IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Case No. DA-24-0432

IN RE THE PARENTING OF:

G.L.M.S AND T.L.S.,

Minor Children,

THOMAS STEIGER,

Petitioner/Appellant,

and

HOPE VANDELDEN,

Respondent/Appellee.

OPENING BRIEF OF APPELLANT

On Appeal From
Montana Nineteenth Judicial District Court, Lincoln County
Before the Honorable Matthew J. Cuffe

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in amending the parties' parenting plan without holding a hearing.

2. Whether the District Court erred in amending the parenting plan without a change in circumstance.

3. Whether several of the District Court's Findings of Fact are clearly erroneous and unsupported by the record.

STATEMENT OF THE CASE

This case arises from the District Court's Order Granting Motion to Amend Parenting Plan entered on July 12, 2024. On October 10, 2023, Respondent/Appellee filed a Motion to Proceed with Mediation and later a Motion to Amend Parenting Plan on January 23, 2024. After being granted an extension of time to respond, Petitioner/Appellant Thomas Steiger filed a Motion Denying Respondent's Request to Amend the Final Parenting Plan on February 21, 2024. The District Court, on its own accord, entered an Order Setting Interview with G.L.S., only one of the parties' minor children, on May 22, 2024. Without first holding a hearing, on July 12, 2024, the District Court entered its Order Granting Motion to Amend Parenting Plan adopting Respondent/Appellee's Proposed Amended Parenting Plan. Petitioner/Appellant filed his Notice of Appeal on July 25, 2024.

STATEMENT OF THE FACTS

Petitioner/Appellant Thomas Steiger (hereafter "Tom") and Respondent Appellee Hope VanDelden (hereinafter "Hope") share two minor children of their relationship, G.L.S., who is now 12 years old, and T.L.S., who is now 8 years old. Approximately one (1) year after T.L.S. was born, Tom filed a Petition for Establishment of a Permanent Parenting Plan (D.C. Doc. 1) on October 18, 2016. Hope was served with the documents on November 23, 2016, but never filed a response. Tom then filed a Request for Entry of Default and Application for Default

Judgment (D.C. Doc. 7) on January 26, 2017, and Hope's Default (D.C. Doc. 8) was entered the same day. Tom then filed a Notice of Filing Amended Proposed Parenting Plan and Request for Hearing (D.C. Doc. 9). A Final Parenting Plan hearing was set for May 1, 2024, where the Court entered a Final Parenting Plan (D.C. Doc. 13) and Hope did not attend the hearing.

On October 20, 2023, Hope filed a Motion to Proceed with Mediation requesting the Court to allow her to set mediation with Sindy Filler or one of the mediators on Lincoln County Court mediator list. (D.C. Doc. 29, ¶ 1). Hope included an affidavit with her motion stating she wanted to hold mediation so that the minor children could see her more because that is what they have asked her and Tom for. (D.C. Doc. 29, ¶ 1). Tom filed a Response to Respondent's Motion to Proceed with Mediation on October 27, 2023, stating that Hope's request to use Sindy Filler was not an option as he wanted counsel to be present and she did not allow attorneys to be present during mediation. (D.C. Doc. 31, ¶1). Tom indicated that he did not oppose mediation and that the undersigned provided Hope half a dozen attorney mediators available in the Flathead County (D.C. Doc. 31, ¶ 6). The parties parenting plan states for the parties to use a Flathead County mediator under the Dispute Resolution Clause (D.C. Doc 13). In an attempt to try to accommodate Hope's request to use a mediator in Lincoln County, Tom suggested using Melissa Cichosz who resides in Lincoln County (D.C. Doc 31, ¶ 9). On November 29, 2023, the

district court entered an Order for Mediation (D.C. Doc 32). The parties attended a mediation on December 13, 2023, with Melissa Cichosz that was not successful and Ms. Cichosz filed her report to the court on January 3, 2024 (D.C. Doc 33).

On January 23, 2024, Hope filed her Motion to Amend the Parenting Plan checking the box on the form indicating the reason that "Montana law says that it is not in the child(ren)'s best interest when one parent does not allow the other parent to see the child(ren) or tries to keep the other parent from seeing the child(ren). Mont. Code Ann. '40-4-219(3)". (D.C. Doc. 34). Hope supported this position in her affidavit stating that Tom has not allowed or has attempted to prevent her from seeing their minor children. (D.C. Doc. 34). Hope further alleged that Tom did not allow their children to spend any additional time other than what was ordered in the parenting plan and that the children wanted to see her more and Tom wouldn't allow it.

The undersigned was granted an extension of time to respond to Hopes motion due to recovering from a cesarian section (D.C. Doc 38) and on February 21, 2024, Tom filed a Motion Denying Respondent's Request to Amend the Final Parenting Plan (D.C. Doc 39) demonstrating that there was not a change in circumstance that would warrant amending the parenting plan. Tom provided an affidavit with his Motion providing contradictory evidence to Hope's allegations of not receiving any parenting time (D.C. Doc. 40).

The District Court, *sua sponte,* set an interview in chambers with only the parties' oldest child and said interview was held on May 30, 2024 (D.C. Doc. 41). On July 12, 2024, the District Court issued its Order Granting Motion to Amend Parenting Plan (D.C. Doc. 43). It is from that Order that Tom timely appeals.

SUMMARY OF THE ARGUMENT

Tom brings his appeal to this Court to obtain relief from the District Court's error in amending the parties' parenting plan without holding an evidentiary hearing. Tom has always been the primary caregiver of the parties' minor children due to Hope's instability. Hope has struggled to have adequate housing, stable employment and failed to maximize the minimal parenting time she was granted under the plan during the seven (7) years the parties' Final Parenting Plan was in place.

Hope brought an action to amend the parties' Final Parenting Plan without providing evidence of a substantive change in circumstance that would warrant the parenting plan to be amended. Absent motion by either party, the District Court ordered an in-chambers interview of only one of the parties' minor children and shortly thereafter entered Hope's proposed amended parenting plan without holding a hearing. Hope has already attempted to negotiate changes to the amended parenting plan outside of what has been ordered.

The District Court erred by amending the parties' parenting without establishing a change in circumstance that would allow it to be amended. Further,

the District Court failed to hold a hearing allowing testimony and evidence to be introduced prior to amending the parties' parenting plan. The District Court's findings were clearly erroneous and abused its discretion in determining the best interests of G.L.S. and T.L.S.

STANDARD OF REVIEW

A district court's conclusions of law are reviewed for correctness. *In re the Parenting of C.J.*, 2016 MT 93¶ 12, 383, Mont. 197, 369 P.3d 1028.

The standard review of a district court's decision to modify a parenting plan is under the clearly erroneous standard. *Guffin v. Plaisted-Harman*, 2010 MT 100 ¶ 20, 356 Mont. 218, 232 P.3d 888. It is presumed that a court cautiously considered all the evidence and made correct findings when considering parenting of a child as they are given broad discretion when making this determination. *In re G.M.N.*, 2019 MT 18, ¶ 11, 394 Mont. 112, 433 P.3d 715. There must be a clear abuse of discretion found in order to disturb a district court's decision regarding parenting plans. *Reed v. Martin (In re L.R.)*, 2023 MT 235 ¶ 7, 414 Mont. 191, 539 P.3d 642.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT AMENDED THE PARENTING PLAN WITHOUT HOLDING AN EVIDENTIARY HEARING.

Pursuant to Mont. Code Ann § 40-4-220(1):

> Unless the parties agree to an interim parenting plan or an amended parenting plan, the moving party seeking an

> interim parenting plan or amendment of a final parenting plan shall submit, together with the moving papers, an affidavit setting forth facts supporting the requested plan or amendment and shall give notice, together with a copy of the affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, based on the best interests of the child, in which case it shall set a date for hearing on an order to show cause why the requested plan or amendment should not be granted.

Analyzing the language of Mont. Code Ann § 40-4-220, the court is required to hold a hearing on a party's request to amend the parenting plan unless either: (1) the parties stipulated to amending the parenting plan or (2) the court denies the motion to amend the parenting because there is no adequate cause to hear the motion.

A court must look at the plain language when interpreting a statute. *In re U.A.C.*, 2022 MT 230, ¶ 13, 410 Mont. 493, 520 P.3d 295 (*citing State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622). "The plain meaning of a statute controls when the legislative intent can be determined from the plain meaning of the words used in the statute." *In re U.A.C.*, ¶ 13 (quoting *Christensen*, ¶ 95).

In re the marriage of Berk and Berk, No. 23-0454 (2024 MT 40N), the Appellant, April Berk and Appellee Dan Berk had a stipulated final parenting incorporated into their divorce decree entered in January of 2022. The decree referenced a GAL who had assisted the parties with working on the parenting plan

and to further help until a final agreement of the parties or subsequent Court order. *Id*., ¶ 2. The GAL issued his recommendations in May of 2023 that were then ordered by the District Court. April argued that the District Court erroneously amended the parties' parenting plan without holding a hearing under Mont. Code Ann § 40-4-220. April contended that she did not expressly request a hearing because the statute provides for the requirement of a hearing prior to a District Court amending a parenting plan. *Id*., ¶ 15. In *Berk,* since the parties did not agree to amend the parenting plan, the plain language of Mont. Code Ann § 40-4-220 required the court to schedule a hearing unless it found sufficient cause and denies the motion. The Court determined to decide *Berk* pursuant to Section I, Paragraph 3(c) of their Internal Operating Rules that provides for memorandum opinions. The Court concluded that the case presented a question that was controlled by settled law or clear application of applicable standards of review. This Court determined that the District Court erred by granting Dan's motion to amend the parenting plan without first holding a hearing reversing the order and remanding for a hearing .*Id*., ¶ 24.

In the present case, just as in *Berk,* the Court amended a parenting plan without first holding a hearing. Neither requirement of Mont. Code Ann § 40-4-220 were met that would merit the Court not holding a hearing. The parties did not stipulate to amend the parenting plan and the District Court did not deny Hope's motion to amend the parenting plan outright. Though Tom did not expressly request a hearing,

a request for hearing would not be required as it is apparent he objected to Hope's Motion to Amend the Parenting Plan when he filed a Motion Denying Respondent's Request to Amend the Final Parenting Plan (D.C. Doc. 39).

Therefore, the District Court erred when it amended the parties' parenting plan without holding a hearing prior to entering its Order Granting Motion to Amend Parenting Plan. This Court should reverse the District Court's Order and remand for further proceedings.

II. THE DISTRICT COURT ERRED WHEN IT AMENDED THE PARENTING PLAN WITHOUT A FINDING A CHANGE IN CIRCUMSTANCES HAD OCCURRED THAT WOULD WARRANT AN AMENDMENT

A party requesting to amend a parenting plan must fulfill the preliminary statutory threshold of changed circumstances. *In re R.J.N.*, 2017 MT 249, ¶ 9, 389 Mont. 68, 403 P.3d 675 (citing *In re Marriage of Whyte*, 2012 MT 45 ¶ 23, 364 Mont. 219, 272 P.3d 102). "The party seeking modification of a parenting plan carries a heavy burden of proof." *In re R.J.N.*, ¶ 9.

Pursuant to Mont. Code Ann § 40-4-220, a District Court must "deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, based on the best interest of the child." The statute's procedural and substantive requirements supports stability for the child at issue and deters unnecessary parenting plan litigation. *Bessette v. Bessette*, 2019 MT 35, ¶ 19, 394 Mont. 262, 434 P.3d 894.

A District Court may, in its discretion, "amend a prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interest of the child[ren]." Mont. Code Ann § 40-4-219. Upon a parent filing an affidavit in support of a requested amendment and receiving an opposing affidavit, if any, the court shall set a hearing on the request for amendment if the court finds that adequate cause is established by affidavits based on the best interests of the children. Mont. Code Ann § 40-4-220.

A prerequisite to an amendment of a parenting plan must be evidence demonstrating a changed circumstance and without such finding a District Court cannot modify an existing custody arrangement. *In re the Marriage of Jacobsen*, 2006 MT 212, ¶ 17, 333 Mont. 322, 142 P.3d 859. *In re RJN*, the Mother sought modification of the parties' parenting plan because of the children's age and desire to live primarily with her. The District Court determined that those factors did not constitute a sufficient change in circumstance warranting a hearing under Mont. Code Ann § 40-4-220(1). *Id*., ¶ 10. The Court recognizes that under the best interest factors, pursuant to Mont. Code Ann § 40-4-219(1)(c), a child that is over the age of 14 years old and desires an amendment to the parenting plan can be considered. This Court found that, "while we have not adopted a blanket rule that the aging of a child,

in conjunction with consideration of his or her desires, can never constitute a change in circumstances warranting a hearing on modification." *Id*., ¶ 11. With nothing more than the Mother's pleadings noting the children's ages and their desire to live primarily with her, the Court determined those allegations were not enough to entertain her motion and hold a hearing. *Id*. This Court also determined the "mere aging of a child is not a basis for modification of a parenting plan. *In re D'Alton*, 2009 MT 184 ¶ 11, 351 Mont. 51, 209 P.3d 251. *In re RJN* is similar to the present case whereby Hope mentioning the age of their daughter and the children's reported desire to have more parenting time with her. Though in the present case the District Court did hold an In Chambers Interview with the oldest child, the District Court failed to interview both children and at the time of interview the children were 12 and 8 years old.

In *D'Alton*, the Father requested modification of the parties' parenting plan that reflected a current 70/30 basis to a proposed 50/50 arrangement which is a similar parenting arrangement to our present case (*citing LR v. Martin, 2023 MT 235, ¶ 11, 414 Mont. 191*). Further, both parties shared unsupervised parenting time and no assertion was made by the Father that his employment and stability had improved that could potentially impact the children. *Id*. There was no assertion that the children's relationship with the Father or his extended family was being comprised to their detriment by the existing parenting plan. *Id*. Additionally, there

were no allegations that Father was prevented by their parenting plan from being involved in the children's school, sports or extra-curricular activities. *Id.* This Court affirmed the District Court's findings that the aging of the children did not satisfy the threshold criteria for the Court to hold a hearing to amend the parenting plan. Our case at hand is very similar to the facts found in *D'Alton*.

In the present case, the parties had a similar 70/30 schedule with Tom being the primary custodian of the children and Hope proposing a 50/50 arrangement due to the alleged desire of the children. Though Hope made allegations that Tom was preventing her from having any additional parenting time than was allowed in their Final Parenting Plan, Tom provided evidence rebutting her allegations with correspondence he had with Hope providing her numerous opportunities for additional time or flexibility with her schedule (D.C. Doc. 35 and 40). There have been no allegations by Hope that she has been prevented by being involved with the children's school or extra-curricular activities. The District Court concluded that since she made allegations that both children want to spend more time with her that it was in fact true.

Therefore, the District Court erred when it allowed for the parenting plan to be amended without any substantial evidence showing that a change in circumstance exists to warrant such an amendment. This Court should reverse the District Court's Order and remand for further proceedings.

III. SEVERAL OF THE DISTRICT COURT'S FINDINGS WERE CLEARLY ERRONEOUS AND NOT SUPPORTED IN THE RECORD

The District Court issued the Order Granting Motion to Amend Parenting Plan (D.C. Doc. 43) subject to this Appeal on July 12, 2024. This was the only Order which addressed the facts upon which the District Court's decision was based. Several of the District Court's principal findings upon which the Court relied are clearly erroneous and not supported in the record.

First, the Order states that the parties requested the Court interview the oldest child when no such motion was ever brought by either party as can be confirmed by the District Court's record. The District Court, *on its own accord*, issued the Order Setting Interview with G.L.S. absent any motion (D.C. Doc. 41). The District Court also found that both children wanted to spend more time with their mother and paternal grandparents though only one child was interviewed. *See Appendix "A" Order Granting Motion to Amend Parenting Plan*, at ¶ 4. The District Court found that the one interview paired with Hope's affidavit was sufficient to amend the parenting plan without holding a hearing.

The second principal factual error is the District Courts' determination that Hope's living arrangements and employment status have improved since the entry of the Final Parenting Plan and had become more stable, though no record of this information exists. *See Appendix "A" Order Granting Motion to Amend Parenting*

Plan, at ¶ 3. This Court has recognized that changes in a parent's circumstances may constitute a change in the circumstances of the child. *Sian v. Kooyer*, 2010 MT 178, ¶ 11, 357 Mont. 215, 239 P.3d 121. A parent's change in circumstances shall be substantial and evident in order for it to be considered as a reason to amend a current parenting plan. *LR. V Martin*, 2023 MT 235, ¶ 12, 414 Mont. 191, 539 P. 3d 642. In *LR v. Martin*, the Father filed to amend the parenting plan on the basis that he did not need to establish a change in circumstances since the parties' prior order setting review of the parenting plan had expired. *Id*., ¶ 5. The Father brought to the District Court's attention that his circumstances had significantly changed coupled with the age of the child that would allow him more time with the child. *Id*. Since the final parenting plan, the Father had graduated from law school, passed the bar exam and had been practicing a year as an attorney and was also in a stable and loving relationship. *Id*. The Father also had been limited to supervised parenting time not allowing him involvement in the child's school or extra-curricular activities. The parenting plan also prevented the establishment of relationship with the paternal grandparents. *Id*.

The present case significantly differs from *LR v. Martin*, where there has been no evidence of Hope's personal circumstances improving since the parties' final parenting plan had been entered. The court made conclusions from findings that are not alleged in Hope's affidavit or found in any evidence at all. The District Court's

order states, "over the last 5 years Hope's living arrangements and employment status have improved and become more stable." (D.C. Doc. 43). There is nothing in Hope's affidavit that discloses information on her living arrangements or employment, leaving the Appellant puzzled as to where this finding came from.

The last principal factual error is the District Court's findings that Tom has not been flexible with providing additional parenting time for Hope even though Tom provided documentation of correspondence of such flexibility to the Court. *See Appendix "A" Order Granting Motion to Amend Parenting Plan*, at ¶ 5. It is considered a change in circumstances where it is evident that facts have occurred since the prior parenting plan such as the parties' failure to follow the parenting plan. *In re Marriage of Klatt*, 2013 MT 17, ¶ 17, 368 Mont. 290, 294 P.3d 391. *In re Marriage of Klatt,* the parties had substantially deviated from their original parenting plan by entering a stipulated temporary parenting schedule. *Id*.

The present case differs from *In re Marriage of Klatt*, where herein, Tom being flexible to Hope's requests in changing parenting dates and times to accommodate her schedule and allowing additional parenting time sporadically is not the same as completely deflecting from the established parenting schedule, which is not occurring here. The court's reliance on that factor is unsubstantiated. The District Court's conclusion is contradictory in itself as the order initially states that the parties have not been strictly following the Final Parenting Plan and filings

indicate that visitation outside the time frames are routinely granted by Petitioner. Then when the District Court mentions the best interest factors pursuant to 40-4-212, it implies a relevant factor appears to be a lack of flexibility and cooperation on the part of Tom for not providing additional parenting time for Hope. The District Court's findings were clearly erroneous as the findings are not supported by any documented facts or evidence and are, in fact, contradictory to its conclusions.

This court has consistently required that findings of fact must be complete and relevant to the issues to provide a basis for a decision. Factual findings must be support by the evidence in the record. *In re Marriage of Funk*, 2012 MT 14, ¶ 6, 363 Mont. 352, 270 P.3d 39; *In re Marriage of Lewis*, 2020 MT 44, ¶ 5, 399 Mont. 58, 61, 458 P.3d 1009.

CONCLUSION

The District Court entered an order amending the parties' parenting plan without holding an evidentiary hearing allowing both parties to present testimony and evidence before making a final determination. The District Court also erred by considering Hope's Motion to Amend Parenting Plan when it failed to provide a substantial change in circumstance that would warrant such a change. The District Court's findings were clearly erroneous as it made factual findings based on information that was not provided evidence and not supported by the record.

For the foregoing reasons, this Court should reverse the District Court's Order Granting Motion to Amend Parenting Plan (D.C. Doc 43) and remand this case for additional proceedings.

DATED: August 22, 2024.

LAW OFFICE OF SARA T. YOUNG, LLC

By: */s/ Sara T. Young*
Attorney for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for quoted and indented material; and the word count calculated by Microsoft Word, is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED August 22, 2024

LAW OFFICE OF SARA T. YOUNG, LLC

By: */s/ Sara T. Young*

CERTIFICATE OF SERVICE

I, Sara Tower Young, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-22-2024:

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