88: 7.)

The district court did not abuse its discretion in allowing Robbyn to offer lay opinion testimony as to the similarities between the unsigned letter and Cullen's journal.

C. The district court did not commit error in admitting Exhibit I which was a summary of Robbyn's testimony.

Again, overlooking a Montana Rule of Evidence directly on point, Cullen argues that the district court erred with the admission of Exhibit I, which contained a summary of Robbyn's observations as to the similarities between the unsigned letter and Cullen's journal entries. (Tr. Ex. I is attached as App. B.)

Montana Rule of Evidence 1006 provides as follows:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

After Cullen objected to the admission of Exhibit I, Robbyn responded that she would be happy to go over each entry, but she was asking to admit Exhibit I to save time. (Tr. 297.)

The district court correctly admitted Exhibit I as a summary of Robbyn's observations of the similarities between the unsigned letter and Cullen's journal entries. On appeal, Cullen's arguments to the contrary are not supported by any law and are frivilous. Importantly, and contrary to Cullen's arguments on appeal,

Robbyn did not claim that the letter was written by Cullen, nor did the district court make this finding. Again, consideration of the letter was used by the district court to limit the third parties who would be allowed to be around the child while unsupervised by a parent. The district court properly considered the best interests of the child and the district court's decision adopting the final parenting plan should be upheld on appeal.

IV. Robbyn is entitled to an award of attorney fees and costs on appeal.

Cullen, again citing to no authority, summarily claims that he should be reimbursed attorney fees and costs "upon reversal and remand." (Appellant's Brf. at 29.)

Under M.R.App. P. 19(5), this Court has the authority to award sanctions to the prevailing party in an appeal determined to be taken without substantial or reasonable grounds. Sanctions may include costs, attorneys fees, or such other monetary or non-monetary penalty as the supreme court deems proper under the circumstances. (*Id.*)

Here, Cullen's appeal was taken without substantial or reasonable grounds. In his appeal, Cullen misstates the district court's findings and fails to alert this Court to controlling authority and applicable evidentiary rules. Robbyn should not be forced to incur costs and attorney fees in responding to Cullen's appeal.

Robbyn respectfully asks that she be awarded her attorney's fees or that Cullen be sanctioned in a manner determined appropriate by this Court.

CONCLUSION

Robbyn respectfully asks that the district court's order adopting the final parenting plan and ordering child support be affirmed on appeal. Robbyn also requests that she be awarded attorney fees and costs incurred in responding to this appeal, or for such other relief as this Court deems appropriate.

RESPECTFULLY SUBMITTED this 3 day of February, 2023.

LaRANCE LAW FIRM, P.C.

By: _____
Jill Deann LaRance
Attorney for Respondent/Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the Response Brief of Respondent/Appellee is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

JILL DEANN LaRANCE

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Response Brief of Respondent/Appellee was e-mailed (e-file system) and mailed, postage prepaid, to Adrian M. Gosch, PO Box 30457, Billings, Montana 59107-0457, on the 3 day of February, 2023.

Teri Williams, Paralegal to
Jill Deann LaRance

CERTIFICATE OF SERVICE

I, Jill Deann LaRance, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-03-2023:

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