STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1004

In the Matter of the Custody of: A.E.P.,

Stacy Ann Pinske Rusch, petitioner,
Appellant,

vs.

Christian Marcus Boyce,
Respondent.

Filed March 25, 2013
Affirmed
Schellhas, Judge

Stearns County District Court
File No. 73-F2-02-050170

John E. Mack, Mack & Daby, New London, Minnesota (for appellant)

James R. Spangler, Vermeulen Law Office, P.A., St. Cloud, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant-mother challenges the district court's child-custody modification under Minn. Stat. § 518.18(d) (2012), arguing that the modification is unsupported by sufficient evidence and findings and is the result of judicial bias against her. We affirm.

FACTS

Appellant Stacy Pinske Rusch (mother) and respondent Christian Boyce (father) were never married. After mother petitioned the district court for a paternity adjudication of father as to A.P., born June 28, 2001, and for other related relief, a court-appointed guardian ad litem (GAL) conducted a custody evaluation and submitted a report to the court. Father subsequently affirmed his paternity of A.P. and stipulated to being granted joint legal custody of A.P. and to mother being granted sole physical custody of A.P., subject to father's parenting time. On February 5, 2003, the court issued findings of fact, conclusions of law, an order, and judgment and decree, adjudicating father's paternity and incorporating the terms of the parties' stipulation. At that time, father's court-ordered parenting time with A.P. was supervised by a mutually agreed-upon third party or an institutional third party, based on the parties' stipulation.

On October 1, 2003, father moved the district court for unsupervised visitation with A.P. On October 4, 2004, a court-appointed GAL recommended that father be granted increasing amounts of unsupervised visitation, noting that mother and father were capable of working together to parent A.P. as long as they appropriately addressed past issues. On January 24, 2005, the court granted father increasing amounts of unsupervised visitation, based on the parties' agreement.

On October 21, 2009, father moved the district court for a modification of custody, granting him sole legal and physical custody of A.P. on the basis of a substantial change in circumstances that included endangerment of A.P. in mother's physical custody. The district court appointed a custody evaluator to conduct a custody evaluation, and, on

June 1, 2010, the custody evaluator issued her report, recommending a continuation of joint legal custody of A.P. and sole physical custody with mother, subject to father's parenting time. Mother did not undergo a psychological evaluation as part of this custody evaluation. Father moved the court for the appointment of a second custody evaluator and for an order that mother submit to a psychological evaluation and testing, and the district court granted father's requests.

On September 1, 2011, the second custody evaluator recommended that A.P. be immediately placed in father's physical custody and that father be granted temporary sole legal custody. The second custody evaluator reported A.P. credibly alleged that mother physically abused her, found that mother was interfering with A.P.'s emotional development and potentially endangering A.P.'s physical health, and concluded that mother was endangering A.P.'s emotional and psychological welfare. The custody evaluator based her conclusion on mother's extreme, systematic alienation of A.P. from father; mother's mental-health issues; and A.P.'s anxious attachment to mother.

The district court conducted a seven-day evidentiary hearing at which both custody evaluators testified, among many other witnesses. On May 25, 2012, based on mother's endangerment of A.P., the court modified custody of A.P. under Minn. Stat. § 518.18(d)(iv), granting father sole physical and temporary sole legal custody of A.P.

This appeal follows.

D E C I S I O N

District courts have "broad discretion in determining custody matters," and "[a]ppellate review of custody determinations is limited to whether the district court

abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Goldman v. Greenwood*, 748 N.W.2d 279, 281–82 (Minn. 2008) (quotations omitted). "[W]e must uphold [a district court's] findings unless they are clearly erroneous." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (citing Minn. R. Civ. P. 52.01). A district court's finding is clearly erroneous if this court "is left with the definite and firm conviction that a mistake has been made," *id.* (quotations omitted), when "view[ing] the record in the light most favorable to the trial court's findings," *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002), and giving "[d]eference . . . to the opportunity of the trial court to assess the credibility of the witnesses," *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). "We cannot reweigh the evidence presented to the trial court." *Vangsness*, 607 N.W.2d at 475.

Minnesota Statutes section 518.18(d) governs custody modifications, *Goldman*, 748 N.W.2d at 282, and in such proceedings "the burden is on the party opposing the current custody arrangements," *Gordon v. Gordon*, 339 N.W.2d 269, 270–71 (Minn. 1983). Section 518.18(d)(iv) provides:

> If the court has jurisdiction to determine child custody matters, the court shall not modify a prior custody order or a parenting plan provision which specifies the child's primary residence unless it finds, upon the basis of facts, including unwarranted denial of, or interference with, a duly established parenting time schedule, that have arisen since the prior order or that were unknown to the court at the time of the prior order, 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. In applying these standards the court shall retain the custody arrangement or the parenting plan provision specifying the child's primary residence that was established by the prior order unless:

. . .

> (iv) 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 . . . .

Change of Circumstances

Sufficiency of Evidence

A change in circumstances under section 518.18(d) must be "significant," *Goldman*, 748 N.W.2d at 284, and must not be "a continuation of conditions that existed prior to the order," *Tarlan v. Sorensen*, 702 N.W.2d 915, 923 (Minn. App. 2005). But a change in circumstances under section 518.18(d) may be an "extreme deterioration of [a] relationship" between a parent and the child, *Abbott v. Abbott*, 481 N.W.2d 864, 869 (Minn. App. 1992), or "an increase in conflict" between the child's parents, *Coady v. ViRay*, 407 N.W.2d 710, 713 (Minn. App. 1987). "What constitutes changed circumstances for custody-modification purposes 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).

Mother argues that the district court's findings are not supported by sufficient evidence. We disagree. Record evidence shows that mother has physically abused A.P.; her half-sibling, S.R.; and C.R. On March 14, 2009, father took A.P. to a therapist, based on his concern that A.P. was depressed and anxious and that she might be subjected to

abuse in mother's care. Mother also took A.P. to see a therapist, beginning in March 2009. Both therapists' notes are revealing.

The July 25, 2009 notes of the therapist to whom father took A.P. reveal that A.P. disclosed that mother physically abused S.R. and physically abused A.P. on multiple occasions. The therapist's August 5, 2009 notes disclose that mother and mother's friend told A.P. not to call the police if mother hurt her and that mother threatened to ground A.P. for two weeks if she "tell[s] on" mother. The therapist's January 16, 2010 notes reveal that A.P. recanted her report that mother abused her and stated that father and his wife "forced her to tell [the therapist] those things." But the notes of the therapist to whom mother took A.P. reveal that, 11 days later, A.P. disclosed that mother had hit her when she was angry.

The record also reveals that in early 2004, mother began a romantic relationship with C.R. and married him; gave birth to his child, S.R.; became separated from C.R. in June 2008; and was subsequently divorced from C.R. Record evidence supports the district court's finding that A.P. reacted negatively to the deterioration of mother's relationship with C.R.

C.R. testified about an incident when mother repeatedly hit C.R. in the presence of A.P. and S.R., placed her hand on C.R.'s neck and mouth, and caused C.R. to be "scared for [his] life." And C.P., a long-time acquaintance of mother and father, described an incident in which mother covered C.R.'s mouth and pushed him, while he was holding S.R. and screaming for help. The district court found that, in May 2006, mother pleaded guilty to disorderly conduct in connection with an altercation with C.R.,

and, in January 2010, she violated a harassment-restraining order in place for C.R.'s protection.

Record evidence also shows that A.P.'s environment in mother's custody emotionally endangered her. The second custody evaluator, appointed by the district court at father's request, testified that mother has displayed "a pattern" of conduct alienating A.P. from father and "consistently said that she would like [A.P.]'s contact with [father] to be eliminated." A.P. has an "unhealthy [anxious] attachment" to mother, which results in a child worrying that the child's parent will abandon the child if the child does not do what the parent needs or wants. Mother has a "significant pathology . . . dating back to 2006 when she was hospitalized," has been "routinely diagnosed with depression and anxiety that has clearly interfered with her functioning and relationships," and mother has had evaluations that indicate that she suffers from "paranoid ideation" and has a hysterical personality. During a testing session, mother "totally fell apart emotionally" and went from "participating and being jovial to . . . being angry, unwilling, [and] slamming things down."

We conclude that the record evidence is sufficient to support the district court's findings that mother physically abused A.P. and that the endangerment of A.P.'s emotional health is a significant change in circumstances that occurred subsequent to the court's February 2003 custody order.

Sufficiency of District Court's Findings

Mother argues that district court's findings are inadequate because the court failed to make findings about changed circumstances that warrant the custody modification. A

district court must "set forth [the basis of the district court's custody determination] with a high degree of particularity," *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989) (quotation omitted), and appellate courts generally remand when a district court fails to do so, *see, e.g.*, *Wallin v. Wallin*, 290 Minn. 261, 266–68, 187 N.W.2d 627, 631–32 (1971) (remanding); *Abbott*, 481 N.W.2d at 867 (noting that "appellate courts have unwaveringly remanded decisions modifying custody when the trial court has not included findings adequate to demonstrate that the appropriate factors were considered").

Although we agree that in its 33-page order, the district court did not include a finding about the specific change in circumstances between the court's February 2003 and May 2012 custody orders that warranted the custody modification, we decline to remand because, on remand, the district court would undoubtedly make findings that comport with section 518.18(d)(iv)'s statutory language and the court's consideration of the circumstance-change element is implicit in its other findings. *See Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (declining to remand because, "on remand[,] the trial court would undoubtedly make findings that comport with [section 518.18(d)'s] statutory language"); *Eckman v. Eckman*, 410 N.W.2d 385, 389 (Minn. App. 1987) (rejecting argument that district court's failure to "make a specific finding regarding" section 518.18(d)(iv) element required reversal because court's consideration of element was "implicit" in findings regarding other elements).

Mother also argues that the district court's findings are insufficient because the court's findings do not show that the circumstances on which the district court based its custody modification are circumstances that changed after the court's January 24, 2005

parenting-time modification. Mother's argument suggests that the circumstances presented to the court at the evidentiary hearing were circumstances that existed in January 2005. The argument is neither persuasive nor compelling.

In determining whether a significant circumstance has changed over a certain period of time, the beginning date is the last custody order or order that specifies the child's primary residence. *See* Minn. Stat. § 518.18(d) (concerning facts arising or disclosed after "prior *custody* order[s]," "*custody* arrangement[s]," or "parenting plan provision[s] *which specif[y] the child's primary residence*" (emphasis added)). Here, the order that pertained to custody or specified A.P.'s primary residence is the February 2003 order. Consequently, the issue in this case is whether a significant change in circumstances occurred after the February 2003 order. *See Bettin v. Bettin*, 404 N.W.2d 807, 808 (Minn. App. 1987) (stating that section 518.18(d) "requires either a showing that the circumstances have changed *or that facts unknown to the court at the prior custody determination have now been disclosed*" (emphasis added)).

Based on information known to the district court when it issued its order in February 2003, we conclude that the district court's findings are sufficient to support its implicit finding that a significant change in circumstances occurred between February 2003 and May 2012.

Best Interests of A.P.

Mother challenges the district court's balancing of the best-interests factors, arguing that the court clearly erred by finding that neither parent was favored by

factor (2)—the reasonable-preference factor—and that father was favored by factor (4)—the intimacy factor.

"The guiding principle in all custody cases is the best interest of the child," *Durkin*, 442 N.W.2d at 152, and, when rendering a custody determination, a district court must "make the detailed best interest findings required . . . by [Minn. Stat. §] 518.17, subd. 1," *In re Santoro*, 594 N.W.2d 174, 178 (Minn. 1999). Section 518.17, subdivision 1(a), provides a nonexclusive list of 13 best-interests factors that a district court must consider when evaluating a child's best interests in custody determinations. Minn. Stat. § 518.17, subd. 1(a) (2012). "[T]he law leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *In re Child of Evenson*, 729 N.W.2d 632, 635 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. June 19, 2007). The district court found that A.P.'s best interests favored awarding sole physical and temporary sole legal custody to father. The district court found that six of the best-interests factors favored father—factors (4), (7)–(9), and (12)–(13)—while only two factors favored mother—factors (3) and (6). The court found that factors (1)–(2), (5), and (10)–(11) favored neither parent.

A.P.'s Preference

The district court found that this factor favored neither parent. The court, after an October 18, 2011 in camera interview of A.P., found that A.P. "exhibited a clear preference . . . to stay with" mother. But the court found that A.P. "is not of sufficient age or maturity to express a preference" due to A.P.'s age—ten—and "the court's finding that [A.P.]'s preference has been unduly influenced by" mother.

Mother attempts to challenge the district court's maturity finding based on this court's opinion in *Steinke v. Steinke*, 428 N.W.2d 579 (Minn. App. 1988). In *Steinke*, this court rejected a district court's finding that a ten-year-old child's "clearly expressed preference" was "not credible" when the court found that "the child's 'reasons for his preference [were] not credible'" but "gave no reasons why it found [the child]'s testimony not credible." *Id*. at 581, 583–84. But here, unlike *Steinke*, the district court explained its reasoning, finding that A.P.'s preference for her mother "has been unduly influenced" by mother because—referring to *In re Weber*—"there has been such a campaign [of hatred] by [mother] in the instant case" and "there is a failure of guilt by [A.P.] for treating [father] in a negative fashion." *See In re Weber*, 653 N.W.2d 804, 810 (Minn. App. 2002) (concluding that record supported finding that child's custody preference "'resulted from manipulation by his father'" when record supported conclusions that "'the signs of alienation could not be more clear—a campaign of hatred, a failure of guilt on the minor child for treating the parent with malice, the parroting of adult language, and a declaration of independence'"). Moreover, the record of the district court's in camera interview with A.P.[1] supports the district court's undue-influence finding, which we conclude is not clearly erroneous.

A.P.'s Intimacy with Mother and Father

The district court found that this factor slightly favored father. The court noted that, although A.P. is "more attached" to mother, "[A.P.] has developed something of a

[1] We intentionally omit a description of A.P.'s disturbing statements made during the in camera interview.

caretaking role with her mother" and A.P.'s intimacy with mother is unhealthy. The court noted that the second custody evaluator found that A.P. had an "'anxious' attachment" to mother. That custody evaluator testified about A.P.'s "unhealthy" and "anxious" attachment to mother and reported that A.P. was forced to become mother's caretaker. The custody evaluator described A.P.'s caretaking role as A.P. anxiously doing whatever A.P. perceived that mother wanted her to do. The court's finding that this factor slightly favored father is not clearly erroneous.

Mother argues that the district court abused its discretion by failing to appoint a guardian ad litem for S.R., who is A.P.'s half-sibling. Mother argues that the court erred by not considering S.R.'s best interests with respect to A.P.'s custody and a split of the children's custody. Neither S.R. nor her father, C.R., were parties to the proceedings before the district court, and mother did not raise this issue in the district court. We therefore decline to address mother's arguments. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)). But we note that father and C.R. testified that the children's relationship would continue, which C.R. emphasized he would encourage.

We conclude that the district court did not abuse its discretion when balancing the 13 best-interests factors in favor of awarding sole physical and temporary sole legal custody of A.P. to father.

A.P.'s Endangerment

Section 518.18(d)(iv) predicates a district court's custody modification on "the child's present environment endanger[ing] the child's physical or emotional health or impair[ing] the child's emotional development and the harm likely to be caused by a change of environment . . . [not] outweigh[ing] . . . the advantage of a change to the child." Minn. Stat. § 518.18(d)(iv). "The concept of 'endangerment' is unusually imprecise, but a party must demonstrate a significant degree of danger to satisfy the endangerment element of section 518.18(d)(iv)." *Goldman*, 748 N.W.2d at 285 (quotations omitted). An endangerment finding may not be "based . . . solely on the history of care," although "[t]he history of a child's care is a relevant consideration in addressing the child's current circumstances" and "may indicate what can be presently expected." *Hassing v. Lancaster*, 570 N.W.2d 701, 703 (Minn. App. 1997). Evidence of endangerment includes "[a]llegations of abuse, physical or emotional" and "[f]ear of the custodial parent and her spouse." *Lilleboe v. Lilleboe*, 453 N.W.2d 721, 724 (Minn. App. 1990).

The district court "specifically [found] that [A.P.]'s present environment endangers [A.P.]'s emotional health and impairs [A.P.'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." Mother argues that the district court's endangerment findings and record evidence are insufficient to conclude that A.P.'s present environment endangered A.P. Mother further argues that the findings and evidence are insufficient to conclude that

the harm that would likely result by changing A.P.'s environment outweighs any potential advantage to A.P. We disagree.

Present Endangerment

Record evidence shows that, at the time of the October 2011–February 2012 hearing proceedings underlying the district court's May 2012 custody modification, A.P. was presently endangered. We will not restate the evidence described above that supports the district court's determination and custody modification. But we emphasize that the evidence and the court's findings do support the custody modification and are not clearly erroneous.

We applaud the district court for its thoughtful consideration about how "emotional and difficult" the custody transition will be for A.P. Yet, despite that difficulty, the court properly concluded that mother's continuing physical custody of A.P. would "only lead to ever-increasing estrangement" between A.P. and father, whereas father had previously demonstrated a willingness to encourage A.P.'s relationship with her mother by "including [mother] in activities at his home." Father testified that he wants "a healthy [mother] in [A.P.]'s life" and believes mother's role in A.P.'s life after the custody modification would be "fully involved." Father's wife testified about her "really positive, open relationship" with her former husband's wife. The district court found that father's wife understood the importance of A.P.'s relationship with mother and that she "will encourage both [A.P.] and [father] to give that relationship the importance it deserves." And the record shows that father and his wife have included mother at A.P.'s birthday party in their home.

Judicial Bias

Mother alleges that the district court was biased against her in part because the district court ordered mother—and not father—"to not make any negative comments to [A.P.] about [father], his spouse or the Court's decision to change custody." We decline to address mother's argument because she failed to raise it in the district court. *See Braith v. Fischer*, 632 N.W.2d 716, 725 (Minn. App. 2001) ("[T]he issue of bias was not presented to the district court and we decline to address the issue." (citing *Thiele*, 425 N.W.2d at 582)), *review denied* (Minn. Oct. 24, 2001). But, even if we were to address it, we note that the record before us reveals no evidence of judicial bias, including the district court's non-disparagement order. We conclude that the district court did not abuse its discretion by modifying custody, and we therefore affirm.

Affirmed.