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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0477**

In re the Marriage of:
Yasmeen Khan, petitioner,
Respondent,

vs.

Asber Asher Ansar,
Appellant.

**Filed September 9, 2008
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Dakota County District Court
File No. 19-F3-05-014166

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Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Ross, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Asber Ansar appeals from the district court's issuance of a harassment restraining order, which restricted his parenting time and removed his legal custody of his child by

conferring sole legal custody to his former wife, Yasmeen Khan. Ansar maintains that the district court lacked authority to restrict his parenting time because he had harassed only Khan and not their child, and he contends that the court abused its discretion by modifying custody without conducting an evidentiary hearing. Ansar also challenges the district court's requirement that he pay Khan's attorney fees without first issuing and allowing him to respond to a show-cause order. We hold that the district court did not abuse its discretion by restricting Ansar's parenting time. But because we conclude that the district court abused its discretion by modifying custody without an evidentiary hearing and by awarding attorney fees without first issuing an order to show cause and allowing Ansar to respond, we reverse those parts of the district court's order, and we remand.

FACTS

Yasmeen Khan and Asber Ansar were married in 2000. Their child, A.A., was born in 2001. Their marriage dissolved in July 2006 by a judgment and decree that granted joint legal custody of A.A. to both parents and sole physical custody to Khan. The decree rested on the district court's fact findings. These findings included examples of Ansar's behavior towards Khan, which provide context for the present dispute over Ansar's more recent conduct.

The facts found by the district court in the 2006 dissolution decree illustrate the acrimony and hostility that frame the parties' relationship and the conflict from which this appeal arises. The decree makes several explicit findings regarding Ansar's behavior towards Khan and its harmful effect on A.A. The district court found that Ansar had

demonstrated a history of physical abuse, aggressive controlling behavior toward Khan, psychological threats aimed at controlling Khan, and intimidation. Ansar used A.A. to control Khan, and he used videotaping of A.A. to place his parenting skills in a falsely flattering light. In December 2004, Ansar had filed a police report alleging that Khan committed acts of child abuse against A.A. He later recanted. In June 2005, Khan told police that Ansar threatened to kill her and her mother and to destroy her family in India. Later that same month, Ansar took A.A., then five years old, to a store to purchase a knife. He then cut himself with that knife in front of Khan and A.A. during a parenting exchange. When police arrived, Ansar falsely reported that Khan had attacked him. Ansar later pleaded guilty to making a false report of a crime. The judgment and decree notes that A.A.'s daycare disenrolled him because of Ansar's disruptive behavior, which, according to a daycare spokesperson, "was frightening for the children, their parents and the [daycare] staff." The district court issued a one-year order for protection, and Ansar's parenting time with A.A. was restricted to occur only at a supervised safety center.

With that background, we consider the bases for Khan's harassment restraining order (HRO), which are the substance and frequency of Ansar's e-mails sent during one week in December 2007. Ansar contacted Khan 28 times by e-mail, making the following threats or accusations: that Khan's brother forged his name on immigration documents and that Khan must meet with Ansar to discuss that issue; that Khan's brother embezzled money from Ansar and committed fraud and that Khan must meet with him to discuss that issue; that Khan engaged in insurance fraud; that Khan lied to police; that Khan lied about her unemployment; and that Khan fraudulently obtained her medical

license in Iowa and Minnesota. Ansar became angry when Khan did not agree to discuss matters on the same day in person or on the telephone, and he threatened to report her to the Federal Fraud Hotline.

Khan met with the parties' neutral parenting consultant in December 2007 and expressed her concern about the e-mails. The parenting consultant restricted Ansar's parenting time because she concluded that Ansar "constitutes a danger to [A.A.'s] welfare." Two days later, Khan petitioned for an HRO based on Ansar's emails. Khan asked the district court to prevent Ansar from contacting her, from coming to her home, and from contacting A.A. except as permitted by the parenting consultant.

Ansar responded by filing two motions, asking for the following relief: granting him unsupervised access to A.A.; appointing a guardian ad litem; appointing a parenting time expeditor; discharging the current parenting consultant; ordering Khan not to move A.A. out of state; ordering Khan to place A.A. back in school; granting Ansar an evidentiary hearing on the issue of parenting time; granting Ansar interim parenting time; ordering Khan to hand over A.A.'s passport to a neutral third party; granting Ansar compensatory parenting time; granting an in camera interview of A.A.; appointing a vocational expert for Khan; and imposing sanctions against Khan's attorney for alleged unprofessional conduct. Khan asked the court to deny Ansar's motions and to require that A.A. be seen by a therapist as recommended by the parties' parenting consultant. She also asked the court to order Ansar to undergo a psychological or psychiatric evaluation by a mental health professional selected by the parenting consultant.

At the evidentiary hearing on Khan's motion for an HRO in January 2008, Ansar admitted sending the e-mails to Khan. He argued that Khan's motion could not be granted, however, because Khan never asked him to stop sending the e-mails or informed him that she considered the e-mails to be harassing. Khan testified that Ansar's contact and threats caused her to become concerned about Ansar's mental health and about her own safety. She described the negative effect that Ansar's behavior was having on A.A., then six years old. Her affidavit asserted that A.A. told her that Ansar had claimed that Khan had a boyfriend and therefore she did not love him. According to Khan, A.A. told her that Ansar told A.A. that Khan "wanted to kill [A.A.] when he was in [her] tummy" and that Khan had gone to an abortion clinic. Khan also asserted that A.A. has problems at school because of Ansar's behavior. The district court stated at the hearing that Ansar's behavior was harmfully affecting A.A.

As context for the request for an HRO, Khan discussed the evidence of Ansar's past abusive conduct and evidence that Ansar contacted her repeatedly regarding unimportant or frivolous claims, called her obscene names, insulted her, and threatened to have her medical license revoked and to have her and her family members sued and charged with crimes. Ansar occasionally called Khan more than five times a day or sent her more than 14 e-mails a day. Khan emphasized that Ansar repeatedly demanded that she contact him "immediately" to resolve some issue he was raising, often threatening a negative consequence if she did not comply. Ansar conceded that it was wrong for him to send the e-mails, but he denied that he could benefit from a psychological evaluation.

The district court concluded orally on the record that Ansar still sought to control Khan's life. It announced that it planned to issue the HRO but would hold an evidentiary hearing on whether to grant Khan sole legal custody of A.A., which had not been requested in Khan's motion papers. The district court then issued an HRO requiring Ansar to refrain from harassing Khan and barring him from having any contact with Khan and A.A. except as permitted by the party's parenting consultant or by the court. The HRO permits Ansar to have telephone contact with A.A. for 30 minutes every three days. The district court never held an evidentiary hearing on whether to grant Khan sole legal custody of A.A., but it granted her sole legal custody nonetheless, effectively modifying the joint custody arrangement that the parties shared as ordered in the dissolution decree. Ansar appeals.

D E C I S I O N

I

We first consider Ansar's argument that the district court abused its discretion by restricting his parenting time in the HRO because he did not harass A.A. He does not challenge the district court's factual conclusion that he harassed Khan, nor does he challenge the underlying factual circumstances that provide the context for that conclusion. A district court may grant an HRO if "the court finds at the hearing that there are reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 5(a)(3) (2006). This court reviews the issuance of an HRO for an abuse of discretion. *Witchell v. Witchell*, 606 N.W.2d 730, 731 (Minn. App. 2000). Because of the substantial similarity between domestic-abuse orders for protection (OFP)

and HROs, caselaw addressing the issuance of OFPs under section 518B.01 is applicable to the issuance of HROs under section 609.748. *Anderson v. Lake*, 536 N.W.2d 909, 911 (Minn. App. 1995). And section 518B.01 allows a court to restrict parenting time based on either “safety of the victim or the children.” Minn. Stat. § 518B.01, subd. 6(a)(4) (2006). A finding of abuse of a nonchild victim may be the basis for the district court to restrict parenting time. *Id.*

We hold that Ansar’s harassment of Khan provided a sufficient basis for the district court to restrict his parenting time because of its effect on A.A. The district court expressly found that Ansar’s harassment of Khan harmed the child. The recent history and background regarding this harassment, including but not limited to Ansar’s willingness to cut himself with a knife in A.A.’s presence as part of his hostility toward Khan, places the decision to grant the HRO well within the district court’s discretion. The district court’s finding of harm to A.A. is not directly challenged and is sufficient to support the HRO’s parenting-time restriction.

II

We turn to Ansar’s contention that the district court abused its discretion by granting Khan sole legal custody without affording him an evidentiary hearing regarding custody and that the court failed to make best-interests findings as required by Minn. Stat. § 518.18 (2006). We review a district court’s custody modification order for an abuse of discretion. *Johnson-Smolak v. Fink*, 703 N.W.2d 588, 591 (Minn. App. 2005). An order that modifies custody “should be based on a hearing in which witnesses may be cross-examined.” *Hummel v. Hummel*, 304 N.W.2d 19, 20 (Minn. 1981). And we reverse a

custody modification order when a district court fails to conduct an evidentiary hearing. *Harkema v. Harkema*, 474 N.W.2d 10, 14 (Minn. App. 1991); *see also Auge v. Auge*, 334 N.W.2d 393, 396 (Minn. 1983) (stating that “while the trial court has continuing jurisdiction to modify a custody order if warranted, it may not do so absent an evidentiary hearing in which witnesses may be cross-examined”).

The January 4, 2008 hearing dealt only with Khan’s petition for an HRO and not Ansar’s parenting-time motions. The district court noted this:

It’s very likely that irrespective of what happened on the harassment, Ms. Khan will be awarded sole, temporary legal custody of this child. Then given that, you certainly have a right to a hearing on that [I]t’s probably best to just hear the harassment matter at this point, and we will come back and make sure that we have done everything we need to do in the family court matter.

The district court also stated that it would afford Ansar an evidentiary hearing “because there is a serious question whether you two should have joint legal custody.” But the district court did not hold an evidentiary hearing despite its declaration to the parties that it would. Ansar had requested one. Khan’s present argument accentuates our impression that an evidentiary hearing was necessary. Khan maintains that she proved a prima facie case for endangerment-based modification under section 518.18. But “[a] district court is required under section 518.18[] to conduct an evidentiary hearing . . . if the party seeking to modify a custody order makes a prima facie case for modification.” *In re Marriage of Goldman*, 748 N.W.2d 279, 284 (Minn. 2008). The district court erred by modifying custody without an evidentiary hearing. We therefore reverse the order

modifying the parties' joint legal custody of A.A. and remand for an evidentiary hearing if legal custody remains in dispute.

III

Ansar also argues that the district court abused its discretion by deciding sua sponte to order Ansar to pay more than \$11,000 of Khan's attorney fees. We review the award of attorney fees for an abuse of discretion. *Johnson ex rel. Johnson v. Johnson*, 726 N.W.2d 516, 518 (Minn. App. 2007). A district court may award sanction-based attorney fees under Minnesota Statutes section 549.211 (2006) or Minnesota Rule of Civil Procedure 11. *Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn. App. 2001). The district court awarded fees partially based on Ansar's admission that his conduct was wrongful. The court did not specify whether it was ordering fees as a sanction under rule 11 or section 549.211. But the district court complied with neither the rule's requirements nor the statute's requirements.

Both rule 11 and section 549.211 require a district court to direct an attorney or unrepresented party to show cause before the court may order him to pay attorney fees on its own initiative. Minn. R. Civ. P. 11.03(a)(2); Minn. Stat. § 549.211, subd. 4(b). The district court ordered Ansar to pay Khan's fees without issuing an order to show cause. A district court abuses its discretion when it fails to comply with rule 11 or section 549.211 when awarding attorney fees. *In re the Claims for No-Fault Benefits Against Progressive Ins. Co.*, 720 N.W.2d 865, 875 (Minn. App. 2006), *review denied* (Minn. Nov. 22, 2006). Because the district court did not comply with the rule or the statute by

ordering Ansar to pay Khan's fees without first issuing a show-cause order, it acted beyond its discretion.

Because the district court did not abuse its discretion by restricting Ansar's parenting time, we affirm the HRO's parenting-time restriction. But because the district court abused its discretion by modifying custody without an evidentiary hearing and by awarding attorney fees without first issuing and allowing Ansar an opportunity to respond to an order to show cause, we reverse the court's custody-modification order and attorney-fee award.

Affirmed in part, reversed in part, and remanded.