DA 17-0427

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 138N

IN RE THE MARRIAGE OF:

BETH MILLIKEN, f/k/a BETH MANGOLD,

Petitioner and Appellee,

And

TIMOTHY MANGOLD,

Respondent and Appellant.

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause No. DR-13-80
Honorable James A. Haynes, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Marybeth M. Sampsel, Measure, Sampsel, Sullivan & Obrien, P.C.,
Kalispell, Montana

For Appellee:

Dustin M. Chouinard, Markette & Chouinard, P.C., Hamilton, Montana

Submitted on Briefs: April 25, 2018

Decided: June 5, 2018

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Timothy Mangold (Father) appeals from a Twenty-First Judicial District Court order adopting Beth Milliken's (Mother) Proposed Amended Parenting Plan. We affirm.

¶3 Father and Mother have four children together. In February 2014, Father and Mother entered into a Stipulated Final Parenting Plan, which was adopted by the District Court in a Decree of Dissolution issued on March 21, 2014. The Stipulated Final Parenting Plan provided that the four children would reside with Mother, subject to visitation with Father. The Stipulated Final Parenting Plan also stated that if Father or Mother planned to change his or her residence in a way that would significantly affect the other parent's contact with his or her children, the parent changing residences must serve the other parent personally or by certified mail no less than thirty days before the proposed change in residence, and must include a proposed revised residential schedule.

¶4 On September 22, 2016, Mother filed and served Father with a Notice of Intent to Move to South Carolina along with a revised parenting schedule which was included within her Proposed Amended Parenting Plan. Father filed and served Mother with a Notice of Objection on October 21, 2016. A hearing on the issue was rescheduled so that

an appointed guardian ad litem (GAL) could make recommendations to the District Court and address other ongoing issues.

¶5 On May 15, 2017, the GAL filed Interim Recommendations and was granted additional time to complete her Final Report and Recommendations (Report). The Report was submitted on June 7, 2017. The GAL recommended that the children move to South Carolina with Mother and that Father have liberal parenting time with the children during the year. These recommendations were discussed at the June 19, 2017 hearing on petitioner's proposed amendments. On August 1, 2017, the District Court concluded that it would be in the children's best interest to adopt Mother's Proposed Amended Parenting Plan and allow the children to move to South Carolina. Father appeals.

¶6 We review a district court's findings of fact when modifying a parenting plan for clear error. *In re Marriage of Klatt*, 2013 MT 17, ¶ 12, 368 Mont. 290, 294 P.3d 391. If a district court's findings are not clearly erroneous, we will only reverse its decision when an abuse of discretion is clearly demonstrated. *Klatt*, ¶ 12. A district court has broad discretion when considering the parenting of a child, and we presume that the 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.

¶7 Father argues that the District Court erred by failing to adequately consider current and frequent contact between himself and his children. A district court may amend a parenting plan if

> it finds, upon the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interest of the child.

Section 40-4-219(1), MCA. One factor to consider is "whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests." Section 40-4-212(1)(l), MCA. Father asserts that this factor creates a presumption that frequent and ongoing contact with both parents is in a child's best interest and may only be overcome by a finding that contact with a parent would be detrimental to the child's best interest. This Court has never held that such a presumption exists. *In re Marriage of Wilson*, 2009 MT 203, ¶ 18, 351 Mont. 204, 210 P.3d 170.

¶8 The District Court considered the frequent and continuing contact factor with Father. At the hearing, the GAL testified that Father's time with his children would increase under the proposed parenting plan because the children "would spend an extended amount of time during the summer with [Father]." The District Court noted this in its order, and considered other relevant statutory factors pursuant to § 40-4-212, MCA. The District Court's findings were not clearly erroneous and it did not abuse its discretion when it adopted the Proposed Amended Parenting Plan.

¶9 Father argues that Mother did not comply with § 40-4-220(1), MCA, when she failed to file an affidavit in support of her request to amend the Stipulated Final Parenting Plan. Father asserts that without fulfilling this statutory requirement, the District Court

was rendered without subject matter jurisdiction, which may be raised at any stage of a judicial proceeding. *In re Marriage of Miller*, 259 Mont. 424, 426, 856 P.2d 1378, 1380 (1993). However, Father fails to cite any law that would establish that filing an affidavit with Mother's Motion to Amend Parenting Plan is a jurisdictional rather than a procedural requirement. It is the appellant's burden to establish error by the district court and such error cannot be established in the absence of legal authority. *State v. Bailey*, 2004 MT 87, ¶ 26, 320 Mont. 501, 87 P.3d 1032.

¶10 Finally, on appeal, Father argues that the District Court erred because the Report was not provided to Father at least ten days prior to the hearing pursuant to § 40-4-205(5), MCA, and thus the District Court should have granted his motion to continue.[1] At the hearing, Father stated that he felt the Report was incomplete because the GAL failed to interview a number of collateral contacts that were provided by Father. The District Court denied Father's request for a continuance, noting that Father failed to offer any reason why information from the collateral contacts would have supplemented what was already considered in the Report and discussed at the hearing by other witnesses. The District Court has the discretion to determine "the level of evaluation necessary for adequate investigation and preparation of the [R]eport." Section 40-4-215(2), MCA.

¶11 The District Court did not abuse its discretion when it amended the Stipulated Final Parenting Plan and denied Father's request for a continuance. We will not address

[1] A review of the record indicates that the Report was served and filed with Ravalli County on June 6, 2017. The hearing was held on June 19, 2017.

Father's argument regarding Mother's failure to file an affidavit with her Motion to Amend Parenting Plan because it is not supported by legal authority.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law.

¶13 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA