

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 25-0223

IN RE THE MARRIAGE OF:

MATTHEW EARL COOL,

Respondent-Appellant,

and

ABIGAIL COOL,

Petitioner-Appellee.

APPELLEE'S BRIEF

On Appeal from the Montana Thirteenth Judicial District Court
Yellowstone County, The Honorable Mary Jane Knisely, Presiding
District Court Case No DR 21-0261

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I. STATEMENT OF THE ISSUES

The Appellant raises the issue of whether the District Court erred in establishing a residential parenting schedule for the parties' two minor children.

II. STATEMENT OF THE CASE

Yellowstone District Court Judge Mary Jane Knisely issued Findings of Fact and Conclusion of Law, and a Final Parenting Plan on October 21, 2024. See District Court Docket #70; see also **Exhibit B** to Appellant's Brief (hereinafter referred to as *Order*). Appellant Matthew Cool (Matthew) filed a timely appeal. Appellee Abigail Cool (Abigail) now files this Response.

III. STATEMENT OF THE FACTS

A. The Undisputed Evidence Was that Abigail was the Children's Primary Parent

The parties were married in 2009 and they separated on or about March, 2021. Hrg. Transcript 9/13/2022, p. 8-9. Appx. 8-9. The parties have two minor children, both boys. The boys, T.C. and L.C., were aged 7 and 5 when the parties appeared for trial in September 2022. Hrg. Transcript 9/13/2022, p. 9. Appx. 9.

The parties appeared for trial on dissolution and final parenting plan on September 13, 14, and 15, 2022. Abigail testified and called two other witnesses. Abigail called Tom Madden, a Billings realtor to establish the value of her residence. Abigail also called her sister, Naomi Sikora, to testify as to various issues related to the marital estate and parenting of the children. Matthew testified and did not call

any witnesses. The Court issued its Findings of Fact, Conclusions of Law, Property Division, Decree of Dissolution of Marriage, and Final Parenting Plan on October 21, 2024. District Court Docket #70 (hereinafter referred to as “Order”).

The Court’s *Order* was extensive. The Court based its determination for a final parenting schedule on numerous factors. The District Court found that

Abigail was 35 years old at the time of trial. Hrg. Tr. 9/13/2022, p. 8/7. Appx. 8. She and the parties’ two children, T.C. aged 7 and L.C. aged 5, moved into their residence on May 15, 2021. *Id.* Hrg Tr. 9/13/2022, p. 8/24-25-9/1-8. Appx. 8-9. Matthew resided at a different residence from Abigail and the children commencing in April 2021. *Id.* Hrg. Tr. 9/13/2022, p. 9/17-20. Appx. 9. At the time of trial, L.C. attended Kindergarten and T.C. attended 1st grade. *Id.* Hrg. Tr. 9/13/2022, p.10/17-24. Appx. 10. Matthew resided with his girlfriend at the time of the trial. Matthew testified that his girlfriend’s residence had a bedroom set up for his children, when they visited. Hrg. Tr. 9/15/2022, p. 13-14. Appx. 230-231.

The evidence reflected that Abigail was the primary residential parent of the children. Abigail was primarily responsible for the children’s day-to-day needs. Matthew never took the children for medical care. Hrg. Tr. 9/13/2022, p. 126/17-21. Appx. 126.

Abigail commenced working in March of 2022. Hrg. Tr. 9/13/2022, p. 21/22-25; p. 22/1-19. Appx. 21-22. Her job selling insurance allowed her to have a very flexible schedule which included the ability to work from home. *Id.*

Matthew acknowledged that Abigail had always been the children's primary caretaker. Hrg. Tr. 9/15/2022 p. 67/5-12. Appx. 284. Matthew admitted that even when he wasn't at work, he would spend a lot of time doing things other than parenting. Indeed, he spent a lot of time, a "good chunk" in his words, engaged in outdoor activities and at casinos. Hrg. Tr. 9/15/2022 p. 67-68. Appx. 284-285. He acknowledged that, historically, he elected to participate in those activities as opposed to parenting on his days off from work. Hrg. Tr. 9/15/2022 p. 68/3-13. Appx. 285.

Abigail was primarily a stay-at-home mom during the marriage. Matthew's fluctuating schedule affected his ability to parent. Hrg. Tr. 9/13/2022, p. 15. Appx. 15. Abigail stopped working to be a full-time mom in July of 2016, when she was 5 months pregnant with L.C. *Id.* Hrg. Tr. 9/13/2022, p. 12/17-25. Appx. 12. Abigail provided the day-to-day care for the children after that. *Id.* Hrg. Tr. 9/13/2022, 13/1-12. Appx. 13.

Matthew's testimony during his second day of direct examination testimony was instructive as to this issue:

Q (from his counsel): In [Abigail's] testimony a couple days ago, she basically relies upon a foundation of her proposed parenting plan is she's the primary care provider during your marriage, and it kind of presented in a way that you didn't have much participation in parenting during your marriage. Is that true?

A: Um, yes. She was there for the majority of everything that a wife would be taking care of, as far as the house and the children go. Um, on my days off, yes, I would be doing other things. I'm not always at home.

Hrg. Tr. 9/15/2022, p. 26/1-11. Appx. 243.

Q (from his counsel): Why?

A: Um, I'm an outdoorsy person, and I guess everyone kind of depending, deserves a little bit of free time if the situation provides it.

Hrg. Tr. 9/15/2022, p. 26/12-15. Appx. 243.

Matthew's counsel attempted to provide Matthew with a softball question in order to salvage his case. His attempt to issue Matthew a life-preserver was without success:

Q: In the future, are you going to parent on your time off?

A: Um, I will, if everything pans out the way I believe it should.

Hrg. Tr. 9/15/2022, p. 26 16/20. Appx. 243.

Further supporting Abigail's status as the "parent" or primary parent of the children were Matthew's actions following the parties' separation. Matthew did not take any of the children's belongings when he moved out of the home. Matthew testified as follows:

Q (from his counsel): You didn't take anything that belonged to the boys out of the home.

A: Not a single thing.

Q: Your wife has all the clothing, toys, everything.

A: Yes.

Q: Never surrendered anything.

A: Nope.

Q: Because she's the parent.

A: Yep.

Hrg. Tr. 9/15/2022 p. 14/3-12; see also Hrg. Tr. 9/15/2022 p. 52/4-23. Appx. 231; Appx. 269.

Matthew acknowledged that Abigail would have let him take clothing for the children had he asked her if he could do so. Hrg. Tr. 9/15/2022 p. 79/5-10. Appx. 296. Instead, he took his guns, fishing equipment, 4-wheeler, camper, and welder. But, nothing related to the children. Hrg. Tr. 9/15/2022 p. 52/4-14. Appx. 269.

Matthew also had limited involvement in other aspects of parenting the children. Abigail testified that she should make educational decisions related to the children in accordance with the parties' historical practice. Hrg. Tr. 9/13/2022, p. 105/13-19. Appx. 105. Abigail testified that Matthew was not involved in getting

the children enrolled in school, he wasn't involved in school open houses, with a caveat of unless his work allowed that time off. Hrg. Tr. 9/13/2022, p. 126/9-16. Appx. 126. Additionally, Matthew was not involved in medical decisions related to the children or their individual medical needs. *Id.*, Hrg. Tr. 9/13/2022, p. 126/17-21. Appx. 126.

Matthew testified that he could take the children to medical appointments because he is off from work half of the time. But, even though that had been the case for years, he had never taken the children to medical appointments other than a couple of immunizations.

Further, Matthew was unable to identify the children's pediatrician. Hrg. Tr. 9/15/2022 p. 29/9-23. Appx. 246. He also acknowledged that he had missed the children's dental appointment that was scheduled during his time earlier in the year. The appointment was later rescheduled to occur during Abigail's parenting time. Hrg. Tr. 9/15/2022 p. 30-5-13. Appx. 247.

The children remained in Abigail's primary care throughout the course of the dissolution proceedings. Matthew exercised parenting of the boys on two weekends each month and on a Wednesday afternoon. Hrg. Tr. 9/13/2022 pp 17-19. Appx. 17-19. Indeed, this schedule was the product of an agreement between Matthew and Abigail. See Hrg. Tr. 9/13/2022, pp. 37-39; see also Exhibit 66. Appx. 37-39. Abigail testified that maintaining this agreed-upon schedule of two weekends per

month for Matthew was in the children's best interests. Hrg. Tr. 9/13/2022, p. 41/8-14. Appx. 41.

The children did not adjust well to their time with Matthew. For instance, the parties' child, T.C., experienced issues with potty training. Abigail testified to T.C.'s regression with this issue. Hrg. Tr. 9/13/2022, p. 39; see also Hrg. Tr. 9/13/2022, p. 128-129. Appx. 39; Appx. 128-129. Abigail testified to L.C.'s difficulties in adjusting to parenting time with Matthew. Hrg. Tr. 9/13/2022, p. 40/4-22. Appx. 40.

Matthew testified to the issues in a manner that did not speak well of his parenting or the children's adjustment to his care. Matthew described a recent event with T.C. wherein the child had a potty-training accident. Hrg. Tr. 9/15/2022, p. 7-8. Appx. 224-225. Matthew denied that it was an accident and considered it an issue of "laziness."

Further, Matthew acknowledged that following the second day of trial on Wednesday September 14, 2022, he was supposed to exercise his regular Wednesday parenting time. Hrg. Tr. 9/15/2022, p. 9-12. Appx. 226-229. Matthew had made no arrangements for the children's care and relief upon Abigail to make the arrangements.

Matthew had other interests, in addition to his work, that limited his involvement with the children. Hrg. Tr. 9/13/2022, p. 18/10-21. Appx. 18. Most of his time off was spent hunting, fishing, or being engaged in other activities. *Id.*

Further, Matthew gambled frequently. Hrg. Tr. 9/13/2022, p. 19/5-10. Appx. 19. Indeed, Abigail was able to track exorbitant marital resources that were dissipated by Matthew as part of his frequent gambling. Abigail tracked more than \$60,000 of marital resources lost by Matthew to gambling at casinos. Hrg. Tr. 9/13/2022, p. 70, pp. 71-74, see also Exhibits 4, 5-63. Appx. 70, 71-74.

Indeed, Matthew's discussion of this topic during his direct examination is instructive:

Q (from his counsel): Do you have a gambling problem?

A: I wouldn't say it's a problem. Um, at the time, it was a reason to get away.

Q (from his counsel): Listen to my questions, please.

Hrg. Tr. 9/14/2022 p., 16/23-25, p. 17. Appx. 166; Appx. 173.

B. The Undisputed Evidence is that the Children Were Adjusted to Abigail's Primary Environment

Matthew acknowledged that the children were secure in their home with Abigail. Matthew acknowledged that the children's items should have remained in the residence that they were secure in. Hrg. Tr. 9/15/2022 p. 53/2-5. Appx. 270.

Abigail testified to the daily routine she had with the children as their primary caretaker. Hrg. Tr. 9/13/2022, p. 13/2-17. Appx. 13. Abigail testified that she provided the structure for the children and provided their day-to-day care. *Id.* Hrg. Tr. 9/13/2022, p. 14/13-10. Appx. 14. Abigail provided continuity of care and stability for the children. *Id.* Hrg. Tr. 9/13/2022, p. 15/14-16. Appx. 15. Indeed,

Matthew acknowledged that Abigail picked the children up from their childcare provider on a daily basis. Hrg. Tr. 9/14/2022, p. 12/7-9.

C. The Parties Entered Into a Stipulated Interim Parenting Schedule that was Generally in the Children's Best Interests

The parties were exercising an agreed-upon, and *de facto* parenting schedule for the lengthy period of time post-separation and up to trial. The interim parenting plan was not imposed by the Court, it was a stipulated parenting plan. Hrg. Tr. 9/15/2022 p. 31/2-5. Appx. 248.

Matthew would typically have two weekends off from work each month. Hrg. Tr. 9/13/2022, p. 17/13-25. Appx. 9, Appx. 17. Matthew would typically exercise those weekend days. He would also have another roughly 8-hour period of parenting time. *Id.* Matthew would also exercise time on Wednesday afternoons on his days off. Hrg. Tr. 9/13/2022, p. 19/20-24. Appx. 19. See also Hrg. Tr. 9/13/2022 p. 20/4-14 (establishing Matthew's parenting schedule as his two weekends off from work each month along with a non-overnight Wednesday period) see also Hrg. Tr. 9/13/2022, p. 104-105 (reflecting that Matthew had exercised approximately 8 days of parenting per month since December 2021 during his two weekends off from work each month, and additional Wednesdays, as the parties' stipulated schedule). Appx. 20; Appx. 104-105.

Abigail admitted Exhibit 65 into evidence at trial. Hrg. Tr. 9/13/2022, p. 35. Appx. 35. The schedule maintained by Abigail reflected that Matthew, starting in

January 2021, would be two weekends per month, or perhaps less. Indeed, he missed weekends in some months for events such as attending a Denver Broncos football game. Hrg. Tr. 9/13/2022, p. 35, p. 36. Appx. 35-26.

The children were adjusted to this residential schedule. Hr. Tr. 9/13/2022, p. 20/15-20. Appx. 20. Abigail continued to have an established day-to-day routine in her care. Hrg. Tr. 9/13/2022, p. 19; see also Hrg. Tr. 9/13/2022, p. 21/5-21. Appx. 19; Appx. 21. Abigail's sister, who was familiar with her relationship with the children testified that the children were "very much" adjusted to Abigail's care and that they found "comfort" in her care. Hrg. Tr. 9/13/2022, p. 153. Appx. 153. Matthew admitted that Abigail was a good parent. Hrg. Tr. 9/14/2022, p. 5/17-19. Appx. 162. Matthew acknowledged that the children were accustomed to the interim parenting schedule. Hrg. Tr. 9/15/2022 p. 68/21-25. Appx. 285.

D. Matthew's Work Schedule Does Not Provide a Stable, Consistent Schedule for the Children

Matthew described his rotating work schedule during his examination. Hrg. Tr. 9/14/2022, p. 6. Appx. 163. He worked 4 days on, with 5 days off. Then, he worked 5 days on with 4 days off. Then, he worked 5 days on with 5 days off. He described that his shifts rotated from day to night shifts. His description of his schedule reflected the changing and unpredictable nature of the schedule. *Id.*

Matthew's work schedule was not conducive to structured, stable parenting of the children. Matthew worked as a mechanic for Stillwater Mine. Hrg. Tr.

9/14/2022, p. 13. Appx. 170. Matthew's work schedule fluctuated between day and night workshifts. Hrg. Tr. 9/14/2022, p. 14-15. Appx. 171-172. His scheduled days of work, and days off from work, also fluctuated. Hrg. Tr. 9/14/2022, p. 6. Appx. 163.

Matthew's employment at Stillwater Mine affected his availability to parent the children. He worked graveyard shifts at the mine. The children would generally see him first thing in morning upon his arrival home from work, and then before he would leave for work that evening. The times Matthew would see the children was usually on his days off from work. Hrg. Tr. 9/13/2022, p. 15/2-15. Appx. 15.

Abigail noted some confusion about the rotating shift-work schedule that Matthew exercised at the Mine. Hrg. Tr. 9/13/2022, p. 15/17-22. Appx. 15.

Matthew worked a rotating day shift, and rotating graveyard shift schedule at the mine. Hrg. Tr. 9/13/2022, p. 16/6-15. Appx. 16. Abigail expressed concern about that work schedule and Matthew's ability to parent on an equal basis. She noted concerns related to Matthew's lack of sleep following his graveyard shifts Tr. 16/19-25. Appx. 16. She noted concerns about basing the children's residential schedule upon Matthew's work schedule. Hrg. Tr. 9/13/2022, p. 17/4-6. Appx. 17. He also testified about the changing times that he would get home from shifts and his need for rest following night shift schedules. *Id.* Hrg. Tr. 9/14/2022, p. 7. Appx. 164.

Matthew did not provide any sort of consistent day-to-day schedule that a parenting schedule could reasonably be based upon.

Matthew was asked on his direct examination as to the flaw in Abigail's proposed parenting plan. Matthew responded that he believed that the children should have equal time with both parents, that he worked a schedule that allowed equal time, that he's a good parent, and that he doesn't "abuse" the children. Hrg. Tr. 9/14/2022, p. 10. Appx. 167. Matthew's answer was void of any explanation as to how his proposed schedule was actually in the children's best interests.

E. The Evidence Showed That Matthew Did Not Provide a Consistent Environment for the Children

Matthew generally testified that he believed he should receive additional parenting time. However, he admitted that he used daycare services at times during his scheduled parenting of the children due to "other obligations." Hrg. Tr. 9/15/2022 p. 44/22-25; Hrg. Tr. 9/15/2022 p. 45/1-9. Appx. 261; Appx. 262.

Matthew was not able to provide details, throughout the entirety of trial, as to why his proposed arrangement was actually in the children's best interests.

Matthew acknowledged that one of those other obligations that he chose over parenting of the boys was to attend a Denver Broncos football game that occurred during his scheduled parenting time. Matthew failed to take the boys with him on this trip even though he acknowledged that he could have done so. Hrg. Tr. 9/15/2022 p. 46; *Id.* at p. 47/1-7. Appx. 264.

Matthew acknowledged that he was scheduled to parent the children on the afternoon of the second day of trial and that one of his responsibilities during his parenting time was to arrange for pick-ups of the children. But, he acknowledged that he had failed to make any arrangements for the children's care on September 14, 2022. Hrg. Tr. p. 32-33. Appx. 189-190.

Further, Matthew attempted to explain his reaction to T.L.'s recent potty-training accident. He acknowledged that the child was embarrassed about the incident. He noted that the child was upset about the incident. He admitted that he threatened to spank the child following the incident and that it put "fear" in the child in an effort to help prevent the child from having further accidents. Hrg. Tr. 9/15/2022 p. 43/3-16. Appx. 260.

F. Matthew's Proposed Residential Schedule Did Not Afford the Children with Stability of Care or Continuity of Care

Matthew's proposed residential schedule for a 5 year old child and 7 year old child was that it be structured around his work schedule. Hrg. Tr. 9/15/2022 p. 36-37. Appx. 253-254. This would result in the children changing their schedule in the middle of the week—on Tuesday, or Wednesday, or a Monday, or "whenever." Hrg. Tr. 9/15/2022 p. 37/1-13. Appx. 254. The day that Matthew would receive the children would change "from week to week." *Id.* at page 38/24-25. Appx. 255. Matthew acknowledged that the children's schedule could change "every week."

Id. At page 39/1-2. Appx. 256. In fact, Matthew admitted that consistency is especially important for children aged 5 and 7 years old. *Id.* At page 39/3-6. Appx. 256.

Matthew acknowledged that the children's residential schedule had not been based upon his work schedule in the past. Hrg. Tr. p. 41/6-11. Appx. 258.

Matthew's work schedule also does not afford him consistency with regard to exercising holiday parenting. He acknowledged that Christmas is the only holiday that he was guaranteed to have off from work. Hrg. Tr. p. 41/16-20. Appx. 258.

Matthew, throughout the entirety of the trial, failed to provide a basis or a schedule with which the District Court could reasonably find that his proposal afforded the children continuity of care and stability of care.

IV. STANDARD OF REVIEW

The Supreme Court reviews a district court's findings of fact supporting a parenting plan for clear error. *In re Marriage of Crowley*, 2014 MT 42, ¶44, 374Mont. 48, 318 P.3d 1031. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if the Court's review of the record leaves it firmly convinced that the district court made a mistake. *Crowley*, ¶24. Unless a court has made clearly erroneous findings, a District Court's decision regarding parenting will be sustained,

unless there is a clear abuse of discretion. *In re Marriage of Epperson*, 2005 MT 46, ¶17, 326 Mont. 142, 107 P.3d 1268.

Conclusions of law are reviewed for correctness. Trial courts have broad discretion when determining parenting, and the Court will not disturb the trial court's decision on appeal absent a clear abuse of discretion. A court abuses its discretion when it acts arbitrarily without employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *Id*; see also *In re the Parenting of M.C.*, 2015 MT 57, ¶ 10, 378 Mont. 305, 343 P.3d 569.

Violations of due process are questions of constitutional law and are subject to plenary review. *In re AS*, 2004 MT 62, ¶ 9, 320 Mont. 269, 97 P.3d 408.

V. SUMMARY OF ARGUMENT

The District Court properly weighed the best interests factors set forth in Section 40-4-212, MCA when it adopted the Final Parenting Plan in the *Order*. The District Court's findings are sufficient for the Court to determine that Abigail should continue to exercise a residential schedule wherein she primarily parents the children. The court considered the statutory factors in details and based its ruling on the best interests of the children. The District Court weighed the conflicting evidence presented and issued findings supported by evidence.

The Final Parenting Plan adopted by the District Court was largely premised on the children's stability and continuity of care. The parenting schedule was based

upon the fact that Matthew's work schedule was not an appropriate basis to establish a parenting schedule as it changed from week-to-week and from day to night shifts. Further, the District Court found that equivalent parenting time for both parents would be contrary to the children's best interests. The District Court found that Matthew's schedule did not provide the children with the stability and continuity of care needed to provide for their best interests.

Although the District Court's parenting order was supported by substantial evidence and was demonstrably in the children's best interests, the standard of review is not whether the appellate court would have made the same findings as the District Court regarding the parenting schedule. The standard of review is whether the District Court acted arbitrarily and without conscientious judgment. The extensive testimony at trial supported the District Court's *Order*. The District Court's extensive findings and conclusions support its *Order*. Matthew's appeal should be denied.

VI. ARGUMENT

Although Matthew alludes to several issues in his brief, they are all appropriately analyzed as objections to the Final Parenting Plan adopted by the District Court due to an alleged abuse of discretion by the District Court. Matthew challenges the sufficiency of findings made by the District Court. Matthew also

challenges application of certain findings to the determination that the Final Parenting Plan is in the children's best interests.

A. The District Court Made Sufficient Findings to Support the Final Parenting Plan

The preference of the Montana Supreme Court is for the trial court to make specific findings on each relevant factor under § 40-4-212, MCA, but the Court has repeatedly held that such findings are not required. *In re Marriage of Woerner*, 2014 MT 134, ¶ 15, 375 Mont. 153, 325 P.3d 1244 (citing *In re Marriage of Keating* (1984), 212 Mont. 462, 467, 689 P.2d 249 and *In re Marriage of Converse* (1992), 252 Mont. 67, 71, 826 P.2d 937.). The Court requires that the trial court make findings sufficient for the Court to determine whether the trial court considered the statutory factors and based its ruling on the best interests of the child. *Jacobsen v. Thomas*, 2006 MT 212, ¶ 19, 333 Mont. 323, 142 P.3d 859. Nonetheless, the District Court made specific findings under each statutory best interest factor in its *Order*.

Section 40-4-212(1), MCA, includes a non-exhaustive list of factors for the court to consider, including the wishes of the parties; the interaction with the child and each parent; the child's adjustment to home, school, and community; stability of care; and the developmental needs of the child. It is not mandatory that a district court's order contain specific findings on each of the listed factors, but a court's findings must “express the essential and determining facts upon which it rests its conclusions.” *In re Epperson*, ¶ 30 (internal citation omitted). *In re Marriage of*

Crowley, 2014 MT 42, ¶ 45, 374 Mont. 48, 58, 318 P.3d 1031, 1040, 2014 WL 631646.

The District Court engaged in an exhaustive analysis of the statutory best interest criteria set forth in §40-4-212, MCA. See Order at pp. 38-43, ¶¶88-102. The Court found that the children are well-adjusted to living with Abigail and that there was less evidence as to the children's adjustment to living with Matthew. *Id.* at page 40 ¶93. The Court found that Abigail's approach to T.C.'s developmental issues was more conducive to supporting the child's physical or mental health. *Id.* page 41 ¶94. The Court found that Matthew did not have predictable days of the week or times of day that he will be available for parenting of the children. Thus, Abigail's proposed parenting plan served the children's best interests. *Id.* page 41. These findings were all supported by the factual record set forth above.

The Court's *Order* emphasized the children's stability of care and continuity of care. The record clearly demonstrated why Abigail was the parent more equipped to provide for continuity and stability of care. The factual record described above demonstrates that Abigail was the parent who provided continuity and stability of care for the children while Matthew worked, hunted, fished, gambled, or needed a break.

It is not the Court's function to reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence for that of the trial court. *In re A.F.*,

2003 MT 254, ¶ 24, 317 Mont. 367, 77 P.3d 266. The ultimate test for adequacy of findings of fact is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence presented. *In Re Marriage of Wolfe* (1983), 202 Mont. 454, 457-58, 659 P.2d 259. Even when there is a conflict in the evidence, the Court will uphold the trial court's determination in the context of a dissolution proceeding where there is substantial credible evidence to uphold its findings of fact and conclusions of law. *Bock v. Smith*, 2005 MT 40, ¶ 27, 326 Mont. 123, 129, 107 P.3d 488.

Here, the District Court found that Abigail had provided most of the parenting time during the parties' marriage. The Court found that the children were "well-adjusted" to being in Abigail's primary care. *Order*, p. 34 ¶¶67-70. had parented the children for the majority of time during the marriage. *Order*, par. 72, p. 35. The District Court found that Matthew has missed a documented medical appointment for the children during his parenting time and that he lacked knowledge of the children's medical care. *Order*, par. 73-74. The District Court expressed concern related to the younger son's regression following visitation with Matthew. *Order*, par. 86-87, p. 38. Again, these findings were all supported by the factual record described above.

In his Brief, Matthew states the relevant statutory factors and notes that the District Court concluded that several of those factors did not favor either party.

Appellant's Brief at p. 10. But, the District Court found that the crucial factors related to the parties' children favored Abigail.

The District Court found that Abigail was responsible for taking the children to their appointments or activities and that she otherwise performed the daily, hands-on tasks of being an engaged parent. *Order* p. 34 ¶71. In contrast, the Court found Matthew did not have much involvement parenting the children. He admitted that he was not often home on his days off from work. Instead, he pursued his hobbies such as hunting and fishing, or gambling in casinos. *Order*, p. 35 ¶72.

The District Court found that the children's adjustment to home, school, and community favored Abigail's parenting plan. *Order*, p. 40 ¶93. The Court found that T.C.'s toilet accidents are a developmental issue and a regression issue. *Order*, p. 38 ¶¶86-87. The Court found Abigail's approach to the issue more productive than Matthew's approach of instilling "fear" in the child. *Id.* Further, the boys' mental and physical health were promoted by Abigail's parenting plan. *Order*, par. 94, pp. 40-41.

Further, as noted in *Appellant's* Brief, the District Court found that continuity and stability of care favor her. In *In re Marriage of Tahija* (1992), 253 Mont. 505, 833 P.2d 1095, this Court affirmed the district court's joint custody determination even though it erred in finding that the parties accepted and agreed upon a joint custody arrangement, stated no reasons for adopting one plan over

another, and did not address numerous issues raised by the father at trial. *Tahija*, 253 Mont. at 507–08, 833 P.2d at 1096. Citing to *In re Marriage of B.H.J.* (1988), 233 Mont. 461, 463, 760 P.2d 753, 754, the Court stated that “this Court will not disturb a visitation schedule ordered by the District Court when it is supported by substantial credible evidence.” *Tahija*, 253 Mont. at 507, 833 P.2d at 1096. “While the District Court erred in finding the visitation plan was adopted and accepted by both parties, its adoption of [the mother's] proposed plan was within its discretion.” *Tahija*, 253 Mont. at 508, 833 P.2d at 1096. Likewise, the District Court is not required to address every issue raised at trial by a party nor to address in specific detail all of the evidence submitted. Its decision will be upheld if it is supported by substantial evidence and if its findings set forth the essential and determining factors for its custody determination. *Czapranski v. Czapranski*, 2003 MT 14, ¶¶ 49-50, 314 Mont. 55, 70, 63 P.3d 499, 509, 2003 WL 291899.

Here, the District Court correctly found that Matthew’s proposed schedule would result in the children “continuously” adapting their schedules and routines to Matthew’s ever-changing availability. The Court, correctly and crucially, found that his proposal would require the Court to disrupt the continuity and stability of care which the children are accustomed. The Court found that there would be no consistency in the days of the weeks or the times for exchanging the children under Matthew’s proposed schedule. *Order*, p. 42 ¶¶97, ¶¶101. That is correct. Matthew

acknowledged as much during his testimony. Matthew cannot demonstrate that the District Court was wrong. He certainly cannot demonstrate that the District Court abused its discretion in making this determination. The issue is not, as Matthew attempts to confuse this Court, whether Matthew has a defined work schedule in terms of whether he knows when he will be working.

The relevant issue as to the children is whether his proposed schedule provides the children with a stable, predictable, consistent schedule from which to base a parenting schedule—and it does not. The Court adopted residential schedule comports with the parties’ practice, serves the children’s need for continuity and stability of care, and provides for a predictable schedule. *Order* pp. 50-52 ¶112.

B. The District Court Appropriately Applied the Best Interests Factors

The District Court addressed reasons as to why Abigail’s parenting plan promoted the children’s best interests and provided them with continuity and stability of care. The Court noted Matthew’s ever-changing work schedule. Matthew mischaracterizes the issue as the District Court purportedly misunderstanding his work schedule. In fact, the District Court’s finding that Abigail’s schedule promoted stability for the children, whereas, Matthew’s schedule did not, is based on his constantly changing day/night rotation, and his constantly changing workdays. The only stable fact related to Matthew’s schedule, especially as would be understood by young children, is the fact that Matthew was typically able to exercise two weekends

of parenting per month when he did not work. *Order*, par. 42-43. This finding is further supported by the factual record.

Matthew essentially asks this Court to reverse the trial court's decision because he does not work roughly half of the time and is theoretically available to parent. This position ignores the substantial evidence presented at trial that the children's best interests were not served by an equal residential schedule.

Montana's statutory scheme no longer contains a presumption in favor of joint custody and where the best interest statute, as opposed to the custody modification statute, contains permissive factors that a district court may or may not consider on a case-by-case basis when making initial custody determinations. *See In re Marriage of Bukacek* (1995), 274 Mont. 98, 106, 907 P.2d 931, 936 (noting that although the best interests statute lists several relevant factors that the district court must consider, the court is not required to make specific findings which address each factor, but must set forth the "essential and determining" factors on which its determination is based). *Czapranski v. Czapranski*, 2003 MT 14, ¶ 37, 314 Mont. 55, 67, 63 P.3d 499, 507, 2003 WL 291899. The District Court considered these factors in great detail and its *Order* is supported by the factual record.

Matthew asks this Court to adopt a different standard in determining a parenting plan that is in the children's best interests. Matthew essentially argues that

his work schedule never varied, that he has 14 days per month off to exercise parenting with the children, and that he is a “good parent.” See Brief at pp. 13-14. Matthew asserts a “public policy” argument that the best interests statute cannot be construed to “allow a court to find that a static employment factor, makes contact with one parent to [*sic*] detrimental to a child’s best interests.” *Id.* at p. 14. There is no such “public policy” set forth in Section 40-4-212, MCA.

Further, the District Court’s ruling was not as broad or far-reaching as Matthew portrays. The District Court’s ruling does not have broad “public policy” implications. The District Court simply applied the facts presented at trial to the children’s best interests. The children’s best interests are not served, as the Court concluded, by placing young children on a schedule that is based upon an employed adult’s rotating day-night and rotating days on/days off schedule.

The District Court found that this schedule was not in the children’s best interests, especially based upon Abigail’s history as the children’s primary caretaker, the parties’ agreed interim plan, the children’s difficulty with adjusting to parenting time with Matthew, and the entirety of the best interest factors. Laws governing parenting plans seek to preserve stability and continuity of custody for the children. *Brown v. Brown*, 384 P.3d 476, 385 Mont. 369 (2016); see also Mont. Code Ann. §40-4-219. The Court followed this guidance in establishing the parenting schedule herein.

Matthew's schedule is predictably unpredictable. The District Court correctly described his schedule, based upon the relatively limited information that Matthew provided about the schedule. See Order, page 8 ¶10; see also page 32 ¶61; see also page 33 ¶64. The Court found that Matthew "did not propose particular or predictable days or times of day upon" which he would bring the children back to Abigail at the conclusion of his parenting time. *Id.* at page 33 ¶64.d. Although Matthew's year-round schedule was set, his actual day-to-day and hour to hour schedule was constantly changing. That was a finding in accordance with the trial testimony.

Further, the District Court correctly concluded that while Matthew could reliably assume that he would have at least two weekends off from work per month, he did not present any evidence that he predictably or consistently has certain days of the week and certain times off from work. Further, based on his schedule, the Court could not fashion a consistent, predictable visitation schedule due to the changing nature of his work schedule. *Id.* at page 34 ¶66-67. Matthew's parenting days and times would be subject to change on a week-to-week basis which was contrary to stability for the children. The Court did not determine that Matthew could not parent because he was employed as Matthew seems to imply. The Court found that the rotating day-to-day and day to night shift work complicates adopting a schedule that is "in the children's best interests." *Id.*

Matthew's schedule is not one that the Court could reasonably base a child custody schedule around. The District Court found that Matthew did not establish evidence that he had predictable and certain days of the week off. (*Order* par. 66). Matthew's testimony acknowledged the same. Matthew seeks to confuse this Court and confuse the issues at trial related to his schedule. The issue at trial was not whether his work schedule changed.

Matthew's own brief notes that the trial testimony related to his work schedule was "couched in abstract terms." *Brief* at p.18. This is important in two respects. One, if Matthew failed to provide the District Court with sufficient information to support a decision in his favor, then Matthew cannot now assert that the District Court somehow abused its discretion in deciding the issue as he cannot assert that the Court ignored substantial credible evidence.

But, the record is clear that the District Court did have sufficient information with which it could consider Matthew's schedule with regard to the parenting plan. Thus, the second reason that Matthew's classification of his schedule as being "abstract" relates to the children's need for stability and continuity of care. If Matthew's schedule was "abstract" to his experienced trial counsel, to the experienced District Court Judge, and to his experienced appellate counsel, the schedule was certainly more "abstract" to two young children who had *never* had their own schedules based around Matthew's work schedule. Thus, placing the

children's day-to-day schedule in accordance with Matthew's work schedule would have been detrimental to their own stability and continuity of care.

Indeed, Matthew's brief alleges that the District Court acted "arbitrarily" by determining that his Stillwater Mine schedule was not an appropriate model for a parenting schedule and by adopting the parties' interim schedule. However, as noted above, the District Court weighed all of the best interests factors and the children's stability and continuity of care. Had the District Court ignored all of those circumstances, as requested by Matthew and adopted his schedule *then* the District Court could have been fairly accused of acting arbitrarily.

Further, Matthew asserts in error that the District Court did not include a review provision. The District Court is not required to include a "periodic review" provision pursuant to Section 40-4-234(2)(f), MCA. The inclusion of a review provision is within the discretion of the Court pursuant to that statute. Matthew asserts that the District Court compounded its error by not including a review provision for the parenting plan. Matthew does not cite any legal support for his implication that a Court must include a review provision in a final parenting plan.

But, there is a "review provision" provided for under Montana law: the amendment process codified in statute as Section 40-4-219, MCA. Further, as acknowledged by his brief, he did not raise this issue at trial, thus, he has waived this argument on appeal. As discussed above, a party may not raise a new issue or

change its theory on appeal. *See Day*, 280 Mont. at 276, 929 P.2d at 866 (citation omitted). *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 28, 289 Mont. 255, 262, 961 P.2d 100, 105, 1998 WL 325175.

The District Court appropriately deferred to Section 40-4-219, MCA as the appropriate legal standard should Matthew desire to seek an amendment to the parenting plan.

C. The District Court Correctly Concluded that Matthew’s Work Schedule Did Not Provide a Stable and Continuous Schedule to Base a Parenting Schedule

Matthew asserts in error that this finding was “totally based its finding on the finding that Mr. Cool’s work schedule...” *Brief* at p. 20. *See page 41*. This is simply not true. There were numerous factors and circumstances, as set forth above, that supported the District Court’s findings and *Order*. Further, Matthew’s constantly changing schedule, in terms of work hours and workdays, is a legitimate basis to adopt Abigail’s proposed schedule.

Matthew asserts that the District Court erred in finding that his work schedule was “ever changing.” Matthew asserts that the District Court’s finding was clearly erroneous. Matthew asserts that the District Court erred in finding that Matthew provided no evidence of what his schedule looked like in practice. This misstates the *Order*. See Order Par. 65. The Court simply and correctly noted that Matthew did not establish a record with which the District Court could thoroughly

consider his proposed work schedule, let alone how that schedule comported with the children's best interests.

Matthew's brief, like his trial presentation, focuses on what he wanted not the children's best interests. In determining custody of children in divorce case, best interests of children, not parents, are of paramount consideration to Supreme Court. *In re Marriage of Reininghaus*, 1991, 250 Mont. 86, 817 P.2d 1159, certiorari denied 112 S.Ct. 1497, 503 U.S. 945, 117 L.Ed.2d 637; *Matter of B.N.*, 1990, 245 Mont. 511, 802 P.2d 1244. Matthew's trial presentation did not establish how his proposed schedule benefitted the children. The record, and his brief, make it apparent that he believed that he should receive equal parenting time simply by virtue of being a biological parent. This view focuses on his needs and desires, as opposed to the children. This is consistent with the trial testimony that Matthew was more focused on his interests or getting a "break" from the kids, as opposed to being a parent and establishing a consistent and stable bond with the children.

D. Matthew's Claim that the Best Interests Findings Were an Abuse of Discretion Fails

Matthew argues that the District Court abused its discretion by essentially adopting the parties' interim parenting schedule. The record demonstrates that the District Court focused on the best interest criteria in establishing the parenting plan. The record demonstrates that the Court issued extensive findings applying the facts and evidence presented at trial to the statutory best interest criteria. Matthew is

misdirecting this Court by alleging or implying that the District Court simply adopted the interim plan.

E. Matthew's Claim that the Court Erred in Finding that Abigail Provided More Stability is Transparently Baseless and Must Fail

Matthew claims that the District Court erred in finding that Abigail provided the children with more stability and continuity of care. The District Court had ample evidence that Abigails provided more continuity and stability of care. Matthew fails to provide any reference to evidence or to the record that he argues would demonstrate that he provides equal or more continuity and stability of care for the children. Instead, he merely argues that his work schedule had been the same for years and that the children should not be in daycare, as opposed to being subjected to a parenting schedule contingent upon his mine work schedule.

F. Matthew Asserts in Error That He Does Not Have Frequent and Continuing Contact with the Children

Matthew also misinterprets Section 40-4-212(1)(l), MCA as applied to this case. Matthew does have frequent and continuing contact with the children. Matthew does enjoy frequent and continuing contact with the children pursuant to the Final Parenting Plan. Matthew fails to acknowledge that the District Court generally adopted the residential schedule that had been in practice by the parties' agreement. Indeed, he determined that such contact was sufficiently frequent and continuing. Further, he acknowledged that he did not necessarily exercise the amount of parenting time he agreed to.

Matthew also misapplies caselaw with regard to the fundamental right to parent. Matthew's parental rights have not been terminated. The Court did not suspend his parenting of the children. He does enjoy custody of the parties' children. Matthew is not entitled to "equal" parenting time in the guise of equal rights to parent. The "best interest of the child" test is correctly used to determine custody rights between natural parents in divorce proceedings; in this situation the "equal rights" to custody which both the father and the mother possess are weighed in relation to each parent's ability to provide best for child's physical, mental, and emotional needs upon breakdown of marital relationship and "fitness" of each parent is determined only in relation to other and not to society as a whole. *Matter of Guardianship of Aschenbrenner*, 182 Mont. 540, 597 P.2d 1156 (1979).

Matthew does not point to any law indicating or asserting that there is: (1) a presumption for equal residential custody; or (2) that subsection 40-4-212(1)(l), MCA takes precedence over the other best interests factors. Thus, the District Court appropriately analyzed and weighed the best interests factors.

Further, Matthew incorrectly applies caselaw for termination proceedings to the instant matter. The constitutional implications of terminating parental rights are severe, and the statutory scheme for terminating the parent-child relationship reflects the high burden of proof required by the party attempting to terminate the relationship and further require a specific finding, by clear and convincing

evidence, of abuse and neglect. Section 41-3-609, MCA. A custody proceeding, however, is not so harsh as a termination proceeding and does not share the same constitutional implications, and neither do the custody statutes require such a steep burden of proof. Thus, the best interest statute, § 40-4-212, MCA, requires that a district court “shall” determine the parenting plan in accordance with the best interest of the child or children by considering all relevant factors which “may include but are not limited to” the factors listed in the statute. The factors which are relevant, however, may be different on a case-by-case basis and, thus, may be different for each custody determination. *Czapranski v. Czapranski*, 2003 MT 14, ¶ 43, 314 Mont. 55, 68–69, 63 P.3d 499, 508, 2003 WL 291899.

G. Matthew’s Assertion that the Court Found That It was Not in the Children’s Best Interests to Have Frequent and Continuing Contact with Him Misstates the Findings

Matthew asserts that the District Court erred in finding that he should not have frequent and continuing contact with the children. The Court did not specifically find that he should not have frequent and continuing contact. Matthew’s brief contains assertions that exaggerate the implications of the District Court’s *Order* or that make assumptions that are not supported by the record. The Court did not “specifically find” that his ever-changing availability would be detrimental to the children’s best interests. The District Court has significant findings demonstrating that Matthew’s proposal was contrary to the children’s best interests.

H. The Court Adopted an Appropriate Parenting Schedule to Meet the Children's Developmental Needs

Matthew essentially asserts that he is being penalized for being a “working class man.” There is no basis in the record for this claim. Matthew appears to argue that because he is employed that the Court cannot adopt a parenting plan other than an equal residential schedule, otherwise, he is being discriminated against. This argument continues the hyperbolic nature of Matthew’s brief. The Court simply and appropriately determined that the parenting schedule the parties agreed upon, the schedule that had been in effect since 2021, and the schedule the children were adjusted to more effectively met their developmental needs than a mine rotating day-night shift work parenting schedule.

Unfortunately, Matthew’s claim that in his Brief that his “track record as a parent is excellent” is also incorrect. *Brief at p. 25*. Matthew points to a single incident when the Court determined that he improperly parented the children; however, the record is full of evidence that he was generally not-involved and that the children had difficulties adjusting to his parenting.

Further, there is no blanket-rule that Matthew is somehow entitled to an equal residential schedule. What is, or what is not, in the best interest of the child depends upon the facts and circumstances of each case. The responsibility of the District Court is to sift through these contradictory facts and make an equitable custody decision. Because the court has the opportunity to observe the demeanor of

the witnesses on the stand, it stands in a better position to draw the fine lines inherent in custody matters. Therefore, its decision will not be disturbed absent a clear showing that the court abused its discretion in making the custody decision.

Brooks v. Brooks (1976), 171 Mont. 132, 134, 556 P.2d 901, 902; *In re the Adoption of Biery* (1974), 164 Mont. 353, 356–57, 522 P.2d 1377.

Connolly v. Connolly, 209 Mont. 298, 305–06, 680 P.2d 568, 572 (1984).

The District Court’s determination that this schedule was not conducive to the nearly equal parenting time Matthew claimed is not an abuse of discretion. The conclusion was supported by the substantial evidence.

Further, even if the Court incorrectly determined Matthew’s work schedule, the District Court has other bases from which to support its findings and the District Court was well-within its discretion to determine that Abigail’s parenting plan was otherwise in the children’s best interests.

The district court has broad discretion to determine parenting and may require supervised parenting to protect children. *Kulstad v. Maniaci*, 2010 MT 248, ¶¶ 14, 31, 358 Mont. 230, 244 P.3d 722. § 40-4-218(2), MCA.

Here, it is important that Abigail had always been the children’s primary caretaker. The District Court’s *Order* simply maintained the children’s stability of care by having Abigail continue to be their primary caretaker to promote their stability and continuity of care. It is also noteworthy that the parties had exercised

an interim *de facto* schedule which was consistent with the District Court's ultimate schedule. The importance of a *de facto* schedule for children is reflected in Section 40-4-219(2)), MCA which notes that a parenting plan may be amended in accordance with a *de facto* schedule and the best interests factors.

VII. CONCLUSION

Matthew has not demonstrated any error or abuse of discretion. The trial evidence directly supported the District Court's extensive findings. Matthew presents no basis for asserting that the District Court ignored substantial evidence. The parenting plan adopted by the District Court was in the best interests of the children for a variety of factors. The case should be affirmed.

DATED this 26th day of September, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and correct copy of the APPELLEE'S BRIEF with the Clerk of the Montana Supreme Court and that a true and correct copy of the APPELLEE'S BRIEF was served by mail upon all parties or opposing counsel of record at their address or addresses as follows:

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DATED this 26th day September, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed:

1) with a proportionally spaced Times New Roman text typeface of 14 points; and is double spaced, except of footnotes and quoted indented material which have a line spacing of 1.0;

2) and the word count as calculated by Word is not more than 10,000 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, and appendix.

DATED this 26th day September, 2025.

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CERTIFICATE OF SERVICE

I, Daniel O.C. Ball, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-29-2025:

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Service Method: eService

Electronically signed by Katie Groepler on behalf of Daniel O.C. Ball
Dated: 09-29-2025