STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1664

In Re the Marriage of: NaCole LaVae Ferden, petitioner,
Appellant,

vs.

Kristopher Kollen Ferden,
Respondent,

County of Clay,
Intervenor.

Filed August 28, 2017
Affirmed
Connolly, Judge

Clay County District Court
File No. 14-FA-11-939

NaCole L. Ferden, Fergus Falls, Minnesota (pro se appellant)

Kristopher K. Ferden, Moorhead, Minnesota (pro se respondent)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Toussaint, 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

CONNOLLY, Judge

Appellant-mother challenges the granting of respondent-father's motion to modify custody, arguing that the district court abused its discretion in granting the motion. Appellant also argues that the district court was biased against her and violated the rules of judicial conduct. Because the evidence supports the district court's findings, there is no improper application of the law, and we see no bias, the decision is affirmed.

FACTS

Appellant NaCole Ferden and respondent Kristopher Ferden are the parents of two sons, M., now 12, and E., now nine. The parties' marriage was dissolved in 2011, when M. was six and E. was three. Appellant was granted sole physical custody of them; the parties had joint legal custody. Respondent had weekend and weekday parenting time, but did not exercise his weekday parenting time because he worked out of town during the week.

In 2013, the children and appellant were living with her boyfriend, with whom she had a joint child. M. and E. witnessed the boyfriend's physical and verbal abuse of appellant and appellant's violent behavior. Appellant and the children, then eight and five, moved from Moorhead, where both parties lived, to Fergus Falls, which is about 55 miles away; this made exercising parenting time difficult for respondent. Respondent moved in with his girlfriend, who had a son about the age of E.

In 2015, respondent married his girlfriend and was promoted so that he no longer worked away from home during the week. He filed a motion to modify custody, seeking sole physical and sole legal custody. Appellant opposed the motion.

The district court appointed a guardian ad litem (GAL) for the children; in her report, the GAL recommended denying respondent's motion. During 2016, four hearings were held on the motion. The GAL filed a supplementary report, again recommending that the motion be denied. In July 2016, the district court ordered that the children spend alternate weeks with each party during the summer, an arrangement that proved successful. In August, the district court granted respondent's motion for sole physical custody but denied his motion for sole legal custody.

Appellant now argues that the change of physical custody was an abuse of the district court's discretion; she also argues that the district court was biased against her.[1]

D E C I S I O N

"Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). "Even though the [district] court is given broad discretion in determining custody matters, it is important that the basis for the court's decision be set forth with a high degree of particularity." *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989) (quotation omitted). The law "leaves

[1] Both parties are pro se on appeal; respondent has been pro se throughout the custody dispute, while appellant was represented by counsel until shortly before the filing of the notice of appeal.

scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000).

"[A] court shall not modify a prior custody order . . . unless it finds . . . that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child." Minn. Stat. § 518.18 (d) (2016). The district court found that changes in respondent's circumstances had occurred between 2011 and 2016: respondent had acquired a job that did not require him to be gone during the week, a stable relationship, and a stable residence.

The 12 factors to be considered in determining a child's best interests are set out in Minn. Stat. § 518.17, subd. 1(a) (2016). The district court made meticulous and objective findings as to the impact of each of these factors on granting respondent's motion to have the boys live with him in Moorhead rather than with appellant in Fergus Falls.

1. Effect of the change on the children's physical, emotional, spiritual, and other needs. This factor would "slightly favor[]" granting respondent's motion because the boys "would no longer be exposed to the apparent volatility of [appellant's] emotions to the extent that they are now."

2. Accommodating the children's special medical, mental health, or educational needs. This factor is neutral because M., who needs counseling and therapy services, could continue to receive them in Moorhead at a larger facility.

3. The children's reasonable preferences. This factor is neutral because "the children love both of their parents very much and largely enjoy the time that they spend with them."

4. Implications of domestic abuse, if any. This factor favors granting respondent's motion because the children "witnessed both physical and verbal abuse" of appellant by her former boyfriend; they "expressed fear that [the boyfriend] would attempt to find and kill [appellant]"; "[t]his fear was most certainly fueled by the fact that [appellant] shared her own feelings of fear" with them; they "are more afraid of what will happen to [appellant] than they are of anything else related to the past occurrences of violence"; and their fear "appears to be based more on the fear instilled by [appellant] rather than the current reality."

5. Either parent's physical, mental or chemical health issue, if any. This factor favors granting respondent's motion because appellant has mental-health issues, specifically anger-management issues, that have had a negative effect on the children and that have not been treated. "The custody arrangement proposed by [r]espondent would allow [appellant] a greater opportunity to address her own issues and ultimately become a less volatile individual when she is in the presence of the minor children."

6. History of each parent's care for children. This factor slightly favors denying respondent's motion because appellant "has an established history of physically caring for the minor children." However, she was unable to "hold down a steady job" or to "establish a long-term home for the minor children and moved them between various homes, hotels, and apartments including those of her romantic interests at the time," while respondent

"kept a consistent job, made child-support payments, and maintained a suitable domicile for the minor children when he chose to exercise his parenting time."

7. Each parent's willingness and ability to care for the children. This factor favors granting respondent's motion because he, with his wife, has "a well structured, stable household with the resources necessary to raise a family" and "has lived in Moorhead for several years and intends to remain in his current situation for the foreseeable future," while appellant "has a history of moving between various jobs and homes [and] . . . would consider moving out of Fergus Falls if a better opportunity presents itself"; and has a "current boyfriend [who] is a Fargo, N.D.[,] resident." Respondent has done almost all the driving to facilitate his parenting time; appellant "often creates unpleasant parenting-time exchanges and has a history of interfering with phone calls between the minor children and [r]espondent," who has "a greater ability to guarantee future stability in providing consistent care for the minor children."

8. Effect of a change of home, school, and community on the children. This factor favors granting respondent's motion because, until the children moved to Fergus Falls when they were eight and five, they lived in the Fargo-Moorhead area; M.'s disciplinary issues at school began after the move to Fergus Falls; week-long visits to respondent during the summer of 2016 went well; and E. has a strong bond with respondent's wife's son, who lives primarily with her and respondent.

9. Effect of change in custody on children's relationships with each other, their parents, and others. This factor is neutral because the children have friends and extended

family in both Fergus Falls and Moorhead. Moreover, they "seem to be attached to both parents and that attachment will probably not fade regardless of the custody arrangement."

10. Effect on the children of maximizing or limiting time with each parent. This factor favors granting respondent's motion because "[appellant] has unaddressed anger issues and volatile emotions which she exposes to the minor children on a regular basis" and "[u]ntil these issues are dealt with[,] the court believes it to be in the best interests of the minor children that [appellant's] time with the children be more limited than it is [now.]"

11. Disposition of each parent to support the children's relationship with the other parent. This factor favors granting respondent's motion because he "has consistently provided transportation to and from [appellant's] residence and no allegations have been made that he has retained the minor children beyond the time constraints of the current parenting time schedule" while appellant has "interfered with [his] parenting time in the past," including his "phone calls to the minor children, [by] angry outbursts during parenting time exchanges or outright denying scheduled parenting time" and "seems to have an inherent difficulty with temporarily surrendering the minor children to [r]espondent."

12. Willingness and ability of each parent to cooperate in raising children. This factor did not overcome the presumption in favor of joint legal custody and was neutral in regard to physical custody because "[b]oth parents have demonstrated an inability to cooperate" in raising the children and "[i]t is likely that [they] have spoken to the minor

children about this highly contentious custody battle" and "have occasionally expressed their disdain of [each other] in the presence of the minor children."

Thus, the district court concluded that four of the 12 factors were neutral, one favored denying respondent's motion, and seven favored granting his motion. Given that the law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations," *Vangsness*, 607 N.W.2d at 477, there is no basis to reverse the district court's determination.

The district court acknowledged that the GAL had recommended denying respondent's motion, but noted that "the court's own legal analysis simply result[ed] in a different conclusion than that arrived at by the [GAL]." *See Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993) (a district court has discretion to contradict a GAL's recommendation if its own analysis of the best-interest factors results in a different outcome), *review denied* (Minn. Jan. 26, 1994). The GAL noted that appellant "has perhaps shared too much adult information with the children" and "sometimes inappropriately allows her emotions and feelings to show in front of the children as well," but did not see this as a reason to modify custody. The district court, in contrast, said repeatedly (in regard to factors 1, 5, 7, 10, and 11) that appellant's unaddressed anger-management issues need to be addressed and that, until they are addressed, the children will do better in respondent's custody.

Finally, appellant argues that the district court was biased against her. In reviewing claims of judicial bias, an appellate court considers whether the district court "considered arguments and motions made by both sides, ruled in favor of a complaining [party] on any

issue, and took actions to minimize prejudice to the defendant." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008). Here, the district court considered each of the 12 factors in terms of each party and concluded that some factors were neutral and that one favored appellant. Thus, the district court's opinion does not reflect bias.

Appellant claims that bias was shown when, during the evidentiary hearings, the district court initially ordered a psychological evaluation of her and not of respondent. An appellate court will grant a new trial because of judicial bias only in the rare cases where the remark of a district court was so prejudicial to one party that it rendered a fair and impartial result improbable. *Fortier v. Ritter's Hairdressing Studios, Inc.*, 282 Minn. 382, 386, 164 N.W.2d 897, 899-900 (1969). But, after receiving a letter from the GAL requesting that both parties have psychological evaluations, the district court issued an order "[t]hat both parties shall submit to psychological evaluations by qualified clinical or forensic psychologists, focusing on the party's fitness for parenting, and that such psychological evaluations be completed within 60 days of this Order." Thus, any prejudice to appellant was mitigated by the district court's second order, and the district court's original order that appellant have a psychological evaluation was not so prejudicial as to render a fair result improbable. *See id*. In any event, because appellant said the cost of the evaluation was prohibitive and she was not able to pay it, the district court vacated the order for the parties to complete psychological evaluations, and neither party did so. Appellant's claim of judicial bias is without merit.[2]

[2] Appellant's allegations as to past violations of the rules of judicial conduct are irrelevant.

We see no basis for questioning, much less reversing, the district court's balancing of the best-interests factors.

Affirmed.