DA 21-0418

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 113N

IN RE THE MARRIAGE OF:

JENNIFER L. RUSSUM,

Petitioner and Appellant,

and

MATTHEW S. WENDT,

Respondent and Appellee.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DR-10-121
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Vuko J. Voyich, Anderson & Voyich, P.L.L.C., Livingston, Montana

For Appellee:

Rebecca R. Swandal, Swandal Law, PLLC, Livingston, Montana

Submitted on Briefs: May 4, 2022

Decided: June 7, 2022

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 Jennifer Russum (Russum) appeals the July 27, 2021, Findings of Fact, Conclusions of Law, and Order (Order) issued by the Sixth Judicial District Court, Park County. We affirm.

¶3 Russum and Matthew Wendt (Wendt) were married in 2004 and divorced in 2010. During their marriage, they had one child, H.W. Upon divorcing, the parties stipulated to a parenting plan wherein H.W. primarily resided with Russum and was parented by Wendt three times a week. Wendt testified that it was not feasible for him to be H.W.'s primary caregiver at that time due to his work schedule. In 2013, Russum filed a "Notice of Intent to Move" along with an updated parenting plan (2013 Plan). Russum proposed to move to Tennessee and have H.W. primarily reside with her, while Wendt would parent H.W. during the summer and any school breaks. The parties stipulated to this plan without counsel.

¶4 The parties sought to resolve some ambiguities and amended the 2013 Plan in 2017 (2017 Amendments). The 2017 Amendments primarily clarified the logistics of travel arrangements and provided for the calculation of child support by the Child Support Enforcement Division (CSED) but did not affect the parenting schedule. In 2019, Wendt

filed a motion to hold Russum in contempt, arguing that she ignored the 2013 Plan when she opened a case with CSED, resulting in CSED finding Wendt in arrears on his obligations. The District Court ultimately denied Wendt's motion for contempt, noting that Russum could not be in contempt because the 2013 Plan was never approved by court order. However, the District Court further held that the 2013 Plan served the best interests of H.W.; was "valid and enforceable and approved"; and ordered the parties to abide by its terms.

¶5 While visiting Wendt in spring 2021, H.W. indicated that he wished to reside primarily with Wendt in Montana and spend breaks with Russum, essentially flipping the parenting schedule. Wendt filed a motion to amend (Motion to Amend) the parenting plan to reflect H.W.'s desires. Russum opposed the motion and moved to dismiss, arguing that Wendt failed to demonstrate a sufficient change in circumstances necessitating an amendment.

¶6 At the hearing on Wendt's Motion to Amend, the District Court denied Russum's motion to dismiss and heard testimony from both parties concerning Wendt's proposed parenting plan. The District Court also interviewed H.W. in chambers, where H.W. reiterated his desire to live with Wendt in Montana. At the time of the hearing, H.W. was a few months shy of his 14th birthday.

¶7 The District Court issued its Findings of Fact, Conclusions of Law, and Order on July 27, 2021. The District Court concluded that any change of circumstances should be determined from the 2013 Plan, because the 2017 Amendments only clarified travel arrangements, and that circumstances had changed since the 2013 Plan. In reaching this

conclusion, the District Court noted H.W.'s stepmother and new half-siblings, changes to Wendt's work schedule resulting in more availability, and H.W.'s age and stated desire to live with Wendt in Montana. Analyzing the statutory factors set forth in §§ 40-4-212 and 40-4-219, MCA, the District Court concluded that, because Russum and Wendt were "truly devoted and effective parents" and there was no detriment presented to H.W. by either party's living circumstances, H.W.'s "wishes are entitled to a great deal of consideration" and granted Wendt's Motion to Amend. Russum appeals. We restate the issues Russum raises and address each in turn.

¶8 Russum first argues that the District Court's decision to determine whether circumstances had changed based on the 2013 Plan, and not the 2017 Amendments, was clearly erroneous.

¶9 We review a district court's findings relating to custody modification to determine whether those findings are clearly erroneous. *In re Arneson-Nelson*, 2001 MT 242, ¶ 15, 307 Mont. 60, 36 P.3d 874. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if our review of the record convinces us a mistake was made. *In re C.J.*, 2016 MT 93, ¶ 12, 383 Mont. 197, 369 P.3d 1028. We review a district court's conclusions of law for correctness. *C.J.*, ¶ 12.

¶10 Section 40-4-219(1), MCA, allows a district court the discretion to amend a prior parenting plan if, after review of "facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan," the district court determines a

change has occurred in the circumstances of the child and that an amendment would serve the best interests of the child.

¶11 The District Court did not err in relying on the 2013 Plan. The District Court's 2019 order denying Wendt's motion to hold Russum in contempt concluded the 2013 Plan was valid and enforceable between the parties and ordered the parties to comply with "[a]ll provisions" of the 2013 Plan. Russum was aware of this conclusion and order and the record contains no objection or argument against the District Court's conclusion. Instead, Russum's filings disregarded the District Court's order and continued to refer to the 2017 Amendments as the current parenting plan, and her testimony at the hearing on the Motion to Amend reiterated her mistaken belief that the 2017 Amendments constituted the current parenting plan. Russum's mistaken belief in the 2017 Amendments did not undo the District Court's order that the provisions of the 2013 Plan remained in effect. The District Court did not err in relying upon the 2013 Plan that it previously recognized as controlling.

¶12 Next, Russum contends that the District Court clearly erred in denying her motion to dismiss and determining H.W.'s circumstances had changed.

¶13 A threshold showing of changed circumstances must be made before the district court can consider amending a parenting plan. *In re Marriage of D'Alton*, 2009 MT 184, ¶ 11, 351 Mont. 51, 209 P.3d 251. A child's increased age alone does not constitute a changed circumstance. *D'Alton*, ¶ 11. We have previously concluded that a change in the amount of time a child may have with one parent constitutes a changed circumstance. *In re Marriage of Schilling*, 2018 MT 59, ¶ 13, 391 Mont. 25, 414 P.3d 775.

¶14 The District Court's finding of changed circumstances was not clearly erroneous. The District Court did not rely solely on H.W.'s age to find circumstances had changed. The District Court noted the changes in Wendt's work schedule, which resulted in more time for H.W. to spend with Wendt, Wendt's living situation and H.W.'s half-siblings, and H.W.'s expressed desire to live with Wendt. Russum does not dispute the veracity of these findings, but rather, contends these facts were not significant enough to constitute a change in circumstances. However, we review the District Court's findings for clear error, and we cannot say the District Court clearly erred or made a mistake. The District Court's findings that H.W.'s circumstances had changed were each supported by substantial evidence, including filings and testimony by both parties and the District Court's interview of H.W. The District Court correctly found that H.W.'s circumstances had changed.

¶15 Russum further argues that the District Court abused its discretion when it amended the parenting plan and misapplied the statutory factors set forth in § 40-4-212, MCA.

¶16 District courts retain broad discretion when considering the parenting of a child. Absent clearly erroneous findings, we will not disturb a district court's decision regarding parenting unless there is a clear abuse of discretion. *In re Marriage of Woerner*, 2014 MT 134, ¶ 12, 375 Mont. 153, 325 P.3d 1244. A district court does not abuse its discretion unless it acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *Woerner*, ¶ 12. When determining how a proposed change may affect a child, courts consider "the potential impact of the change on the criteria in 40-4-212 and whether . . . the child is 14 years of age or older and desires the amendment." Section 40-4-219(1)(a)(iii), MCA. Section 40-4-212(1), MCA,

directs courts to consider "the wishes of the child" among several other nonexclusive factors when establishing a parenting plan that is in the best interest of the child.

¶17 The District Court did not abuse its discretion when it amended the parenting plan. Contrary to Russum's assertions, the District Court did not solely rely upon the COVID-19 pandemic to determine an amendment was in H.W.'s best interest. The District Court noted the pandemic's effect on H.W. but did not afford undue weight to the pandemic. The District Court addressed the statutory factors under § 40-4-212, MCA, and additionally noted evidence of Wendt's difficulty in getting his summer parenting time. The District Court further noted that H.W. clearly and consistently indicated a preference to reside in Montana with Wendt and concluded that H.W. reached this decision on his own, without being influenced by either parent. The District Court further concluded that, given the stability of both homes and the devotion of both parents, H.W.'s wishes were "entitled to a great deal of consideration." Our review does not convince us the District Court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. The District Court did not abuse its discretion in determining the amended parenting plan was in H.W.'s best interest nor did it misapply the factors set forth in § 40-4-212, MCA.

¶18 Finally, Russum argues that the District Court erred by setting a hearing on Wendt's Motion to Amend before Russum filed any responsive pleading. However, Russum failed to raise this issue to the District Court. Russum's June 9 motion for an extension to respond to Wendt's Motion to Amend did not object to the District Court's order setting a hearing or ask the District Court to vacate the hearing until she filed a response. Russum's response

to Wendt's Motion to Amend likewise did not object. Nor did Russum bring the issue to the District Court's attention at the hearing. We have consistently held that we will not address an issue raised for the first time on appeal because it is fundamentally unfair to fault a district court for failing to rule correctly on an issue it was not afforded the opportunity to consider. *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100. We decline to address the issue further.

¶19 The District Court did not clearly abuse its discretion in amending the parenting plan. The District Court's Findings of Fact, Conclusions of Law, and Order is affirmed.

¶20 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.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE