

DA 19-0184

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 194N

---

IN RE THE MARRIAGE OF:

KENNETH MICHAEL SMITH,

Petitioner and Appellant,

and

MELISSA SUE SMITH, n/k/a GRAHAM,

Respondent and Appellee.

---

APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. BDR 2016-389  
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Kenneth Michael Smith, Self-Represented, Helena, Montana

For Appellee:

Melissa Sue Graham, Self-Represented, Boulder, Montana

---

Submitted on Briefs: June 26, 2019

Decided: August 13, 2019

Filed:

  
Clerk

---

Justice Laurie McKinnon 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 Kenneth Michael Smith (Smith) appeals an order of the First Judicial District Court, Lewis and Clark County, apportioning the guardian ad litem's (GAL) costs. We affirm.

¶3 Smith and Melissa Sue Smith, n/k/a Graham (Graham), married in July 2008. The marriage produced one child, born in 2009. The parties separated in June 2016, and Smith filed a petition for establishment of a parenting plan in July 2016. Graham later filed a petition for dissolution. Smith and Graham each submitted a proposed parenting plan to the District Court. The court adopted an amended version of Graham's plan in September 2016. Thereafter, the parties filed numerous motions to amend the parenting plan. The court did not rule on those motions until January 2017, when it issued its Findings of Fact, Conclusions of Law, and Final Decree of Dissolution. In its findings, the court recognized that Smith and Graham needed a GAL to assist them in co-parenting their child. The court, accordingly, appointed a GAL to the case and ordered Smith to pay 75% of the GAL's costs and Graham to pay 25% of the GAL's costs.

¶4 Two GALs served in this matter. The first GAL served from January 2017 until July 2018, when she moved the court to withdraw and appoint a new GAL. The court obliged, appointing the current GAL and retaining the parties' cost apportionment (75% and 25%, respectively). The current GAL billed the costs he incurred while satisfying his court-appointed duties to Smith and Graham in the proportion the District Court ordered. Smith opposes those costs and appeals the matter. We affirm the District Court's cost apportionment.

¶5 On appeal, Smith argues he should not be obligated to pay the current GAL's costs. "We review a court's order concerning costs for an abuse of discretion." *Total Indus. Plant Servs. v. Turner Indus. Grp., Ltd. Liab. Co.*, 2013 MT 5, ¶ 61, 368 Mont. 189, 294 P.3d 363. Section 40-4-110(1), MCA, allows a court to order a party to pay costs associated with the maintenance of a family law proceeding. Those costs may consist of "professional fees, including sums for legal and professional services rendered." Section 40-4-110(1), MCA. "The court may order that the amount be paid directly to the professional, who may enforce the order in the professionals name." Section 40-4-110(1), MCA. Further, when the court deems a GAL's service is necessary to determine the child's best interest, § 40-4-205(1), MCA, states, "The court may appoint a guardian ad litem to represent the interests of a minor dependent child with respect to the child's support, parenting, and parental contact." The court must enter an order for either or both of the parties to pay the GAL's costs: "The court shall enter an

order for costs and fees in favor of the child’s guardian ad litem. The order must be made against either or both parents . . . .” Section 40-4-205(4), MCA.

¶6 In this case, the District Court acted well within its statutory authority in ordering the parties to pay the GAL fees. *See* §§ 40-4-110(1), -205(4), MCA. Due to this case’s overtly tense and litigious nature, the District Court expressly found a GAL was necessary to represent the child’s best interest. The current GAL incurred his costs by providing the court-ordered professional services in investigating and representing the child’s best interest. We accordingly conclude the court did not abuse its discretion and affirm its ruling.

¶7 On July 17, 2019, Smith filed a motion to suspend proceedings pending response from the office of judiciary commission on practice. Smith’s motion claims that the District Court did not show good cause justifying the appointment of the second GAL. The Court disagrees and addresses the issue above. The District Court acted within its statutory authority when it appointed a GAL and ordered the parties to pay for those services. Thus, Smith’s motion to suspend the instant proceeding is denied.

¶8 On August 7, 2019, Smith filed a motion requesting to withdraw his appeal. In the motion, Smith states that he “would like to give the [District Court] another opportunity to address [his] challenge to [its] appointment of [the GAL].” Smith appeals the District Court’s Findings of Fact, Conclusions of Law, and Final Decree of Dissolution, in which the court appointed a GAL to assist the parties in co-parenting their child. That order is a “final judgment” from which an appeal is well taken. *See* M. R. App. P. 4(1)(a), 6(1).

We find it unnecessary to dismiss the present appeal, as Smith’s motion simply states that he wishes to “give” the District Court another opportunity to consider the precise issue he appeals. The appealed issue is appropriately before this Court, and we see no reason to dismiss the appeal for the District Court’s reconsideration when the court already clearly stated its ruling on the matter. We accordingly deny Smith’s motion to dismiss and affirm the District Court’s order.

¶9 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.

¶10 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE

/S/ BETH BAKER

/S/ INGRID GUSTAFSON