STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1060

In re the Marriage of:

Dee Marie Duckwall,
n/k/a Dee Marie Brust, petitioner,
Respondent,

vs.

Adam Andrew Duckwall,
Appellant.

Filed April 6, 2010
Affirmed; motion denied
Kalitowski, Judge

Anoka County District Court
File No. 02-F5-04-007552

Douglas G. Sauter, William D. Siegel, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota (for respondent)

Lawrence H. Crosby, Jay D. Olson, Crosby & Associates, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Kalitowski, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

KALITOWSKI, Judge

Appellant-father Adam Andrew Duckwall challenges the district court order denying his motion to modify the restrictions on his parenting time, arguing that (1) the district court's finding that he failed to complete psychosexual therapy is without support in the record; (2) the district court violated the Code of Judicial Conduct; (3) the district court violated the prohibition against ex parte communication and improperly appointed its own expert witness; (4) the district court failed to make the findings necessary to reject the recommendations of appellant's therapist and the guardian ad litem; and (5) the district court erred by failing to conduct an evidentiary hearing or undertake a best-interests analysis. We affirm but deny respondent's motion to strike appellant's reply brief.

I.

Appellant filed a motion requesting that the district court modify his parenting-time schedule. The district court denied the motion, finding that appellant had not complied with its August 2007 order, which appellant did not appeal, that unambiguously required appellant to successfully complete psychosexual therapy. Appellant argues that the district court's finding that he failed to complete the psychosexual therapy is without support in the record. We disagree.

Minn. Stat. § 518.175, subd. 5 (2008), governs modification of parenting-time schedules and mandates that modification be granted only if it would serve the best interests of the parties' children. The district court has broad discretion in determining

parenting-time issues and will not be reversed absent an abuse of that discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). A district court's findings of fact, on which a parenting-time decision is based, will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978). Appellate courts review the record in the light most favorable to the district court's decision. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). When there is conflicting evidence, appellate courts defer to district courts' credibility determinations. *Id.* Conflicts in evidence presented in affidavits are to be resolved by district courts. *Straus v. Straus*, 254 Minn. 234, 235, 94 N.W.2d 679, 680 (1959).

Here, the district court viewed affidavits from two clinical psychologists, Dr. Michael Shea, who was hired by appellant, and Dr. Harlan Gilbertson, who was hired by respondent-mother. Dr. Shea stated in his affidavit that (1) he was to "provide [appellant] with any needed treatment and evaluation with regard to the expectations and order of the Court"; (2) he "reviewed the specific details of the case including [appellant's] current psychological status particularly with regard to his psychosexual development and current adjustment . . ."; and (3) he "provided the full evaluation and treatment to [appellant] which was needed and warranted." But Dr. Shea never stated that appellant completed psychosexual therapy.

Dr. Gilbertson's affidavit stated that he reviewed Dr. Shea's reports and "found no evidence supporting completion of any psychosexual therapy." Dr. Gilbertson found that Dr. Shea's assessment "lack[ed] any extensive exploration or discussion of the

antecedents of his sexual behavior. . . . Without such knowledge, treatment interventions cannot be planned accordingly to address any underlying cognitive distortions."

The district court considered Dr. Shea's affidavit and reports, and determined, based on all the evidence, that appellant had "not in fact completed psychosexual therapy" as required by the district court's August 2007 order. From the entirety of the record, and viewing the evidence in the light most favorable to the district court's determination, we conclude that this finding was not clearly erroneous. Further, under *Vangsness* and *Straus*, the district court was charged with resolving the conflicting evidence presented by the affidavits of Drs. Shea and Gilbertson, and this court gives great deference to the district court's resolution of such conflicts. Thus, the district court did not clearly err in finding that appellant did not complete the court-ordered psychosexual therapy.

II.

In his brief, appellant accuses the district court of violating various canons of the Code of Judicial Conduct. But the court of appeals does not have jurisdiction over matters involving the Code of Judicial Conduct or the ethical duties of judges. Matters of judicial discipline are governed by the Board on Judicial Standards. *See* Rules of Board on Judicial Standards, Rule 2(b) ("The board shall have jurisdiction over allegations of misconduct . . . for all judges."); *see also* Minn. Stat. § 480A.06 (2008) (laying out the jurisdiction of the court of appeals, which does not include judicial-discipline proceedings). Thus, appellant's allegations are not properly before us.

III.

Appellant claims that the district court violated the prohibition against ex parte communication when it contacted Dr. Scott Fischer and appointed him to provide a psychosexual evaluation of appellant. We disagree.

This court has held that an appellant waives his right to challenge ex parte communication with a nonparty when the appellant fails to object at the time of trial to the outside investigation by the district court. *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 363 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002). Here, because appellant did not object to the district court's introduction of Dr. Fischer, this issue is waived. Furthermore, to succeed on a claim of reversible error for ex parte violations, appellant must demonstrate that there was an ex parte communication, the communication constituted error, and the error was prejudicial. *Id.* Appellant has not established that contact between the district court and Dr. Fischer resulted in prejudicial error.

Appellant also claims that the district court inappropriately appointed Dr. Fischer to be its own expert witness because Minnesota Rule of Evidence 706(a) requires that the district court permit input from the parties as to the necessity of such an expert. We disagree. Although rule 706(a) allows for input from the parties, it does not require that the judge seek it, and allows the judge to appoint experts of its own selection. *See* Minn. R. Evid. 706(a).

IV.

Appellant contends that the district court failed to make the findings of fact necessary to reject the guardian ad litem's and therapist's recommendations that the district court should modify his parenting-time restrictions. We disagree.

Appellant cites cases that provide that although the district court can reject recommendations of a guardian ad litem, the court must either express its reasons for rejecting the recommendations or provide detailed findings examining the record. *See Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993), *review denied* (Minn. Jan. 28, 1994); *see also Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991) (stating that the district court has discretion not to follow custody recommendations, but that it must explain why or provide detailed findings). But those cases involved custody proceedings, not motions to modify parenting-time schedules, as is at issue here.

Moreover, when the district court found that appellant "has not in fact completed psychosexual therapy" it implicitly rejected the guardian ad litem's recommendation; its reason for doing so was that appellant failed to comply with its previous order. *See Rogge*, 509 N.W.2d at 166 (providing that a district court must explain its reasons for rejecting a guardian ad litem's recommendations).

Appellant also contends that the district court had an obligation to consider Dr. Shea's observations that continuing to restrict appellant's parenting time with his daughter is detrimental to their relationship. But the record indicates that the district court thoroughly considered Dr. Shea's affidavit and reports, and concluded that appellant had not successfully completed psychosexual therapy, as the district court had

required in its August 2007 order. Thus, it was not an abuse of discretion for the district court to reject Dr. Shea's recommendations.

V.

Appellant argues that the district court erred when it failed to conduct an evidentiary hearing or undertake a best-interests analysis before continuing the restriction on his parenting time. We disagree.

First, appellant did not request an evidentiary hearing. The moving party has the burden to do so. *See* Minn. R. Gen. Pract. 3.03(d) (providing that, generally, motions in family cases are to be resolved without an evidentiary hearing); *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001) (citing cases providing that the moving party has the burden in family law cases). Further, a prerequisite to modifying parenting-time schedules is changed circumstances. *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002); *see also Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001) (requiring an evidentiary hearing only when a party makes a prima facie case for a change in parenting-time schedule), *review denied* (Minn. Oct. 24, 2001).

Here, the district court concluded that appellant had not complied with the court's requirement that he successfully complete psychosexual therapy before his parenting-time restrictions would be lifted. Thus, appellant failed to prove changed circumstances, and failed to make a prima facie case to support modification. Therefore, the district court was not required to conduct an evidentiary hearing or engage in further best-interests analysis.

VI.

Respondent moved this court to strike appellant's reply brief. Because appellant's reply brief does not raise new issues, we deny this motion. *See* Minn. R. Civ. App. P. 128.02, subd. 4 (confining reply brief to new matters raised in respondent's brief).

Affirmed; motion denied.