
**IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CASE NO. DA23-0713**

IN RE THE MARRIAGE OF:

MATTHEW THOMAS BASQUE,

Petitioner/Appellant,

and

GINA ALICIA BASQUE,

Respondent/Appellee.

RESPONSE BRIEF OF RESPONDENT/APPELLEE

**On appeal from the Montana Thirteenth Judicial District Court
Yellowstone County, Cause No. DR22-1116
Honorable Donald Harris presiding**

APPEARANCES:

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STATEMENT OF THE ISSUES

- I. Should this appeal be summarily dismissed as Appellant did not appeal from the final order of the district court extending the order of protection entered against him for fifteen years, but instead, only appealed the district court's order denying him a new trial?
- II. Based upon the entirety of the district court file, did the district court abuse its discretion when denying Appellant's motion for new trial where Appellant received actual notice of the hearing to extend the order of protection, but failed to appear?

STATEMENT OF THE CASE

Matthew Basque (Matthew) appeals from the district court's *Order Denying Petitioner's Motion for New Trial*, dated November 17, 2023. (Doc. 75.) Matthew **did not appeal** from the district court's *Amended Order Extending Order of Protection Against Petitioner*, dated September 28, 2023. (See Notice of Appeal, Doc. 78.)

STATEMENT OF THE FACTS

On October 26, 2022, a Temporary Order of Protection was entered against Appellant Matthew Basque (Matthew) in Yellowstone County Justice Court. (Doc. 18.)¹ Matthew was served with a copy of that Order on October 27, 2022. (Doc. 8 at 2.) That same day, Matthew filed a petition for dissolution of marriage in the Yellowstone County District Court case number DR 22-1116. (Doc. 1.) Matthew

¹Doc. refers to the number assigned the documents filed in the district court record.

was represented by three different attorneys throughout the course of the lower court proceedings. His first attorney was Chase Edwin Brown. (See Doc. 1.)

On November 1, 2022, upon petition of Matthew, the district court entered a temporary order of protection against Appellee herein, Gina A. Basque (Gina). (See Doc. 11.) Matthew had successfully moved the district court for an order against Gina, even though he had previously been served with an order of protection issued by the Yellowstone County Justice Court on October 27, 2022.

On November 2, 2023, Attorney Jill LaRance entered a notice of appearance on behalf of Gina. (Doc. 4.) Through her attorney, Gina asked for the temporary order of protection issued against Matthew to be removed to the district court. (See Doc. 18.) After being served with the temporary order of protection issued against her, Gina also filed an emergency motion to quash or amend the second order of protection issued by the district court. (Doc. 8.) In her motion, Gina noted the competing orders and the fact that Matthew had failed to disclose he had been served with an order of protection prior to applying for one in the district court. (Id. at 2.) Gina also filed an affidavit in support of her motion. (Doc. 9.) In her affidavit, Gina described the ongoing physical, emotional and sexual abuse she had endured while being married to Matthew. (Id.) Gina also informed the district court that Matthew had been charged, criminally, for filing a false police report against her. (Id.)

Based upon Gina's motion and affidavit, the district court quashed the temporary order of protection entered against her. (Doc. 18.) The district court also ordered that the original Order of Protection issued by the Justice Court against Matthew would remain in full force and effect pending further hearing before the district court. (Id.)

On November 14, 2022, a second attorney, Marta Nicole Farmer, filed a notice of appearance on behalf of Matthew. (Doc. 13.) On December 15, 2022, the parties entered a stipulation agreeing to extend the temporary order of protection against Matthew for a period of six months. (Doc. 22.) The stipulation also contained a proposed parenting schedule for the parties' two children. (Id.) The stipulation was adopted by the district court on December 15, 2022. Specifically, Matthew stipulated that the order of protection could remain in effect until June 15, 2023. (See Docs. 22, 23.)

The parties eventually entered into a property settlement agreement and a stipulated parenting plan. (Docs. 39, 51.) The Order of Protection entered by the district court on December 15, 2022, was amended to accommodate the updated parenting schedule agreed to by the parties. but all other provisions of the order remained in effect. (Doc. 53.) After the final property settlement agreement was filed with the district court, Matthew's second attorney filed a motion to withdraw.

(Doc. 39.) On March 22, 2023, a third attorney, Shelley Lynn Jared, filed a notice of appearance on Matthew's behalf. (Doc. 44.)

On May 9, 2023, the district court entered a Final Decree of Dissolution of Marriage (Doc. 54.) A Notice of Entry of Judgment was filed on May 10, 2023. (Doc. 55.)

On June 15, 2023, Gina filed an *Emergency Motion to Extend Order of Protection*. (Doc. 56.) Gina supported this motion with an Affidavit. (Doc. 57.) In her affidavit, Gina outlined additional criminal and harassing behavior committed by Matthew against her. (Doc. 57.) In April, just prior to the final decree being entered, Matthew had attempted to obtain an order of protection against Gina in Missoula County. (Tr. Ex. 2.)² The Missoula petition was denied. (Id.) Matthew then attempted to obtain a temporary order of protection of protection against Gina's mother's significant other in Yellowstone County Justice Court, but that petition was also denied. (Doc. 57, Ex. B.)

Unfortunately, Matthew's ongoing efforts to obtain an *ex parte* order of protection against Gina finally proved successful. On May 30, 2023, Matthew travelled to Ravalli County to file a petition for an order of protection. (Doc. 57, Ex. C.) In his sworn application that was filed in the Ravalli County Justice Court,

²Tr. refers to the Transcript of the Hearing on September 27, 2023, and Ex. refers to the exhibits admitted during the hearing.)

Matthew did not alert the court as to the current order of protection entered against him in Yellowstone County or the custody proceedings that had taken place before the district court. (Id.). Instead, he initialed N/A when asked about any other court proceedings. (Doc. 57, Ex. C. at page 5.) After the full situation was presented to the Ravalli County Justice Court, the Order of Protection issued against Gina was dismissed on June 29, 2023. (Tr. Ex. 4.)

On June 20, 2023, the district court in the present case issued a temporary order extending the order of protection entered against Matthew and set a hearing on Gina's emergency motion for a longer extension to be heard on August 28, 2023. (Doc. 59.) On July 26, 2023, Matthew's third attorney filed a motion to withdraw, which was consented to by Matthew. (Doc. 62.) The order to withdraw was granted by the district court, and the hearing on the motion to extend the order of protection was continued until September 27, 2023, at 4:00 p.m. (Doc. 63.) The order granting the motion to withdraw and setting hearing was sent to Matthew by the court clerk. (Doc. 63 at 2, see also Doc. 75 at 2.)

On August 2, 2023, the State of Montana filed a Motion for Leave to File an Information, Affidavit in Support and Information charging Matthew in Yellowstone County District Court Number DC 23-986. (Tr. Ex. 1, 1a.) The Information charged Matthew with two felony counts of Sexual Intercourse without Consent, one felony count of Stalking, and one misdemeanor count of

Partner or Family Member Assault. (Id.) Gina was the named victim of all crimes. (Id.) The Affidavit filed in Support of the Motion for Leave outlined the results of a police investigation against Matthew of alleged crimes committed by him against Gina. (Id.) Matthew is charged with having forcible sexual intercourse with Gina without her consent on two separate occasions, once on September 14, 2022, and again on October 13, 2022. (Id.) He is charged with violating the Temporary Order of Protection entered against him on multiple occasions. (Id.) He is also charged with a series of harassing and stalking behaviors against Gina, including filing a false report with her employer and confronting her friends and contacts after downloading information from her phone. (Id.) Matthew was arrested on the charges filed against him, but was released after posting bail on August 30, 2023. (Tr. at 14.)

Gina's attorney sent Matthew a Rule 10 Notice, notifying him that the district court had granted his attorney's motion to withdraw. (Doc. 64.) The notice informed Matthew that he needed to appoint another attorney or appear in person at the hearing still scheduled for September 27, 2023, at 4:00 p.m. (Id.) The notice contained a certificate of service, dated August 21, 2023, certifying that Matthew was served with the Rule 10 Notice, and was again served with the order allowing his attorney to withdraw combined with the notice of hearing scheduled for September 27, 2023, at 4:00 p.m. (Id.)

On September 27, 2023, the district court called the matter on for hearing at 4:01 p.m. (Tr. at 1.) Matthew did not appear, but Gina appeared with her attorney. (Tr. at 2.) The district court asked whether Matthew was expected to appear. (Id.) Gina's counsel responded that her client had heard from family members that he intended to be present. (Id.) The district court noted that Matthew's attorney had withdrawn and asked Gina's attorney whether she had contact from any subsequent counsel. (Id.) Gina's attorney told the district court that Matthew had emailed her directly, but she had not heard from an attorney on his behalf. (Id.) It was in this context, or referring to current civil proceeding, that Gina's attorney responded that she did not know if Matthew was represented by counsel. (See Tr. at 2.)

Gina was called to testify at the hearing in support of her motion to extend the order of protection. (Tr. at 3.) Gina outlined numerous reasons why extending the order of protection was appropriate. Gina testified that Matthew had been charged with violating the order of protection and filing a false police report against her. Pursuant to a plea agreement, Matthew had pled guilty to filing the false police report. (Tr. at 5.) Gina testified to Matthew's ongoing attempts to obtain an order of protection against her as outlined above. (Tr. at 5-6.) A copy of the petition that Matthew filed in Missoula County together with a copy of the order denying the petition was admitted as Exhibit 2 at the hearing. (See Tr. at 5.) Gina submitted text messages to the district court which she explained

demonstrated Matthew's ongoing attempts to monitor her whereabouts and concerning messages that had taken place between Matthew and their then 12-year-old daughter. (Tr. at 6-11.) Gina testified that her apartment had been broken into while was temporarily staying in Miles City and the only item stolen was a jacket belonging to a male friend of hers. (Tr. at 12-13.) Gina testified that Matthew continues to monitor her whereabouts by questioning their son, who is nine. (Tr. at 13.) Finally, Gina submitted the charging documents filed in Yellowstone County DC 23-986. (Tr. 11, Ex. 1, 1a, 1b.) Gina testified that now that felony charges had been filed against Matthew, she was even more concerned for her safety. (Tr. at 13.)

Based upon the testimony and the documents of record, the district court found good cause and granted Gina's petition to extend the Order of Protection against Matthew for a period of fifteen years. (Tr. at 15, Doc. 70.) The district court did not grant a "permanent" order as stated in Matthew's brief on appeal. (See Brf. of Appellant at 8.) With a slight modification as to the addresses and implementation of the parenting plan, the terms of the order of protection were the same as those stipulated to by Matthew on December 15, 2022. (See Docs. 23, 53, 70.)

On October 20, 2023, three weeks after the hearing, Matthew filed a Motion for New Trial with Brief in Support. (Doc. 71.) Matthew indicated that his motion

was filed pursuant to Rules 59(a)(2) and rule 60 (b)(1) and (b)(6). (Id.) Matthew submitted a document entitled “Affidavit of Matthew Basque of Missed Hearing for OOP.” (Doc. 72.) In it, Matthew did not claim a lack of notice for the hearing, but instead acknowledged that he had missed the hearing “due to a scheduling error on my part.” (Id.) In his affidavit, Matthew indicated that he wanted the district court to grant him a new trial “to hear my defense of this Order of protection.” (Id.) Matthew did not provide the district court with any explanation as to what his defense would purportedly be. (See Id.)

Gina filed a response to Matthew’s motion for a new trial. (Doc. 73.) Gina explained that Matthew had been provided proper notice of the hearing and he had failed to appear. (Id.) Gina explained that she had incurred attorney costs and fees by attending the hearing. (Id.) Gina said that based upon the testimony and evidence presented, the district court had found good cause to properly extend the order of protection and she asked that Matthew’s motion for a new trial be denied. (Id.)

Matthew filed a reply to Gina’s response on November 9, 2023. (Doc. 74.) In it, Matthew now stated that he was entitled to a new trial to present “my side of the defense.” Again, Matthew did not provide the district court with any facts that would support a defense or provide the district court with any factual basis to

question whether the order of protection should not have been extended. (See Doc. 74.)

The district court issued an order denying Matthew's motion for a new trial. (Doc. 75.) In the Order, the district court noted the procedural history of DR 22-1116, including the original Order of Protection issued by the court on December 15, 2022, and extended by stipulation on May 9, 2023. (Id.) The district court found that Matthew had received notice of the hearing that took place on September 27, 2023 at the address he had provided to the district court. (Id.)

In its order the district court discussed the grounds available for relief under Mont. Code Ann. § 25-11-103, Rule 59 and Rule 60(b)(1) and (b)(6). (Id.) The district court determined that Matthew had not alleged sufficient facts to warrant relief under any of the rules and that he was not entitled to a new trial. (Id.) The district court said that although Matthew may have made a mistake when writing down the hearing date in his calendar, he was not denied due process. (Id.) Matthew had been given proper notice of the hearing and he had the opportunity to appear. (Id.) The district court concluded that Matthew's calendaring mistake did not warrant relief under the rules. (Id.)

On December 11, 2023, Matthew filed a "Notice of Appeal" with the district court. In his notice, Matthew specifically alleged that he was appealing from the order denying his motion for a new trial entered by the district court on November

17, 2023. (Doc. 78.) Matthew **did not appeal** from the district court's order of September 28, 2023, which was the order extending the order of protection entered against him for a period of 15 years. (See Notice of Appeal, Doc. 78, see also district court docket.)

SUMMARY OF THE ARGUMENT

Matthew's appeal from the district court's order denying his motion for a new trial should be summarily denied. Matthew did not appeal from the final order entered in the case, extending the order of protection entered against him for a period of fifteen years. Instead, he only appealed from the order denying his motion for a new trial.

Matthew was not denied his right to due process and the district court did not violate "long-standing principles of fundamental fairness." The essential elements of due process are notice and the opportunity to be heard. Due process is accorded where a party is given sufficient notice of a trial and the trial is held, regardless of whether the party actually avails himself of the opportunity to attend or present evidence. Here, Matthew received actual notice of the hearing on the motion to extend the order of protection. He also received notice that the hearing was continued for approximately one month to allow him the opportunity to obtain substitute counsel. The hearing on the motion to extend the order of protection then took place exactly as scheduled. The district court provided Matthew with the

requisite notice and opportunity to be heard and the claim that his right to due process was violated is spurious.

The district court did not abuse its discretion when it denied Matthew's motion for a new trial under either Rule 59 or Rule 60 (b)(1) of the Montana Rules of Civil Procedure. Contrary to Matthew's argument, the district court properly considered the law and determined that Matthew had failed to demonstrate that he was entitled to a new hearing. The district court's order denying Matthew's motion for a new trial was not an abuse of discretion and should be affirmed by this Court.

STANDARD OF REVIEW

This Court will not overturn a district court's decision to continue, amend, or make permanent an order of protection absent an abuse of discretion. *Lockhead v. Lockhead*, 2013 MT 368, ¶ 12, 373 Mont. 120, 314 P.3d 915. The question under this standard is not whether this Court would have reached the same decision as the trial judge, but whether the trial judge acted arbitrarily without conscientious judgment or exceeded the bounds of reason. *Id.*

This Court also reviews a district court's denial of a motion for Rule 59(e) relief for an abuse of discretion. *Folsom v. Mont. Pub. Emps. Ass'n*, 2017 MT 204, ¶ 59, 388 Mont. 307, 400 P.3d 706. A district court's denial of relief pursuant to M. R. Civ. P. 60(b) is also reviewed for an abuse of discretion. *Young v. Hammer, Hewitt, Jacobs & Floch, PLLC*, 2021 MT 180, ¶ 14, 405 Mont. 65, 491 P.3d 725

“An abuse of discretion occurs if a lower court exercises granted discretion based on a clearly erroneous finding of fact, erroneous conclusion or application of law, or otherwise arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice.” *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 13, 402 Mont. 92, 475 P.3d 748.

Prejudice is never presumed on appeal, and a judgment will not be reversed merely because the lower court erred. *Winslow v. Montana Rail Link, Inc.*, 2005 MT 217, ¶ 25, 328 Mont. 260, 121 P.3d 506. In order for a district court’s decision to be reversed, it must affirmatively appear that the error affected substantial rights of the defendant regarding the merits of the case. *Id.*

Whether a person has been denied his or her right to due process is a question of constitutional law. This Court’s review of questions of constitutional law is plenary. *In re A.S.*, 2004 MT 62, 320 Mont. 268, 87 P.3d 408.

ARGUMENT

I. The district court did not violate Matthew’s right to due process when it extended the order of protection entered against him for 15 years.

The essential elements of due process are notice *and the opportunity to be heard*. *In re Marriage of Fishbaugh*, 2002 MT 175, ¶ 15, 310 Mont. 519, 52 P.3d 395 (emphasis added). Due process is accorded where a party is given sufficient

notice of a trial and the trial is held, regardless of whether the party actually avails himself of the opportunity to be heard. *Id.*

The facts in *Fishbaugh* are similar to those in the present case. In *Fishbaugh*, the case was scheduled for trial on the mother's petition for dissolution of the marriage, custody and support of the parties' minor child. *Fishbaugh*, ¶ 7. Four days before the scheduled trial, the attorney for the husband filed a motion seeking to withdraw as counsel and to continue the trial. *Fishbaugh*, ¶ 8. The continuance was requested on the basis that the attorney had a trial scheduled in federal court on the same date as the trial set in the dissolution matter. *Id.* The district court entered an order denying the motion for a continuance and said that the father's attorney could be heard on the motion to withdraw at the time set for trial. *Id.*

The trial was held as scheduled. *Fishbaugh*, ¶ 9. Neither the father nor his attorney appeared. *Id.* The mother presented testimony and the district court subsequently entered its findings of fact, conclusion of law and decree of dissolution granting the mother sole custody of the parties' child and ordering child support. *Id.* The father then appealed the district court's order. *Id.*

On appeal, this Court first addressed whether the district court had abused its discretion in denying the motion to continue. *Fishbaugh*, ¶ 10. As noted by this Court, the moving party must make an affirmative showing that he or she has

suffered prejudice as a result of the court's denial. *Fishbaugh*, ¶ 11. The father argued that he had suffered prejudice because he had been unable to present evidence and cross-examine the mother. *Fishbaugh*, ¶ 13.

This Court concluded that the father had not made a sufficient showing of prejudice. This Court found that the father had presented nothing more than conclusory statements that he was prejudiced because the district court relied on a one-sided view of the facts. *Fishbaugh*, ¶ 14. This alone was insufficient. The Court concluded that the father had failed to establish that the district court had abused its discretion in denying his motion to continue the trial and that he was prejudiced thereby. *Fishbaugh*, ¶ 14.

Like in the present case, the father in *Fishbaugh* also argued that the district court had denied him due process when it held the trial in his absence. *Fishbaugh*, ¶ 15. Again, this Court disagreed. *Id.* This Court held that due process is accorded where a party is given sufficient notice of a trial and the trial is held, regardless of whether the party actually avails himself of the opportunity to be heard. *Id.* The father had been given adequate notice of the trial and the trial was held as scheduled. This Court said, "having accorded [father] the requisite notice and opportunity to be heard to which he was entitled we conclude his right to due process was not violated." *Id.*

In the present case, the hearing was continued because Matthew's attorney withdrew, with his consent. Matthew was given adequate notice of the new hearing date and he was given sufficient time to obtain a new attorney or represent himself at the hearing.

On appeal, Matthew faults the district court for not calling Matthew or his criminal attorney to see why he was not at the hearing. While the court may have assumed Matthew had representation in the pending criminal matter, that does not mean, in a county with courts as busy as they are in Yellowstone, that a district court would know who that attorney would be. A district court has no obligation to call missing parties to see if they plan on attending court. Moreover, as asserted by counsel for Gina at the hearing, Matthew's absence, in view of the criminal charges filed against him made sense. It would be unusual for a criminal attorney who was representing a defendant on charges as serious as those alleged against Matthew, to want him to testify in a civil proceeding that involved the same or similar allegations.

Like in *Fishbaugh*, and beyond a conclusory statement that he was not allowed to present his side of the story, Matthew has failed to establish any prejudice from the district court's order. Matthew has not asserted that the order of protection was extended in error, nor can he. Testimony at the hearing established that the grounds for extending the order of protection were more than adequate.

The district court was aware of the facts of the case. Moreover, the district court had direct knowledge of Matthew's abuse of the judicial system to harass Gina as demonstrated by Matthew's original filings in the case. The district court did not deny Matthew due process and did not violate long-standing principles of fundamental fairness by holding the hearing and granting Gina an extension of an order of protection for 15 years.

The fact that Matthew was representing himself pro se does not change the analysis. First, Matthew was represented by attorneys throughout DR 22-1116. In fact, he was represented by three different attorneys. The district court took into consideration that Matthew's third attorney had withdrawn when the court continued the hearing for approximately one month to allow Matthew additional time to obtain alternate representation.

Latitude can be afforded pro se parties so long as that latitude does not prejudice the other party. *First Bank of Billings v. Heidemas*, 219 Mont. 373, 376 711 P.2d 1384, 1386 (1986). Here, Matthew makes light of the fact that Gina has been forced to incur attorney's fees in an effort to prevent Matthew from harassing her and causing her to fear for her safety. Matthew claims he has not acted in bad faith, or in a willfully disobedient manner of the court or the judicial process. (Brf. of Appellant at 15.) Gina disagrees. Matthew has been adept in using the judicial process to abuse her, from forum shopping and multiple attempts to mislead a court

into entering an order of protection against her. He now files an appeal that is not warranted by the law or the facts. Matthew is not entitled to any latitude as a pro se litigant and his ongoing attempt to use the judicial process to harass Gina should not be condoned by this Court.

II. The district court did not abuse its discretion in denying Matthew's motion for a new trial under Rule 59.

In relevant part, Mont. Rule of Civ. P. 59 provides that a court may, on motion, grant a new trial on all or some of the issues after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in Montana state court. In cases tried without a jury, Mont. Code Ann. § 25-11-103 provides: "No new trial may be granted in cases tried by the court without a jury, except on the grounds mentioned in subsections (1), (3), and (4) of 25-11-102."

The grounds for relief from a final judgment in Mont. Rule of Civ. P. 60(b) overlap with those provided for in Mont. Rule of Civ. P. 59 and Mont. Code Ann. § 25-11-102. See also, *In re Guardianship of A.M.M.*, 2015 MT 250, ¶ 20, 380 Mont. 451, 356 P.3d 474. Matthew's requested relief was a new trial; therefore, the analysis is limited to whether Matthew could establish:

- (1) irregularity in the proceedings of the court ... or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;
- ...
- (3) accident or surprise that ordinary prudence could not have guarded against;

(4) newly discovered evidence material for the party making the application that the party could not, with reasonable diligence, have discovered and produced at the trial;

Mont. Code Ann. § 25-11-102 (1), (3), (4).

The district court noted that this Court has identified four subject areas in which parties have successfully pursued a motion under Rule 59. These four areas include motions which are filed: 1) to correct manifest errors of law or fact upon which the judgment was based; 2) to raise newly discovered or previously unavailable evidence; 3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or 4) to bring to the court's attention an intervening change in controlling law. *In re Marriage of Johnson*, 2011 MT 255, ¶¶ 15-16, 362 Mont. 236, 262 P.3d 1105.

On appeal, Matthew claims that the district court summarily denied Matthew's motion and did not discuss or analyze the merits of his motion. (Brf. of Appellant at 11.) Matthew then belies this claim by noting that the district court said:

The Court finds that Matthew had proper notice of the September 27, 2023 hearing, and he could have presented his arguments at that hearing. The Court finds that Matthew was not deprived of his substantive rights and Matthew has not put forth a proper basis for relief under Rule 59. Thus, Matthew is not entitled to a new trial.

(Brf. of Appellant at 11, citing to Doc. 75 at 4.)

The district court cannot discuss the merits of Matthew's motion when he did not provide the district court with any merits to discuss. Following the logic of this Court's decision in *In re Marriage of Johnson*, it would instead have been an abuse of discretion for the district court to have granted Matthew's motion. *Johnson*, ¶¶ 14-24 (district court abused its discretion when it vacated its previous order without authority to do so under Rule 59.)

Again, Matthew claims that the district court did not give him the opportunity to be heard. This is simply inaccurate. Matthew did have the opportunity to be heard at the hearing held on September 27, 2023. A litigant is given the opportunity to be heard when receiving adequate notice of a hearing, and there is no dispute that Matthew received adequate notice here.

On appeal, Matthew now claims that he could have presented testimony and evidence rebutting Gina's claims in support of the Order of Protection. (Brf. of Appellant at 12.) The facts cited in Matthew's appeal brief in support of this claim are not of record. This Court's review of the district court's order is based on the evidence of record and Matthew should not be allowed to cite to evidence extraneous to the record. See e.g., *Fishbaugh*, ¶ 22.

The bottom line is that the district court did not abuse its discretion in denying Matthew's motion for a new trial. The fact that Matthew does not agree

with the district court's decision does not mean the district court abused its discretion when reaching it.

III. The district court did not abuse its discretion in denying Matthew's motion for a new trial under Mont. Rule of Civ. Pro. 60(b)(1).

Under Rule 60, and upon motion and just terms, a court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

The Montana supreme Court has established that "relief is available under Rule 60(b)(6) for situations other than those enumerated in the first five subsections of the rule. *Tschida v. Rowe*, 2003 MT 192, ¶ 14, 316 Mont. 503, 74 P.3d 1043. It is generally held that if a party seeks relief under any other subsection of Rule 60(b), it cannot also claim relief under 60(b)(6). *Tschida*, ¶ 16.

Here, Matthew asserted that he made a mistake when writing down the hearing date in his calendar. As noted by the district court in its order, generally, "mistake," "inadvertence," and "excusable neglect" require some justification for

an error beyond mere carelessness or ignorance of the law on the part of the litigant or his attorney. *In re Marriage of Castor*, 249 Mont. 495, 499, 817 P.2d 665, 667 (1991). Failing to note a rescheduled date of a hearing is not a mistake that requires setting aside a judgment under Rule 60(b). *Id.* See also *Watson v. Fultz*, 239 Mont. 364, 369, 782 P.2d 361, 364 (1989) (no relief from judgment when attorney failed to notice hearing date in opponent's motion to amend findings); *Griffin v. Scott* (1985), 218 Mont. 410, 710 P.2d 1337 (1985) (no relief from judgment when attorney failed to read mail for five weeks because of work accumulated during his absence).

Matthew did not provide the district court with any grounds to excuse his mistake under Rule 60(b). Further, he failed to allege any potential defense to the extension of the order of protection. While as a general rule, cases are to be tried on their merits and judgments by default are not favored, but a judgment by default is not what happened here. Instead, at issue was whether the district court (the same district court that had preceded over the parties' dissolution and custody proceedings) should extend an order of protection that had previously been continued upon stipulation by Matthew. After hearing the testimony from Gina, and reviewing the exhibits she filed, including the charging documents filed in Yellowstone County DC 23-986, the district court did not abuse its discretion when denying Matthew's Rule 60 motion.

CONCLUSION

This Court should dismiss Matthew's appeal as he did not file notice that he was appealing the district court's final judgment extending the order of protection for 15 years.

This Court should find that the district court did not deny Matthew due process as he was given notice of the hearing and an opportunity to be heard.

On the record that is properly before this Court, this Court should find that the district court did not abuse its discretion when it denied Matthew's motions for a new trial under Rule 59 or Rule 60(b)(1) and affirm the district court's order on appeal.

RESPECTFULLY SUBMITTED this 20 day of June, 2024.

LaRANCE LAW FIRM, P.C.

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and

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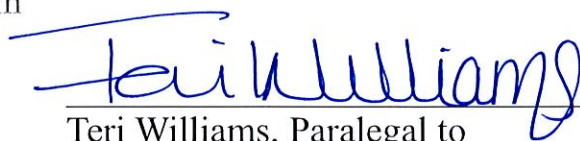


JILL DEANN LaRANCE

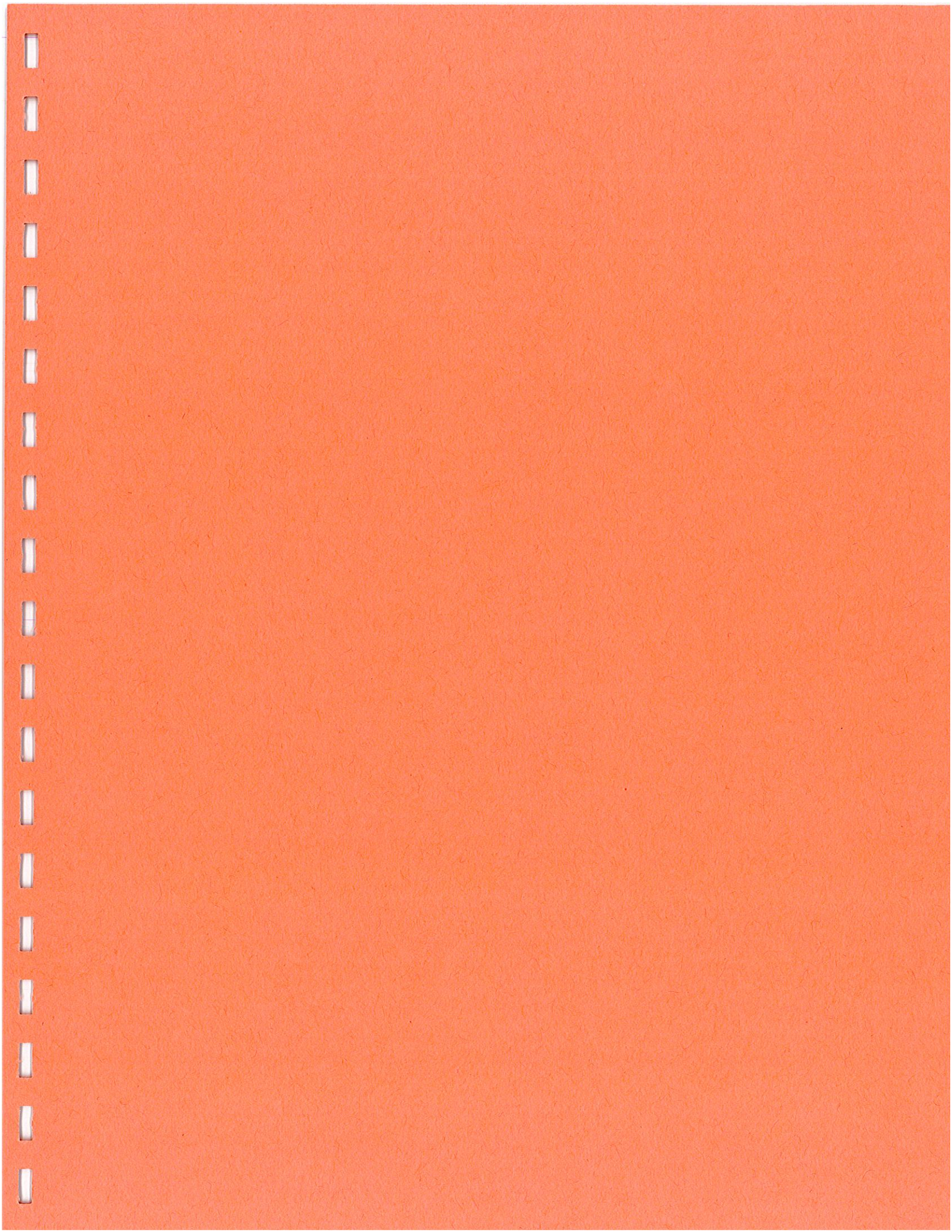
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I hereby certify that on this 21 day of June, 2024, I did cause to be delivered and e-mailed a true and correct copy of the foregoing to the party listed below at the address following their name.

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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 06-21-2024:

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