

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 25-0216

IN RE MATTER OF THE MARRIAGE OF:

MELISSA BARTKOWSKI,

f/k/a MELISSA MURPHY,

Petitioner/Appellant,

vs.

GRAHAM MURPHY,

Respondent/Appellee.

OPENING BRIEF OF APPELLANT

On Appeal From the Montana Fifth Judicial District Court, Madison County
Before the Honorable Christopher D. Abbott

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STATEMENT OF THE ISSUES

1. Did the District Court err by appearing remotely without prior notice?
2. Did the District Court abuse its discretion by reinstating Graham's overnight, unsupervised parenting time given substantial evidence of child safety concerns?
3. Did the District Court err by failing to appropriately consider the order of protection against Graham on behalf of A.M. and her sister?

STATEMENT OF THE CASE

Melissa Bartkowski (formerly Murphy) and Graham Murphy were married in 2017 and divorced in 2022. (D.C. Docs. 1 and 5.) The parties have one minor child, A.M. The present dispute began on October 9, 2024, when Melissa filed an *ex parte* Motion to Adopt Emergency Interim Parenting Plan. (D.C. Doc. 7.) That same day, she also submitted a supporting affidavit. (D.C. Doc. 8.) The District Court granted the motion and entered an *ex parte* Interim Parenting Plan, temporarily restricting Graham's parenting time. (D.C. Doc. 9.)

The District Court scheduled a hearing and appointed a guardian ad litem. (D.C. Docs. 10-11.) After the hearing on October 23, 2024, the District Court issued an Order Adopting Interim Parenting Plan, limiting Graham's contact with A.M. to supervised visitation. (D.C. Doc. 18.)

In the weeks that followed, the parties filed several additional motions. On January 10, 2025, Graham filed a Verified Motion for Communication via Gizmo Watch and Cessation of Tracking Devices. (D.C. Doc. 19.) He then filed a Verified Motion for Contempt on January 14, 2025, alleging that Melissa had violated the parenting plan. (D.C. Doc. 20.) On January 22, 2025, Graham filed a Motion for Approval of Conditional Supervisors. (D.C. Doc. 21.)

A consolidated evidentiary hearing on all pending motions was held on February 11, 2025. (D.C. Doc. 28.) Following the hearing, the District Court issued its Findings of Fact, Conclusions of Law, and Order on Motions. (D.C. Doc. 29.) The court vacated the October interim plan, amended the May 2022 parenting plan in part, and reinstated Graham's unsupervised parenting time. (*Id.*) From that order, Melissa timely filed a Notice of Appeal on March 21, 2025. (D.C. Doc. 30.)

STATEMENT OF THE FACTS

Melissa and Graham were married in 2017 and divorced in 2022. They have one minor child together, A.M., who was born in June of 2018. Melissa has two other children, A.R.M., who is 15 years old, and Ellianna Meek, 19 years old. Graham has another minor child who is nine.

This case began on January 4, 2022, when Melissa and Graham filed a joint petition for dissolution in the Fifth Judicial District Court, Madison County, along with a proposed parenting plan. (D.C. Docs. 1-2). Both parties consented to entry

of the decree (D.C. Doc. 3), and the District Court approved the Stipulated Parenting Plan and entered the Decree of Dissolution on May 16, 2022 (D.C. Docs. 4-5).

On August 20, 2024, Melissa filed a Petition for an Order of Protection on behalf of herself and her children, including A.M., alleging that Graham had sexually abused her older daughters. (D.C. Doc. 29 at 2.) Following a contested hearing on September 6, 2024, the District Court issued a one-year order of protection for A.R.M. and a 30-day limited order for A.M. (*Id.*)

On October 9, 2024, Melissa filed an *ex parte* Motion to Adopt an Emergency Interim Parenting Plan, citing the new disclosures of sexual abuse from her daughters. (D.C. Docs. 7-9.) That same day, the court issued an Interim Parenting Plan and set the matter for hearing. (D.C. Doc. 11.) Following a contested hearing on October 23, 2024, the District Court limited Graham to supervised contact with A.M. (D.C. Doc. 18.)

In the following months, Graham filed additional motions asking to communicate with A.M. through her Gizmo® watch, require Melissa to cease using tracking devices on A.M., and for contempt, alleging Melissa had violated provisions of the parenting plan (D.C. Docs. 19-20.)

The court consolidated these matters for hearing on February 11, 2025. While both parties appeared in person and with counsel, Judge Abbott appeared

remotely via Zoom without prior notice to the parties. (Tr. at 3.) Witnesses included Melissa, Graham, Ellianna Meek, Cecelia Herak, Gary Caprara, Dr. Robert Page, Cynthia Beller, and Stephanie Day.

Cecilia Herak testified to observing Graham consume alcohol at her home in 2020. He became intoxicated and then drove with his two daughters in the vehicle. (Tr. at 9.) As he was leaving, he backed into a power pole. (Id.)

Gary Caprara, Graham's former employer, testified that in July 2022 he witnessed Graham smoking marijuana on a condo balcony during a work trip in Big Sky, then immediately driving home to Twin Bridges with his daughters in the vehicle. (Tr. at 13.) He also recounted instances in which Graham brought the children along on long work trips, at times leaving them for extended periods in the backseat of a truck. (*Id.*) Caprara stated that Graham's employment was terminated due to multiple "mistakes and accidents," including substance use on the job. (Tr. at 12.)

Melissa's 19-year-old daughter, Ellianna Meek, testified remotely. She described an incident, when she was 13, where Graham followed her into her bedroom, straddled her on the bed, and massaged her back, eventually progressing to her buttocks under the waistband of her clothing. (Tr. at 22-24.) She described freezing during the incident and crying afterward. (Tr. at 23-24.) According to Ellianna, Graham later told her not to tell her mother and offered to "buy her

whatever she wanted.” She reported that he subsequently entered her room on multiple occasions without speaking. While she waited several years to disclose the incident, she did so after her younger sister, A.R.M., began experiencing seizures and other trauma responses. (Tr. at 25-26.) Ultimately, she came forward and testified to protect her youngest sister, A.M., and ensure nothing happens to her. (Tr. at 25.)

Melissa testified to the disclosures by her daughters Ellianna and A.R.M. that led her to file the motion to amend the parenting plan, explaining that the allegations surfaced during therapy and were followed by mandatory reports. (Tr. at 45-46.) In response, all three of her daughters underwent forensic interviews in 2023 and again in 2024. (Tr. 45-46.) Melissa recounted that A.R.M., then fifteen, began experiencing what doctors later referred to as dissociative seizures shortly after her initial disclosure. According to Melissa, these episodes involved convulsions, whimpering, and extended periods of unresponsiveness—some lasting as long as two and a half hours—and required multiple emergency room visits. (Tr. at 47-48.) She further testified that these episodes ceased entirely following the court’s issuance of an order of protection in September 2024. (Tr. at 48.)

Melissa further testified that she enrolled A.R.M. in counseling with Elise Maggio in Dillon after researching available providers, explaining that Maggio was

both highly recommended and local. (Tr. at 61.) She emphasized that the alternatives proposed by Graham, in Bozeman and Butte, would have required nearly four hours of travel time for each session and were not feasible given her work schedule and other children's needs. (Tr. at 62.) According to Melissa, A.M. responded positively to Maggio and begun building rapport right away. (Tr. at 60-64.)

Taking the stand for the first time since the allegations were made, Graham denied any wrongdoing. He testified that he maintains a positive parenting relationship with A.M. and his daughter from a different relationship. (Tr. at 99-101.) He admitted to smoking marijuana "prior to August" 2024 and to drinking socially, but stated he had since stopped both. (Tr. at 113-114; 169-170.) He claimed that he voluntarily submitted to a psychosexual evaluation to prove his innocence and demonstrate that he posed no risk to his children. (Tr. at 106-07.) However, Dr. Page based his conclusions solely on Graham's own statements and testing results and had not interviewed any of the alleged victims or reviewed their statements. (Tr. at 116.) Graham also admitted that, at the time of his psychosexual evaluation, he had not bothered to read the reports against him in detail and was not fully informed about the specific nature of the allegations. (Tr. at 115-16.)

Graham requested reinstatement of the 2022 parenting schedule, claiming that A.M. was confused and emotionally distressed by the supervised visits, and

that the separation from her half-sister had strained the girls' bond. (Tr. at 112; 159-160.)

Dr. Robert Page, a licensed clinical counselor with a sexual offender treatment endorsement, conducted a psychosexual evaluation of Graham, as requested by Graham's attorney. (Tr. at 125-26.) He administered a battery of psychological instruments, including the Affinity 2.5 visual response time (VRT) test, which measures sexual interest across age and gender categories. (Tr. at 128-29.) According to Dr. Page, Graham's test results revealed no clinically significant indicators of psychological pathology, characterological disorder, or persistent sexual interest in minors. (Tr. at 130.)

However, Dr. Page identified several important limitations to the evaluation. He confirmed that he had no access to forensic interviews, child protection records, or statements from any of the alleged victims. (Tr. at 131; 138-39.) He did not conduct a parenting evaluation and made no observations of Graham's actual interactions with his children. (Tr. at 134.) Dr. Page acknowledged that psychosexual evaluations such as his cannot determine whether abuse occurred and are not predictive of future risk in the absence of adjudicated misconduct. (Tr. at 130-31; 141.) He further testified that such evaluations are not a reliable basis for assessing parenting fitness unless supported by substantiated findings or a criminal conviction. (Tr. at 134-35.)

Cynthia Beller, a lay supervisor appointed under the October 2024 interim parenting plan, testified that she has supervised nearly all of Graham's parenting time with A.M. since that date. (Tr. at 148.) Generally, she stated that A.M. arrives for visits excited and is often sad at the end. (Tr. at 149.) Beller attributed this emotional response to a child's ordinary desire to see her father more often. (Tr. at 150.)

Following the hearing, the District Court took the matter under advisement. On February 20, 2025, it issued its Findings of Fact, Conclusions of Law and Order, which vacated the Interim Parenting Plan, amended the 2022 Final Parenting Plan in limited respects, and reinstated Graham's unsupervised parenting time. (D.C. Doc. 30.) From that order, Melissa now timely appeals.

SUMMARY OF THE ARGUMENT

This appeal presents three distinct errors that individually and collectively require reversal. Each reflects the District Court's failure to follow established procedural safeguards and statutory mandates designed to protect children and ensure fair judicial proceedings.

First, the District Court committed structural error by appearing remotely at a contested evidentiary hearing without prior notice to the parties or opportunity to object. Montana law, established in *Bonamarte v. Bonamarte* and *City of Missoula v. Duane*, requires advance notice and meaningful opportunity for parties to

address remote participation. The District Court's last-minute announcement that it would preside via Zoom, citing weather and a cold, violated these procedural safeguards in a hearing that hinged entirely on credibility determinations involving serious allegations of child sexual abuse. This structural error compromised the fundamental framework of the proceedings and cannot be deemed harmless, requiring reversal and remand for a properly conducted hearing.

Second, the District Court abused its discretion by reinstating Graham's overnight, unsupervised parenting time without properly applying the best interests standard under Mont. Code Ann. § 40-4-212. Despite substantial evidence of ongoing safety risks, including an active order of protection, recent substance abuse, credible testimony of sexual abuse by multiple witnesses, and expert testimony acknowledging significant evaluation limitations, the District Court prioritized A.M.'s temporary emotional adjustment over fundamental child safety concerns. This approach inverted the statutory priority that requires express consideration of abuse evidence and represents a clear abuse of discretion that placed the child at risk.

Third, the District Court fundamentally misapprehended the significance of the order of protection and committed reversible error by refusing to give it appropriate probative weight in the parenting determination. The District Court artificially distinguished between the order of protection proceeding and parenting

case, despite both involving identical parties, the same judge, identical factual allegations, and the same civil burden of proof. This formalistic approach required Melissa to relitigate already-established facts and effectively nullified judicial findings that Graham posed a credible threat to A.R.M.'s and A.M.'s safety. The District Court's decision to reinstate unsupervised parenting time while maintaining a 1,500-foot protective restriction creates a practically unworkable situation that undermines both proceedings and contradicts Montana's statutory mandate to consider evidence of abuse in parenting determinations.

These errors are particularly egregious given the gravity of the sexual abuse allegations, the documented trauma responses of the children involved, and the recent nature of Graham's acknowledged substance use. Reversal and remand are necessary to ensure proper application of Montana's procedural and substantive protections for children and parties in family court proceedings.

STANDARD OF REVIEW

This Court reviews a District Court's conclusions of law to determine if they are correct. *City of Missoula v. Duane*, 2015 MT 232, ¶ 10, 380 Mont. 290, 355 P.3d 729. Evidentiary rulings are reviewed for an abuse of discretion. *Id.* A court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. *Myrick v. Skolrud*, 2016 MT 341, ¶ 7, 386 Mont. 39, 386 P.3d 934. "Review related to discretionary court

rulings is whether the court abused its discretion.” *Bonamarte v. Bonamarte*, 263 Mont. 170, 172, 866 P.2d 1132, 1133 (1994) (citing *Steer Inc. v. Department of Revenue*, 245 Mont. 470, 475, 803 P.2d 601, 604 (1990)).

A District Court has broad discretion when considering the parenting of a child, and this Court must presume the trial court carefully considered the evidence and made the correct decision. *In re the Parenting of C.J.*, 2016 MT 93, ¶ 13, 383 Mont. 197, 369 P.3d 1028 (citation omitted). Accordingly, absent clearly erroneous findings, this Court will not disturb a District Court’s decision regarding parenting plans unless there is a clear abuse of discretion. *In re A.H.S.*, 2025 MT 57, ¶ 8, 421 Mont. 196, --- P.3d ---- (citing *C.J.*, ¶ 13).

ARGUMENT

I. THE DISTRICT COURT ERRED BY APPEARING REMOTELY AT TRIAL WITHOUT PRIOR NOTICE TO THE PARTIES.

A. The District Court Appeared Remotely Without Any Notice or Opportunity to Object.

On the morning of the contested evidentiary hearing, the District Court announced without warning that it would preside remotely. Judge Abbott stated:

I have to apologize, my intention as of yesterday afternoon was to come down in person. Between dodgy roads... and coming down with a cold, I just didn't want to veer off the road in a Sudafed-induced haze.

(Tr. at 3.) The parties were given no prior indication of this plan, no meaningful opportunity to object, no chance to prepare alternate arrangements, and no

opportunity to address the procedural fairness of remote judicial participation. The District Court's unilateral decision to appear remotely undermined core principles of due process and impaired its ability to make credibility assessments in a high-stakes evidentiary hearing which compromised both the actual and perceived fairness of the proceeding.

B. Montana Law Requires Prior Notice and an Opportunity to Object to Remote Appearances at Evidentiary Hearings.

In *Bonamarte v. Bonamarte*, the Montana Supreme Court emphasized the procedural necessity of prior notice and consent (or at least a meaningful opportunity to object) before allowing remote participation at trial. *Bonamarte*, 263 Mont.at 174, 866 P.2d at 1134. Although *Bonamarte* directly addressed witness testimony by phone, the logic and procedural safeguards articulated in the opinion are equally applicable, if not more critical, to the presiding judge.

Specifically, *Bonamarte* set forth clear procedural considerations for remote testimony, emphasizing that in-person physical presence:

1. assists the trier of fact in evaluating the witness' credibility by allowing his or her demeanor to be observed firsthand;
2. helps establish the identity of the witness;
3. impresses upon the witness, the seriousness of the occasion;
4. assures that the witness is not being coached or influenced during testimony;

5. assures that the witness is not referring to documents improperly; and

6. in cases where required, provides for the right of confrontation of witnesses.

Id. While it did not adopt an absolute bar to remote appearances, the decision made clear that they require prior notice and the opportunity to object or make alternate arrangements:

Where the trial court approves and all parties consent, or at least have sufficient notice to object and/or make alternative arrangements,” remote appearances are permissible.

Bonamarte, 263 Mont. at 177, 866 P.2d at 1136. Here, the District Court failed to provide any such notice or opportunity.

C. The District Court’s Remote Appearance is not Supported by the Safeguards Affirmed in *City of Missoula v. Duane*.

In contrast, the Montana Supreme Court upheld a remote witness appearance in *City of Missoula v. Duane*, precisely because these procedural safeguards were observed. *See Duane*, ¶¶ 19-21. The remote testimony was arranged well in advance, approved after explicit consideration by the trial court, involved clear technical reliability, and provided a meaningful opportunity for adversarial examination. None of these safeguards are present here. The District Court made no record of the technical adequacy or procedural justification for appearing remotely, nor did it offer any rationale beyond inconvenience.

Critically, even in affirming a remote appearance, the Court in *Duane* strongly emphasized Montana’s continuing preference for in-person proceedings. *Duane*, ¶ 21. The absence of similar safeguards and the lack of prior notice here render the District Court’s unilateral remote appearance legally deficient.

D. The District Court’s Unannounced Remote Appearance Constitutes Structural Error.

Montana law recognizes certain trial components as structural: those fundamental to ensuring fairness and integrity of the judicial process. A structural error is that type of error that “[a]ffects the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *State v. Van Kirk*, 2001 MT 184, ¶ 38, 306 Mont. 215, 32 P.3d 735 (internal quotations omitted). “Because of its nature, it cannot be qualitatively or quantitatively weighed against the admissible evidence introduced at trial.” *Id.* Some violations “by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless.” *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284, 293 (1988).

As opposed to structural error, trial error is that type of error that typically occurs during the presentation of a case to the trier of fact. “Such error is amenable to qualitative assessment by a reviewing court for prejudicial impact relative to the other evidence introduced at trial.” *Van Kirk*, ¶ 40. Some examples of trial errors are admission of improper evidence and improper jury instructions. *State v.*

Lamere, 2000 MT 45, ¶ 44, 298 Mont. 358, 2 P.3d 204. In other words, trial errors are those which occur during the presentation of the case and can be assessed in the context of an otherwise proper and fair proceeding.

One standard for determining a trial error as opposed to a structural error is the “durational definition” of a trial error. It holds that a trial error is one that occurs during the presentation of the case to the fact finder. In the criminal context, “an error in jury selection occurs prior to the presentation of any evidence to the jury and, therefore, cannot be said to be a trial error under [this] definition.”

LaMere, ¶ 47. By the same token, the District Court’s decision to appear remotely at the contested hearing without sufficient notice occurred prior to the presentation of any evidence and, likewise, cannot be considered a trial error.

Moreover, the structural nature of this error becomes especially clear when considering the fundamental role of a judge in ensuring procedural fairness and the legitimacy of judicial proceedings. Structural errors are not merely procedural oversights; rather, they strike at the core of the adjudicative process. Here, the District Court's unannounced decision to appear remotely, without prior notice or a meaningful opportunity for objection, undermined the integrity of the factfinding process itself. It was not simply an error in how evidence was presented or assessed; instead, it compromised the essential framework within which evidence was presented and evaluated.

The deferential standard of review typically applied to parenting determinations rests on the foundational principle that the District Court, having observed the proceedings firsthand, is in the superior position to assess witness credibility and weigh evidence. As this Court has noted, trial courts are presumed to have “carefully considered the evidence” precisely because of their direct observation of witnesses and proceedings. *C.J.*, ¶ 13.

However, this presumption loses its foundation when the District Court compromises its own ability to make such assessments. By appearing remotely without notice, the District Court undermined the very basis for the deferential review standard: its superior position to evaluate witness demeanor, credibility, and the overall dynamics of the proceeding. The District Court’s remote participation, particularly in a hearing involving contested allegations of child sexual abuse where credibility determinations were paramount, placed it in a demonstrably inferior position to assess the evidence compared to what would have been possible with in-person proceedings.

This structural deficiency has particular significance for the remaining issues on appeal, which are otherwise subject to the abuse of discretion standard. Where the District Court’s factual findings and discretionary determinations flow from a fundamentally compromised proceeding, those determinations cannot receive the same deference ordinarily afforded to trial court decisions. The structural error thus

compounds the significance of the District Court's subsequent errors in applying the best interests standard and weighing the order of protection evidence, as these determinations were made from a procedurally deficient foundation that calls into question the reliability of the underlying credibility assessments and factual findings upon which they rest.

This Court has consistently held that errors affecting the fundamental fairness of proceedings constitute structural errors, requiring reversal because they render a qualitative or quantitative analysis of prejudice impossible. *See Van Kirk*, ¶ 38. Here, the absence of the judge from the courtroom went directly to the procedural fairness of the hearing, fundamentally altering the dynamics of witness testimony and credibility determinations in a proceeding marked by deeply contested and serious allegations.

The Montana Supreme Court in *Bonamarte* explicitly recognized that the physical presence of key participants is integral to maintaining the integrity and fairness of judicial proceedings. *Bonamarte*, 263 Mont. at 175, 866 P.2d 1135. The hearing in this matter hinged entirely on credibility assessments, involving contested allegations of child abuse, expert testimony, and significant conflicting evidence. Under these circumstances, the District Court's unannounced remote appearance impaired the judicial process so significantly that it casts fundamental doubt on the validity of any conclusions reached.

Finally, this error cannot be deemed harmless precisely because the structural integrity of the proceedings was compromised from the outset. Unlike trial errors, which may be weighed in context against other evidence, structural errors are intrinsically prejudicial, defying such contextual analysis. *Van Kirk*, ¶ 40. Accordingly, this Court should conclude that the District Court's failure to adhere to the procedural safeguards mandated under Montana law, its disregard for the importance of judicial presence, and the substantial prejudice inherent in its remote appearance constitute structural error necessitating reversal and remand for a new, properly conducted hearing.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY REINSTATING UNSUPERVISED PARENTING TIME WITHOUT PROPERLY APPLYING THE BEST INTERESTS STANDARD.

The District Court's decision to vacate the supervised parenting arrangement and immediately reinstate Graham's overnight, unsupervised parenting time constituted a clear abuse of discretion. The District Court failed to properly apply Montana's statutory best interests framework, inadequately weighed compelling evidence of ongoing safety risks, and prioritized short-term emotional concerns over the child's fundamental need for protection from potential harm.

A. Montana's Best Interests Standard Requires Courts to Consider Child Safety When Evidence of Abuse Exists.

District courts have broad discretion to make parenting plan determinations under the applicable standards of Mont. Code Ann. § 40-4-212, and such

determinations are reviewed for clear abuse of discretion. *Bessette v. Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894 (citations omitted).

Notwithstanding this deferential standard, however, judicial discretion must be guided by the rules and principles of law; thus, the standard of review is plenary to the extent that a discretionary ruling is based on a conclusion of law and in such circumstances, the Supreme Court determines whether the court correctly interpreted the law. *ManyWounds v. 20th Jud. Dist. Ct., Lake Cnty. Christopher*, No. OP 23-0629, 2024 WL 35979, at *7 (Mont. Jan. 2, 2024) (citing *Puccinelli v. Puccinelli*, 2012 MT 46, ¶ 12, 364 Mont. 235, 272 P.3d 117).

In deciding parenting matters, a District Court must “determine the parenting plan in accordance with the best interest of the child.” Mont. Code Ann. § 40-4-212(1). The statute directs the District Court to consider “all relevant parenting factors.” Mont. Code Ann. § 40-4-212(1). The statute’s non-exhaustive list of factors includes, relevant to this case:

(c) the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who significantly affects the child's best interest;

[...]

(e) the mental and physical health of all individuals involved;

[...]

(f) physical abuse or threat of physical abuse by one parent against the other parent or the child;

Mont. Code Ann. § 40-4-212(1).

The District Court need not make specific findings on each relevant statutory factor but must make findings sufficient for this Court to determine whether the district court considered the statutory factors and made its ruling on the basis of the child's best interests. *Woerner v. Woerner*, 2014 MT 134, ¶ 15, 375 Mont. 153, 325 P.3d 1244. "The court's findings should, at a minimum, 'express the essential and determining facts upon which it rests its conclusions.'" *Woerner*, ¶ 15 (quoting *In re Marriage of Crowley*, 2014 MT 42, ¶ 44, 374 Mont. 48, 318 P.3d 1031).

The best interests analysis is not a mechanical checklist, it requires trial courts to weigh the factors holistically while giving appropriate consideration to safety concerns. When substantial evidence points to potential threats to a child's welfare, that evidence must be given commensurate weight in the court's analysis. The substantive allegations against Graham implicated at least three of the factors: -212(c), (e), and (f) and required significant consideration.

B. Substantial Evidence Supported Continued Supervision Pending Resolution of Safety Concerns.

The record contained compelling evidence that Graham posed ongoing risks to A.M.'s safety that warranted continued supervision:

Active Order of Protection: Most significantly, an active order of protection required Graham to remain 1,500 feet from A.R.M. This order was issued following a formal hearing stemming from allegations of sexual abuse by Graham against his former stepdaughter. The District Court's decision to reinstate

unsupervised parenting while the order of protection remains active creates an internally inconsistent and practically unworkable situation.

Recent Substance Abuse: Graham admitted to marijuana use “prior to August” 2024, just months before the hearing. (Tr. at 113-14; 169-70.) This recent substance use, combined with the unrefuted testimony about Graham driving while intoxicated with the children in the vehicle (Tr. at 9) and smoking marijuana before driving children home from work trips (Tr. at 13), raised legitimate concerns about his judgment and ability to safely supervise A.M. during overnight visits.

Credible Testimony of Abuse: Two witnesses provided detailed, credible testimony regarding Graham’s inappropriate conduct. Ellianna Meek, now 19, testified about Graham’s sexual abuse when she was 13, describing how he straddled her on her bed and inappropriately touched her. (Tr. at 22-24.) Gary Caprara, Graham’s former employer, corroborated concerns about Graham’s judgment and substance use around children. (Tr. at 12-13.)

Expert’s Acknowledged Limitations: Even Dr. Page, Graham’s own expert, acknowledged significant limitations in his evaluation. He confirmed he had no access to forensic interviews, child protection records, or statements from alleged victims. (Tr. at 131; 138-39.) Critically, Dr. Page testified that psychosexual evaluations “cannot determine whether abuse occurred” and are not predictive of future risk without adjudicated misconduct. (Tr. at 130-31; 141.) He

further stated that such evaluations are not reliable for assessing parenting fitness absent substantiated findings. (Tr. at 134-35.)

C. The District Court Improperly Minimized Safety Concerns in Favor of Short-Term Emotional Considerations.

Despite this substantial evidence of ongoing risk, the District Court based its decision primarily on testimony that A.M. appeared “confused” and “emotionally distressed” by the supervised structure and that separation from Graham’s other daughter had strained their sibling relationship. (Tr. at 112; 159-60.) While these concerns deserve consideration, the District Court’s decision to prioritize temporary emotional adjustment over fundamental safety represents a misapplication of the best interests standard.

Montana law explicitly requires courts to consider evidence of abuse under § 40-4-212(1)(f), in order to ensure the physical and mental wellbeing of a child and keep them safe from would-be abusers. The District Court’s approach effectively inverted this obvious priority, treating safety concerns as secondary to short-term emotional concerns that are common, and typically temporary, in any custody modification.

Moreover, the District Court failed to consider less drastic alternatives that could have addressed A.M.’s emotional needs while maintaining appropriate safeguards. For example, the District Court could have modified the supervision requirements to allow for longer visits or different supervisors, expanded

communication between visits, or implemented a graduated transition plan that would allow for careful monitoring of any concerning behavior.

D. The District Court's Decision Was Particularly Inappropriate Given the Gravity and Recency of the Allegations.

The sexual abuse allegations against Graham were not stale or unsubstantiated claims. They resulted in an active order of protection following contested proceedings that involved multiple alleged victims and included recent disclosures.

The District Court's decision to immediately restore overnight, unsupervised parenting time was particularly troubling given that A.R.M. experienced documented trauma responses, including dissociative seizures requiring emergency room visits, that ceased entirely after the order of protection was issued. (Tr. at 47-48.) This evidence suggested not only that the allegations were credible but that the children in Melissa's household had experienced genuine trauma related to Graham's presence.

Furthermore, the District Court's decision ignored the practical reality that Graham would have unsupervised access to A.M. while he is legally prohibited from being within 1,500 feet of A.R.M. The cognitive dissonance creates an untenable situation that undermines both the order of protection and the safety measures it was designed to provide.

E. The Abuse of Discretion Standard Requires Reversal.

A trial court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or in a manner that exceeds the bounds of reason resulting in substantial injustice. *In re Marriage of Pearson*, 1998 MT 236, ¶ 30, 291 Mont. 101, 965 P.2d 268. Here, the District Court’s decision exceeded the bounds of reason by prioritizing temporary emotional adjustment over compelling evidence of ongoing safety risks.

The District Court’s failure to adequately weigh the order of protection, recent substance abuse, credible testimony of inappropriate conduct, and the expert’s acknowledged limitations demonstrates a lack of conscientious judgment in applying the best interests standard. The decision resulted in substantial injustice by placing A.M. at risk while creating an internally inconsistent legal framework that undermines the order of protection’s purpose.

Accordingly, this Court should reverse and remand with instructions to reinstate supervised parenting arrangements pending further proceedings that adequately address the safety concerns raised in the record.

III. THE DISTRICT COURT MISAPPREHENDED THE SIGNIFICANCE OF THE ORDER OF PROTECTION AND ERRED IN DISCOUNTING ITS RELEVANCE TO THE PARENTING DETERMINATION.

The District Court committed reversible error by dismissing the probative value of an active order of protection that directly bore on Graham’s fitness as a

parent and the safety of the children. This error reflects both a fundamental misapplication of Montana’s statutory framework for parenting determinations and an abuse of discretion in weighing evidence of potential harm to the children.

A. Montana Law Requires the District Court to Consider Evidence of Abuse When Determining a Child’s Best Interests.

Mont. Code Ann. § 40-4-212(1)(f), expressly lists “evidence of physical abuse or threat of physical abuse by one parent against the child or other parent” as a relevant factor for trial courts to consider when making best interest determinations. The order of protection constitutes precisely the type of evidence contemplated by the statute. Following a contested hearing, the same District Court Judge found sufficient credible evidence to issue a one-year order of protection requiring Graham to stay 1,500 feet away from A.R.M. (Tr. 40:16–18.) This judicial determination was not made lightly or by default, it reflected the Court’s assessment that Graham posed a credible threat to A.R.M.’s safety based on allegations of sexual abuse, and the testimony it heard.

Under Montana law, a petitioner may seek a temporary order of protection by filing a sworn petition stating that he or she is in reasonable apprehension of bodily injury or is a victim of certain offenses. Mont. Code Ann. § 40-15-201(1). The court shall issue a temporary order of protection if it finds that the petitioner is in danger of harm if the court does not act immediately. Mont. Code Ann. § 40-15-201(2). A court may continue, amend, or make permanent a temporary order of

protection if it finds, after hearing, that good cause exists to do so. Mont. Code Ann. § 40-15-202(1). The object of a temporary order of protection proceeding “is the swift and efficient protection of one who is being harassed and intimidated by another.” *Lear v. Jamrogowicz*, 2013 MT 147, ¶ 26, 370 Mont. 320, 303 P.3d 790. “The statutory scheme contemplates that the petition will succeed if the petitioner establishes good cause for the entry of an order, and will fail if she does not.” *Id.*

Accordingly, both the parenting modification and the order of protection operated on same standard of proof for civil cases: preponderance of the evidence. And while that standard is directed at slightly different conclusions (whether a person is being harassed or abused as opposed to the best interests of a child) it is impossible to see them as unrelated inquiries. Nonetheless, this is exactly what the District Court did.

B. The District Court’s Formalistic Distinction Between the Order of Protection and Parenting Proceedings was Legally Unsound.

Despite acknowledging the order of protection’s existence, the District Court explicitly refused to consider its underlying findings, reasoning that testimony from that hearing could not be credited because it arose from “a completely separate case with a different standard, different issues, [and] different reasons to develop the testimony.” (Tr. at 44.) And later: “I’m not really giving a whole lot of weight to what was or was not said at that hearing. I mean, the testimony that I need to decide this case needs to be based on the record in this case, not in a

different case.” (Tr. at 44.) This formalistic approach ignores the fundamental overlap between both proceedings and contradicts Montana’s statutory framework.

Both the order of protection proceeding and the parenting determination center on an identical factual inquiry: whether Graham poses a risk to the children. The order of protection was not issued based on different facts or different conduct; it was based on the same allegations of sexual abuse that directly impact Graham’s fitness as a parent and the safety of A.M. The Court’s artificial distinction between these proceedings effectively required Melissa to relitigate already-established facts under a heightened (and ill-defined) evidentiary standard. Moreover, both involved the same parties, the same judge, and the same civil standard of proof.

This approach is particularly problematic given Montana’s preference for judicial economy and the avoidance of inconsistent findings. While the District Court was not bound by the order of protection’s findings, it was required to give them appropriate evidentiary weight, especially when they directly bear on child safety: the paramount concern in any parenting determination.

C. The District Court’s Refusal to Give Probative Weight to the Order of Protection Undermined Its Statutory Obligation to Prioritize Child Safety.

The District Court’s refusal to meaningfully consider the order of protection had practical consequences that undermined A.R.’s safety. In its final order, the

District Court concluded that “Melissa has not provided sufficient evidence... that Graham abused A.R.M. or Ellianna,” citing the absence of direct testimony from the victims and lack of Child Protective Services substantiation. (D.C. Doc. 30 at 7.)

This reasoning ignores that credible, sworn testimony was already provided regarding these exact allegations at the order of protection hearing. Notably, this was testimony the District Court had previously found sufficiently credible to justify legally restricting Graham’s conduct and freedom. By essentially discounting this prior judicial determination, the District Court applied an inconsistent and artificially elevated standard that effectively nullified the order of protection’s probative value and judicial determination.

Moreover, the District Court’s approach created a dangerous precedent whereby orders of protection, designed specifically to protect vulnerable family members from abuse, would have no bearing on parenting decisions involving the same individuals and the same alleged conduct. This result contradicts the clear legislative intent underlying both Montana’s order of protection statutes and its parenting determination framework, both of which prioritize the safety and welfare of children and vulnerable family members.

D. The Error Requires Reversal Because it Compromised the Court's Best Interest Analysis.

The District Court's failure to properly consider the order of protection was not harmless error. The order of protection provided crucial evidence of Graham's potential threat to child safety; evidence that should have informed every aspect of the District Court's best interest analysis under Mont. Code Ann. § 40-4-212. By discounting this evidence, the District Court based its decision on an incomplete factual record that failed to account for judicially-recognized safety concerns.

This error is particularly significant given the nature of the allegations involved. Sexual abuse cases often present unique evidentiary challenges, including victims' reluctance to testify and limited physical evidence. Issues that were obviously present here. In these cases, orders of protection serve as important safeguards and sources of evidence regarding credible threats. The District Court's refusal to give proper weight to this evidence effectively eliminated a critical component of the safety analysis required by Montana law.

The District Court's decision to reinstate unsupervised parenting time while simultaneously maintaining an order of protection requiring Graham to stay away from A.R.M. creates an internally inconsistent and practically unworkable situation. If Graham poses sufficient risk to warrant a 1,500-foot restriction from one child in the household, logic and prudence demand that this finding inform decisions about his unsupervised access to that child's sibling.

Accordingly, this Court should reverse and remand with instructions to reconsider the parenting determination, giving appropriate evidentiary weight to the findings underpinning the order of protection to ensure that the best interests and safety of all children are genuinely protected. At a minimum, this matter should be reversed and remanded for a full and detailed accounting of exactly how these cases have “a different standard” and what standard was applied to each.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the District Court’s February 20, 2025, Findings of Fact, Conclusions of Law and Order on Motions and remand this matter with instructions to conduct a new evidentiary hearing with the judge physically present in the courtroom, reinstate supervised parenting arrangements pending proper resolution of the safety concerns raised in the record, apply Montana’s best interests standard under Mont. Code Ann. § 40-4-212(1)(f) with appropriate consideration of the evidence of abuse including the findings underlying the order of protection.

DATED: July 28, 2025.

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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 footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding the certificate of service and the certificate of compliance.

MEASURE LAW, P.C.

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APPENDIX

Findings of Fact, Conclusions of Law, and Order App. A