STATE OF MINNESOTA
IN COURT OF APPEALS
A11-931

In re the Matter of:
Stevie Lynn Sheid, petitioner,
Respondent,

vs.

Cody Lee Scavezze,
Appellant,

and

Hennepin County,
Intervenor.

Filed March 19, 2012
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Hennepin County District Court
File No. 27-FA-09-7093

Anne M. Honsa, Honsa & Associates, P.A., Minneapolis, Minnesota (for respondent)

Kathryn M. Lammers, Kelsey S. Swanson, Amanda J. Maenner, Heimerl & Lammers, LLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

HALBROOKS, Judge

Appellant challenges the district court's order reducing his parenting time from 50% to less than 25%. Because we find no merit in appellant's arguments that the district court inappropriately applied the best-interests standard or erroneously found a change in circumstances, we affirm in part. But we conclude that the district court's substantial reduction in parenting time amounts to a restriction, for which the district court was required to make findings of endangerment or noncompliance. We therefore reverse in part and remand for the district court to either make those required findings or increase appellant's parenting time so that it is not restricted.

FACTS

Appellant-father Cody Scavezze and respondent-mother Stevie Sheid had a child, H.S., in May 2009. When H.S. was born, the parties were not married and were no longer romantically involved. In October 2009, Sheid commenced a paternity suit against Scavezze, who was working out of state and not paying child support. In response to Sheid's action, Scavezze returned to Minnesota, retained an attorney, and sought joint legal and physical custody of H.S. The parties subsequently rekindled their romantic relationship.

On November 16, 2009, the parties met with a referee for an initial case-management conference. At that conference, the parties proposed a parenting plan under Minn. Stat. § 518.1705 (2010) that the district court later adopted. The parenting plan provided that they would alternate having custody of H.S. on a weekly basis with the

exchange occurring on Sundays at a halfway point between Sheid's residence in Edina and Scavezze's residence in Cromwell. Immediately after the district court adopted the parenting plan, the parties' relationship soured.

On January 6, 2010, Sheid moved the district court to vacate the parenting-plan order based on fraud. She argued that Scavezze only pretended to love her so that she would agree to the parenting plan. She also moved the district court to order a custody and parenting-time evaluation and, in the interim, to award her sole physical custody and increased child support. The district court construed Sheid's motion to be a motion to vacate under Minn. R. Civ. P. 60.02 and Minn. Stat. § 518.145, subd. 2 (2010), and a motion to modify under Minn. Stat. § 518.18(d) (2010). The district court denied the motion to vacate, but found that Sheid "made a prima facie showing that there has been a change in the circumstances of the child and modification may be necessary to serve the best interests of the child." The district court ordered a custody and parenting-time evaluation and placed H.S. in the temporary custody of Sheid. Scavezze was allowed parenting time every other weekend from Thursday at 8:00 p.m. until Sunday at 8:00 p.m. The district court denied Scavezze's subsequent motion to reconsider.

The district court convened a hearing on September 14, 2010, that continued on October 8. Based upon Sheid's testimony, the district court found a substantial change in circumstances. The district court observed, "The circumstances of the parties' relationship, their breakup and the distance between the parties, have significantly altered the co-parenting relationship and are substantial when viewed from the child's perspective." The district court concluded that modification of the custody arrangement

was in H.S.'s best interests. The district court ordered sole custody of H.S. to Sheid and awarded Scavezze parenting time every other weekend from 8:00 p.m. on Thursday to 8:00 p.m. on Sunday. The district court also ordered the parties to alternate holidays and to provide each other with one week of vacation with the child. The district court denied Scavezze's motion to reconsider. Scavezze now appeals.

D E C I S I O N

Scavezze challenges the district court's order modifying the parties' parenting-time arrangement. This court will not reverse a district court's order of parenting time unless it reflects an abuse of discretion. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Id.* "A district court's findings of fact underlying a parenting-time decision will be upheld unless they are clearly erroneous." *Id.*

I.

We first address Scavezze's argument that the district court improperly applied the best-interests standard instead of the endangerment standard in its decision to modify parenting time. "Determining the legal standard applicable to a change in parenting time is a question of law and is subject to de novo review." *Id.*

Although the default standard to modify parenting time under a parenting plan is the endangerment standard under Minn. Stat. § 518.18(d), the parties may agree to apply a best-interests standard. Minn. Stat. § 518.1705, subd. 9(a). To do so, it must be true that "(1) both parties were represented by counsel when the parenting plan was approved; or (2) the court found the parties were fully informed, the agreement was voluntary, and

the parties were aware of its implications." *Id.*, subd. 9(b). Here, both parties were not represented by counsel.

Analyzing the parties' agreement under subdivision 9(b), the district court found that their agreement to apply a best-interests standard was memorialized in paragraph 16 of the parenting plan:

> Either party may file a motion to modify child custody with the court when the parent believes that there has been a substantial change in circumstances such that it is in the best interest of the child that the agreement be substantially modified by the court.

The district court also found that the "plain language of the [parenting plan] agreement states that it is the best interest standard that applies." The district court did not accept Scavezze's argument that the parties were not "fully informed of [the agreement's] implications."

With respect to the required finding that the parties' agreement was voluntary, both parties acknowledged that they were signing it "freely and voluntarily." Scavezze now attempts to minimize the import of that acknowledgment by asserting that he understood the agreement to require the endangerment standard. But that assertion does not comport with the district court's finding that the plain language of the parenting plan states that the best-interests standard would be applied. We conclude that the requirements of Minn. Stat. § 518.1705, subd. 9(b)(2), have been satisfied.

II.

We next address Scavezze's argument that the district court erred by finding a substantial change in circumstances. Under the parenting plan, there must be a

"substantial change in circumstances" before a modification can be made. This language is consistent with the requirement that there be a "substantial change in circumstances" for a parenting-time modification under Minn. Stat. § 518.18(d). Under that provision, "[t]he change of circumstances must be a real change and not a continuation of ongoing problems." *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied* (Minn. June 21, 1989). Moreover, what constitutes changed circumstances "is determined on a case-by-case basis." *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 26, 2000).

The district court found that there was a substantial change in circumstances, and described the change as follows:

> Prior to entry of the [November 20, 2009 Order], [Sheid] credibly testified that [Scavezze] led her to believe that [Scavezze] was willing to move to the Twin Cities area and that [Sheid], [Scavezze] and the child would live together and be a family. Almost immediately after the agreement was put on the record, [Scavezze] made it clear to [Sheid] through his lack of phone calls, text messages sent, actions and his words that his prior representations were not his true intentions. This is best evidenced by [Scavezze's] statement to [Sheid] on November 22, 2009, "Well, I got my kid," in response to [Sheid's] question as to why [Scavezze] previously lied to her about wanting to be a family. [Scavezze] attempted to minimize his actions prior to and after entry of the Stipulated Order, but [Sheid] was far more credible in her testimony about these events.

While Scavezze points to evidence that would support an alternative finding that the parties have always had a tumultuous relationship, the district court's findings are supported by the evidence and are therefore not clearly erroneous. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000) ("That the record might support

findings other than those made by the [district] court does not show that the court's findings are defective.").

III.

Scavezze contends that the district court's modification in his parenting time from every-other-week to every-other-weekend from Thursday at 8:00 p.m. to Sunday at 8:00 p.m. amounts to a "restriction." A district court may not restrict parenting time unless it finds that "parenting time [with a parent] is likely to endanger the child's physical or emotional health or impair the child's emotional development" or that "the parent has chronically and unreasonably failed to comply with court-ordered parenting time." Minn. Stat. § 518.175, subd. 5 (2010). Here, the district court did not make either of those findings.

A.

We begin by clarifying a point of confusion. Both parties conflated the concepts of "restriction" and "25% parenting-time presumption." *Compare* Minn. Stat. § 518.175, subd. 5 (stating that the court may not "restrict parenting time" without certain findings), *with* Minn. Stat. § 518.175, subd. 1(e) (referencing a "rebuttable presumption" that a parent is entitled to at least 25% of the parenting time for the child). Scavezze argues that the failure to provide him with at least 25% of parenting time amounts to a per se "restriction," and Sheid argues that the failure to provide at least 25% parenting time is not a restriction because the 25% presumption was rebutted. But restriction and parenting-time presumption are distinct concepts. *See Hagen v. Schirmers*, 783 N.W.2d 212, 218 & n.3 (Minn. App. 2010) (elaborating on the distinctions between the two

concepts). Importantly for our analysis, a parenting-time allocation falling below 25% is not necessarily a restriction. *Id.* Moreover, the fact that the parenting-time presumption is overcome does not obviate the need for the district court to make required findings in the event that it restricts parenting time. Minn. Stat. § 518.175, subd. 5. Therefore, for the purpose of this analysis, we will focus on whether the district court's order constitutes a restriction of Scavezze's parenting time.

B.

The word "restriction" is not defined in the statute, but "[t]o determine whether a reduction in parenting time constitutes a restriction[,] . . . the court should consider the reasons for the change as well as the amount of the reduction." *Dahl*, 765 N.W.2d at 124. While not all reductions in parenting time constitute restrictions, a restriction "can occur when a change to parenting time is 'substantial.'" *Boland v. Murtha*, 800 N.W.2d 179, 182 n.1 (Minn. App. 2011). When considering whether the amount of a reduction constitutes a restriction, this court must first identify the order that establishes the baseline parenting-time schedule and then determine whether the parenting-time change from the baseline is substantial. *Dahl*, 756 N.W.2d at 123. Scavezze's parenting time was reduced from 50% to roughly 22-23% (or a reduction of roughly three months' time). We conclude that this is a substantial reduction in Scavezze's parenting time. Moreover, the district court did not support this substantial reduction in Scavezze's parenting time with reasons showing that the reduction is not a restriction. *See Danielson v. Danielson*, 393 N.W.2d 405, 407 (Minn. App. 1986) (observing that a substantial reduction in parenting time is not necessarily a restriction if the reason for the reduction,

for example, that a noncustodial parents moves out of state, is reasonably necessary). Here, the amount of the reduction and the reasons for the reduction are similar to those stated in *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002), a case in which we stated that even if the reason to modify the parenting-time schedule was to account for the geographical distance between the parties, a parenting-time change that reduced mother's parenting time by one-half was substantial. Therefore, we conclude that the district court's reduction of Scavezze's parenting time constitutes a restriction.

Because we conclude that the district court's modification amounts to a restriction without the necessary findings, we reverse and remand to the district court to support its restriction with appropriate findings or to increase Scavezze's parenting time so that the difference between the baseline amount and the new amount is not substantial.

Affirmed in part, reversed in part, and remanded.