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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1376

In re the Marriage of: Sheree Rosett Curry, petitioner,
Appellant,

vs.

Michael David Levy,
Respondent.

Filed May 1, 2017
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-FA-06-9089

Sheree R. Curry, Maple Grove, Minnesota (pro se appellant)

Michael D. Levy, Maple Grove, Minnesota (pro se respondent)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant-mother challenges the district court's denial of her motion for increased parenting time, grant of respondent-father's motion to modify child support, and partial denial of her motion to amend. Because the district court erred by not considering factors

other than parenting time when determining the children's primary residence, we reverse and remand the district court's parenting-time and child-support determinations. But we affirm the district court's partial denial of mother's motion to amend.

FACTS

Appellant-mother Sheree Rosett Curry and respondent-father Michael David Levy married in 1999. They have two children. In August 2008, the district court dissolved the parties' marriage by judgment and decree. The district court awarded the parties joint legal and joint physical custody of their two minor children and established a parenting-time schedule that split time equally (50/50) between them. The district court ordered father to pay mother $859 per month in basic child support.

In 2011, mother moved to increase father's child-support obligation. Father filed a responsive motion, seeking to modify the parenting-time schedule. The district court increased father's basic child-support obligation to $1,044 per month and modified the parenting-time schedule from 50/50 to 36/64, with father receiving the majority.

In January 2016, mother moved to "Contest Request for Payment of Unreimbursed or Uninsured Health Care Expenses." In response, father moved to modify child support to "reflect the parenting[-]time schedule and the parties' current earnings." At the time, father's basic child-support obligation was $1,116 per month. Mother then moved to modify the parenting-time schedule.

On March 7, the district court denied mother's motion to modify the parenting-time schedule, eliminated father's child-support obligation, and ordered mother to pay father $768 per month in basic child support.

On April 6, mother moved the district court for amended findings, seeking to eliminate her child-support obligation, to establish a 50/50 parenting-time schedule, and to require that father pay her $941 per month in basic child support. Mother specifically challenged the district court's findings regarding the parties' incomes. On April 18, mother moved to stay her child-support obligation and for $4,280 in need-based attorney fees.

The district court denied mother's motion for amended findings as it related to modification of parenting time and elimination of her child-support obligation. But the district court amended its findings regarding the parties' incomes and reduced mother's basic child-support obligation to $736 per month.[1] The district court also awarded mother $2,853.33 in need-based attorney fees.

Mother appeals.

D E C I S I O N

In this appeal, the parties are self-represented. We commend them for their briefing, which adequately sets forth the parties' legal arguments with supporting authority. Mother seeks reversal on the following grounds: (1) "When there is no order stating a primary residence for joint custodians, parenting time can be modified to 50/50 under Minn. Stat. [§] 518.175 Subd. 5 in the best interests of the children without changing [their] primary residence"; (2) "The court misapplied the child support guidelines and parenting time expense adjustment by making modifications when circumstances were unchanged"; and

[1] The Child Support Guidelines Worksheet supporting the order indicates that mother's pro rata basic support obligation is $736 and that her basic support obligation after parenting-expense adjustment is $648.

(3) "The District Court misapplied the law when it found that one of her two issues in her motion to amend was improper." Mother also argues that certain statements in father's brief should be stricken. We address each argument in turn.

I.

Mother's first argument regards the district court's ruling on her motion for increased parenting time. The district court has broad discretion to determine "parenting-time issues and will not be reversed absent an abuse of that discretion." *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Id.*

Minn. Stat. § 518.175 (2016) governs modification of a parenting-time order.[2] The statute provides:

> If modification would serve the best interests of the child, the court shall modify the decision-making provisions of a parenting plan or an order granting or denying parenting time, *if the modification would not change the child's primary residence*. Consideration of a child's best interest includes a child's changing developmental needs.

Minn. Stat. § 518.175, subd. 5(a) (emphasis added).

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[2] The parties do not dispute that mother's request for parenting-time modification was governed by Minn. Stat. § 518.175. But the parties also discuss Minn. Stat. § 518.18 (2016) in their briefs. That statute provides that "the court shall not modify a prior custody order or a parenting[-]plan provision *which specifies the child's primary residence*" unless certain findings are made. Minn. Stat. § 518.18(d) (emphasis added). The statute further provides that "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 certain circumstances exist. *Id.* (emphasis added). Because this case does not involve a prior custody order or parenting-plan provision specifying the children's primary residence, Minn. Stat. § 518.18(d) does not apply here.

In the district court, mother "requested that the court amend its order to establish a 50/50 parenting time schedule and establish [father's] child support [obligation] at $941 per month." Mother argued for modification of parenting time because "it is in the best interests of the children that parenting time between [mother] and the minor children increase." After the district court denied the request, mother argued that "the court erred in not using the best interests standard when addressing her request for an increase in parenting time," that her request for 50/50 parenting time was "an insubstantial modification of parenting time," and that "the Court erred . . . when it found that an equal parenting time schedule would change the children's primary residence."

In response to mother's request for 50/50 parenting time, father argued that "[t]he children currently reside with [him] 9 out of 14 nights, therefore, . . . the Court cannot modify parenting time per [mother]'s request because it would be changing the children's primary residence." In response to father's primary-residence argument, mother "claimed that Maple Grove is the children's primary residence, and due to the fact that both [mother] and [father] live in Maple Grove, a modification of parenting time would not result in a change of the children's primary residence." Father disagreed, arguing that "primary residence is the physical dwelling space and not a geographical location."

The district court concluded that "the modification of parenting time is governed by Minn. Stat. [§] 518.175" and based its parenting-time determination on father's primary-residence theory. The district court rejected mother's argument that the children's primary residence could be the city of Maple Grove. The district court determined that the "children's primary residence is [father's] home, at which they spend 9 of 14 overnights."

The district court reasoned that "[a] modification of regular parenting time granting [mother] the majority of parenting time or an equal amount would result in the change of the children's primary residence. Therefore, [mother's] motion to modify the regular parenting time based on the best interests of the children is denied." The district court's order does not indicate that it considered the best interests of the children in denying mother's motion for increased parenting time.

In sum, we understand the district court's reasoning to be as follows: because father has the majority of parenting time with the children, his home is the children's primary residence; reducing father's parenting time to 50% or less would mean that father's residence would no longer be the children's primary residence; and the best-interests standard under Minn. Stat. § 518.175, subd. 5(a), therefore did not apply to mother's request for increased parenting time.

Mother challenges the district court's reasoning, arguing that the definition of "'primary residence' could refer to a physical dwelling or to a geographic place." She also argues that Minnesota law does not allow primary residence to be established "solely based on the amount of time a child spends with a joint custodial parent." She contends that the district court erred "by finding [that father's home] is the children's primary residence" and misapplied the law by determining "that primary residence would change" if mother's motion for parenting-time modification were granted. She concludes that the district court erred "by not applying the children's best interests" to her motion for increased parenting time.

The crux of the parenting-time issue in this case is the definition of "primary residence." In *Suleski v. Rupe*, this court noted that the term "primary residence" is not defined in Minn. Stat. § 518.003 (2012), the definitional section of chapter 518, "or in any other section of the family-law statutes." 855 N.W.2d 330, 335 (Minn. App. 2014). Because there is no special or technical definition of the term in statute, *Suleski* defined the term according to its common meaning and usage. *Id*. We stated that "a child's 'primary residence' is the principal dwelling or place where the child lives." *Id*. Applying that definition, we concluded that the child's primary residence was with her mother because "the child lives in Ramsey with her mother for nine months out of the year and attends school in Ramsey" and "[e]ven with the increased parenting time granted to father, mother still has a majority of the parenting time during the course of a year." *Id.*

The district court here cited *Suleski's* definition of "primary residence" and appears to have based its primary-residence determination solely on the amount of time that the children spend with each parent, concluding that because father has the majority of parenting time, his home is the children's primary residence. The district court then concluded that reducing father's parenting time to 50% or less would automatically change the children's primary residence. Father similarly interprets the term "primary residence" to solely mean the home of the parent who has the majority of parenting time, arguing, "The children do, now, spend substantially more time with one parent than the other, and thus do have a primary residence. [Granting mother's request for equal parenting time] would mean that the children's primary residence would change from being with their father to being with both parents."

We understand why the district court and father emphasized the amount of parenting time that each parent currently has with the children when analyzing the primary-residence issue in this case. In *Suleski*, this court reasoned, in part, that "mother still has a majority of the parenting time during the course of a year," when identifying the child's primary residence. *Id.* However, we think the *Suleski* definition of primary residence—that is, the principal dwelling or the place where the child lives—means more than simply the home of the parent who has the majority of parenting time.

In determining the principal "place where a child lives," it must be recognized that there are many aspects to a child's life. Although spending time with parents may be an important aspect, other aspects can include spending time with other family members, practicing religion, attending school, participating in extracurricular activities, and socializing with peers. All of those activities are important parts of a child's life and should not be ignored when determining the principal place where the child lives. Thus, the places where a child engages in those activities are relevant considerations when determining a child's primary residence. Indeed, in *Suleski*, this court considered the place where the child attended school, in addition to the amount of time the child spent with each parent, when determining the child's primary residence. *See id.* (noting that the child attended school in Ramsey).

We recognize that in most cases involving a significant parenting-time disparity, the child's primary residence will likely be the home of the parent with the majority of parenting time. But the primary-residence issue may be less clear when parenting time is allocated at or near 50/50. For example, if parents share joint physical custody, have a

50/50 parenting-time allocation, live in neighboring school districts, and their children attend school and participate in the majority of scheduled extracurricular activities in one parent's school district, the facts might support a conclusion that the child primarily lives in that parent's home, even though the child spends an equal number of nights at the other parent's home. If, on the other hand, the parents' homes are in close proximity in one school district, such that the children participate in the same activities while staying at either parent's home, the facts might support a conclusion that neither parent's residence is the primary residence.

We do not discern a reason to limit a primary-residence determination to a mathematical calculation regarding which parent has the majority of parenting time. Neither statute nor *Suleski* compels that result. Although it may be easy to define a child's primary residence as the home of the parent who has the majority of parenting time, this approach is problematic given the statute that governs parenting-time modification. For example, if primary residence means no more than the home of the parent with the majority of parenting time, it logically follows that a child cannot have a primary residence if parenting time is allocated 50/50, as the district court reasoned in this case. Thus, any change to a 50/50 parenting-time allocation will necessarily change the child's primary residence because one parent will lose the majority of parenting time. As a result, a motion to modify parenting time to an equal allocation generally would not be determined under the best-interests standard. *See* Minn. Stat. § 518.175, subd. 5(a) (authorizing parenting-time modification if it "would serve the best interests of the child," so long as "the modification would not change the child's primary residence"). That outcome seems

inconsistent with the law's emphasis on the best interests of children. *See, e.g.*, *Pikula v. Pikula*, 374 N.W.2d 705, 711 (Minn. 1985) ("The guiding principle in all custody cases is the best interest of the child."); *Hagen v. Schirmers*, 783 N.W.2d 212, 216 (Minn. App. 2010) ("The statute and caselaw make clear that the ultimate issue [when determining parenting time] is the child's best interests[.]"); *Schisel v. Schisel*, 762 N.W.2d 265, 270 (Minn. App. 2009) ("The bedrock principle underlying any decision affecting the custody of minor children is that their best interests must be protected and fostered.").

In conclusion, *Suleski's* definition of primary residence is not limited to the home of the parent who has the majority of parenting time. Because the district court erred by basing its primary-residence determination solely on the majority of parenting-time and by therefore concluding that granting mother's request for parenting-time modification would change the children's primary residence, we reverse the district court's denial of mother's request for increased parenting time and remand for the district court to reconsider the request consistent with this opinion.

In an effort to clarify the proceedings on remand for these self-represented parties, we note that the district court did not err in rejecting mother's argument that the children's primary residence "should be defined as the city of Maple Grove." Although we mentioned the city of Ramsey when discussing the child's primary residence in *Suleski*, our analysis considered whether the primary residence was with mother or father, indicating that primary residence is in a parent's home and not in a geographic area, such as a city. *See Suleski*, 855 N.W.2d at 335.

We also note that in applying Minn. Stat. § 518.175, subd. 5, the district court must determine whether the proposed parenting-time modification would change the children's primary residence, even though there has not been a prior court order specifying the children's primary residence.[3] That determination requires the district court to first identify the children's current primary residence and then to determine if their primary residence will change if mother's request for equal parenting time is granted.

In making the primary-residence determination, the court may consider the number of overnights that each parent has with the children. But the district court should not limit its primary-residence determination to the number of overnights if other factors such as the children's religious practice, school attendance, and participation in extracurricular activities are relevant. If the district court determines, based on all of the relevant circumstances, that the children's primary residence is with father and that increasing mother's parenting time would not change the children's primary residence, it shall base its decision regarding mother's motion to modify parenting time on the children's best interests.

II.

Mother's second argument regards the district court's decision to modify child support, such that mother, and not father, is the obligor. Mother argues that the district court misapplied the child-support guidelines and parenting-expense adjustment and that

[3] Minn. Stat. § 518.18(d) governs modification of a prior custody order or parenting-plan provision that specifies the child's primary residence.

father "did not establish a substantial change *since* the 2011 order to justify applying the guidelines."

This court reviews a district court's modification of child support for an abuse of discretion. *Svenningsen v. Svenningsen*, 641 N.W.2d 614, 615 (Minn. App. 2002). A district court's decision "will be upheld unless it committed clear error and its decision is against logic and the facts of record." *Hesse v. Hesse*, 778 N.W.2d 98, 102 (Minn. App. 2009).

Under Minn. Stat. § 518A.39, subd. 2(a) (2016), the "terms of an order respecting . . . [child] support may be modified upon a showing of one or more of [eight circumstances], any of which makes the terms unreasonable and unfair." One such circumstance is substantially increased gross income of an obligee. Minn. Stat. § 518A.39, subd. 2(a)(1).

Moreover, Minn. Stat. § 518A.39 establishes the following rebuttal presumption regarding whether a current support order is unreasonable and unfair:

> It is presumed that there has been a substantial change in circumstances under paragraph (a) and the terms of a current support order shall be rebuttably presumed to be unreasonable and unfair if:
>
> (1) the application of the child support guidelines in section 518A.35, to the current circumstances of the parties results in a calculated court order that is at least 20 percent and at least $75 per month higher or lower than the current support order . . . .

Minn. Stat. § 518A.39, subd. 2(b) (2016). "When the 20% . . . difference is shown, the presumption of substantial change arising therefrom is irrebuttable." *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009).

In modifying child support, the district court noted that it had imputed annual income to mother of $42,000 when establishing father's child-support obligation in 2011. The imputation was based on the parties' 2008 judgment and decree. The findings of fact supporting the judgment and decree state, "[Mother's] personal earning ability is $42,000 per year, or $3,500 gross per month." The district court found that mother's current gross income is $52,500. Thus, the district court correctly reasoned that mother's gross income had increased by 25% since the last child-support order.

Moreover, when father's child-support obligation was established in 2011, it was based on the 50/50 parenting-time allocation in the original judgment and decree.[4] The district court here applied the child-support guidelines to the parties' current incomes and current 36/64 parenting-time schedule. The district court found that "[w]hile the original child support amount . . . resulted in [father] paying [mother] $1,116.00 per month, the current circumstances result in [mother] paying [father $736] in basic child support." The district court reasoned that "it is obvious that there is a change in circumstances," found the change to be substantial, and concluded that it was appropriate to modify child support.

Assuming a 36/64 parenting-time schedule, we do not discern error in the district court's determination that the statutory standard for modification was satisfied. However, because we are reversing and remanding the district court's parenting-time determination

[4] In its 2011 order in this case, the district court granted mother's request for child-support modification and increased father's monthly support obligation to $1,044. In doing so, the district court based father's child-support obligation on the 50/50 parenting-time allotment in the parties' original judgment and decree. *After* the district court granted mother's request for child-support modification using the 50/50 parenting-time allotment, the district court increased father's parenting time to 64%.

and that determination underlies the district court's determination regarding the modified amount of child support, we also reverse and remand the district court's child-support determination. *See* Minn. Stat. § 518A.36, subd. 2 (2014) (providing an obligor a parenting-expense adjustment based on "the percentage of parenting time allowed to the obligor"). Even though we reverse and remand that determination, we briefly address mother's argument that the district court erred by denying her request to eliminate her basic support obligation.

In district court, mother argued that if she became the child-support obligor under the guidelines because parenting time was not amended to a 50/50 schedule, the district court should deviate downward from the guidelines to eliminate her basic support obligation under Minn. Stat. § 518A.43 (2016). Minn. Stat. § 518A.43, subd. 1, provides that "deviation from the presumptive child support obligation . . . is intended to encourage prompt and regular payments of child support and to prevent either parent or the joint children from living in poverty." The statute requires the district court to consider several factors when determining whether to deviate downward from the presumptive child-support obligation under the guidelines. *Id.* These factors include the resources and debts of each parent, as well as "the standard of living the child would enjoy if the parents were currently living together, but recognizing that the parents now have separate households." *Id.*, subd. 1(1), (3).

Mother specifically relied on Minn. Stat. § 518A.43, subdivision 1a, which authorizes the district court to deviate from the presumptive support obligation and "elect not to order a party who has between ten and 45 percent parenting time to pay basic support

where such a significant disparity of income exists between the parties that an order directing payment of basic support would be detrimental to the parties' joint child." In mother's memorandum supporting her motion to deviate from the child-support guidelines, she argued that requiring her to pay child support was detrimental to the parties' joint children because it diverts money she needs for car and house repairs. Mother also submitted an affidavit listing her current expenses and showing a monthly budget deficit.

The district court refused mother's request for deviation. In doing so, the district court found that father's annual gross income is $142,000 and that mother's annual gross income is $52,500. The district court acknowledged that father's income "is more than twice" mother's income, and that since 2011, mother "has been a recipient of public assistance, invaded her IRA/401(k), and filed Chapter 7 bankruptcy." The district court nonetheless rejected mother's argument that requiring her to pay guidelines child support based on a 36/64 parenting-time schedule "would put her back in a financial state in which she would be unable to meet the basic needs of herself and the children." The district court noted that father disputed mother's "characterization of her finances which suggest[s] that she is nearly destitute." The district court also noted that father objected to the list of expenses that mother provided in support of deviation because they were "not accompanied by any documentation or supporting evidence."

The district court explained its refusal to deviate from the guidelines as follows:

> [I]t is unclear to the Court how requiring [mother] to pay child support according to the guidelines would be detrimental to the parties' joint children. While she briefly addresses her previous financial woes and current expenses, her argument for

> deviation of child support relies primarily on the fact that [father] earns significantly more money than [her].

On this record, it is not apparent that the district court adequately considered facts that could support a child-support deviation. We note that when father paid mother $1,116 per month in child support, mother had annual resources of $65,892 ($52,500 in gross income plus $13,392 in child-support payments from father). Under the modified order, mother's annual resources are reduced by nearly 34% to $43,668 ($52,500 in gross income less $8,832 in basic child-support payments to father). These figures should factor into the district court's deviation determination. In addition, the district court should make findings regarding mother's actual expenses to enable appellate review. If the district court again concludes, on remand, that application of the child-support guidelines to the parties' current circumstances results in mother becoming the child-support obligor, the district court shall reconsider mother's request for deviation, make adequate findings regarding any relevant deviation factor(s), and explain how its findings support its decision.

III.

Mother's third argument is that the "[d]istrict [c]ourt misapplied the law when it found that one of her two issues in her motion to amend was improper." This court reviews a district court's denial of a motion for amended or additional findings for an abuse of discretion. *See Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006).

Under Minn. R. Civ. P. 52.02, a party may move the district court to amend its findings or make additional findings and to amend the judgment accordingly, if the

judgment has been entered. The moving party must do more than reargue a prior motion, which is only appropriate in a motion to reconsider. *Lewis v. Lewis*, 572 N.W.2d 313, 315-16 (Minn. App. 1997), *review denied* (Minn. Feb. 19, 1998), *overruled in part by Madson v. Minn. Mining & Mfg. Co.*, 612 N.W.2d 168 (Minn. 2000); *see also State ex rel. Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd.*, 673 N.W.2d 169, 178 n.1 (Minn. App. 2003) (explaining that *Madson* only partially overruled *Lewis* and that "[d]istrict courts should, therefore, continue to use *Lewis* to determine whether a motion for amended findings has the necessary components and, if it does, then address whether to grant the motion"), *review denied* (Minn. Mar. 16, 2004).

The district court found that mother's "motion for amended findings as it relates to the modification of parenting time is inappropriate" and that mother's arguments "regarding the modification of parenting time are only appropriate in a motion to reconsider." The district court further found that because mother did not request leave of the court to move for reconsideration as required by the Minnesota General Rules of Practice, her "request for amended findings regarding parenting time is improper and should be denied." Mother argues that the district court's findings are prejudicial because they might result in her being labeled "litigious or frivolous."

At the hearing that resulted in the challenged findings, mother argued that the children do not have a primary residence, that the children's primary residence is a geographic location, and that the district court should analyze her request for equal parenting time under the best-interests standard. In her motion to amend, mother argued that "[a] primary residence was never explicitly stated in the divorce decree nor in a

subsequent Order," that "primary residence may mean geography," and that the district court "erred in not using the best[-]interests standard." Because the portion of mother's motion to amend regarding parenting time reargued the position she articulated at the original motion hearing, the district court did not abuse its discretion by concluding that mother's argument was not presented in the proper form.

IV.

In her reply brief, mother argues that "[t]his court must strike or disregard any statement or documents where [father] did not cite to the record, used alternative facts, did not use caselaw, or otherwise did not properly support his arguments."

The Minnesota Rules of Civil Appellate Procedure govern civil appeals. Minn. R. Civ. App. P. 101. Rule 127 states that "[u]nless another form is prescribed by these rules, an application for an order or other relief shall be made by serving and filing a written motion for the order or relief." Minn. R. Civ. App. P. 127. Because mother did not serve and file a written motion, her request to strike is not properly before this court, and we do not consider it.

Affirmed in part, reversed in part, and remanded.