

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 24-0062

IN RE THE PARENTING OF E.C.F.
AND E.H.F.,

ELIZABETH FARNHAM,

Petitioner and Appellee,

and

ERIK FARNHAM,

Respondent and Appellant

**APPELLEE’S
RESPONSE BRIEF**

On Appeal from the Fourth Judicial District Court, Missoula County
Before the Hon. Robert L. Deschamps, III and Standing Master Gail Bourguignon
Cause No. DR-17-712

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I.STATEMENT OF THE ISSUES

The following issues (restated) are dispositive of this appeal:

1. Did the district court err in denying Appellant’s *Motion to Set Aside Order and Schedule Hearing* when Appellant did not specify which relief he sought under Rule 60 of the Montana Rules of Civil Procedure and when no extraordinary circumstances existed that would warrant relief under the catch-all provision of Rule 60(b)(6)?
2. Did the district court err by not allowing Appellant to call the Guardian *ad Litem* to testify at a hearing set on Appellee’s objections to the *Guardian ad Litem’s Report and Recommendations* when Appellant did not file objections to the *Guardian ad Litem’s Report and Recommendations* and Appellee’s objections were resolved by stipulation prior to the presentation of evidence at the hearing?

II.STATEMENT OF THE CASE

The Petitioner and Appellee, Elizabeth Gsell (“Elizabeth”), responds to Appellant’s Opening Brief in this appeal to the Montana Supreme Court from the Fourth Judicial District Court, Missoula County, Cause No. DR-17-712. Notice of Appeal was filed by Respondent and Appellant, Erik Farnham (“Erik”) on February 1, 2024, in which Erik appealed the district court’s denial of his *Motion to Set Aside Order and Schedule Hearing* and *Revised Amended Final Parenting Plan* entered on January 9, 2024.

The district court entered a *Final Parenting Plan* for the parties' minor children on August 7, 2019. The *Final Parenting Plan* provided for the children to reside primarily with Elizabeth. D.C. Doc. 116. The *Final Parenting Plan* contains a periodic review provision that provides for the parenting schedule to be reviewed prior to the parties' oldest child entering third grade. *Id.* at pg. 23, lines 1-3. On March 25, 2022, Erik filed a *Motion to Amend Parenting Plan and Amended Parenting Plan*; however, Erik's *Motion* was stayed due to his failure to follow the mediation provision set forth in the *Final Parenting Plan*. D.C. Doc. 141; D.C. Doc. 149.

On June 7, 2022, after the parties were unable to reach an agreement during mediation, Erik filed an additional *Motion* for review of the *Final Parenting Plan*. D.C. Doc 150. On June 21, 2022 Elizabeth filed a *Response Brief in Objection to Motion*, after which the matter was fully briefed when Erik did not file a reply brief within the timeframe allowed by Montana law. D.C. Doc. 154. On August 1, 2022 the matter was referred to Standing Master Gail Bourguignon. D.C. Doc. 160.

On August 12, 2022 a Guardian *ad Litem* (GAL) was appointed to investigate and make recommendations to the court regarding the best interests of the children. D.C. Doc 162. After completing the investigation, the GAL submitted *Guardian Ad Litem's Report and Recommendations* on June 21, 2023. D.C. Doc. 170. In accordance with the GAL's *Order of Appointment*, any objections to the GAL's

recommendations were to be filed within 10 days of the *Guardian Ad Litem's Report and Recommendations* being submitted to the Court. D.C. Doc. 162, pg. 3. On July 3, 2023—the day objections were due as set forth in the *Order of Appointment*—Elizabeth filed minor objections to the *Guardian Ad Litem's Report and Recommendations*. D.C. Doc. 170. Then, on July 5, 2023, the Court issued a *Notice of Intent to Adopt Guardian ad Litem's Recommendations Unless Objections Received*, which provided Erik with an additional 10 days (until July 25, 2023) to submit objections to the *Guardian Ad Litem's Report and Recommendations*. D.C. Doc. 171. On July 25, 2023—the day of the extended deadline for Erik to file objections to the *Guardian Ad Litem's Report and Recommendations*—Erik's counsel, Bradley Jones, appeared in the case on Erik's behalf. D.C. Doc. 173. Erik's counsel did not file objections to the *Guardian ad Litem's Report and Recommendations* at any point in the district court proceeding.

On August 25, 2023 the Court convened for an Informal Domestic Relations Trial on the limited issued of *Petitioner's Objections to the Guardian ad Litem's Report and Recommendations*. At trial, the parties were able to resolve Appellee's [then Petitioner] limited objections by agreement of the parties, which was read into the record at the start of the trial setting. *Tr. Transcr.* 4:16-24; 5:1-25; 6:1-25; 7:1-16 (Aug. 25, 2023). On November 11, 2023 the district court entered *Findings of Fact, Conclusions of Law and Order* and an *Amended Final Parenting Plan*. After

the *Amended Final Parenting Plan* was issued, Elizabeth filed a *Motion to Alter or Amend Findings of Fact, Conclusions of Law, and Order* for purposes of correcting minor issues in the *Amended Final Parenting Plan*. D.C. Doc. 181 (Dec. 8, 2023). Erik did not file a response to Elizabeth's *Motion* and the relief Elizabeth sought was granted as set forth in the *Revised Amended Final Parenting Plan* issued by the court on January 9, 2024. D.C. Doc. 190. On December 13, 2023, prior to the court ruling on Elizabeth's *Motion*, Erik submitted his *Motion to Set Aside Judgment and Schedule Hearing* through which Erik requests relief under Montana Rule Civil Procedure 60, without any reference to the form of relief sought under the rule. Erik's *Motion* was deemed denied at the expiration of 60 days as set forth in the rule. The denial of this *Motion* is the order from which the appeal was brought.

III. STATEMENT OF FACTS RELEVANT TO APPEAL

Erik and Elizabeth are parents to two minor children, E.C.F. (born 2010) and E.H.F. (born 2014). D.C. Doc. 179, pg. 2, lines 15-17. The district court adopted a *Final Parenting Plan* for the children on August 7, 2019. D.C. Doc 119. The *Final Parenting Plan* provided for the children to reside primarily with Elizabeth with Erik parenting on shared holidays, every Thursday after school (or 9:00 a.m. if school was not in session) until Sunday at 7:00 p.m. during week one, and every Thursday for the evening on week two. *Id.* at lines 5-14. The *Final Parenting Plan* provided for the parents to share parenting equally during the summer months. *Id.*

On June 7, 2022, Erik, relying upon the periodic review provision of the *Final Parenting Plan*, submitted his *Motion* in which he requested that the court amend the *Final Parenting Plan* to a week on week off parenting schedule year-round. D.C. Doc. 150. As a result of Erik's *Motion*, and at the request of Elizabeth who expressed concerns about Erik's parenting and household, Amy Lord, Esq. was appointed as GAL for the minor children. D.C. Doc. 162. Ms. Lord completed a thorough investigation, which included interviews with thirteen individuals plus the minor children with whom she met with on multiple occasions, and a review of relevant records including police reports, medical records, and the children's education records. D.C. Doc. 169, pg. 2-3. Relevant to these proceedings, Ms. Lord reported finding that:

[F]ather's approach to conflict with E.C.F. sometimes escalates, potentially involving physical and/or verbal abuse. The GAL also recognizes instances where Father has been resistant to, or undermining of, therapeutic support for the children. Of primary concern to the GAL, E.C.F. where coaching of E.C.F. has occurred [sic]. In one meeting with GAL, E.C.F. met first, spoke freely, and came across as genuinely expressing his perspective. After time with Father, Father requested another meeting between E.C.F. wherein E.C.F. returned and parroted Father's wishes regarding the changes to the parenting plan.

...

Father frequently includes the children in conversations about this case and coparenting conflict. *Id.* at pg. 7, lines 2-13.

...

Mother actively supports the children's relationship with Father, while concerns have been raised about Father's support of the children's relationship with Mother. *Id.* at pg. 9, lines 12-14.

The GAL's report also outlines the ways that Erik has refused to follow the orders of the district court, including refusing to register for Our Family Wizard and refusing to provide Elizabeth with an insurance card for the children. *Id.* at pg. 7, lines 22-24.

When analyzing the best interests of the child factors, the GAL reported concerns about E.C.F.'s conflicting requests as discussed above, and ultimately determined that his requests for time between households were unreliable. *Id.* at pg. 9, lines 3-4. The GAL concluded that while at times the children expressed a wish for 50/50 parenting time, those statements "conflicted with other statements and appear[ed] to be either explicitly or implicitly induced by Father." *Id.* at pg. 11, lines 10-12. The GAL recommended that the children reside with Erik every other Wednesday through Sunday, year-round, in addition to a shared holiday schedule. *Id.* at pg. 12, lines 2-6. The GAL recommended that the parents work together to secure a suitable counselor for the children to process the parenting dynamic and other life challenges. *Id.* at 15, lines 16-23.

Elizabeth submitted timely objections to the *Guardian ad Litem's Report and Recommendations*. D.C. Doc. 170. Elizabeth's objections were minor, mostly addressing areas in the recommendations that Elizabeth was concerned would result in further conflict between the parents. After the initial deadline for Erik to submit objections as set forth in the *Order of Appointment* lapsed without Erik objecting,

the district court extended the deadline from July 3, 2023 to July 25, 2023, and clarified that the recommendations would be adopted unless objections were received by that date. D.C. Doc. 171.

On July 25, 2023—the date the renewed deadline for objections to the *Guardian ad Litem’s Report and Recommendations* were to be filed—Bradley Jones, BULMAN JONES & COOK PLLC, filed a *Notice of Appearance* on behalf of Erik. D.C. Doc. 173. The *Notice of Appearance* was signed by Mr. Jones on July 24, 2023. *Id.* Despite the importance of Erik’s status as a pro se or represented party to his position on appeal, in *Appellant’s Opening Brief* Erik misstates the status of his representation at multiple points. First, Erik mischaracterizes the status of his legal representation as being “pro se up until the time of the hearing objections to the GAL report and its adoption.” *Appellant’s Opening Brief*, pg. 5 (July 3, 2023). Then, later in the briefing, Erik argues that he did not *retain* counsel until July 26, 2023. *Id.* at pg. 2-3. Regardless of these mischaracterizations, it is clear from the *Notice of Appearance* that, at a minimum, Erik retained counsel on July 24, 2023 (the date the *Notice of Appearance* was signed) and was represented by counsel at least two days prior to the second deadline for objecting to the *Guardian ad Litem’s Report and Recommendations* lapsing and over a month before the hearing on Elizabeth’s objections occurred. Erik did not file objections to the *Guardian ad Litem’s Report and Recommendations* at any time.

On August 25, 2023 the parties appeared with their counsel before the district court for a hearing on Elizabeth’s objections to the *Guardian ad Litem’s Report and Recommendations*. Although Erik argues that he believed he would be able to present his objections at the hearing, the order setting the hearing date and time is entitled “*Order Setting Hearing on Petitioner’s Objections to the Guardian ad Litem’s Report and Recommendations*.” D.C. DOC. 172. [Emphasis added.] Further, the body of the *Order* states “the parties shall appear before the Court for a hearing on Petitioner’s Objections to the Guardian ad Litem’s Report and Recommendations . . . the parties shall each have 1 hour to present evidence relevant to *Petitioner’s Objections to the Guardian ad Litem’s Report and Recommendations*.” The district court’s order is glaringly clear that the substance and scope of the scheduled hearing was on *Petitioner’s* objections. *Id.* [Emphasis added].

On the date of the scheduled hearing, the parties were able to resolve Elizabeth’s minor objections by stipulation, which was read into the record at the start of the proceeding. *Tr. Transcr.* 4:16-24; 5:1-25; 6:1-25; 7:1-16. Contrary to the representation made by Erik in *Appellant’s Opening Brief*, this stipulation was reached *prior* to Erik learning that Respondent’s objections would not be heard at the hearing set for *Petitioner’s* objections. *Id.* See also *Appellant’s Opening Brief*, pg. 3. The parties’ stipulation, having been reached prior to the start of the proceeding, was not based upon “the Court’s refusal to hear any testimony from Erik

or his objections” as Erik wrongfully alleges in *Appellant’s Opening Brief*. *Id.* 6 194:1-25; 195:1-8. This is a misrepresentation of the district court proceeding.

After the parties’ agreement was read into the record resolving all issues set forth in *Petitioner’s Objections to the Guardian ad Litem’s Report and Recommendations*, Erik attempted to lodge his objections (which were unknown to Elizabeth, the GAL, and the court) in open court for the very first time. *Tr. Transcr.* 8:1-17. Counsel for Erik acknowledged on the record that he was unaware of the deadline to lodge objections to the GAL’s recommendations and that he had not accessed the court file despite appearing on the case a month prior to the hearing. *Id.* After further conversation was had in open court, it became clear that Erik’s counsel was actually aware of the missed deadline as early as August 1, 2023 but still did not lodge objections on Erik’s behalf prior to the hearing on August 25, 2023. *Id.* 14:5-13. Based on this information and concerns regarding the children’s exposure to the litigation and how that exposure impacts their best interests, the court denied Erik’s request to either lodge objections during the hearing or to continue the hearing so Erik’s objections could be heard. D.C. Doc. 179, pg. 2, lines 5-10.

Following the hearing, the parents initially struggled in their efforts to share parenting time between households, due to Erik continuing to expose the children to adult conversations. D.C. Doc. 177. Despite the recommendation that the children engage in counseling, Erik refused to agree to a counselor for the children and

directly involved the children in this adult decision as referenced by his text message in which he stated, “[a]s for counseling, [E.C.F.] does not believe he has issues that he can’t talk to me, or his church youth group.” D.C. Doc. 177, Ex. B. Erik’s refusal to engage the children in counseling resulted in Elizabeth seeking an emergency order from the district court to resolve the issue. Although Erik argues in *Appellant’s Opening Brief* that the children refused to follow the parenting schedule due to them wanting to spend more time with Erik, it is clear from his text messages attached to Elizabeth’s motion regarding counseling that Erik was continuing to engage the children in conversations regarding the litigation as he acknowledged having shared a parenting plan proposal with the children during this timeframe. *Id.*

While improperly raised in his briefing before this Court, Erik wrongfully alleges that the children continued to struggle with the parenting schedule after the *Revised Amended Final Parenting Plan* was issued. As documented in post-trial filings before the district court, E.C.F. spent a period of time refusing some of Elizabeth’s parenting days following the August 25, 2024 hearing; however, in December of 2023, E.C.F. returned to following the parenting schedule ordered by the court and has generally complied with *Revised Amended Final Parenting Plan* since that time. D.C. Doc. 187, ¶ 12 (Jan. 4, 2024). Contrary to Erik’s allegation, which is unsupported by the district court record, as of the filing of *Appellee’s*

Response Brief, the children remain enrolled in the same schools they have throughout these proceeding with no upcoming transitions planned for either child.

IV. STANDARD OF REVIEW

In a case tried before a Standing Master, this Court applies the same standard of review as is applied to any other district court order. A district court's ruling on motion for relief from judgment is reviewed for abuse of discretion. *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, 338 Mont. 423, 166 P.3d 451. Evidentiary rulings made by the district court are likewise reviewed for abuse of discretion.

Puccinelli v. Puccinelli, 2012 MT 46, 364 Mont. 235, 272 P.3d 117. An abuse of discretion occurs if a court exercises granted discretion based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or otherwise “acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice.” *In re D.E.*, 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586.

V. SUMMARY OF ARGUMENT

The district court acted within its discretion when it denied the Appellant’s *Motion to Set Aside Order and Schedule Hearing*. The Appellant failed to specify which form of relief he sought under Rule 60 of the Montana Rules of Civil Procedure and no “extraordinary circumstances” existed that would qualify the Appellant for the catch-all provision of Rule 60(b)(6) M.R.Civ.P. The *Order of*

Appointment required that objections to the *Guardian ad Litem's Report and Recommendations* be filed no later than 10 days after the GAL's report was filed, which established an initial deadline of July 3, 2023. D.C. Doc. 162, pg. 3. The Appellee filed *Petitioner's Objections to the Guardian ad Litem's Report and Recommendations* prior to the expiration of the court's deadline. D.C. Doc. 170. Then, after no objections were filed by Appellant, the district court issued a subsequent order, extending the deadline for filing objections to the GAL's report and recommendations to July 25, 2023. D.C. Doc. 171. This subsequent order put Appellant on notice that any objection needed to be specific and discussed with the GAL prior to filing. *Id.* The Appellant retained counsel before the expiration of the second deadline but still no objections were submitted on Appellant's behalf prior to the second deadline or at any point in the district court case. D.C. Doc. 173. A month after the deadline had lapsed, the Appellant with his counsel appeared at the hearing specifically set on *Petitioner's Objections to the Guardian ad Litem's Report and Recommendations* where the district court had limited evidence to that relevant to Petitioner/Appellee's objections and attempted to argue his own objections for the very first time. Appellant's request to lodge his objections for the first time at the hearing set on Petitioner/Appellee's objections was properly denied by the district court as Appellant had missed the deadline for filing objections and

had not provided proper notice to the parties or the court of his objections prior to the hearing. D.C. Doc. 172.

The district court acted within its discretion when it denied the Appellant an opportunity to call the GAL to testify at the hearing on Appellee's objections. The parties resolved Appellee's objections at the start of the hearing and Appellant never objected to the *Guardian ad Litem's Report and Recommendations*. As all issues before the court were resolved, the court properly adopted the *Guardian ad Litem's Report and Recommendations* without the need for either party to present evidence at the hearing on Appellee's objections.

VI. ARGUMENT

1. The district court did not abuse its discretion in denying Erik's Motion to Set Aside Order and Schedule Hearing.

The rule governing vacating judgments is an exception to the doctrine of finality of judgments only insofar as it allows relief from an otherwise final judgment where a party was wronged through no fault of its own. *Wittich Law Firm, P.C. v. O'Connell*, 2013 MT 122, 304 P.3d 375, 370 Mont. 103. [Emphasis added]. Accordingly, Rule 60(b) of the Montana Rules of Civil Procedure allows the district court to set aside a final order in limited circumstances. The Rule provides:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by

due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Erik's *Motion to Set Aside Order and Schedule Hearing* sets forth very little legal argument outside of citing to M. R. Civ. P. 60(b) generally without reference to any applicable subsection. In both his underlying *Motion* and *Appellant's Opening Brief*, Erik altogether fails to specify which provision of Rule 60(b) he relies upon in requesting that the final judgement be set aside. Although unclear, it appears he sought relief under Rule 60(b)(6), which allows relief for "any other reason justifying relief from the operation of the judgement."

This Court has repeatedly held that relief under Rule 60(b)(6) is "appropriate only in extraordinary circumstances which go beyond those covered by the first five subsections of the rule." See e.g. *Skogen v. Murray*, 2007 MT 104, ¶ 13, 337 Mont. 139, ¶ 13, 157 P.3d 1143, ¶ 13; *Falcon v. Faulkner*, 273 Mont. 327, 333, 903 P.2d 197, 201 (1995) [Emphasis added]. Accordingly, before a party may be allowed to modify a final judgment under Rule 60(b)(6), "he must first show that none of the other five reasons in Rule 60(b) apply." *In re Marriage of Waters*, 223 Mont. 183, 187, 724 P.2d 726, 729 (1986). A motion for relief pursuant to Rule 60(b)(6) must

contain “more than a request for rehearing or a request that the District Court change its mind.” *Lussy v. Dye*, 215 Mont. 91, 93, 695 P.2d 465, 466 (1985). A successful Rule 60(b)(6) motion requires that the movant demonstrate each of the following elements: (1) extraordinary circumstances; (2) the movant acted to set aside the judgment within a reasonable period of time; and (3) the movant was blameless. *In re Paternity of C.T.E.-H.*, 2004 MT 307, ¶ 45, 323 Mont. 498, 101 P.3d 254 (citing *Bahm v. Southworth*, 2000 MT 244, ¶ 14, 301 Mont. 434, 10 P.3d 99).

Here, the district court properly denied Erik’s *Motion*, which failed on its face to establish that none of the first five subsections of Rule 60(b) apply—an error which is fatal to a Rule 60(b)(6) motion. See *Waters*, 223 Mont. at 187, 724 P.2d at 729. Even if Erik had properly argued the *Motion*, he could not meet the required elements for Rule 60(b)(6) relief as no extraordinary circumstances exist and Erik is not blameless in the outcome of the proceeding. Erik sought relief asking that the Court set aside the *Revised Amended Final Parenting Plan* based on his own failure to file objections within the generous time allowed by the court. Erik is not blameless in his failure to lodge objections, nor does his failure to meet two court-ordered deadlines establish an extraordinary circumstance.

In making his argument, Erik misrepresents the procedural background of the district court matter to this Court, by alleging that he was pro se until the hearing, or pro se at the time the deadline lapsed. Erik makes the following conflicting and false

statements regarding the status of his representation in the month leading up to hearing:¹

- “Erik, who was pro se, did not file an objection because the Court had already set the contested hearing and he intended to present his evidence and proposal at the hearing. Erik subsequently retained, Bradley Jones, to represent him at the hearing on July 26, 2023.” *Appellant’s Opening Brief*, pg. 2-3. [Emphasis added].
- “The District Court essentially issued a default judgement against Erik who was pro se up until the hearing on objections to the GAL report and its adoption.” *Appellant’s Opening Brief*, pg. 3 [Emphasis added].
- “In this case the District Court would not allow an evidentiary hearing to be held because in the District Court's words ‘I'm quite loathed to allow objections at this point. And Mr. Jones I just-- I'm struggling with your, your explanation of how nothing was filed.’ This was stated despite Elizabeth's counsel noting that Mr. Jones was not retained until after the deadline to file objections had passed and further was out of the office serving in the National Guard during the majority of the

¹ Elizabeth’s counsel contacted Erik’s counsel regarding the factual misrepresentations in *Appellant’s Opening Brief* but the errors, as outlined above, were not corrected prior to the filing of *Appellee’s Response Brief*.

duration preceding the hearing.” See transcript p.16.” *Appellant’s Opening Brief*, pg. 8[Emphasis added].

The record demonstrates that Erik retained counsel no later than July 24, 2023, which is the date Erik’s counsel signed the *Notice of Appearance*. Based upon the *Notice of Appearance*, Erik’s counsel was retained at least one day prior to the deadline for Erik to file objections had expired. D.C. Doc. 173. The record does not support Erik’s allegation that he was pro se up until the hearing; that Erik was pro se at the time the deadline for filing objections lapsed; or that Erik’s counsel was retained by Erik on July 26, 2023 (after the expiration of all deadlines). Erik even claims in his argument that Elizabeth’s counsel pointed out to the Standing Master that Erik’s counsel was retained after the expiration of the deadline—this is untrue. This statement was never made by Elizabeth’s counsel and is not found anywhere on page 16 of the trial transcript as is cited to by Erik, or anywhere else in the trial transcript. Rather, Elizabeth’s counsel pointed out that Erik’s counsel filed his *Notice of Appearance* (dated July 24, 2023) on the day of the deadline and Elizabeth’s counsel assumed objections would be forthcoming based upon the timing of the appearance by Erik’s counsel. *Tr. Transc.* 10:16-20, 13:1-4; D.C. Doc. 173. Elizabeth’s counsel even notified Erik’s counsel of the missed deadline on August 1, 2023—24 days prior to the hearing and two days prior to Erik’s counsel

leaving for National Guard training—and even with the notification by Elizabeth’s counsel, Erik still did not file objections prior to the hearing. *Id.* at 14:5-13.

The court record is clear that Erik was represented by counsel at the time the objections were due (and prior to the court hearing) but Erik did not lodge objections to the *Guardian ad Litem’s Report and Recommendations* by the deadline set by the court or at all. Erik received two orders establishing the deadlines to object to the *Guardian ad Litem’s Report and Recommendations*, both of which were ignored by him. Erik was not “blameless” in missing these deadlines and the district court denying him the opportunity to lodge objections unknown to the court, GAL, or opposing party at the hearing on *Petitioner’s Objections to the Guardian ad Litem’s Report and Recommendations* was appropriate and does not warrant Rule 60(b)(6) relief.

Erik also cites to the children struggling with the transition as a reason why the district court should have granted his *Motion*; however, Erik’s argument fails as Erik was not “blameless” in the children’s struggles to transition into the court-ordered parenting schedule. The GAL’s report cautioned about the possibility (if not the likelihood) of the GAL’s report and recommendations being used to coach and gaslight the children subsequent to the filing of the report and recommendations. D.C. Doc. 169, pg. 11, lines 18-23. Erik did just what the GAL had cautioned he would do when he shared information about the proceedings with E.C.F. resulting

in E.C.F. temporarily refusing to follow the parenting schedule. D.C. Doc. 177, Ex. B (text message from Erik to Eliabeth where Erik admits to having shown a version of the parenting plan, though not yet adopted, to E.C.F). Immediately after the hearing but before an amended parenting plan was issued, Erik was charged by the City of Missoula for four counts of parental interference in violation of Mont. Code Ann. § 45-5-631 for interfering with Elizabeth’s contact with the children.² D.C. Doc. 177, Ex. A. Further, the children’s hesitation to follow the court-ordered parenting schedule no longer existed at the time Erik filed his *Motion* on December 8, 2023 as Elizabeth noted that E.C.F. had complied with the parenting schedule for nearly a month prior to the execution of her *Declaration*. D.C. Doc 187, pg. 3, lines 23-24, pg. 4, lines 1-2. Erik cannot successfully argue he was blameless in the children struggling to transition to a new parenting schedule. None of the circumstances alleged by Erik amount to an “extraordinary circumstance” as would warrant Rule 60(b)(6) relief.

² These charges were later dismissed with the suggestion that the issue would be better handled in the district court parenting plan proceeding.

2. **The district court did not abuse its discretion by not requiring the GAL to testify as the substance of the *Guardian ad Litem's Report and Recommendations* when the hearing was limited to evidence regarding Petitioner's objections and those objections were resolved by stipulation at the start of the hearing.**

On July 5, 2023 the district court issued its *Notice of Intent to Adopt Guardian ad Litem Recommendations Unless Objections Received* which extended the deadline for the parties to submit objections from July 3, 2023 to July 25, 2023. D.C. Doc. 171. The *Notice* specified the manner in which objections were to be made, reading:

The Court has received the Guardian ad Litem's Report and Recommendations, filed June 21, 2023. The Court shall adopt these Recommendations unless the parties file objections by July 25, 2023. Any objections must be specific and may include a request for a Status Hearing. Any objections should be reviewed and discussed with the GAL, and a copy must be sent to both the other party and the GAL at the time that they are filed with the Court.

D.C. Doc. 171 [Emphasis added]. Upon receipt of *Petitioner's Objections to the Guardian ad Litem's Report and Recommendations* the district court set a hearing on Petitioner's objections. D.C. Doc. 170. The *Order Setting Hearing on Petitioner's Objections to the Guardian ad Litem's Report and Recommendations* specified that the only evidence to be heard at the limited hearing, would be evidence relevant to *Petitioner's Objections to the Guardian ad Litem's Report and Recommendations*. D.C. Doc. 172.

The parties appeared before the Court on August 25, 2023 on *Petitioner's Objections to the Guardian ad Litem's Report and Recommendations*. Prior to the start of the evidentiary portion of the proceeding, the parties entered a stipulation in open court that resolved Petitioner's objections. *Tr. Transcr.* 4:16-24; 5:1-25; 6:1-25; 7:1-16. As Erik did not file any objections to the GAL's *Report and Recommendations*, let alone any objections that were "specific" and "reviewed and discussed with GAL" prior to the August 25, 2023 hearing, no hearing was set for Erik's objections to be heard. Allowing the GAL to be questioned during the hearing on Petitioner's objections would have been unjust in that neither Elizabeth or the GAL had adequate notice of the substance of the objections. The only issue before the court at the August 25, 2023 hearing were Elizabeth's objections. Those objections were resolved by agreement of the parties at the commencement of the hearing. Following the parties' agreement on Elizabeth's objections, the district court properly adopted the GAL's recommendations as amended by the stipulation of the parties.

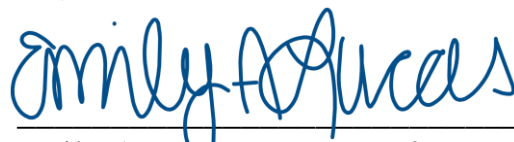
Erik cites to *Jacobsen v. Thomas*, 2004 MT 273, 323 Mont. 183, 192, 100 P.3d 106 in support of his position that the district court erred by not subjecting the GAL to cross examination. However, this case is easily distinguishable from *Jacobsen*. In *Jacobsen*, the appellant properly objected to the GAL's report and recommendations but was denied the opportunity to question the GAL at trial due to

the district court's concern that doing so would violate the Montana Rules of Professional Conduct for the GAL who was also a licensed attorney. *Id.* at ¶ 32. Here, the district court adopted the recommendations of the GAL based upon Elizabeth's objections being resolved by stipulation and Erik's failure to file objections. As there were no issues before the court that required the presentation of evidence, the district court properly adopted the recommendations without the need for the GAL to testify. The district court did not abuse its discretion in not allowing Erik to call the GAL as a witness when the only issue set for hearing was resolved by stipulation.

VII. CONCLUSION

Montana law provides for Rule 60(b)(6) relief only in extraordinary circumstances—extraordinary circumstances do not exist here. Erik's *Motion to Set Aside Order and Schedule Hearing* was little more than a request for a new hearing. Accordingly, the district court acted within its discretion in denying the *Motion*. At the time of the final hearing, the only issues before the court were resolved by stipulation. As such, the district court acted within its discretion when it adopted the recommendations of the GAL without requiring the GAL to testify.

DATED this 3rd day of September, 2024.



Emily A. Lucas, *Attorney for Appellee*

CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellee’s Brief is printed with a proportionally spaced roman text, typeface of 14 points, is doubled spaced, with a word count of 5931 and 23 pages.

DATED this 3rd day of September, 2024.



Emily A. Lucas, *Attorney for Appellee*

CERTIFICATE OF SERVICE

I, Emily Ann Lucas, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-03-2024:

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