FILED
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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0577

DA 18-0577

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 118N

In re the Parenting of A.H., A Minor Child,

EDWARD "JIMMY" HAERR,

Petitioner and Appellee,

v.

TIFFANY P. WHELAHAN,

Respondent and Appellant.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DR-15-156
Honorable Brenda Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jami Rebsom, Jami Rebsom Law Firm, P.L.L.C., Livingston, Montana

For Appellee:

Courtney Jo Lawellin, Attorney at Law, Livingston, Montana

Submitted on Briefs: April 3, 2019

Decided: May 21, 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 Appellant-Respondent Tiffany P. Whelahan (Mother) appeals the judgment of the Montana Sixth Judicial District Court, filed October 4, 2018, imposing a parenting plan that provided for alternative primary residential custody schemes contingent upon her choice of whether to continue to reside in Montana or move to Michigan as contemplated. We affirm.

¶3 Mother and Appellee-Petitioner Edward "Jimmy" Haerr (Father) are the unmarried natural parents of A.H., a female child born in October 2014. The parents initially lived together with A.H. from birth until May 17, 2015, when Mother was arrested and briefly incarcerated on the offense of partner or family member assault. As alleged by the State, Mother threatened Father with a shotgun in the midst of an alcohol-fueled altercation in their home. Upon Mother's arrest and the resulting issuance of a no-contact order, the child resided in Father's care and custody for several weeks. A.H. thereafter separately resided with both parents under an agreed alternating week schedule until Mother's criminal case resolved by plea agreement in or about October 2015. Mother and Father then resumed living together with the child.

¶4 However, on or about November 25, 2015, Mother obtained an *ex parte* temporary order of protection (TPO) against Father based on her allegation that his belligerent conduct caused her reasonable apprehension of bodily injury. A.H. thereafter resided in Mother's care pending further proceedings on the TPO. On December 11, 2015, in advance of the TPO hearing, Father petitioned the District Court for a formal parenting plan. Six days later, Mother filed a justice court civil complaint against Father asserting claims for civil assault based on the May 17, 2015 shotgun altercation and for restitution based on Father's veterinarian-conducted euthanization of the parties' allegedly aggressive dog.[1] In January 2016, upon hearing in the now-consolidated TPO and parenting plan proceedings, the District Court temporarily continued the TPO based on Father's aggressive behavior toward Mother. The District Court attributed his behavior to military service-related post-traumatic stress disorder (PTSD) and ordered that A.H. would continue to reside with Mother until Father obtained and completed PTSD-related counseling after which he would have the child on alternating weekends pending further proceedings. Father ultimately completed the required counseling and the temporary alternating weekend schedule thereafter commenced in March 2016.

[1] Following bench trial on May 2, 2016, the court found that Father was the victim in the shotgun altercation, he struck Mother with the butt of the gun in self-defense, Mother presented no evidence regarding her dog restitution claim, and Mother was liable for Father's attorney fees and costs pursuant to § 27-1-722, MCA. The matter came up again at hearing in this matter on August 21, 2018. Mother again alleged that Father beat the dog to death despite her acknowledgment that the testimony and records of the involved veterinarian clearly indicated that the dog was uninjured when Father presented the dog to the vet. Mother reconciled her view with those facts by asserting that the veterinarian and investigating police were not truthful.

¶5 Through subsequent mediation on a final parenting plan, the parties agreed that A.H. would continue to reside primarily with Mother but that Father would have her on alternating weekends and as specified in a stipulated holiday schedule. The District Court approved and adopted the stipulated final parenting plan on April 7, 2016. The parties thereafter followed the stipulated plan for the next two years.

¶6 While in Mother's care, A.H. generally resided with her half-sibling B.L., who is Mother's son from a prior relationship. B.L. is approximately three-and-a-half years older than A.H. Father helped Mother parent B.L. after they began living together in fall 2012 after she left B.L.'s father. In a separately pending child custody battle between Mother and B.L.'s father, the District Court found upon hearing that Mother falsely accused B.L.'s father of sexually abusing B.L. in December 2012.

¶7 On April 11, 2018, Mother filed an "emergency motion" seeking suspension of Father's existing visitation rights on the alleged ground that A.H. had been sexually abused while in Father's care. Mother based the allegation on her observation of inflammation about the child's vulva after Father returned her from a weekend visitation. Pending hearing, the District Court immediately suspended Father's parental rights.

¶8 However, at hearing on May 25, 2018, the District Court immediately restored Father's parenting plan rights upon finding that Mother failed to substantiate the sexual abuse allegation. The court largely based its finding on independent testimony of the nurse practitioner who examined and treated A.H. and an investigative detective of the Park

County Sheriff's Office. In a subsequent written order, the District Court expressly found that Mother's testimony in support of the sex abuse allegation was not credible.[2]

¶9 Six days after the court restored Father's parenting rights, Mother filed a notice of intent to move with the child to Michigan and a motion for an amended parenting plan. In her filings, Mother stated that her mother and other family reside in Michigan, she had a guaranteed floral company job waiting for her in Michigan, and that her cost of living would be lower in Michigan. After hearing on August 21, 2018, the District Court issued detailed written findings of fact, conclusions of law, and judgment on Mother's notice and motion for an amended parenting plan. In summary, the court found that it was in A.H.'s best interests to "remain in the Livingston area" where she is well-adjusted, will have regular contact with her half-brother B.L., will have more direct parental care and greater continuity of adequate care with extended family and close friends, and will thus receive greater attention to her developmental and educational needs. Based on a finding that, to the extent possible under the circumstances, it is in A.H.'s best interest to have regular and continuing contact with both parents, the District Court imposed two alternative parenting plan schemes—one in the event that Mother remained in the Livingston area and another if she ultimately elected to move. If Mother remained in the Livingston area, the court ordered that Mother and Father would equally co-parent A.H. on an alternating weekly

[2] In subsequent findings of fact on the August 21, 2018 hearing, the District Court noted, *inter alia*, that Mother further alleged in December 2015 that Father struck B.L. and left a handprint on his back while Father and Mother were living together. The District Court found, however, that Father denied the allegation and gave unrebutted testimony that he had not been in the home with B.L. in the ten days prior to the alleged incident. The Court further noted the testimony of B.L.'s father indicating that he did not believe Mother's allegation against Father.

schedule. However, if Mother ultimately elected to move to Michigan, A.H. would primarily reside with Father and then secondarily reside with Mother in Michigan under a specified summer and holiday visitation schedule. Mother timely appeals.

¶10 District courts have broad discretion to make and modify parenting plan determinations under the applicable standards of §§ 40-4-212, -217(2)(a), and -219, MCA. *In re C.J.*, 2016 MT 93, ¶ 13, 383 Mont. 197, 369 P.3d 1028. We review parenting plan determinations and modifications for a clear abuse of discretion. *C.J.*, ¶ 13; *Jacobsen v. Thomas*, 2006 MT 212, ¶ 13, 333 Mont. 323, 142 P.3d 859; *Czapranski v. Czapranski*, 2003 MT 14, ¶ 10, 314 Mont. 55, 63 P.3d 499. A lower 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 citations 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." "We review conclusions of law de novo for correctness." *D.E.*, ¶ 21.

¶11 Mother first asserts that the District Court abused its discretion under §§ 40-4-212 and -219(1), MCA, on the ground that various cited findings of fact are either not supported by, or are contrary to, the evidence presented. However, upon our review, the cited findings are supported by substantial record evidence. We are further not convinced from our review of the record that the District Court misapprehended or was otherwise mistaken

about the evidence in any material regard. At most, Mother has shown conflicts in the evidence that were within the court's discretion to resolve based on its determination of relative veracity, weight, and credibility. Under the particular circumstances of this case, the court's contingent alternative parenting plan scheme manifests reasonable and conscientious judgment. We hold that the District Court's findings of fact are not clearly erroneous and that the contingent alternative parenting plan scheme was not an abuse of discretion under §§ 40-4-212 and -219(1), MCA.

¶12 Mother further asserts that, even if the court did not abuse its discretion under §§ 40-4-212 and -219(1), MCA, the alternative parenting plan scheme violates her right to interstate travel. A parent who has custody of a child under state law has a fundamental federal constitutional right to freely "travel throughout the United States" with the child which includes the freedom "to migrate, resettle, find a new job, and start a new life. . . ." *In re M.C.*, 2015 MT 57, ¶ 12, 378 Mont. 305, 343 P.3d 569 (citing *Shapiro v. Thompson*, 394 U.S. 618, 629-31, 89 S. Ct. 1322, 1328-29 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 671, 94 S. Ct. 1347, 1360 (1974)). However, separate from that right, both parents generally have co-equal fundamental constitutional rights to co-parent their child. *In re A.R.A.*, 277 Mont. 66, 70-71, 919 P.2d 388, 391 (1996) *superseded in part by statute as stated in Kulstad v. Maniaci*, 2009 MT 326, ¶ 56, 352 Mont. 513, 220 P.3d 595; *In re Guardianship of Doney*, 174 Mont. 282, 286, 570 P.2d 575, 577 (1977) *superseded in part by statute as stated in Kulstad*, ¶ 56; *Troxel v. Granville*, 530 U.S. 57, 65-67, 120 S. Ct. 2054, 2059-61 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651-52, 92 S. Ct. 1208, 1212-13 (1972). Based on the integrity of the family unit, this right

necessarily includes "the child's right to be with" both of "his or her natural parent[s]" to the extent reasonably possible. *A.R.A.*, 277 Mont. at 71, 919 P.2d at 391 (citing *Stanley*, 405 U.S. at 652, 92 S. Ct. at 1213).

¶13 State law may not infringe on fundamental travel and parenting rights except as narrowly tailored to further a compelling state interest in balance with any competing constitutional rights of parents. *M.C.*, ¶¶ 12-13; *In re Adoption of A.W.S. & K.R.S.*, 2014 MT 322, ¶¶ 16-18, 377 Mont. 234, 339 P.3d 414. As embodied in §§ 40-4-212, -217, and -219(1), MCA, the State of Montana has a compelling interest in furthering and protecting the best interests of children by facilitating "the maximum opportunit[y] for the love, guidance and support of both" parents to the extent reasonably possible under the circumstances. *M.C.*, ¶ 13. *See also Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989); *New York v. Ferber*, 458 U.S. 747, 756-57, 102 S. Ct. 3348, 3354 (1982). However, only "legitimate, case-specific" application of relevant criteria under §§ 40-4-212 and -219(1) based on "case-specific proof" are a sufficiently narrowly tailored basis upon which to interfere with a parent's federal constitutional right to interstate travel and relocation. *See M.C.*, ¶ 14 (internal citation omitted).

¶14 Here, as manifest in the District Court's various findings of fact and the contingent parenting plan scheme imposed, the relevant §§ 40-4-212 and -219(1) criteria implicated by the evidence presented and resulting findings of fact essentially balance evenly in the event that both parents continue to live in the Livingston area. However, in the event that Mother may move to Michigan as contemplated, the case-specific findings of fact

aggregately tip the balance in favor of the child remaining in the primary custody of her Father. Though the evidentiary record may have supported different findings, the findings made are not clearly erroneous under the governing standard of review. The contingent alternative parenting plan scheme imposed by the court thus furthered Montana's compelling interest in effecting and protecting the best interests of the child in a manner narrowly tailored to further that interest in balance with the competing constitutional rights of both parents and the included constitutional right of the child. We hold that the contingent alternative parenting plan imposed by the District Court does not violate Mother's federal constitutional right to interstate travel and relocation.

¶15 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 of first impression, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶16 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ JIM RICE