DA 18-0118

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 294N

IN RE THE PARENTING OF:

L.R.,

A Minor Child,

ANTHONY REED,

Petitioner and Appellant,

and

CATHERINE MARTIN,

Respondent and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DR 16-0552
Honorable James B. Wheelis, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Clifford B. Irwin, Irwin Law Office, P.C., Missoula, Montana

For Appellee:

Brandi R. Ries, Emily A. Lucas, Ries Law Group, P.C., Missoula, Montana

Submitted on Briefs: November 8, 2018

Decided: December 4, 2018

Filed:

Clerk

Justice Ingrid Gustafson 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 Anthony Reed (Anthony) appeals from the Findings of Fact, Conclusions of Law, and Decree Establishing Permanent Parenting Plan issued January 29, 2018, by the Fourth Judicial District Court, Missoula County, establishing a parenting plan which provides the parties' child, L.R., shall reside on a primary basis with Catherine Martin (Catherine) and for Anthony to have supervised visits with L.R. We affirm.

¶3 Anthony and Catherine had a tumultuous relationship. As a result of their relationship, they have one child, L.R., born in 2013. After the parties separated in December 2015, L.R. resided on a primary basis with Catherine and Anthony initially parented a few hours on Tuesdays, Thursdays, and then Sundays. In March 2016, Anthony's parenting time expanded to Tuesday and Thursday overnights and weekends. In June 2016, Anthony advised Catherine since the parties were parenting L.R. on an equal basis, he would not pay her child support. He further advised he was willing to take L.R. more to help her out. Thereafter, the parties' relationship became more contentious. Anthony filed a Petition for Establishment of Permanent Parenting Plan on July 22, 2016, and the parties maintained the parenting arrangement with Anthony parenting Tuesday and

Thursday overnights and weekends until November 4, 2016. Following hearing on November 1, 2016, the District Court issued its Order Adopting Respondent's Proposed Parenting Plan as Interim Parenting Plan on November 4, 2016. Following the court's denial of Anthony's motions for Appointment of a Guardian Ad Litem, for Court-Ordered Parenting Evaluation, for Joint Evaluation of Parents, and to Disqualify Presiding Judge, the District Court held trial on November 27, 2017. The parties each testified in support of their respective positions, presenting wildly divergent perceptions of their relationship and parenting abilities. Post-trial, the District Court issued its Findings of Fact, Conclusions of Law, and Decree Establishing Permanent Parenting Plan which adopted Catherine's proposed parenting plan—previously adopted by the court as the interim parenting plan—as the Final Parenting Plan.

¶4 Anthony appeals, contending the District Court violated his constitutional right to parent and abused its discretion by failing to appoint a guardian ad litem, allowing Abigail Eyre to testify as an expert witness, admitting incomplete text messages, awarding attorney fees to Catherine, and denying his motion to disqualify the presiding judge. Catherine asserts the District Court did not violate Anthony's constitutional right to parent and thoroughly considered the evidence presented and appropriately established a parenting plan which is in L.R.'s best interest.

¶5 Review of an asserted violation of a constitutional right is plenary. *Kulstad v. Maniaci*, 2009 MT 326, ¶ 50, 352 Mont. 513, 220 P.3d 595 (citation omitted). We review a district court's findings establishing a parenting plan under the clearly erroneous

standard. *In re Marriage of Williams*, 2018 MT 221, ¶ 5, 392 Mont. 484, 425 P.3d 1277 (citation omitted). We review a district court's conclusions of law to determine if they are correct. *In re the Parenting of C.J.*, 2016 MT 93, ¶ 12, 383 Mont. 197, 369 P.3d 1028 (citation omitted). A district court has broad discretion when considering the parenting of a child, and we must presume the court carefully considered the evidence and made the correct decision. Accordingly, absent clearly erroneous findings, we will not disturb a district court's decision regarding parenting plans unless there is a clear abuse of discretion. *C.J.*, ¶ 13 (citations omitted). The district court has broad discretion regarding admissibility of evidence, including expert testimony, and absent an abuse of discretion determinations made by the court regarding such will not be disturbed. *Daley v. Burlington Northern Santa Fe Ry.*, 2018 MT 197, ¶ 3, 392 Mont. 311, 425 P.3d 669 (citations omitted). We review an award of attorney fees for abuse of discretion. *McCann v. McCann*, 2018 MT 207, ¶ 14, 392 Mont. 385, 425 P.3d 682 (citation omitted).

¶6 Anthony asserts his constitutional right to parent was violated by the court's parenting plan because it limits him to supervised contact with L.R. Anthony maintains that the court's denial of his motions for appointment of a guardian ad litem and parenting evaluation deprived him of the opportunity to prove supervision was not warranted. It is well-established in Montana that a parent unquestionably can be denied the right to parent under a parenting plan even if that parent is fit. *See In re Marriage of Nash*, 254 Mont. 231, 233-34, 836 P.2d 598, 600-01 (1992) (affirming award of sole custody to mother where both parents found to be fit parents); *Bier v. Sherrard*, 191 Mont. 215, 623 P.2d 550

(1981) (affirming award of custody to father where mother was found fit because fitness of a parent is only one factor considered under § 40-4-212, MCA, and is not determinative). This Court has held that a parent's liberty interests in parenting a child do not obviate the best interest standard of § 40-4-212, MCA. *See Czapranski v. Czapranski*, 2003 MT 14, ¶ 44, 314 Mont. 55, 63 P.3d 499.

¶7 Section 40-4-212, MCA, requires a district court to determine the parenting plan in accordance with the best interest of the child by considering all relevant factors which "may include but are not limited to" the factors listed in the statute. In determining the best interest of the child, pursuant to § 40-4-205, MCA, the court *may*, but is not required to, appoint a guardian ad litem, and pursuant to § 40-4-215, MCA, the court *may*, but is not required to, order a parenting evaluation. We have consistently held that § 40-4-205, MCA, is not a mandatory statute and that appointment of a guardian ad litem is discretionary with the court. *See Arneson-Nelson v. Nelson*, 2001 MT 242, ¶ 34, 307 Mont. 60, 36 P.3d 874; *In re Custody of J.M.D.*, 259 Mont. 468, 476, 857 P.2d 708, 714 (1993); and *In re Marriage of Johnston*, 255 Mont. 421, 428-29, 843 P.2d 760, 764 (1992). While a guardian ad litem or parenting evaluation may assist the court, both are discretionary. *In re Marriage of Merriman*, 247 Mont. 491, 496, 807 P.2d 1351, 1354 (1991). Anthony has failed to present a constitutional analysis that this Court should apply which would mandate a district court appoint a guardian ad litem or order a parenting evaluation in a contested parenting plan case. Anthony was afforded the same opportunity to present his and Catherine's respective parenting abilities as was Catherine.

¶8 Further, upon review of the record, we find no error by the District Court. The court was clearly faced with contradictory evidence. Catherine painted an unflattering characterization of Anthony. Contrarily, Anthony testified to his positive parenting abilities and completion of the Circle of Security parenting course. He also exposed inconsistencies in Catherine's position, including: the parties had successfully co-parented for several months, L.R. did not appear to have any emotional or physical delay and was a well-adjusted child despite the turmoil between his parents, Catherine admitted Anthony had never physically harmed L.R., and Catherine was concerned Anthony *may* model poor behavior for L.R. Anthony also exposed inconsistencies in Catherine's assertions that Anthony made unwanted sexual advances toward her, including her inconsistent behavior of asserting fear of Anthony but taking a cross-country trip with him in her car, and sending him numerous sexual texts and nude pictures of herself after they had separated. Finally, on rebuttal, Anthony presented testimony of Dr. Cindy Miller, clinical psychologist, who had evaluated Anthony and opined he seemed well-adjusted. After listening to Catherine's testimony, Dr. Miller saw no reason Anthony could not parent. While the truth likely lies somewhere in between each party's versions, it is not our role to reweigh conflicting evidence or substitute our evaluation of the evidence for that of the District Court's. It is the District Court's role to untangle the conflicting evidence. *In re Matter of A.F.*, 2003 MT 254, ¶ 24, 317 Mont. 367, 77 P.3d 266 (citations omitted). Clearly, the District Court gave more weight and credibility to the evidence presented by Catherine.

¶9 The court appropriately heard and marshalled the evidence, weighed its credibility, and thoroughly and conscientiously considered the best interest factors set forth in § 40-4-212, MCA, to determine L.R.'s best interest. In the light most favorable to Catherine, the evidence of record supports the District Court's findings and conclusions. As such, we cannot conclude the District Court incorrectly followed Montana's statutes and well-settled precedent in its findings and conclusions. *See* §§ 40-4-211 through -213, -215, and -233, MCA, and *Williams*, ¶ 5 (citations omitted). Thus, with regard to the parenting and evidentiary issues, we conclude the District Court's finding of fact are not clearly erroneous and its conclusions of law are correct.

¶10 Although we conclude the District Court did not abuse its discretion in establishing the Final Parenting Plan, we recognize there will likely be a future request to amend the parenting plan as the current plan provides no viable means to progress beyond supervised visitation and does not address L.R.'s needs as he matures and grows. Upon initiation of a modification action, it would be prudent for the court to order a qualified individual, such as a clinical psychologist with experience in child development, parenting assessment, and domestic violence to conduct a parenting evaluation and make recommendations regarding amendment of the parenting plan to progress beyond supervised contact between Anthony and L.R. and provide for L.R.'s needs as he matures and grows. It may also be advisable to appoint a guardian ad litem to represent L.R.'s best interest.

¶11 Likewise, we find no abuse of discretion in the court's award of attorney fees to Catherine. However, we agree there appears to be a typographical error in paragraph 4 of

the Decree, and the correct attorney fee award should be $576.07 (as set forth in paragraph 12 of the Findings of Fact and paragraph 4 of the Conclusions of Law).

¶12 Finally, as Anthony failed to timely file his motion to disqualify the Judge and failed to allege facts establishing personal bias or prejudice as opposed to discontent with the rulings in the case, it was appropriate for the District Court to deny the motion without referring it to this Court. *See* § 3-1-805, MCA; *Dambrowski v. Champion Int'l Corp.*, 2000 MT 149, ¶ 51, 300 Mont. 76, 3 P.3d 617.

¶13 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 or by the clear application of applicable standards of review.

¶14 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JIM RICE