DA 20-0103

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 35N

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 R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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

For Appellee:

Courtney Lawellin, Courtney Lawellin P.C., Livingston, Montana

Submitted on Briefs: December 9, 2020

Decided: February 9, 2021

Filed:

Clerk

Justice James Jeremiah Shea 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, 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 Tiffany P. Whelahan appeals from an order of the Sixth Judicial District Court, Park County, amending the parenting plan for her minor child, A.H. We affirm.

¶3 Tiffany and Edward are the parents of A.H, born in 2014. The parties resided together with A.H. until Tiffany was arrested and charged with Partner or Family Member Assault (PFMA) for assaulting Edward in May 2015. Edward parented A.H. exclusively for several weeks after this, and then the parties alternated parenting time from week to week until October 2015.

¶4 In October 2015, Tiffany's PFMA was resolved by plea agreement and the parties resumed living together with A.H.

¶5 In November 2015, Tiffany was granted a temporary order of protection against Edward based on reasonable apprehension with no allegations of assault. Edward moved into a separate home. A.H. resided with Tiffany pending proceedings on the order of protection.

¶6 In December 2015, Edward petitioned the District Court for a formal parenting plan, seeking to resume parenting time with A.H.

¶7 On April 5, 2016, Edward and Tiffany executed a stipulated parenting plan. The plan provided that A.H. would reside with Tiffany, and Edward would have parenting time

every other weekend. The District Court approved and adopted the stipulated parenting plan on April 7, 2016. Edward and Tiffany followed this plan for the next two years.

¶8 On April 11, 2018, Tiffany filed a motion to suspend Edward's parenting rights, alleging that A.H. had been sexually abused while in Edward's care. The court immediately suspended Edward's parenting rights and scheduled a hearing.

¶9 After the hearing on May 25, 2018, the District Court restored Edward's parenting rights upon finding that Tiffany failed to substantiate the sexual abuse allegation.

¶10 On May 31, 2018, Tiffany filed a Notice of Intent to Move and Motion to Modify Parenting Plan, seeking to relocate to Michigan with A.H.

¶11 The District Court held hearings regarding Tiffany's motion in August and September 2018. Evidence was presented at the hearing that Tiffany consumed alcohol almost daily, there were multiple allegations of abuse towards her male partners, and that she struggled with communication, relationships, and mental stability.

¶12 On October 4, 2018, the District Court issued a parenting plan that provided for alternative custody arrangements, one in the event Tiffany remained in Montana, and another if she decided to relocate to Michigan. If Tiffany remained in Montana, the parties would equally co-parent A.H. on an alternating weekly schedule. If Tiffany chose to relocate to Michigan, A.H. would remain in Montana in Edward's primary care, but A.H. would spend summers with Tiffany in Michigan. Tiffany appealed and we affirmed the parenting plan imposed by the District Court. *Haerr v. Whelahan (In re A.H.)*, 2019 MT 118N, 396 Mont. 548, 455 P.3d 432.

¶13 On October 16, 2018, Tiffany relocated to Montmorency County, Michigan. In accordance with the parenting plan, A.H. remained in Montana in Edward's primary care.

¶14 On June 28, 2019, A.H. arrived in Michigan to spend the summer with Tiffany. While in Michigan, Tiffany brought A.H. to be examined by medical professionals. In A.H.'s presence, Tiffany told medical personnel that A.H. was being sexually and physically abused while in Edward's care. A.H. was then interviewed separately and confirmed variations of what her mother had reported. Tiffany also made a report to the local sheriff's office. When interviewed by a sheriff's deputy, A.H. again repeated variations of what her mother had reported in her presence.

¶15 On July 24, 2019, Tiffany filed a motion to amend the parenting plan, requesting the court to keep A.H. with her in Michigan. Tiffany alleged A.H. was being abused in Montana and attached records from the Michigan medical providers as evidence of abuse.

¶16 Tiffany also filed proceedings in Michigan asserting temporary emergency jurisdiction. The Michigan judge ordered A.H. to remain in Michigan pending a hearing in the Montana District Court.

¶17 On September 20, 2019, the District Court held a hearing on Tiffany's motion. The District Court heard testimony from the Michigan medical providers and deputy who had interviewed A.H., and from Dr. Michael Bütz, an expert witness with specialized training in clinical neuropsychology. Bütz testified that the medical providers and deputy failed to use nationally recognized protocols for assessing sexual abuse when they examined A.H., which may cause evaluations of abuse to be tainted. Bütz further testified that there had

been no determination that any actual trauma had occurred to A.H. and confirmed that A.H.'s medical records do not indicate evidence of abuse.

¶18 The District Court entered its Findings of Fact, Conclusions of Law, and Order on February 14, 2020. The court determined that "[t]here is no substantiated evidence of abuse by Edward against A.H." and noted its concern that A.H. may have been coached to make false statements about Edward. The court found that Tiffany has consistently made unsubstantiated allegations against Edward in the attempt to denigrate, alienate, and frustrate Edward's contact with A.H. The court concluded that "it would not be in the child's best interest to be removed from frequent and continuing contact with her father" and ordered that A.H. be returned to Edward in Montana on or before February 26, 2020.

¶19 Consistent with its Order, the District Court entered an Amended Parenting Plan on February 18, 2020. The plan provides that A.H. will reside primarily with Edward. If she completes a chemical dependency evaluation and is following all recommendations, Tiffany will have parenting time for four weeks during the summer and for a week at Christmas and Easter. Tiffany may exercise her parenting time in Michigan or Montana, and "Tiffany may request additional time with A.H., which will not be unreasonably withheld, if she comes to Montana."

¶20 District courts have broad discretion to make and modify parenting plan determinations under the applicable standards of §§ 40-4-212 and -219, MCA. *Tubaugh v. Jackson (In re C.J.)*, 2016 MT 93, ¶ 13, 383 Mont. 197, 369 P.3d 1028. We review the findings of fact underlying a district court's decision to amend a parenting plan for clear error. *In re S.E.L.*, 2015 MT 228, ¶ 9, 380 Mont. 256, 354 P.3d 1237. Findings

are clearly erroneous if they are not supported by substantial evidence, the court misapprehended the effect of the evidence, or this Court's review of the record convinces it that a mistake has been made. *In re Marriage of Robinson*, 2002 MT 207, ¶ 15, 311 Mont. 246, 53 P.3d 1279.

¶21 Absent clearly erroneous findings, this Court will not disturb a district court's decision regarding a parenting plan unless there is a clear abuse of discretion. *C.J.*, ¶ 13. The test for an abuse of discretion is whether a district court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *Robinson*, ¶ 15.

¶22 Tiffany argues that the District Court abused its discretion in amending the parenting plan on the basis that its findings of fact are contrary to the evidence presented. We disagree. At most, Tiffany identifies conflicts in the evidence or suggests different interpretations of the evidence based on testimony presented by her witnesses. Tiffany's arguments relate to the weight, credibility, and veracity of witness testimony, the determinations of which are within the discretion of the District Court. It is not this Court's function to reweigh conflicting evidence or substitute its judgment regarding the strength of the evidence for that of the district court. *In re Matter of A.F.*, 2003 MT 254, ¶ 24, 317 Mont. 367, 77 P.3d 266.

¶23 Upon our review, the District Court's findings are supported by substantial record evidence. We are not convinced that the District Court misapprehended the effect of the evidence or was otherwise mistaken about the evidence presented. The District Court's

findings of fact are not clearly erroneous. The modified parenting plan demonstrates reasonable and conscientious judgment and was not an abuse of discretion.[1]

¶24 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. We affirm.

/S/ JAMES JEREMIAH SHEA

We Concur:

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

[1] Tiffany also argues that the District Court erred by issuing two conflicting parenting plans. We disagree. It is clear from the record that the District Court intended for the February 18, 2020 Amended Parenting Plan to supersede all prior parenting plans.