STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1268

In re the Marriage of:
Rebekah L. Bennett, petitioner,
Appellant,

vs.

Kevin E. Bennett,
Respondent.

Filed June 12, 2017
Affirmed
Bjorkman, Judge

Steele County District Court
File No. 74-FA-13-859

Thomas R. Braun, Eric G. Rathman, Restovich Braun & Associates, Rochester, Minnesota (for appellant)

Mark J. Rahrick, Smith, Tollefson, Rahrick and Cass, Owatonna, Minnesota; and

Kristine A. Anderson, Owatonna, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Reyes, Judge.

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

BJORKMAN, Judge

Appellant-mother challenges an order modifying parenting time, arguing that the district court erred by (1) denying her request for an evidentiary hearing, (2) modifying

legal custody without an evidentiary hearing or adequate findings, and (3) restricting her parenting time without adequate findings. We affirm.

FACTS

Appellant-mother Rebekah Bennett and respondent-father Kevin Bennett are the parents of J.B., born September 19, 2002, and N.B., born February 7, 2005. On April 30, 2014, the parties' marriage was dissolved by a stipulated judgment under which the parties share joint legal and physical custody of the children. The judgment designates father's home as the children's primary residence and gives him the majority of the parenting time. Mother was awarded six overnights every two weeks, two of which occurred over the weekend.

On January 5, 2016, father moved to modify parenting time and for sole authority to make medical decisions on behalf of the children. Father based his request on mother's persistent efforts to alienate the children from him, including bringing the children to numerous medical appointments during school hours to bolster her unsupported contention that father was abusing the children. Six days later, mother filed a cross-motion opposing father's motion and requesting, among other things, temporary sole legal and physical custody pending an evidentiary hearing. Mother based her motion on her allegations that father abused her and the children. The district court heard both motions on March 30, and filed a temporary order granting father's motions. On June 6, the district court filed its final order, specifically finding that mother was alienating the children from father. In denying mother's request for an evidentiary hearing on her custody motion, the district court stated that mother had not offered any evidence to corroborate the allegations

contained in her affidavit. The district court found that modifying the parenting-time schedule was in the children's best interests because mother was frequently taking the children out of school and inappropriately involving them in her conflicts with father. Mother appeals.

D E C I S I O N

I. The district court did not abuse its discretion by denying mother's request for an evidentiary hearing on her motion to modify custody.

We review a district court's decision to deny a custody-modification motion without an evidentiary hearing for abuse of discretion. *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). In reviewing such decisions, we defer to the district court's credibility determinations. *Id*.

Where, as here, a party moves to modify custody based on endangerment, the district court must conduct an evidentiary hearing only if the moving party makes a prima facie showing that (1) the children's circumstances have changed since the disposition of the court's last custody order, (2) modification would serve the children's best interests, (3) the children's present environment endangers their physical or emotional health or development, and (4) the benefits of modification outweigh the likely detriments. Minn. Stat. § 518.18(d)(iv) (2016); *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). In determining whether the moving party has made a prima facie showing, the district court generally must accept the allegations contained in the party's affidavit as true. *Geibe v. Geibe*, 571 N.W.2d 774, 777 (Minn. App. 1997). But a district court may deny an evidentiary hearing where the supporting affidavit is "devoid of allegations supported by

any specific, credible evidence." *Weber*, 653 N.W.2d at 811 (quotation omitted); *see also Axford v. Axford*, 402 N.W.2d 143, 145 (Minn. App. 1987).

Mother's supporting affidavit falls into the latter category—it is devoid of allegations supported by credible evidence. The affidavit alleges 35 instances of abuse by father, nine of which occurred before the 2014 dissolution. None of the attached documents confirm the abuse reports, and there are no medical records or reports indicating the children are endangered while in father's care. Moreover, the record demonstrates mother has an extensive history of making unsubstantiated abuse allegations against father. Since the 2014 dissolution, mother has filed 18 child-protection complaints with Steele County Human Services. County protection workers investigated each complaint, finding them all to lack supporting evidence. On one occasion, mother told a doctor that father slapped N.B. more than 300 times. When asked, N.B. said it did not happen. And when the children did report abuse to medical providers, their accounts were vague and medical personnel did not observe bruising or any other sign of injury. All 18 cases were closed after review, with the county investigator concluding, in many cases, that it appeared the children were asked to falsely report abuse by father.

Contrary to mother's assertions, the district court did not weigh mother's allegations against father's denials; the court simply found mother's allegations not supported by the record. On this unique record, we discern no abuse of discretion by the district court in denying mother's request for an evidentiary hearing.

II. The district court did not abuse its direction by giving father sole authority to make medical decisions for the children.

Parents who have joint legal custody "have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(b) (2016). Mother argues that the district court abused its discretion by giving father sole medical decision-making power because, in doing so, the district court functionally modified the prior award of joint legal custody without a hearing. We are not persuaded that a remand for a hearing is required.

The record extensively documents mother's dubious systematic efforts to alienate the children from father, and her habitual attempts to enlist the county's child-protection system in this endeavor. Mother's own affidavit concedes that she has repeatedly removed the children from school for medical appointments related to alleged abuse by father. None of the resulting medical records and reports substantiate mother's assertions or confirm a need for medical care. Indeed, the record shows that the county investigated and rejected each of mother's 18 child-protection complaints. And mother's contention that J.B. has special needs that require evaluation and treatment is simply belied by the medical records. In short, the record amply supports the district court's finding that mother's conduct in taking the children to numerous unnecessary doctors' appointments unnecessarily interrupted the children's lives and schooling.[1]

[1] We note that creating academic problems for a child can constitute endangerment of that child. *See Weber*, 653 N.W.2d at 811 (noting that "behavioral problems and poor school performance by the child have served as indications of endangerment to a child's physical

Thus, even if mother is right and the district court did modify the prior award of joint legal custody, we conclude that any error in not holding a hearing does not require a remand. On this unique and egregious record, we are convinced that remanding for a hearing will not change the result already reached by the district court. *See Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (declining to remand and, instead, affirming a custody decision reached by the district court without explanatory findings of fact when "from reading the files, the record, and the court's findings, on remand the [district] court would undoubtedly make findings that comport with the statutory language" and reach the same result); *Tarlan v. Sorensen*, 702 N.W.2d 915, 920 n.1 (Minn. App. 2005) (citing this aspect of *Grein*); *see also* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

III. The district court did not impermissibly restrict mother's parenting time.

A district court has broad discretion in determining parenting-time issues. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). Minn. Stat. § 518.175, subd. 5(b) (2016) requires a district court to modify parenting time if the modification serves the children's best interests and does not change the children's primary residence.[2] Insubstantial modifications or adjustments that do not restrict parenting time and are in the children's best interests do not require an evidentiary hearing. *Shearer v. Shearer*, 891 N.W.2d 72,

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and emotional health" (citing *Kimmel v. Kimmel*, 392 N.W.2d 904, 908 (Minn. App. 1986), *review denied* (Minn. Oct. 29, 1986))); *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991) (noting that a child's emotional problems resulted in academic problems which could be addressed by a change of custody).

[2] It is undisputed that the challenged order does not change the children's primary residence.

77 (Minn. App. 2017); *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). A reduction of parenting time is not necessarily a restriction. *Anderson v. Archer*, 510 N.W.2d 1, 4 (Minn. App. 1993). We review de novo whether a change in parenting time amounts to a restriction. *Dahl*, 765 N.W.2d at 123.

Mother argues that, because father did not allege a change of circumstances, and the modification restricts mother's parenting time, the district court abused its discretion. We disagree. A party seeking to modify parenting time need not establish a change of circumstances. *Shearer*, 891 N.W.2d at 76. Rather, modification is governed by the best interests of the children. *Id.* (stating that "[t]he statute requires only that a proposed modification serve the best interests of the child" (quotation omitted)). And when determining whether a change in parenting time amounts to a restriction, courts consider not only the extent of the change, but the reasons for the change and whether both parents continue to have meaningful time with the children. *See* Minn. Stat. § 518.175, subd. 5(c) (2016); *Suleski v. Rupe*, 855 N.W.2d 330, 336 (Minn. App. 2014).

The dissolution judgment provided mother six overnights with the children every two weeks. The challenged order provides mother four overnights every two weeks, a 14.2% decrease in mother's overnight parenting time.[3] The modification here is more than

[3] Mother's original schedule with the children was as follows:

> 1. Every other weekend from Friday after school at 2:30 pm. (or at 2:30 pm. during the summer) to Sunday at 5:00 P.M.
> 2. **Every week** from Tuesday morning at 8:00 am. to Thursday at 8:00 P.M.

The district court changed the schedule to the following:

the 7% change in *Suleski* which we held to be insubstantial, 855 N.W.2d at 337, but less than the 50% reduction found to constitute a restriction in *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002). But more importantly, the reduction addresses the district court's concern that mother's conduct was interfering with the children's education. The modified schedule shifts mother's parenting time away from school nights, thereby reducing mother's ability to take the children out of school for unnecessary medical appointments. And while mother's parenting time has decreased, she still has meaningful time with the children. On this record, the district court found that this is not a restriction. We agree with the district court.

Moreover, the record supports the district court's finding that the modification serves the children's best interests. In addition to addressing the myriad of unnecessary medical appointments to which mother subjected the children, the modified order shifts the parenting exchanges to occur at school rather than in the parties' homes. This change addresses the district court's concern about mother's other efforts to alienate the children from father. A custody evaluator observed, in early 2014, that mother "is oblivious to the impact her comments have on the children's attitudes and emotional health" and that

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> 1. Every other weekend from Friday after school at 2:30 p.m. (or at 8:00 a.m. when school is not in session) to Monday morning at 8:00 a.m. (or 6:00 p.m. when school is not in session).
> 2. **Following [mother's] weekend**, Thursday after school at 2:30 p.m. (or at 8:00 a.m. when school is not in session) to the following Friday morning at 8:00 a.m. (or 6:00 p.m. when school is not in session).

mother "has not and she will not support the children's relationship with their father." Mother's documented practice of making false abuse allegations against father further supports the district court's finding that mother "has maintained if not escalated her efforts to alienating the children from their father." On this record, we discern no clear error in the district court's findings or in its conclusion that modifying parenting time would afford the children more consistency and predictability, especially during the school year.

In sum, we conclude that the reduction in mother's parenting time is not a restriction and the district court did not abuse its discretion in modifying parenting time.

Affirmed.