STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0796

In re the Marriage of:

Sharon Elizabeth Anderson, petitioner,
Respondent,

vs.

William Thomas Anderson,
Appellant,

and

County of Dakota, intervenor,
Respondent.

Filed August 28, 2017
Affirmed
Reilly, Judge

Dakota County District Court
File No. 19AV-FA-11-611

Sharon E. Anderson, Excelsior, Minnesota (pro se respondent)

William T. Anderson, Chanhassen, Minnesota (attorney pro se)

James C. Backstrom, Dakota County Attorney, Karen Linn Hinrichs Wangler, Assistant County Attorney, West St. Paul, Minnesota (for respondent Dakota County)

Considered and decided by Schellhas, Presiding Judge; Reilly, Judge; and Smith, John, Judge.*

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

REILLY, Judge

Self-represented appellant-father challenges an order modifying parenting time, arguing that the district court erred by restricting his parenting time without adequately considering (1) the custodial preference of the children and (2) the rebuttable presumption that each parent is entitled to at least 25% of the parenting time. We affirm.

FACTS

Self-represented appellant-father William Thomas Anderson and self-represented respondent-mother Sharon Elizabeth Anderson married in 1994 in Tennessee. The highly contentious nature of the parties' separation and divorce has resulted in numerous court appearances before the district court.

Father and mother have five children together, two of whom have reached the age of majority. The other three are now respectively 16, 14, and 9 years of age. Because the parties could not agree on physical and legal custody of the minor children at the time they filed for dissolution, the district court appointed a guardian ad litem to advise the court on permanent custody and parenting time. The guardian ad litem interviewed each of the parties' five children and concluded that, with the exception of the parties' oldest child, who had a strained relationship with father, the children wished to spend equal time with

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

both parents. The guardian ad litem prepared a report recommending the parties have joint legal custody of the parties' four youngest children, but that mother receive sole physical custody, subject to father's parenting time. In 2012, the district court entered the judgment and decree of dissolution, which adopted the recommendations of the guardian ad litem. The district court awarded father parenting time with the four youngest children every Wednesday from 6:00 p.m. to 9:00 p.m., and every other weekend from Friday after school until Monday morning before school. Father's parenting time during the summer months was expanded to six days every two weeks.

In February 2013, mother moved to modify parenting time and legal custody based on father's "willful[] refus[al] to communicate or cooperate in education, healthcare, and other child rearing issues" and isolation of the children during his parenting time. In July 2013, the district court issued an order in which the court concluded that mother "has made a prima facie showing of endangerment/impairment sufficient to warrant an evidentiary hearing on her motion for change of custody" and reserved mother's motion, pending an evidentiary hearing.

The district court appointed a guardian ad litem to represent the best interests of the children at the evidentiary hearing and to advise the court with respect to custody and parenting time. After interviewing the children, the guardian ad litem prepared a report in which she determined that the children "love and care for their parents and benefit from each of their parent's love and attention," but cautioned that "it would be detrimental to give either parent the sole decision making authority for these children" because "history would indicate that these decisions would be made to win, rather than do what is best for

the children." For these reasons, the guardian ad litem recommended that the parties continue to share joint legal custody, and that father's parenting time on Wednesday be expanded to include an overnight stay. After the evidentiary hearing, the district court adopted the recommendations of the guardian ad litem, noting that the parties "have demonstrated a profound inability to cooperate in the raising of [their] children," and that "[o]rdinarily, this would provide a basis to consider granting one parent sole custody." After considering the best interest factors established in Minnesota Statutes section 518.17 (2016) and the guardian ad litem report, the court concluded that "joint legal custody continues to be in the children's best interests," and expanded father's weekday parenting time to include overnight stays.

The parties' highly contentious relationship, however, did not improve with each additional modification to parenting time. Mother later requested by motion that the court find father in contempt for various violations of court orders. Father opposed the motion, and by way of response requested limitations on communication between the parties, appointment of a guardian ad litem, modification of the parenting schedule to minimize contact between the parties, and additional parenting time with the parties' second oldest child, at the discretion of the child. The district court denied father's request for appointment of a guardian ad litem, noting that the prior two appointments satisfied the issues raised in father's motion and that appointment of a guardian ad litem would not resolve the "primary difficulty for the children," which the court explained is "the incessant parental conflict." Because the court determined that a "prima facie case for endangerment has been made such that an evidentiary hearing on the issue of legal custody is warranted,"

the court reserved the issues of modification of legal custody and parenting time, pending an additional evidentiary hearing.

After the evidentiary hearing, the district court granted mother's request for sole legal custody and modification of parenting time. Because the Minnesota Legislature amended the best interest factors in 2015, the district court applied the new factors and determined that modification of child custody and parenting time was appropriate. The court noted that the "steady, high conflict between these parents unfortunately impacts each of these factors." Specifically, the court found that the best interest factors favor an award of sole legal custody to mother, that mother rebutted the presumption in favor of joint legal custody, and that father's parenting time should be limited because father tends to isolate the children from other individuals during his parenting time. The district court limited father's parenting time to every first, second, and fourth weekend of the month, from Saturday at 5:00 p.m. until Sunday at 6:00 p.m.

Father filed a motion for amended findings, conclusions, and order. On March 21, 2016, the district court filed an amended order in which it granted various portions of father's motion for amended findings, but denied father's motion for amended conclusions of law with regard to custody and parenting time.

Father appeals.

D E C I S I O N

I. The district court did not abuse its discretion by granting sole legal custody of the parties' minor children to mother without the appointment of a guardian ad litem or testimony from the minor children.

A district court has broad discretion to provide for the custody of children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984); *In re Best Interest of M.R.P.-C.*, 794 N.W.2d 373, 378 (Minn. App. 2011). Appellate review of custody-modification 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). Appellate courts review a district court's factual findings for clear error and defer to a district court's opportunity to evaluate witness credibility. *Id.* at 284. "Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted).

An endangerment-based motion to modify custody requires the moving party to show that (1) there has been a change of the circumstances of the children or custodian, (2) modification is necessary to serve the children's best interest, (3) the children's present environment endangers their physical health, emotional health, or emotional development, and (4) the benefits of the modification outweigh the detriments with respect to the children. Minn. Stat. § 518.18(d)(iv) (2016) (establishing these requirements); *Goldman*, 748 N.W.2d at 284 (articulating the elements of a prima facie case for endangerment-based motion to modify custody). If the moving party alleges facts in her affidavit that, if true, are sufficient to support a modification of custody, the court must hold an evidentiary

hearing to determine the truth of the allegations. *Taflin v. Taflin*, 366 N.W.2d 315, 320 (Minn. App. 1985). At the evidentiary hearing, the moving party must show all four factors to obtain an actual modification of custody. *Id.*

The first factor, a change in circumstances, must be significant and must have occurred after the original custody order; it may not be a continuation of conditions that existed prior to the original order. *Spanier v. Spanier*, 852 N.W.2d 284, 288 (Minn. App. 2014). The second factor, the best interests of the child, is determined according to the factors set forth in Minn. Stat. § 518.17. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). The third factor, endangerment, requires a showing of a "significant degree of danger" to the children's emotional or physical development. *Id.* (quotation omitted). The fourth factor, the balance of harms, may be implicit in one of the other three factors. *See Eckman v. Eckman*, 410 N.W.2d 385, 389 (Minn. App. 1987) (upholding modification where explicit findings on fourth factor not made).

Father argues that the district court erred by not considering the preferences of the children. "A child's preference has been found relevant to three of the four modification factors." *Geibe*, 571 N.W.2d at 778. A reasonable preference of a child who is deemed to be of sufficient age, ability, and maturity to express an independent, reliable preference is also one of the statutory factors for the court to weigh in determining the child's best interests. Minn. Stat. § 518.17, subd. 1(a)(3).

The district court made detailed findings concerning the children's preferences. At the evidentiary hearing on July 8, father testified that the minor children are "upset [by] the current parenting agreement." Father also testified at the September 3 evidentiary hearing

that one child expressed a preference to stay at his residence. In its order, the district court noted that father testified the children generally wanted to spend more time with him, but found that "this factor does not clearly favor either party" as "no evidence regarding the maturity of the children was offered in support of [father's] assertion."

Father nevertheless suggests that "[h]ad a guardian ad litem been appointed, the best interest factors would likely have resulted in the exact same denial of mother's [custody-modification] motion." In this case, the district court appointed a guardian ad litem to assess the preferences of the children on two prior occasions. In all proceedings where custody or parenting time with a minor child is at issue, and where there is no reason to believe that the child is a victim of domestic abuse or neglect, the district court *may* appoint a guardian ad litem to advise the court. Minn. Stat. § 518.165, subd. 1 (2016). Accordingly, the decision to appoint a guardian ad litem is discretionary when there is no allegation of abuse or neglect. *Id.* Given the district court's familiarity with the parties and prior appointments of a guardian ad litem, the denial of father's request to appoint a third guardian ad litem was not an abuse of the district court's discretion.

II. The district court did not abuse its discretion by restricting father's parenting time.

Father also argues that the district court wrongfully restricted his parenting time, misapplied the endangerment standard, and abused its discretion by awarding him less than 25% of the parenting time without considering the statutory presumption. A district court may modify an order granting or denying parenting time when modification would serve the best interests of the child. Minn. Stat. § 518.175, subd. 5(a) (2016). Modification of

custody or parenting time requires the district court to use the procedures established in Minn. Stat. § 518.18(d). Because appellate courts recognize that a district court has broad discretion to decide questions of parenting time, *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995), appellate courts will not reverse a parenting-time decision unless the district court abused its discretion by misapplying the law or by making findings unsupported by the record, *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009).

To determine whether the change to father's parenting time constitutes a restriction or a modification, this court must consider the amount of the reduction as well as the reasons for the adjustment. *Dahl*, 765 N.W.2d at 124. The district court reduced father's parenting time by more than 50% or about 7 weeks per year. On this record, this disparity is substantial and constitutes a restriction of parenting time, regardless of the reason for the restriction; it is therefore governed by Minn. Stat. § 518.175, subd. 5.

A court may not restrict parenting time unless "(1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development; or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time." Minn. Stat. § 518.175, subd. 5(c). Although this court has previously cautioned that "the concept of endangerment is unusually imprecise," this court clarified that "the legislature likely intended to demand a showing of a significant degree of danger." *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991). Conduct that is likely to endanger a child's physical or emotional health, or emotional development, may constitute endangerment. Minn. Stat. § 518.175, subd. 5. When a district court makes a finding of endangerment pursuant to section 518.175, subdivision 1(b), the district court

shall restrict or deny parenting time as the circumstances warrant. *See* Minn. Stat. § 518.175, subd. 1(b) (2016) ("If the court finds . . . that parenting time . . . is likely to endanger the child's physical or emotional health or impair the child's emotional development, the court shall restrict parenting time with that parent as to time, place, duration, or supervision and may deny parenting time entirely, as the circumstances warrant.").

Here, the district court found that "the children's present environment endangers their emotional development." The court noted that "father has shown a willingness to isolate the children from all other individuals, including the mother, when it suits him" and explained its endangerment finding, stating:

> the children are [not] better off isolated from their friends and family whenever it is the father's turn to spend time with them. To the contrary, given their ages, the children are also in need of contact with extended family members, friends, coaches, and other mentors to help ensure their continued emotional, cultural, and spiritual growth and health.
> . . .
> [The] Court is inclined to limit parenting time for the father due to the relative isolation his parenting time requires. The father's parenting time appears to be more about the father and his right to impose his parenting theories upon the children than about the children and their best interests. Under these circumstances, and in light of the parental conflict, the children's time with their father should be limited.

Accordingly, the district court limited father's parenting time to every first, second, and fourth Saturday from 5:00 p.m. until Sunday at 6:00 p.m., which the parties estimate is 11% of the parenting time.

"[T]here is a rebuttable presumption that a parent is entitled to receive at least 25% of the parenting time for the child." Minn. Stat. § 518.175, subd. 1(g). And district courts generally must demonstrate an awareness and application of the statutory presumption when a party appropriately raises the issue and the district court awards less than 25% of the parenting time. *Dahl*, 765 N.W.2d at 123-24; *see In re Custody of M.J.H.*, ____ N.W.2d ____ (Minn. App. July 3, 2017) (noting that the presumption would lack purpose if appellate courts could supply findings, after the fact, to conclude the presumption would have been overcome, had the presumption been considered). While we acknowledge that father appropriately raised the issue, and the district court did not address the presumption, we determine that under the specific facts of this case, given the district court's finding of endangerment and the overwhelming support for that finding on this record, the district court's failure to consider the statutory presumption was, at most, harmless error. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *see also Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (declining to remand the case to the district court when it is clear that the district court would undoubtedly make findings that satisfy the statutory language and reach the same result); *see also* Minn. Stat. § 518.175, subd. 1(b) ("If the court finds . . . that parenting time . . . is likely to endanger the child's physical or emotional health or impair the child's emotional development, the court shall restrict parenting time . . . and may deny parenting time entirely, as the circumstances warrant.").

Lastly, father contends that the district court's factual findings with respect to his proposed parenting-time schedule are clearly erroneous. Father contends that his proposed schedule would "eliminate the interaction between the parties during custody exchanges."

The district court declined to accept father's proposal and instead accepted mother's proposal after determining that father's schedule "would necessitate approximately nine exchanges per month, four of which would be in the middle of the school week," while mother's proposal would result in only "six exchanges per month, none of which would be in the middle of the school week, year round."

Father proposed the following:

> [Father] shall have parenting time on every Wednesday immediately after school until Thursday morning at which time [father] shall cause the children to attend school at its normal start time; [father] shall have parenting time every other weekend from Friday afternoon immediately after school until Monday morning at which time [father] shall cause the children to attend school at its normal start time.

A plain reading of father's proposal indicates that the proposal would result in zero exchanges between the parties per month during the school year and approximately eight exchanges between the parties per month during the summer. But we conclude that any error that resulted from the district court's erroneous interpretation of father's proposal does not warrant remand. On this particular record, given the district court's familiarity with the parties due to the highly contentious nature of the parties' separation and divorce, we are unconvinced that remand will change the result already reached by the district court. *See Grein*, 364 N.W.2d at 387 (declining to remand and, instead, affirming a custody decision reached by the district court without explanatory findings of fact when it is clear from the record that on remand the district court would make the same findings and reach the same conclusion); *see also* Minn. R. Civ. P. 61 ("The court at every stage of the

proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

Affirmed.