

DA 18-0322

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 293N

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IN RE THE PARENTING OF: R.W.W.,

A Minor Child,

TRINA J. WOLF,

Petitioner and Appellant,

v.

WALTER E. WOLF,

Respondent and Appellee.

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APPEAL FROM: District Court of the Eighteenth Judicial District,  
In and For the County of Gallatin, Cause No. DR 13-380C  
Honorable Brenda Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Michael J. Uda, Uda Law Firm, P.C., Helena, Montana

For Appellee:

Leanne M. Schraudner, Schraudner & Hillier, PLLC, Bozeman, Montana

Troy Greenfield, Schwabe, Williamson & Wyatt, P.C., Seattle, Washington

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Submitted on Briefs: November 14, 2018

Decided: December 4, 2018

Filed:



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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 Trina Wolf (Trina) appeals from the twenty-nine page Findings of Fact, Conclusions of Law and Order Regarding Petitioner's Objections to Professional Team's Report, Setting Forth Parenting Arrangements, and Addressing Respondent's Notice of Intent to Relocate filed May 7, 2018 (May 2018 Order) by the Eighteenth Judicial District, Gallatin County, which amended the parties' parenting plan contained in the court's Findings of Fact and Conclusions of Law issued on July 20, 2016 and the Final Parenting Plan of October 19, 2016. Pursuant to the amended plan contained in the court's May 2018 Order, RWW will continue to reside exclusively with Walter Wolf (Walter), Trina's visitation rights are discontinued, RWW has the absolute right to contact Trina and other relatives as he sees fit, RWW will continue counseling as recommended by his counselor, Walter may establish his primary residence with RWW in Bozeman, MT, or Costa Rica, and Walter shall provide Trina a mailing address and telephone number in the event he relocates to Costa Rica. We affirm.

¶3 Trina and Walter divorced in 2011. They are the parents of RWW, currently 14 years old. After several interim orders, the District Court entered a Final Parenting Plan

which provided RWW would exclusively reside with Walter.<sup>1</sup> The District Court also established a Professional Team to work with Trina to attempt to re-establish a positive relationship between RWW and Trina. Ultimately, Walter gave notice of his intention to relocate with RWW to Costa Rica and the Professional Team issued its recommendations to which Trina objected. Following hearing, the District Court amended the prior parenting plan as delineated above. Trina appeals contending the District Court improperly ordered a de facto termination of her parental rights in violation of her constitutional right to parent. Walter asserts the District Court thoroughly considered the evidence presented and appropriately amended the parenting plan in RWW's best interests.

¶4 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. We review for clear error a district court's findings of fact on a decision regarding modification of a parenting plan. *In re Whyte*, 2012 MT 45, ¶ 14, 364 Mont. 219, 272 P.3d 102. In the absence of clear error, we will reverse a district court's decision regarding modification of custody only where an abuse of discretion is clearly demonstrated. *In re Marriage of Nies*, 2003 MT 100, ¶ 10, 315 Mont. 260, 68 P.3d 697. We review a district court's conclusions of law to determine if they are correct. 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

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<sup>1</sup> Trina appealed to this Court in July 2015 and August 2016, both of which we dismissed because they appealed temporary orders. DA 15-0437; DA 16-0495. Trina appealed for a third time in December 2016, challenging the District Court's Final Parenting Plan, which we affirmed. *In re R.W.W.*, 2017 MT 174N, 389 Mont. 540, 400 P.3d 230.

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. *In re C.J.*, 2016 MT 93, ¶ 12-13, 383 Mont. 197, 369 P.3d 1028.

¶5 Upon review of the record, we find no error by the District Court. Trina asserts a constitutional violation of her right to parent for the first time on appeal.<sup>2</sup> It is well-settled that a constitutional issue is waived if not presented at the earliest opportunity. *E.g.*, *In re Arneson-Nelson*, 2001 MT 242, ¶ 37, 307 Mont. 60, 36 P.3d 874. This Court does not consider a change in legal theory or new arguments first raised on appeal, because of the fundamental unfairness of faulting a district court for failing to rule correctly on an issue it was never given the opportunity to consider. *E.g.*, *Schlemmer v. N. Central Life Ins. Co.*, 2001 MT 256, ¶ 22, 307 Mont. 203, 37 P.3d 63. Accordingly, Trina has waived this issue for appeal.

¶6 Trina's appeal focuses on her constitutional claim and does not specifically assert an abuse of discretion on the part of the District Court. Despite Trina's failure to raise an abuse of discretion issue, from our review of the record and the May 2018 Order we find no error by the District Court. Amendment of a parenting plan is controlled by § 40-4-219 and § 40-4-212, MCA. As required by § 40-4-219, MCA, the court specifically noted the change in circumstances since issuance of the prior parenting plan and then thoroughly and

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<sup>2</sup> In his opening statement at the March 8, 2018 hearing, Trina's counsel stated, "there's no evidence, direct evidence she's done anything or could've done anything, [and] then this is just simply a parentectomy. And I would submit to Your Honor that that is not only wrong, but unconstitutional." He did not elaborate in the hearing or in District Court pleadings.

conscientiously considered the best interest factors set forth in § 40-4-212, MCA to determine RWW's best interests. The testimony presented at hearing together with the reports of the Professional Team support the detailed findings made by the District Court. The District Court appropriately followed Montana's statutes and well-settled precedent in its findings and conclusions. *See* §§ 40-4-212, -215, -217, -219, and -233, MCA and *Nies*, ¶¶ 26-27. Thus, we conclude the District Court's finding of fact are not clearly erroneous and its conclusions of law are correct.

¶7 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.

¶8 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR