DA 18-0196

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 21N

IN RE THE PARENTING OF:

D.E.L.-W., a Minor Child,

SHARMANE MARIE WARNER,

Petitioner and Appellee,

and

STEVEN DUANE LEE,

Respondent and Appellant.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Dawson, Cause No. DR-17-030
Honorable Olivia Rieger, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

James C. Reuss, Guthals, Hunnes & Reuss, P.C., Billings, Montana

For Appellee:

Rennie Wittman, Lucas & Tonn, P.C., Miles City, Montana

Submitted on Briefs: August 29, 2018

Decided: January 29, 2019

Filed:

Clerk

Justice Dirk Sandefur 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 Steven Duane Lee appeals from the judgment of the Montana Seventh Judicial District Court, Dawson County, imposing a final parenting plan, filed February 21, 2018, governing the parenting of the minor child D.E.L.-W. We affirm.

¶3 At the time of hearing and decision in this case, D.E.L.-W., was an infant child born June 11, 2016. Steven and Appellee Sharmane Marie Warner are the biological parents of D.E.L.-W. Sharmane and Steven are unmarried and did not live together. Both reside in Glendive, Montana. D.E.L.-W. has resided with Sharmane since birth. D.E.L.-W. was not subject to a prior parenting plan.

¶4 Upon hearing, the District Court found that Sharmane is employed full-time (approximately 40 hours per week) as a certified nursing assistant at the Eastern Montana Veteran's Home in Glendive. She is also a member of the Army National Guard and attends Guard training one weekend per month and two weeks in the summer. Steven is employed full-time by Crisafulli Pumps in Glendive where he generally works four 10-hour days per week.

¶5 The District Court made various findings pertinent to who should have custody and care of the child. *Inter alia*, the court found that Sharmane has been the child's primary custodian and caregiver since birth and has provided for all of the child's physical and emotional needs. In contrast, though he desires to be more involved with the child's parenting, the court found that Steven has exercised only limited parenting time with the child and has never cared for the child overnight. Both parents acknowledged that it is important for the child to have a bonded relationship with the other. The court further found that Sharmane wants Steven to build a bond with the child over time under an extended period of graduated visitation. Steven proposed a parenting plan under which the parents would share custody after a graduated schedule over a few weeks.

¶6 The District Court found that, though they have differing views on the child's best interests, the parents each agreed that the other is a "good parent" and that neither is concerned about the safety of the child with the other. The court found that the child is "fully integrated" into Sharmane's home and adequately cared for in her custody with the assistance of third-party day care and the maternal grandparents when she is working or otherwise unable.

¶7 Based on the evidence presented, the District Court made express or manifestly implicit findings of fact specifically relevant to the statutory criteria specified by § 40-4-212(1)(a) through (j), and (l), MCA. With specific reference to § 40-4-212(1)(h), MCA, the court found that "continuity and stability of care" for the young child "is of greatest concern" under the totality of the circumstances of record. In regard to

§ 40-4-212(1)(l), MCA ("whether the child has frequent and continuing contact with both parents"), the Court found that:

> Mother has the most frequent and continuing contact with the Minor Child . . . . Father has attempted to have more contact with the Minor Child. There is no evidence . . . that contact with either parent would be detrimental to the Minor Child's best interests.

¶8 Based on its findings of fact, the District Court ultimately found and imposed the following parenting distribution in the best interests of the child:

> (1) the child shall reside primarily with Sharmane subject to specified custodial visitation with Steven;
>
> (2) Steven would have custody and care of the child on a specified non-overnight basis for an initial 12-week period and then increasing as specified over a subsequent 6-week period;
>
> (3) Steven's custody and care of the child would then transition to a specified Wednesday evening and alternating Friday and weekend schedule with specified additional Sunday time on weekends when the child is in Steven's weekend custody and care; and
>
> (4) after the initial transition periods, Steven would have the right-of-first-refusal to have custody and care of the child in lieu of Sharmane placing the child in the temporary care of third-parties, whether family or other day/temporary care providers.

The parenting plan further included other miscellaneous provisions regarding healthcare and administration of the plan, *inter alia*.

¶9 District courts must determine initial parenting plans "in accordance with the best interest of the child" based on consideration of "all relevant parenting factors" including but not limited to certain expressly enumerated criteria. Section 40-4-212(1), MCA. Among other relevant criteria, courts must consider, as pertinent here, "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. While district courts must consider the factors enumerated in § 40-4-212(1), MCA, as relevant on the evidence presented in determining the best interests of a child, § 40-4-212, MCA, does not necessarily require that the court make a specific finding regarding each factor in every case. *Woerner v. Woerner*, 2014 MT 134, ¶ 15, 375 Mont. 153, 325 P.3d 1244 (specific findings on each statutory criteria good practice but not required); *In re Marriage of McKenna*, 2000 MT 58, ¶ 15, 299 Mont. 13, 996 P.2d 386 (internal citation omitted).

¶10 The standard of review for district court parenting plan determinations is whether the court clearly abused its discretion in determining the best interests of the child under the standards of § 40-4-212, MCA. *Czapranski v. Czapranski*, 2003 MT 14, ¶ 10, 314 Mont. 55, 63 P.3d 499; *McKenna*, ¶¶ 14-15. A court abuses its discretion if it exercises discretion based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or otherwise "acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *In re D.E.*, 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586 (internal citation omitted). A finding of fact is clearly erroneous only if not supported by substantial evidence, the court misapprehended the effect of the evidence, or, based on our review of the record, we have a definite and firm conviction that the lower court was mistaken. *In re D.E.*, ¶ 21 (citing *In re D.H.*, 2001 MT 200, ¶ 14, 306 Mont. 278, 33 P.3d 616). We review conclusions of

law de novo for correctness. *In re D.E.* ¶ 21 (citing *In re M.W.*, 2004 MT 301, ¶ 16, 323 Mont. 433, 102 P.3d 6).

¶11 Here, Steven asserts that the District Court abused its discretion by failing to impose a parenting plan providing for "frequent and continuing contact" between the child and his father as presumed in the best interests of the child under § 40-4-212(1)(l), MCA. Absent a contrary finding, "frequent and continuing contact with both parents" is presumed to be in a child's best interests. Section 40-4-212(1)(l), MCA. Steven correctly points out that the District Court made no finding rebutting this presumption. However, courts must necessarily weigh and balance the presumption of § 40-4-212(1)(l), MCA, with other relevant considerations under § 40-4-212(1), MCA. *In re Parenting of N.S.*, 2011 MT 98, ¶ 21, 360 Mont. 288, 253 P.3d 863. The record and the District Court's findings, conclusions, and judgment manifest that the court did that here.

¶12 The District Court's findings of fact are supported by substantial evidence. Steven has failed to demonstrate that the court misapprehended the effect of the evidence. We conclude that the court correctly applied the law. Steven has further failed to demonstrate that the District Court otherwise acted arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice. The District Court's findings of fact, conclusions of law, and judgment clearly manifest that it duly considered and reasonably weighed all relevant statutory criteria on the evidence presented. The parenting plan expressly provides that the plan "should be reviewed by the Court as the Minor Child matures and grows." Though the parenting plan imposed was

not the only parenting allocation that the facts and circumstances would have supported in the best interests of the child, we hold that the District Court did not abuse its discretion in imposing the parenting plan in this case.

¶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. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶14 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ LAURIE McKINNON