DA 22-0169

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 252N

IN RE THE MARRIAGE OF:

SYRENA LOUISE DESKINS, f/k/a
SYRENA LOUISE ROSE,

Petitioner and Appellee,

and

CORY LANE ROSE,

Respondent and Appellant.

APPEAL FROM: District Court of the Fifth Judicial District,
In and For the County of Jefferson, Cause No. DR 2019-07
Honorable Luke Berger, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Kathryn Keiser, Kathryn Keiser Family Law, PLLC, Bozeman, Montana

For Appellee:

Joy Barber, William F. Hooks, Montana Legal Services Association,
Helena, Montana

Submitted on Briefs: November 10, 2022

Decided: December 27, 2022

Filed:

Clerk

Justice Ingrid Gustafson 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 Respondent and Appellant Cory Rose (Cory) appeals from the March 29, 2022 Findings of Fact, Conclusions of Law and Order, along with the accompanying March 29, 2022 Amended Final Parenting Plan issued by the Fifth Judicial District Court, Jefferson County. We affirm.

¶3 Cory and Petitioner and Appellee Syrena Deskins (Syrena) were married in 2016. Also in 2016, they had a child together, A.R. Cory and Syrena separated in 2018. Syrena and A.R. moved to Jefferson City, while Cory resided in Livingston. On March 6, 2019, Syrena filed a Petition for Dissolution of Marriage. On March 4, 2020, the District Court issued its Findings of Fact, Conclusions of Law, and Decree of Dissolution. The court also issued its Final Parenting Plan that same day. In the Final Parenting Plan, Syrena was designated to serve as the primary residential care parent for A.R. The plan provided Cory with four days of parenting time for every 18-day period to accommodate Cory's work schedule. Cory was also entitled to parenting time for three non-consecutive weeks during the summer and on alternating holidays. Following the adoption of the Final Parenting Plan, Cory generally exercised his parenting time with A.R. for two days every two-week

period. Cory remained in Livingston, living with his mother, Regina Rose. Syrena and A.R. continued to reside in Jefferson City, while both Syrena worked and A.R. attended school in Boulder.

¶4 On November 19, 2021, Syrena filed a Notice of Intent to Move and a Motion to Amend Parenting Plan. Syrena requested an amendment of the parenting plan to allow her to move with A.R. to Enterprise, Oregon, where they would reside with Syrena's fiancé. On December 8, 2021, Cory filed Respondent's Verified Response to Motion to Amend Parenting Plan and Notice of Intent to Relocate. Cory objected to the amendment of the parenting plan and asserted if Syrena chose to move to Oregon, it was in A.R.'s best interests to stay in Montana and live with him in Livingston.

¶5 The District Court held a hearing on February 9, 2022, at which Syrena, Cory, Regina, and A.R.'s kindergarten teacher, Kayla Hecht, testified. Hecht testified that A.R. was doing well in school and Syrena was an engaged parent. Syrena testified she had been A.R.'s primary caregiver since birth and that A.R. was extremely close with Syrena's daughter from a previous relationship, who lived with them in Jefferson City and would be moving to Oregon as well. Syrena testified that she worked at Rocky Mountain Head Start and hoped to transfer her employment to a Head Start in Oregon and would be helping her fiancé with his family's ranch business. Syrena further testified that Cory would receive more parenting time under her proposed amended parenting plan than before and that the plan provided for Cory to have telephone and video calls with A.R., which he had not taken advantage of under the previous plan. Cory testified to his and his mother's close

relationship with A.R.; that he had hired a contractor to build A.R. her own bedroom at the house in Livingston; that he would enroll A.R. in a private school in Livingston if A.R. stayed with him in Montana; that he had not telephoned or video chatted with A.R. as allowed under the parenting plan; and that Syrena was A.R.'s primary caregiver. Regina testified to her close relationship with A.R. and her ability to care for A.R. when Cory was at work.

¶6 On March 29, 2022, the District Court issued its Findings of Fact, Conclusions of Law and Order, as well as its Amended Final Parenting Plan. In its Conclusions of Law, the court specifically addressed each of the best interest factors found in § 40-4-212(1)(a)-(m), MCA, but its order did not specifically set out the factors found in § 40-4-219(1), MCA. The District Court granted Syrena's proposed relocation to Oregon with A.R. and, rather than adopting Syrena's proposed parenting plan, crafted a parenting plan which provided A.R. would live with Syrena in Oregon during the school year and with Cory in the summer, over Thanksgiving, half of Christmas break, and during spring break.

¶7 Cory appeals. We address whether the District Court clearly abused its discretion by granting Syrena's request to modify the parenting plan.

¶8 We review the underlying findings in support of a district court's decision regarding modification of a parenting plan for clear error and its conclusions of law for correctness. *In re Marriage of Solem*, 2020 MT 141, ¶ 5, 400 Mont. 186, 464 P.3d 981 (citations omitted). "Absent clearly erroneous findings, we will not disturb a district court's decision

regarding a parenting plan unless there is a clear abuse of discretion." *In re Marriage of Solem*, ¶ 6.

¶9 Cory asserts the District Court erred by improperly weighing the § 40-4-212, MCA, factors; by failing to address the § 40-4-219, MCA, factors; and by failing to weigh Syrena's constitutional right to travel with A.R.'s best interests. Cory contends a proper analysis of the best interest factors would lead to the conclusion A.R.'s best interests would be served by denying Syrena's request to relocate to Oregon with A.R. We find neither clear error nor a clear abuse of discretion in the District Court's decision to amend the parenting plan and allow Syrena to relocate to Oregon with A.R.

¶10 "In those cases in which a parent relocates and a parenting plan is modified . . . the guiding principle remains the best interest of the child." *Guffin v. Plaisted-Harman (Guffin II)*, 2010 MT 100, ¶ 30, 356 Mont. 218, 232 P.3d 888 (citing *In re Marriage of Robison*, 2002 MT 207, ¶ 27, 311 Mont. 246, 53 P.3d 1279). In parental move cases, a court "must try to reconcile the interests of both parents with the best interests of the child." *Northcutt v. McLaughlin (In re G.M.N.)*, 2019 MT 18, ¶ 12, 394 Mont. 112, 433 P.3d 715. Such cases are difficult because "they are rarely amenable to compromise[.]" *In re G.M.N.*, ¶ 12. Here, the essential thrust of Cory's argument is the District Court's best interests analysis—as required by both §§ 40-4-212 and -219, MCA—was wrong and Syrena should not have been allowed to move to Oregon with A.R. As previously noted, the court did specifically set out each best interest factor found in § 40-4-212(1)(a)-(m), MCA, but did not specifically set out the factors found in § 40-4-219(1), MCA, in its order.

¶11 This Court continues to "strongly recommend and caution that district courts should make specific findings on all relevant statutory criteria in making parenting plan determinations under Title 40, chapter 4, part 2, MCA." *In re Marriage of Bessette*, 2019 MT 35, ¶ 26, 394 Mont. 262, 434 P.3d 894. "Nonetheless, under the doctrine of implied findings, we will not reverse a parenting plan determination for failure to make a specific finding if the express findings made were not clearly erroneous and were themselves sufficient, alone or in conjunction with other record evidence, to support and manifestly imply a more specific finding on the requisite statutory criteria." *In re Marriage of Bessette*, ¶ 26 (citing *In re D.L.B.*, 2017 MT 106, ¶¶ 13-14, 387 Mont. 323, 394 P.3d 169). Here, the District Court did not specifically set forth the factors implicated by § 40-4-219, MCA, in its written order. The relevant portion of that statute states:

> The court may in its discretion amend a prior parenting plan if it finds, upon the basis 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, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interest of the child.
>
> (a) In determining how a proposed change will affect the child, the court shall consider the potential impact of the change on the criteria in 40-4-212 and whether:
>
> (i) the parents agree to the amendment;
>
> (ii) the child has been integrated into the family of the petitioner with consent of the parents;
>
> (iii) the child is 14 years of age or older and desires the amendment; or
>
> (iv) one parent has willfully and consistently:

> (A) refused to allow the child to have any contact with the other parent; or
>
> (B) attempted to frustrate or deny contact with the child by the other parent.
>
> (b) If one parent has changed or intends to change the child's residence in a manner that significantly affects the child's contact with the other parent, the court shall consider, in addition to all the criteria in 40-4-212 and subsection (1)(a):
>
> (i) the feasibility of preserving the relationship between the nonrelocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties;
>
> (ii) the reasons of each parent for seeking or opposing the change of residence;
>
> (iii) whether the parent seeking to change the child's residence has demonstrated a willingness to promote the relationship between the child and the nonrelocating parent; and
>
> (iv) whether reasonable alternatives to the proposed change of residence are available to the parent seeking to relocate.

Section 40-4-219(1), MCA.

¶12 We have reviewed the record pursuant to this Court's doctrine of implied findings and conclude the District Court's findings were sufficient "to support and manifestly imply a more specific finding on the requisite statutory criteria." *In re Marriage of Bessette*, ¶ 26. "We have repeated on numerous occasions that the trial court's decision is to be accorded great deference because it 'is in a better position than this Court to resolve child custody issues.'" *In re Marriage of Klatt*, 2013 MT 17, ¶ 13, 368 Mont. 290, 294 P.3d 391 (quoting

In re Marriage of Wilson, 2009 MT 203, ¶ 15, 351 Mont. 204, 210 P.3d 170). Accordingly, we "presume the district court's ruling is correct" in such cases. *In re Marriage of Hedges*, 2002 MT 204, ¶ 17, 311 Mont. 230, 53 P.3d 1273.

¶13 While it did not specifically list each § 40-4-219(1), MCA, factor in its order, the District Court clearly considered those factors in its decision. The court did not simply adopt Syrena's proposed parenting plan, but instead crafted its own which allows Cory more in-person parenting time than he had under either Syrena's proposed plan or the previous plan. The court's plan also allows Cory to contact A.R. by telephone every day and encourages video chat sessions as well, though Cory failed to take advantage of those options during the years the previous plan was in force. Though Cory continually minimized Syrena's reason for moving to Oregon as being "for a man," the record shows, and the District Court considered, that Syrena was moving to be with her fiancé, who had a close relationship with both A.R. and A.R.'s half-sister before moving to Oregon and contacted the girls regularly once he moved. Both Cory and Syrena proposed plans where they would be the primary parent during the school year, but the other would have a large block of parenting time during the summer, allowing the non-residential parent time to bond with A.R. Cory also argues the District Court should have placed more weight on Syrena's statement she would stay in Montana if she was not allowed to move to Oregon with A.R., but Cory's counsel argued the court "ha[d] to consider that the parent will move" at trial. The court's order clearly considered this factor as well, crafting an amended parenting plan which allowed Syrena's move to Oregon with A.R., but required the parties

to immediately notify the court if Syrena did not move. Under our implied findings doctrine, it was harmless error for the District Court to not specifically set out these considerations as it did for those found in § 40-4-212, MCA.

¶14 Cory also complains the District Court's best interests analysis was improperly skewed by its consideration of Syrena as the historical primary caregiver for A.R. The court was required to consider the continuity and stability of A.R.'s care in this case. Section 40-4-212(1)(h), MCA. Syrena had long been A.R.'s primary caregiver during the school year. Cory proposed he would become the primary parent during the school year, which would require A.R. to move from Jefferson City to Livingston and start at a new school. Cory would also be unavailable to parent for days at a time during the school year due to his work schedule, which would require Cory's family members and/or third parties to care for A.R. during parts of the school year. Under either plan, A.R. was going to have to change both her residence and her school. The District Court's consideration that A.R.'s continuity and stability of care was better served by remaining with Syrena and moving to Oregon was neither clearly erroneous nor a clear abuse of discretion.

¶15 Cory sought to restrict Syrena from moving to Oregon with A.R. in this case. The freedom to travel throughout the United States, and to migrate, resettle, find a new job, and start a new life, has long been recognized as a fundamental constitutional right which may be restricted only by a compelling state interest. *Collie v. Pirkle (In re M.C.)*, 2015 MT 57, ¶ 12, 378 Mont. 305, 343 P.3d 569. "[W]hile the parent seeking amendment of the parenting plan has the burden of proof under § 40-4-219(1), MCA, to establish amendment

of the parenting plan is in the child's best interest, in parental move cases the objecting party also has a responsive evidentiary burden to bring forth case-specific facts as to why the amendment should not be granted." *In re Marriage of Solem*, ¶ 11. While Cory presented his objections to Syrena moving to Oregon with A.R.—severing A.R.'s frequent and continuous contact with Cory and his family members—the District Court found them unpersuasive in its ultimate best interests analysis. We agree with the District Court on this point and note the court crafted a plan which allowed Cory more parenting time in the summer than requested by Syrena.

¶16 While it would have been preferable for the District Court to make specific findings on each relevant statutory factor in this case, upon our review of the record, we find the findings made were sufficient to determine the District Court "considered the statutory factors and made its ruling on the basis of the child's best interests." *In re Marriage of Woerner*, 2014 MT 134, ¶ 15, 375 Mont. 153, 325 P.3d 1244 (citations omitted). In essence, Cory merely asks this Court to reweigh the evidence and substitute his preferred weighing of the best interest factors for that of the District Court. We decline to do so. The District Court's findings of fact were not clearly erroneous and its amendment of the parenting plan to allow Syrena to relocate to Oregon with A.R. was not a clear abuse of discretion.

¶17 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.

¶18 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR