IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE THE PARENTING OF E.O.: SIVANA F. CORPRON, Petitioner/Appellee, vs. DANIEL T. O'GORMAN, Respondent/Appellant.	Appellant Cause No. DA -24-0436

(REDACTED) APPELLANT'S OPENING BRIEF

On Appeal from the Montana Fifth Judicial District Court, Jefferson County, the Honorable Luke Berger, Presiding
District Court Cause No. DR 22-2023-45

APPEARANCES:

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Respondent/Appellant Daniel T. O'Gorman ("Daniel") by and through his counsel of record provides this Opening Brief on Appeal.

STATEMENT OF ISSUES

The following issues are presented to this Court on appeal:

1. Did the district court make clearly erroneous findings when it failed to consider concerns raised by the Department of Public Health and Human Services, Child Family Services Division ("CFS") about Appellee Sivana Corpron's ("Sivana") lack of willingness to protect E.O. from ongoing assault from E.O.'s cousin?

2. Did the district court err as a matter of law when it failed to apply the statutory factors for E.O.'s best interests in its final Order?

STATEMENT OF THE CASE

This is an appeal from a custody order issued by the Fifth Judicial District Court of Montana, Jefferson County, awarding primary physical custody of the parties' minor child, E.O., to Sivana upon E.O.'s attending Boulder Public Schools. The district court erred in its decision by failing to consider the concerns raised by CFS regarding Sivana's refusal to act on E.O.'s disclosure that she was the victim of inappropriate sexual contact by a member of Sivana's family. According to CFS, E.O. made this disclosure directly to Sivana, as well as other caregivers in Sivana's household. The district court further erred as a matter of

law when it failed to apply all relevant factors in its Order when determining the final parenting plan.

STATEMENT OF FACTS

Daniel and Sivana were never married, but they have one minor child together: E.O., born in 2019. (Dkt. No. 6.00, *Declaration of Daniel O'Gorman*, ¶ 4.) In 2020, CFS became involved in the parties' lives due to drug use by both parents. (*Transcript of Proceedings* ("*Trns*."), 4/26/2024,[1] 6:13-7:1.) CFS established a treatment plan for both parents. (*Trns*., 4/26/2024, 7:9-10, 9:16-10:11.) In January 2021, CFS closed its case, placing E.O. in Sivana's care (*Trns*., 4/26/2024, 11:1-6.) Between January of 2021, and July of 2023, Daniel was absent from E.O.'s life while he got sober. (*Trns*., 60:21-61:24.) Daniel's lack of involvement in E.O.'s life during that time period was intentional. (*Trns*., 60:21-61:24.) Daniel knew the negative impact it could have on E.O. if he came back before he could maintain sobriety, which he knew was an issue based on prior relapses. (*Trns*., 60:21-61:24.) He did not want to put E.O. through that trauma, so he waited until he was confident his sobriety was a permanent change. (*Trns*., 60:21-61:24.) Upon his reentry into E.O.'s life, Sivana exercised absolute authority over how and when Daniel would have time with E.O. (Dkt. No. 6.00,

[1] This hearing was actually held on April 19, 2024, and is inadvertently misidentified on the transcript cover page. To avoid confusion with the documented record, Daniel will use the date on the cover page throughout his briefing.

Declaration of Daniel O'Gorman, ¶ 4.) Daniel had no say in determining his parenting schedule with E.O despite there being no parenting plan which provided Sivana with that kind of authority.

Daniel had E.O. in his care the last weekend of September 2023. (Dkt. No. 6.00, *Declaration of Daniel O'Gorman*, ¶ 6; *Trns*, 2/14/2024, 35:15-18.) During that weekend, on September 28, 2023, E.O. disclosed to Daniel that she was being asked to touch her cousin's penis, and to allow him to touch her privates.[2] (Dkt. No. 6.00, *Declaration of Daniel O'Gorman*, ¶¶ 7-10; *Trns*., 4/26/2024, 12: 9-24; *Trns*., 4/26/2024, 76:13-14.) E.O.'s cousin lives with E.O.'s maternal grandmother, who is his primary caregiver, and is developmentally disabled. (Dkt. No. 6.00, *Declaration of Daniel O'Gorman*, ¶ 10; Trns., 2/14/2024, 61:3-8.) Daniel contacted both Sivana and the authorities. (*Trns*., 4/26/2024, 74:21-76:25.) The exact timeline of communication between Daniel and Sivana over this weekend is disputed, but what is undisputed is that at some point during that weekend, Daniel contacted Sivana about their upcoming exchange and asked her where he was supposed to drop E.O. off. When Daniel learned that it was at Sivana's mother's house, he refused to drop E.O. off and explained to Sivana why. (*Trns*., 4/26/2024, 75:3-16.) Sivana accused Daniel of making this statement to

[2] E.O.'s cousin is, or at least was at the time of the disclosure, a 17-year-old minor.

obtain custody of E.O., and she accused E.O. of lying. (Dkt. No. 6.00, *Declaration of Daniel O'Gorman*, ¶¶ 12-13; *Trns*., 4/26/2024, 74:17-20.) Not long after this conversation, Daniel was contacted by the police, and was told they were investigating an alleged kidnapping by him of E.O. which was reported by Sivana. (Dkt. No. 6.00, *Declaration of Daniel O'Gorman*, ¶¶ 12-13; *Trns*., 4/26/2024, 74:21-76:25.) Upon further investigation, the police officer learned Daniel had the legal right to have E.O. in his care at that time, and the investigation was dropped. (Dkt. No. 6.00, *Declaration of Daniel O'Gorman*, ¶¶ 12-13.)

CFS was called as a result of E.O.'s disclosures, and an internal case investigating the disclosures was opened. (*Trns*., 4/26/2024, 12:11-14.) During that investigation, CFS learned that E.O. had previously made similar disclosures to her maternal grandmother, her mother, and her mother's boyfriend. (Dkt. 16.00, *Minute Entry*, Exhibit 1; *Trns*., 4/26/2024, 16:7-14.) Despite those disclosures, none of those people took any action to protect E.O. from ongoing abuse and instead continued to leave E.O. with Sivana's mother while Sivana worked. (Dkt. 16.00, *Minute Entry*, Exhibit 1; *Trns*., 4/26/2024, 15:21-16:14.) E.O. was interviewed within ten days of the complaint to CFS. (*Trns*., 4/26/2024, 25:25-26:23.) Upon completing its interview, CFS issued a 48-hour protection plan and directed Daniel to get an emergency parenting plan. (Dkt. 6.00, *Declaration of Daniel O'Gorman*, ¶ 17.) Daniel submitted his emergency request on October 10,

2023, the same day that Sivana filed her Petition for Parenting Plan. (Dkt. Nos. 4.00 and 5.00.) Sivana filed just prior to Daniel, however, and he was forced to resubmit his emergency request in the matter she filed. (Dkt. No. 1.00.) Daniel's emergency request was granted on October 11, 2023. (Dkt. No. 7.00, *Order to Show Cause*.) Despite Sivana, her boyfriend, and her grandmother claiming E.O. never made any disclosures to any of them, CFS specifically found that,

[redacted]

(Dkt. No. 16.00, Exhibit 1, emphasis added.) CFS closed their case on November 27, 2023, and did not take further action ***because*** Daniel implemented an emergency parenting plan. (Dkt. No. 16.00, *Minute Entry*, Exhibit 1; *Trns*., 4/26/2024, 14:21-16:14.) This decision and rationale were provided directly to the district court as well. In that conversation, the district court was informed that largely **because** Daniel had implemented his emergency plan, CFS was okay with closing its case. (*Trns*., 12/15/2023, 5:16-6:15.)

The matter came to a final hearing split between February 14, 2024, and

April 19, 2024. (Dkt. No. 24.00, *Minute Entry*; Dkt. No. 29.00, *Minute Entry*.) The Court issued its final Order on May 29, 2024. (Dkt. No. 30.00, *Order*, attached hereto as Appendix 1) Although the district court made no findings it its Order about CFS's investigation, it did specifically decline to adopt Sivana's position, through the testimony of her mother, that the abuse by her nephew never happened. (Dkt. No. 30.00, *Order*, FN 1). Notice of Entry of Judgment was never filed. Daniel timely filed his appeal. (Dkt. No. 31.00, *Notice of Filing (Appeal)*.)

STANDARD OF REVIEW

This Court reviews custody orders to determine if the district court's findings are clearly erroneous. *In re Marriage of Crowley*, 2014 MT 42, ¶ 44, 374 Mont. 48, 318 P.3d 1031. A finding of fact is clearly erroneous "if it is not supported by substantial evidence, the district court misapprehended the effect of the evidence, or our review of the record convinces us that the district court made a mistake." *Crowley*, ¶ 24. District Courts misapprehend the effect of the evidence when it misinterprets, or incorrectly assesses the significance or implications of the evidence in a legal or factual context. This can happen if the district court overlooks key details, draws incorrect conclusions, or fails to see the relevance or weight of certain pieces of evidence which can lead to a potentially flawed decision or judgment.

The Court reviews district court's conclusions of law for correctness. *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 11, 307 Mont. 45, 36 P.3d 408. Additionally, the Court also applies de novo review to mixed questions of law and fact. *Mlekush v. Farmers Ins. Exch.*, 2015 MT 302, ¶ 8, 381 Mont. 292, 358 P.3d 913 (citations omitted). Thus, while district court's factual findings are reviewed for clear error, "whether those facts satisfy the legal standard is reviewed de novo." *Id.*

SUMMARY OF ARGUMENT

The district court erred in its custody determination by ignoring critical evidence from CFS and CFS's concerns about Sivana's ability to provide a safe environment for the child. Despite specifically refusing to adopt the position that E.O. was not abused by her cousin, the district court awarded primary custody to Sivana without addressing *any* of CFS's concerns. This oversight horrifically undermines E.O.'s safety and well-being, which should be the primary consideration in custody decisions, particularly where the founded findings involve physical neglect by a parent because of her failure to protect the child against sexual abuse.

The district court's decision must be reversed and the parenting plan proposed by Appellant adopted as an order of this Court. In the alternative, this Court must remand for a new parenting plan in conformance with an order of this

Court that it correct the erroneous findings at issue herein and apply **all** relevant best-interest-of-the-child factors, even if they are not specifically identified by statute.

ARGUMENT

A. The District Court Erred in Granting Primary Custody to Sivana Given Her Failure to Protect the Child from Sexual Abuse.

Pursuant to the Montana Code Annotated, the best interests of the child are paramount. District courts must "determine the parenting plan in accordance with the best interest of the child," Mont. Code Ann. § 40–4–212(1) (2023); *In re the Marriage of Woerner*, 2014 MT 134, ¶ 12, 375 Mont. 153, 325 P.3d 1244. In determining a child's best interests, section 40-4-212 clearly directs district courts "to consider *all relevant* parenting factors." *Tubaugh v. Jackson*, 2016 MT 93, ¶ 14, 383 Mont. 197, 369 P.3d 1028 (emphasis added). Equally important, the statute is explicit that the list of factors specifically identified is not an exhaustive list. Mont. Code Ann. § 40-4-212(1); *Tubaugh*, ¶ 14. Thus, if factors not specifically identified by section 40-4-212 are relevant to the child's best interest, those additional factors must be considered by the district court.

In this case, the district court completely failed to consider Sivana's refusal to protect E.O. from ongoing sexual abuse by her cousin—which was founded by CFS—when she did not take any action after E.O.'s disclosure of sexual abuse

from her cousin. Moreover, when CFS was called, Sivana failed to cooperate with the investigation and refused to allow her two older children to be interviewed. (*Trns*., 4/26/2024, 24:14-23.) This conduct prevented CFS from gathering additional information about the underlying complaint and showed a complete lack of concern for E.O.'s safety.

When CFS closed its case, it did so for two reasons: (1) Daniel already a had parenting plan implemented that provided E.O. with additional protection against ongoing occurrences of the assault; and (2) Sivana said she would ensure that E.O. had no contact with the perpetrator. *Trns.*, 4/26/2024, 15:10-16:14; 34:18-35:1. The findings by CFS underscore a severe breach of Sivana's duty to keep E.O. safe. The documented evidence that Sivana failed to protect E.O. from inappropriate sexual abuse combined with the testimony of Krista Westerhold (the CFS supervisor) that she was not confident Sivana would prevent further abuse from happening, poses a serious threat to E.O's physical, emotional, and psychological wellbeing, which is directly counter to her best interests. In spite of Ms. Westerhold's founded concerns, Sivana has remained adamant that the abuse could not have happened. (*Trns.*, 2/15/2024, 56:16-23; *Trns.*, 4/26/2024, 33:21-34:17.) If Sivana refuses to acknowledge any abuse happened, there is no reason to believe she will do anything to protect E.O. from harm.

Courts have consistently held that exposure to abuse of any kind (including inappropriate sexual conduct) constitutes grounds to reconsider custodial arrangements to ensure the child's safety. *In re Marriage of Stoneman*, 2003 MT 25, ¶ 1, 314 Mont. 139, 142, 64 P.3d 997, 998-99 (domestic violence provides cause to yield jurisdiction to protect the child's safety); *Bock v. Smith*, 2005 MT 40, ¶ 25, 326 Mont. 123, 129, 107 P.3d 488, 492 (child's safety when there is a risk of abuse is especially important); *In re Marriage of Sarsfield*, 206 Mont. 397, 408-09, 671 P.2d 595, 601-02 (1983) (even the probability of danger to a child of sexual misconduct from a third party provides a basis to determine custody in favor of safe parent); *In re Marriage of Starks*, 259 Mont. 138, 141-42, 855 P.2d 527, 529 (1993) (mother's refusal to cooperate with investigation into sexual misconduct by child's family member provided adequate basis to presume she would not protect the child in the future). In this case at bar, CFS explicitly raised concerns with the court about Sivana's willingness to keep E.O. from being in contact with her nephew. (*Trns.*, 2/15/2024, 43: 25-44:11, 56:16-23; *Trns.*, 4/26/2024, 33:21-34:17.) In fact, Ms. Westerhold was extremely confident that E.O. had already been in contact with her cousin due to Sivana's denial of sexual abuse, and she was concerned by the apparent unwillingness of Sivana to monitor E.O.'s safety while she was in Sivana's care. (*Trns.*, 2/15/2024, 43: 25-44:11, 56:16-23; *Trns.*, 4/26/2024, 33:21-34:17.) Even though the district court was not

willing to adopt the position that no sexual abuse occurred to E.O (Dkt. No. 30.00, Order, FN1), it completely failed to consider or even address CFS's concerns, nor did the court even consider the fact that none of the other adults who provided E.O. with care during Sivana's parenting time, such as her mother, would acknowledge E.O.'s allegations as true, again bringing into question who would protect E.O. from sexual abuse.

The district court's complete failure to consider or prioritize CFS's findings of abuse and neglect against Sivana and its related concerns about Sivana's conduct in the investigation, places E.O. at risk in a manner that no individual, and particularly no child, should be forced to be subject to.

B. The Mother's Non-cooperation with CFS Demonstrates a Lack of Commitment to the Child's Wellbeing.

CFS noted Sivana's lack of cooperation during their investigation, which impeded their ability to fully assess E.O.'s environment. Specifically, Sivana would not allow her older children to be interviewed or to even meet with a child protective service specialist; she only allowed E.O. to be interviewed. (*Trns*., 4/26/2024, 24:14-23.) Cooperation with authorities investigating child welfare is critical for ensuring a child's protection. It is axiomatic that failing to cooperate with CFS during a youth-in-need-of-care case may result in termination of one's parental rights. It should be equally self-evident that failing to cooperate with a

CFS investigation into allegations of sexual misconduct against a minor child may also result in significant changes to parenting time. Indeed, the lack of cooperation here directly evidenced Sivana's unwillingness to prioritize E.O.'s safety over her personal interests, undermining her suitability as the primary custodial parent. See *In re Marriage of Starks*, 259 Mont. 138, 141-42, 855 P.2d 527, 529 (1993) (mother's refusal to cooperate with investigation into sexual misconduct by child's family member provided adequate basis to presume she would not protect the child in the future.)

C. The District Court Failed to Properly Apply the Best Interests Standard as Required Under Section 40-4-212.

In custody cases, district courts are required to issue parenting plans that are in a child's best interests. Mont. Code Ann. § 40-4-212(1) (2023). Among other objectives, the district court's purpose with every parenting plan must be to maintain the child's emotional stability. Mont. Code Ann. § 40-4-233(3) (2023). In order to do that, district courts must consider the emotional, psychological, and physical welfare of the child as well as the parents. Mont. Code Ann. 40-4-212(e). Despite these requirements and the extensive testimony regarding the CFS investigation, when addressing the mental and physical health of **all** individuals involved, the district court limited its conclusions to the parents' mental health, (Dkt. 30.00, *Order*, ¶ 2)e), and did not make any findings or conclusions about

E.O.'s mental health or how the sexual abuse may impact her mental health. Similarly, when addressing allegations of abuse by either parent against the other parent **or child**, the district court only considered allegations of abuse by the parties against each other. (Dkt. 30.00, *Order*, ¶ 2)g.) When one considers that this case was nearly initiated with an emergency motion based on CFS involvement in E.O.'s life, this was a significant misapplication of the law which requires this Court to reverse the district court's decision regarding primary custody for E.O.

Considering the lack of findings and/or conclusions, and for all of the reasons stated above, the district court's decision to award custody to Sivana disregarded CFS' expertise in evaluating child safety and deviated from the statutory legal standard the district court was required to apply in determining a final parenting plan. Moreover, awarding custody to Sivana in light of the actual facts of the case conflicts with the statutory mandate to prioritize the best interests of the child.

CONCLUSION

For the foregoing reasons, the district court's decision to award primary custody to Sivana during the school year should be reversed. Daniel respectfully requests this Court remand the case with instructions for the district court to reconsider custody, prioritizing the findings of CFS and applying the best-interests

standard to ensure the child's safety without consideration of factors not relevant to E.O.'s best interests.

Dated: October 30, 2024.

VANISKO LAW, PLLC

By: /S/ Michelle H. Vanisko

Michelle H. Vanisko
Attorney for Respondent/Appellant
Daniel T. O'Gorman

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word Office 365 for Windows is 2,971 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

Dated: October 30, 2024.

VANISKO LAW, PLLC

By: /S/ Michelle H. Vanisko

Michelle H. Vanisko
Attorney for Respondent/Appellant
Daniel T. O'Gorman

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing **(REDACTED) APPELLANT'S OPENING BRIEF** with the Clerk of the Montana Supreme Court; and that on October 30, 2024, I served true and accurate copies of the foregoing **(REDACTED) APPELLANT'S OPENING BRIEF** upon the Petitioner/Appellee as set forth below:

Sivana Corpron
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Boulder, MT 59632

By Regular US Mail

/S/ Michelle H. Vanisko

Michelle H. Vanisko

CERTIFICATE OF SERVICE

I, Michelle H. Vanisko, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-07-2024:

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Boulder MT 59632
Service Method: Conventional

Electronically Signed By: Michelle H. Vanisko
Dated: 11-07-2024