STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1490

In re the Custody of J. W. V. H.
Duane Arnold Van Hoever, plaintiff,
Respondent,

vs.

Candelauria Camilla Akin,
Appellant,

Julie Friedrich,
Guardian ad Litem.

Filed October 3, 2011
Affirmed in part and remanded
Ross, Judge

Dakota County District Court
File No. 19HA-FA-08-355

Kurt Robinson, Attorney at Law, Blaine, Minnesota (for respondent)

Candelauria C. Akin, Apple Valley, Minnesota (pro se appellant)

Julie Friedrich, Woodbury, Minnesota (guardian ad litem)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Candelauria Akin challenges the district court's order granting her and Duane Van Hoever joint physical and legal custody of their seven-year-old son, J.W.V.H. The order modifies a 2007 custody order conferring joint legal custody but also granting Akin sole physical custody. She argues that the district court abused its discretion by conferring joint custody because Van Hoever has a history of domestic abuse, the parties cannot cooperate, and the guardian ad litem did not recommend joint physical custody. She also accuses the district court judge of bias and contends that she should have been awarded attorney fees. We hold that the district court did not abuse its discretion by granting joint custody and did not err in any other aspect of the custody order. We affirm the decision but remand for findings related to attorney fees.

FACTS

Candelauria Akin and Duane Van Hoever began dating in 2001 but never married, and they had a son, J.W.V.H., in August 2003. Their relationship was spotted by occasional domestic disputes, and they finally separated in February 2004.

By stipulation in 2007, the parties agreed to joint legal custody and that Akin would have sole physical custody of J.W.V.H. They also agreed to use a safety center for pick-ups and drop-offs and that "[a]ny motion for modification of custody shall be determined by application of the best interests standard of Minn. Stat. § 518.17, rather than the endangerment standard of Minn. Stat. § 518.18." The district court issued a custody order incorporating the stipulation.

Van Hoever moved the district court in 2009 to order sole legal and physical custody. A court-appointed guardian ad litem (GAL) described Akin and Van Hoever's relationship as one "marked with much acrimony and domestic abuse." But she concluded that the domestic-abuse concerns appear to have been resolved, both parents love J.W.V.H., and the child is happy and healthy in both homes. She noted communication problems but observed that, despite them, the parents had improved in encouraging and permitting mutual frequent contact with J.W.V.H. She recommended joint legal custody but sole physical custody to Akin with Van Hoever having frequent parenting time.

After conducting custody hearings in 2009 and 2010, the district court doubted a number of Akin's allegations about Van Hoever. It determined that joint legal and physical custody with alternating weekly parenting time served J.W.V.H.'s best interests. Akin appeals.

D E C I S I O N

Akin contests the district court's decision to award joint legal and physical custody. The district court has broad discretion in resolving child-custody disputes. *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989). Our review of its custody decision is limited to determining whether it abused that broad discretion by making findings not supported by the evidence or by improperly applying the law. *Id.* We examine the record in the light most favorable to the district court's findings. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). And we defer to the district court's credibility determinations. *Id.*

In making its custody determination, the district court must consider the best interests of the child under factors listed in Minnesota Statutes section 518.17, subdivision 1 (2010). *See Peterson v. Peterson*, 393 N.W.2d 503, 505 (Minn. App. 1986). When a district court contemplates joint custody, it must consider additional factors. Minn. Stat. § 518.17, subd. 2. These include the parents' ability to cooperate, their methods of resolving disputes, whether it would be detrimental to the child for one parent to have sole authority over the child's upbringing, and whether domestic abuse has occurred between the parents. *Id.*

I

Akin first argues that the trial court erred by modifying custody without finding a substantial change in circumstances. A district court may not modify custody unless the party seeking to modify makes a prima facie case for modification under Minnesota Statutes section 518.18(d) (2010). *In re Marriage of Goldman*, 748 N.W.2d 279, 284 (Minn. 2008). The district court must find, on the basis of facts that have arisen since or were unknown at the time of the prior order, that a change in circumstances has occurred, and that modification is necessary to serve the child's best interests. Minn. Stat. § 518.18(d).

A district court's discretion includes deciding whether the moving party has made a prima facie case to modify custody. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). Van Hoever submitted several affidavits to the district court alleging that Akin had told lies that had impacted the previous custody decision and that Akin had frequently changed residences, impacting J.W.V.H.'s stability. The district court

recognized that the parties had agreed, with the assistance of counsel, that either party could seek to modify custody under the best-interests standard. It found that Akin's lack of both stability and truthfulness endangered the child. It concluded that there had been a change in circumstances and that modification would be in J.W.V.H.'s best interests. The district court's decision to consider modifying the custody arrangement is therefore factually supported and does not reflect any abuse of discretion.

II

Akin contends that the district court abused its discretion by ordering joint custody, citing three factors against the order: (1) Van Hoever's having engaged in domestic abuse, (2) the parties' inability to co-parent, and (3) the GAL's declining to recommend joint physical custody.

We believe that the district court gave sufficient weight to the evidence of domestic abuse. When undertaking a best-interests analysis, a district court must consider "all relevant factors," including the impact of domestic violence on the child. Minn. Stat. § 518.17, subd. 1(12). A rebuttable presumption arises that joint custody is not in the child's best interests if domestic abuse has occurred between the parents. Minn. Stat. § 518.17, subd. 2(d). The district court reviewed in detail all the best-interests factors and it acknowledged a single incident of abuse between the parties. Van Hoever admitted to butting heads (literally) with Akin during one of their arguments. But the best-interests factors weighing in favor of joint custody, in the district court's assessment, overcame the statutory presumption against joint custody. It found that no pattern of domestic abuse existed, that the incident had occurred seven years earlier, and that Akin provided "no

credible evidence . . . of any additional abuse." It noted also that J.W.V.H. had not been negatively impacted. It found particularly that Akin is "more than willing to contrive facts and allegations to keep [Van Hoever] from being involved in his son's life." We must rely on these credibility determinations. The district court also considered vague allegations of past domestic abuse by Van Hoever involving other family members, and the record supports the implicit finding that these are irrelevant to any encounter between the parties or to the issues concerning J.W.V.H.'s custody. The district court did not abuse its discretion in its treatment of the domestic abuse evidence.

The district court also sufficiently considered the parties' communication difficulties before it found that they do not preclude a joint-custody arrangement. The district court predicted that joint custody might initially be "turbulent"—a prediction that was bolstered by the GAL's concern about a "[l]ack of co-parenting skills between parents." But the parties' difficulties getting along does not alone make a joint-custody award erroneous. And the district court was "not convinced that [the parties] are unable to cooperate in the rearing of their child" because it found that they are both "tiring of the battle" and "truly do want to do what they perceive is best for the minor child." It predicted that ordering sole physical custody to Akin would result in her eliminating Van Hoever from the child's life. It observed Akin's history of "denigrating the absent parent" and concluded that giving her sole custody would lead to greater difficulties than those that might result from joint custody. We do not second guess the district court's reasoned considerations of the different scenarios that might arise from the parties' interpersonal

conflicts, and, deferring to its judgment in the exercise of its discretion, we have no basis on which to discount its more-informed perspective.

We are also not persuaded by Akin's contention that the district court erroneously failed to follow the GAL's written recommendations. The district court, not a guardian ad litem or any other witness, decides whether joint sole custody is appropriate. The district court therefore may decline to follow any or all portions of a GAL's recommendations. But we have held that in doing so it should provide its reasons or provide sufficient findings that address the factors that the GAL considered. *Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993), *review denied* (Minn. Jan. 28, 1994).

The district court here did both. It noted that it was not following the GAL's written recommendation because it conflicted somewhat with the GAL's following trial testimony:

> Well, frankly, from the very first time I was appointed on this case [joint physical custody is] what I wished could have happened. . . . And, frankly, I think that would be the best case scenario in this case is if the parents could more equally share this child. I think he benefits from contact from both of them a great deal and not one more than the other, and I don't see a negative impact of these parents sharing him equally.

The district court also made detailed findings as to every best-interests factor that the GAL addressed in her report. We are confident that the district court did not abuse its discretion by taking a different course than the one suggested by the GAL's written recommendation.

Akin also argues that the district court should have relied on a custody evaluator's report. But the custody evaluation that she references is from a 2004 custody dispute, six

years before the district court decided this case. The district court was free to disregard it and to rely on current evidence.

III

Akin next argues that the district court made other material errors. She asserts that it erred by "approving competing and conflicting and non-cooperative medical insurance providers and medical prescriptions for a special needs child." Akin appears to be referring to a March 8, 2011 order addressing her motion for a stay pending appeal, which we have resolved by separate order.

She asserts also that the district court erroneously ordered custody exchanges to take place at the parties' homes rather than at a safety center. She alleges that this change harms her because of the history of domestic abuse with Van Hoever. Akin's assertion overlooks her own proposed custody order, which, if signed by the district court, would have directed that "future exchanges of the child . . . take place curbside" because it would "make transportation more equitable for the parties while still minimizing contact." The district court also disbelieved Akin's allegations of abuse. For both reasons, it did not abuse its discretion by ordering that custody exchanges take place curbside at the parties' homes.

IV

Akin charges the district court judge with bias and asserts that he should have recused himself because he knew Van Hoever's attorney from law school. "No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror." Minn. R. Civ. P. 63.02. "A judge shall

disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Minn. Code Jud. Conduct, Canon 2, R.2.11. We review de novo whether a district court complied with the rules of procedure and whether a judge has followed the Code of Judicial Conduct. *Citizens State Bank of Clara City v. Wallace*, 477 N.W.2d 741, 742 (Minn. App. 1991); *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005).

Akin's accusation faces procedural difficulties. She never moved to have the district court judge removed. The rules allow a party to direct the removal of a judge without any showing of cause by giving notice within a limited time after the judge's assignment to the case, and they allow a party to seek removal later on a showing of cause to remove. *See* Minn. R. Civ. P. 63.03. Akin acknowledged to the district court that she saw no bias to warrant the judge's removal. The judge had disclosed that he knew Van Hoever's attorney in law school, but he explained that he had not seen him in more than 20 years and that their acquaintance would not diminish his impartiality. He told Akin that if she wished to remove him for cause she could apply to the chief judge. Akin's attorney then relayed Akin's decision not to seek removal:

> I discussed the matter with my client, and she understands that at this stage of the proceeding that any petition for your removal for bias would have to have a showing of actual bias before the chief judge. And it has been her decision at this point not to pursue that and to allow this matter to be resolved and to continue on with the matter before the Court.

Akin herself confirmed this decision, stating, "I don't feel there's been any showing of bias."

Having expressly acknowledged that no bias existed and directed the district court judge to decide the issues, Akin is in no position now to genuinely claim that the consequent decision is infirm on account of the judge's alleged bias. We add that even if this were not so, on our reading, the record reflects no bias whatsoever.

V

Akin argues that the district court abused its discretion by failing to award her need-based attorney fees. "On review, this court will not reverse a [district] court's award or denial of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). In a custody proceeding, the district court may award need-based attorney fees when it is necessary for the good faith assertion of a party's rights if the party seeking fees lacks the ability to pay the fees and the party from whom the fees are sought can pay them. Minn. Stat. § 518.14, subd. 1 (2010). The district court made no findings on attorney fees or the parties' related finances and stated only that each party would be responsible for his and her own fees. A district court's denial of a party's request for need-based attorney fees in a custody determination, without any relevant findings about the parties' financial situations, reflects an abuse of discretion. *Wende v. Wende*, 386 N.W.2d 271, 276 (Minn. App. 1986). We remand for findings consistent with section 518.14.

Affirmed in part and remanded.