STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1138

In re the Marriage of:
Douglas Lee Rauenhorst, petitioner,
Respondent,

vs.

Julie Anne Rauenhorst,
Appellant.

Filed January 9, 2012
Affirmed
Hudson, Judge

Rice County District Court
File No. 66-FA-08-1403

John M. Jerabek, Niemi, Jerabek & Kretchmer, P.A., Minneapolis, Minnesota; and

Jacqueline A. Dorsey, Hvistendahl, Moersch, Dorsey & Hahn, P.A., Northfield, Minnesota (for respondent)

Michael D. Dittberner, Linder, Dittberner & Bryant, Ltd., Edina, Minnesota; and

W. Bradley Frago, Frago & Lasswell, P.A., Northfield, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Connolly, Judge.

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

HUDSON, Judge

Following a 2008 dissolution judgment granting appellant-mother and respondent-father joint physical and joint legal custody of their minor children, mother challenges the district court's parenting-time order granting father equal parenting time with mother. Because the order did not modify a prior custody order or parenting plan that specified the children's primary residence, and did not restrict mother's parenting time, the district court did not err by applying the best-interests standard or abuse its discretion in determining parenting time. The district court also did not err by declining to order child support and did not abuse its discretion by removing the court-appointed parenting-time expeditor. Therefore, we affirm.

FACTS

The Rice County District Court dissolved the marriage of appellant Julie Anne Rauenhorst (mother) and respondent Douglas L. Rauenhorst (father) by stipulated judgment in April 2008. The parties, who are both employed in law enforcement, earn approximately equal incomes. After their separation, mother moved to Farmington; father remained living in Nerstrand.

The judgment granted mother and father joint legal and physical custody of their children, then aged seven and five. It provided that the children "shall reside with [father] for the remainder of the 2007-08 school year" and that their "residence for the

2008-09 school year and each year after shall be with [mother]." It also stated that "[w]hen the parties have parenting time and are unable to parent more than one overnight, the other parent shall have the first right to care for the minor children, prior to obtaining an outside person [for their] care." Based on the parties' equal incomes and their sharing joint physical custody, the issue of child support was reserved.

About a month after the judgment, the parties stipulated to a parenting-time schedule that related only to the remainder of the 2007-08 school year and the summer of 2008. Under that schedule, father had parenting time during the school week, mother had parenting time on weekends, and the parties alternated parenting time on a weekly basis during the summer. The district court approved the stipulation and amended the judgment accordingly.

The children attended school in Nerstrand for the 2007-08 school year and began attending school in Farmington for the 2008-09 school year. In November 2009, father sought to have mother held in contempt of court, alleging several instances of failing to allow him parenting time. Mother denied father's allegations and maintained that, since the beginning of the 2008-09 school year, the parties had followed a parenting-time schedule by which the children were generally with mother during the school week and with father for one night during the school week and on weekends.

By stipulation, the parties then agreed to amend the judgment to provide for alternative-dispute resolution with a parenting-time expeditor (PTE). The amended judgment provided that either party could request the district court to enter an ex parte order incorporating the PTE's recommendation, which could be contested only on the

basis that it did not fairly state the recommendation or was not in the children's best interests.

After working with the parties for nine months, the PTE issued a letter stating her recommendations. She noted the 2008 judgment's provision that the children reside with mother during the school year and stated she would not make any changes to the existing parenting-time schedule, by which father had parenting time every Wednesday overnight and on weekends when mother worked. The PTE stated that she had spoken to two counselors previously involved with the children, and she recommended that if the children returned to therapy, they would visit mother's chosen counselor.

Father contested the adoption of the PTE's recommendations and sought to remove the PTE. He argued that the parties had previously followed a 2009-10 schedule in which mother generally had parenting time only one weekend a month and a 2008-09 schedule in which he had parenting time nearly every weekend. He maintained that the PTE had essentially examined the parties' parenting-time history only from the period when mother started eliminating his parenting time and that the PTE's interpretation of the judgment guaranteed him parenting time for only four nights per month. He also argued that the PTE's recommendation ignored the judgment's directive that when a parent was unable to take the children for more than one scheduled overnight, the other parent had the first right to care for the children. He challenged the PTE's endorsement of mother's chosen counselor.

Mother moved for the adoption of the PTE's recommendations or the appointment of a new PTE. She argued that father's request amounted to a substantial modification of

parenting time that would constitute a restriction of parenting time and require a finding of endangerment under Minn. Stat. § 518.18(d) (2010). She contended that father always had the children on weekends that she worked, and she allowed him extra weekend parenting time. She maintained that the judgment's first-right-of-refusal provision was designed to operate only when she would be away for more than one overnight. She argued that father's proposed weekday schedule was not in the children's best interests because father lives about 28 miles from their school, and she asserted that her chosen counselor was familiar with the children's history and current situation. In the alternative, mother sought a determination that father had parenting time in the 10%–45% range for the purpose of establishing child support.

The district court issued its order rejecting the PTE's recommendations on the basis that they were not in the children's best interests. The district court found that the PTE lacked authority to modify custody and that the proposed parenting-time alternating schedule would have restricted father's parenting time. The district court also ordered the removal of the PTE on the grounds that she had not been neutral on the choice of a counselor or in the dispute over the first right to care for the children when the parent scheduled to do so was unavailable. The district court affirmed the judgment's provision for joint physical custody and the reservation of child support. The district court declined to name a new PTE, but ordered the parties to agree on a counselor and negotiate a parenting schedule that would approximate a 50%–50% split, or if they could not do so, to schedule an additional hearing.

When the parties were unable to resolve these issues, the district court issued an additional parenting-time order. The district court found that there was not a substantial difference between the parties' proposed schedules, except that father's proposed schedule allowed him one additional weekly overnight with the children. The district court ordered the adoption of father's proposed school-year parenting-time schedule of alternating weekends, with mother having parenting time every Monday–Wednesday morning and father having parenting time every Wednesday evening–Friday morning. The district court also ordered an equally-shared schedule of summer and holiday parenting time. The district court also ordered that father's choice of counselor act as counselor for the children. Mother appeals.

D E C I S I O N

I

The district court has broad discretion with respect to custody matters, and on review, this court determines whether the district court abused that discretion by making findings unsupported by the evidence or by improperly applying the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). This court will set aside the district court's findings of fact only if they are clearly erroneous. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). But we review de novo questions of law, including the legal standard applicable to changes in parenting time. *Dahl v. Dahl*, 765 N.W. 2d 118, 123 (Minn. App. 2009).

Mother argues that the district court erred by issuing its parenting-time order without a finding that the children's current environment endangered their physical or

emotional health, as required by Minn. Stat. § 518.10(d)(iv) (2010). Under Minn. Stat. § 518.18(d), a district court "shall not modify a prior custody order or a parenting plan provision which specifies the child's primary residence unless it finds . . . that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child." *Id*. The court is directed to "retain the custody arrangement or the parenting plan provision specifying the child's primary residence that was established by the prior order unless" certain criteria are met, which include a finding that "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." *Id*. at (iv).

Initially, we note that the language in Minn. Stat. § 518.18(d) that relates to "a parenting plan provision which specifies the child's primary residence" is inapplicable to this case. A "parenting plan" is a term of art referring to a mechanism for caring for a child that fits the profile set out in Minn. Stat. § 518.1705 (2010). Alternatively stated, all parenting plans are plans addressing the care of a child, but a plan to care for a child is not a parenting plan unless it satisfies Minn. Stat. § 518.1705. Minn. Stat. § 518.1705 requires, among other things, "a schedule of the time each parent spends with the child." Minn. Stat. § 518.1705, subd. 2(a)(1) (2010). The amended judgment did not contain a parenting-time schedule that extended beyond the summer of 2008. Therefore, it did not create a parenting plan. *Cf. Rutz v. Rutz*, 644 N.W.2d 489, 492 (Minn. App. 2002)

(stating that the lack of a dispute-resolution mechanism "means that the judgment did not create a parenting plan"), *review denied* (Minn. July 16, 2002).

Mother argues, however, that the district court's decision to eliminate the minor children's school year residency with appellant and replace it with an equalized school year parenting time is the type of major alteration which merits scrutiny under the endangerment standard. Mother cites *Goldman v. Greenwood*, 748 N.W.2d at 283, in which the supreme court observed that "[s]ection 518.18(d) refers to . . . '*a change in the custody arrangement* or primary residence.'" *Id.* (quoting Minn. Stat. § 518.18(d)(i)). In *Goldman*, the supreme court concluded that the endangerment standard in Minn. Stat. § 518.18(d) applied to a sole physical custodian's motion to modify a locale restriction in a prior custody order to allow removal of a child to another state. *Id*. at 283–84; *cf. Schisel v. Schisel*, 762 N.W.2d 265, 269–70 (Minn. App. 2009) (concluding that district court had authority to restrict a child's in-state residence on a showing that the restriction was necessary to serve the child's best interests, noting that the term "'residence' includes 'place'" with respect to custody determinations).

But we conclude that the district court's order imposing a parenting-time schedule did not constitute a "change in the custody arrangement or primary residence" within the meaning of Minn. Stat. § 518.18 (d)(i) when the parties' stipulated judgment provided for joint physical custody, without a locale restriction. "'Joint physical custody' means that the routine daily care and control and the residence of the child is structured between the parties." Minn. Stat. § 518.003, subd. 3(d) (2010); *see Blonigen v. Blonigen*, 621 N.W.2d 276, 283 (Minn. App. 2001) (Crippen, J., dissenting) (noting that "joint physical custody"

merely requires that the routine daily care and control of the child be structured between the parties and that "[n]othing in the law precludes a 90%/10% care-sharing arrangement [from being given] the label "'joint'"), *review denied* (Minn. Mar. 13, 2001). Although the judgment provided that the children would reside with mother during the school year beginning in 2008-09, it contained no specific provision with a schedule of parenting time between mother's and father's households, apparently contemplating only that the parties would structure the children's routine daily care and control as they saw fit. *See Lutzi v. Lutzi*, 485 N.W.2d 311, 314 (Minn. App. 1992) (stating that the label "joint physical custody" does not require an equal division of time). When the parties were unable to agree on a schedule, the district court provided mediation assistance from a PTE and ultimately resolved the issue by ordering a parenting-time schedule. Because this case does not involve an attempt to modify a locale restriction in a prior custody award, *Goldman* is distinguishable, and it does not require that the order setting a parenting-time schedule apply the endangerment standard set out in Minn. Stat. § 518.18(d).

Alternatively, mother notes that, under Minn. Stat. § 518.175, subd. 5(1) (2010), a district court may modify an order regarding parenting time if modification would serve the child's best interests, but it may not restrict parenting time without a determination that parenting time is likely to endanger the child's health or impair the child's emotional development. She then argues that the district court's parenting-time order constituted a substantial modification of parenting time, which amounted to a restriction of her parenting time and therefore required a finding of endangerment. A change in parenting

time that reduces the amount of time a parent has with a child is not necessarily a restriction of parenting time. *Danielson v. Danielson*, 393 N.W.2d 405, 407 (Minn. App. 1986). A restriction occurs when a change to parenting time is "substantial." *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002). If a modification would result in a substantial change in parenting time, the district court must conduct an evidentiary hearing. *Id.*

Mother argues that the the district court's order substantially modified parenting time because it altered the parties' prior practice, whereby the children spent the majority of the time during the school week with her. But because the judgment did not contain a parenting-time schedule and the parties were free to make their own arrangements regarding the children's daily schedules under their grant of joint physical custody, we conclude that the district court's order granting the parties equal parenting time did not substantially modify mother's parenting time awarded in that judgment so as to amount to a parenting-time restriction. Therefore, mother's restriction-based argument does not show that the district court erred by not applying the endangerment standard. *See Lutzi*, 485 N.W.2d at 315 (stating that, under section 518.175, subdivision 5, best-interests standard governs modifications except in cases of "more substantial reductions of visitation" and that a restriction involves "greater alteration of visitation rights").

Mother also argues that, even if the district court did not err by applying the best-interests standard, it abused its discretion by concluding that the children's best interests were served by the schedule imposed by the district court, which specifies that the children are to spend two school nights per week with father during the school year.

Minnesota law requires district courts to "grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child." Minn. Stat. § 518.175, subd. 1(a) (2010). The district court has broad discretion in deciding parenting time based on the best interests of the child and will not be reversed absent an abuse of discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). "A district court abuses [its] discretion [regarding parenting time] by making findings unsupported by the evidence or improperly applying the law." *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010) (citing *Pikula*, 374 N.W.2d at 710).

Mother argues that it is not in the children's best interests to travel about 28 miles one way from father's home to school for one additional day per week. But she has failed to allege specific activities that the children are missing as a result of their spending an additional weeknight with father. Mother has not shown that the district court abused its discretion by concluding that the children's best interests supported the parenting-time schedule as ordered.

II

Mother argues that the district court erred by failing to establish a child-support obligation for father. In setting support, for purposes of establishing a parenting-expense adjustment, parenting time is determined by the terms of a court order scheduling parenting time. Minn. Stat. § 518A.36, subd. 1(a) (2010). Mother notes that the schedule proposed by the PTE would have afforded father between 10%–45% parenting time, which would support a parenting-expense adjustment for father of 12%. *See* Minn. Stat.

§ 518A.36, subd. 2(1)(ii) (2010) (stating that parenting time in the range of 10%–45% supports a parenting-expense adjustment of 12%).

The district court rejected the PTE's recommended schedule and declined to order the payment of support, determining that the parties' child support-related circumstances had not changed since the judgment. If a prior order contained "only a reservation of support, a later setting of a support obligation is an initial setting of support." *Eustathiades v. Bowman*, 695 N.W.2d 395, 399 (Minn. App. 2005). But the district court's order maintaining equal parenting time between mother and father does not support a parenting-expense adjustment for the purpose of calculating basic support. *See* Minn. Stat. § 518A.36, subd. 2(1)(iii) (stating that parenting time in the range of 45.1% – 50% results in a presumption that parenting time is equal). Mother argues that a support obligation should still be established for father. But because the district court record contains only minimal evidence of the parties' current income and expenses, it is insufficient to provide a basis for our review of this issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988) (stating that appellate court is bound to district court record on review and "may not consider matters not produced and received in evidence below").

III

Mother challenges the district court's decision to remove the PTE and to proceed without appointing a successor PTE. This court reviews the district court's removal of a PTE for abuse of discretion. *Cf. In re Welfare of J.G.W. and J.L.W.*, 429 N.W.2d 284,

286–87 (Minn. App. 1988) (observing that this standard applies to issue of removing child's psychotherapist), *aff'd*, 433 N.W.2d 885 (Minn. 1989).

A PTE "is a neutral person authorized to use a mediation-arbitration process to resolve parenting time disputes." Minn. Stat. § 518.1751, subd. 1b(c) (2010). A district court may remove a PTE for good cause pursuant to Minn. Stat. § 518.1751, subd. 5a (2010). *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 293 (Minn. App. 2007). The district court removed the PTE based on her failure to act as a neutral regarding (1) consideration of the choice of counselor for the children and (2) a dispute over the interpretation of the provision of the judgment providing for a right of first refusal to take the children if the party having parenting time is unable to parent more than one overnight.

The district court found, based on mother's affidavit, that although the parties disputed the choice of a counselor for the children, mother scheduled an appointment with her chosen counselor, and when they arrived for the appointment, it had to be cancelled because of father's objection. The record supports the district court's finding that the PTE's endorsement of mother's counselor merely "rubber-stamped" that choice and did not constitute a neutral action. And although the record is not entirely clear, we also agree with the district court that the PTE favored mother in interpreting the provision of the judgment referring to the right of first refusal to parent the children. The record shows that the PTE interpreted that portion of the judgment to permit mother to have someone care for the children when she worked nights, but not to permit father's mother to take the children to their regularly scheduled religious education classes when father was out of town. Under these circumstances, the district court did not abuse its discretion

by removing the PTE, and the court was not required to appoint a successor PTE. *See* Minn. Stat. § 518.1751, subd. 1 (stating that the district court "may appoint a [PTE] to resolve parenting time disputes"); Minn. Stat. § 645.44, subd. 15 (2010) (stating that "'[m]ay' is permissive").

Affirmed.