STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0074

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

vs.

Michael David Levy,
Respondent.

Filed December 10, 2018
Affirmed; motion denied
Reyes, Judge

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

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

Kay Nord Hunt, Marc A. Johannsen, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondent)

Caroline B. Heicklen, Jones Day, Minneapolis, Minnesota (for amicus Minneapolis Chapter of NAACP)

Considered and decided by Florey, Presiding Judge; Ross, Judge; and Reyes, Judge.

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

REYES, Judge

In this marital-dissolution appeal, pro se appellant-mother argues that the district court abused its discretion in: (1) denying her motion to disqualify the referee for bias and prejudice; (2) failing to obtain confirmation of the referee's decision to interview the

parties' minor child; (3) taking judicial notice without giving her an opportunity to be heard; (4) denying her a deviation from the presumptive child-support obligation guidelines; and (5) omitting consideration of race in its evaluation of a parenting-time modification. Respondent-father cross-appeals, challenging the district court's findings of fact regarding each parties' litigiousness and credibility. We affirm.

FACTS

Appellant-mother Sheree Rosett Curry (mother) and respondent-father Michael David Levy (father) married in 1999. Their marriage dissolved in August 2008. The parties had two minor children during the marriage. A first referee presided over the parties' case until 2016, when the parties' case was reassigned to a second referee (the referee). Beginning in 2016, the parties brought various motions focused on requests for modifications of parenting time and child support. In August 2016, mother appealed a district court decision to this court. We reversed in part and remanded to the district court for consideration of additional factors to determine the children's primary residence, and re-consideration of the parenting-time division and the parties' child-support obligations.

Father moved to request, among other things, that the referee interview the younger of the parties' minor children to obtain his preference on a proposed modification of parenting time. Mother filed new motions, seeking modification of parenting time and a downward deviation from the presumptive child-support-obligation guidelines. At a two-day motion hearing, on July 20 and 21, 2017, both parties presented arguments on the issue of interviewing the minor child. During the hearing, the referee informed the parties that he would be taking judicial notice of "all adjudicated facts in the file, specifically all prior

orders by [the first referee] or any other judicial officer and the Court of Appeals decisions." After the first day of the hearing, the referee sent an e-mail to all parties, indicating that he would interview the minor child. Mother unsuccessfully petitioned this court for a writ of prohibition that same day, seeking to preclude the interview. On the second day of the motion hearing, the referee stated on the record his reasons for wanting to interview the minor child, and he interviewed the child later that day.

Mother filed a motion to strike the interview of the minor child. In her affidavit, she also included a request for the referee to disqualify himself from the case, alleging that he exhibited bias or prejudice against her. Mother cited to a variety of cases from approximately seventeen years ago when the referee had been a prosecutor. These cases involved prosecutorial misconduct by the referee, including inappropriately inviting jurors to apply racial and socio-economic considerations to their fact-finding when race should have been irrelevant. Mother, an African-American woman, argued that these cases suggested that the referee harbored latent bias or prejudice against minorities.

The referee issued an order on remand (1) denying mother's request for parenting-time modification based on a more in-depth determination of the childrens' primary residence; (2) amending mother's basic child-support obligation but denying her request for a downward deviation; and (3) implicitly affirming the district court's earlier decision to take judicial notice of prior findings and orders in the district court's file. This order also denied mother's request to remove the referee for cause. Mother sent a letter to the chief judge, requesting review of the referee's denial of her motion to remove. The chief judge filed her order in February 2018, denying mother's motion to remove the referee.

Mother filed this appeal. In March 2018, father filed a notice of related appeal, and the National Association for the Advancement of Colored People (NAACP) filed a motion for leave to participate as amicus curiae in support of mother.

D E C I S I O N

I. The district court did not abuse its discretion in denying mother's motion for disqualification.

Mother argues that the referee should have been disqualified for bias or prejudice because of his past race-related misconduct as a county prosecutor. We disagree.

The decision to deny a motion to disqualify a judge based on bias or prejudice will be reversed only upon a showing of an abuse of discretion. *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002). "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality *might reasonably be questioned*, including but not limited to [when] . . . the judge has a personal bias or prejudice *concerning a party*." Minn. Code. Jud. Conduct Rule 2.11(A)(1) (emphasis added).

Mother makes several arguments in support of her position. The NAACP filed an amicus brief in support of mother, raising a pertinent argument. Each argument will be addressed in turn.

A. The referee did not exhibit an appearance of bias.

Mother argues that disqualification was warranted because she satisfied her burden of proof under Minnesota Code of Judicial Conduct Rule 2.11 by citing to the various prior cases in which the referee engaged in race-based misconduct as a county prosecutor. She interprets the "might reasonably be questioned" language of rule 2.11 to mean that, in order

to be disqualifying, she only needs to demonstrate an appearance of bias by the referee without evidence of actual bias against her. Mother's interpretation of the rule is unfounded.

The types of circumstances that warrant disqualification of a judge involve more than a mere "appearance" of bias or prejudice. The plain language of rule 2.11 states that a judge's alleged bias or prejudice must "concern a party" in the current proceeding. *See* Minn. Code. Jud. Conduct Rule 2.11(A)(1). In *Pedro vs. Pedro*, a case mother relies on, this court held that any alleged bias or prejudice is disqualifying only if it "stem[s] from an extrajudicial source *and* results in an opinion on the merits on some basis other than what the judge learned from his participation in the case." 489 N.W.2d 798, 804 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992) (emphasis added). Therefore, in addition to proving that the referee engaged in extrajudicial misconduct, mother had the burden of proving such misconduct resulted in bias or prejudice against her in the current controversy. On appeal, mother fails to point to any evidence that the referee exhibited bias or prejudice against her in the current proceeding or that his past misconduct had an effect on the result of her case. As a result, mother's disqualification claim is unfounded.

B. The district court properly executed the standard for reviewing a motion for disqualification.

Mother argues that it was improper for the chief judge to review the referee's denial of her motion for disqualification because the chief judge was not an unbiased layperson. Mother's argument lacks merit.

Mother relies on a footnote in *State v. Pratt* that discusses the "reasonable examiner" standard for reviewing disqualification cases. 813 N.W.2d 868, 876 (Minn. 2012). Under this standard, the reviewing judge must adopt the perspective of an objective, unbiased layperson with full knowledge of the facts and circumstances. *Id*.

Mother's argument lacks merit for two reasons. First, the facts in *Pratt* are dissimilar because the chief judge in *Pratt* expressly chose to evaluate the motion for disqualification from the perspective of a chief judge, which is not the standard. *Id.* Here, the chief judge cited the correct reasonable-examiner standard in her February 7, 2018 order. Second, it appears that mother misunderstands how the reasonable-examiner standard operates in practice. It requires the chief judge to review the facts *from the perspective* of an unbiased layperson, which the chief judge here did. Therefore, the chief judge properly executed the standard for reviewing a motion for disqualification.

C. Any error in the interpretation of Rule 2.11(A)(5) was harmless.

The NAACP argues that the district court erred by improperly applying *expression unis est exclusio alterius*[1] to Rule 2.11(A). For purposes of this appeal, we will assume that the district court committed error. However, on this record, any error is harmless.

This court reviews questions of rule interpretation de novo. *Walsh v. U.S. Bank*, 851 N.W.2d 598, 601 (Minn. 2014) (citing *Mingen v. Mingen*, 679 N.W.2d 721, 727 (Minn. 2004)). Rule 2.11(A) lists certain circumstances in which a judge must disqualify herself if her impartiality might reasonably be questioned. Minn. Code. Jud. Conduct Rule

[1] Expressing one item of an associated group or series excludes another left unmentioned. *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017).

2.11(A). The "including but not limited to" language indicates that the list is non-exhaustive. This qualification extends to all of Rule 2.11(A)'s subsections, (1) through (5).

Rule 2.11(A)(5) contains a sub-list of disqualifying circumstances that relate to a judge's previous work as a lawyer. Upon close reading of Rule 2.11(A)(5), all of the listed circumstances are characterized by some degree of direct involvement in the matter in controversy. While it is true that the referee's prior conduct in unrelated cases is not covered by any of the listed provisions of the rule, the "including but not limited to" language makes it possible that other circumstances would qualify despite not being expressly listed.[2] Therefore, we conclude that the chief judge erred in determining that the referee's past conduct cannot be a disqualifying circumstance under Rule 2.11(A)(5).

However, here this error was harmless. As previously noted, the rule itself and the caselaw related to disqualification for bias or prejudice makes clear that the judge's extrajudicial conduct must bear some relation to the present matter or result in a biased opinion in the present matter. Mother fails to provide evidence of bias or prejudice by the referee against her in the current proceeding. Therefore, any error was harmless.

[2] "Under [Rule 2.11], a judge is disqualified whenever the judges impartiality might reasonably be questioned, *regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply*." Minn. Code. Jud. Conduct Rule 2.11, advisory comm. cmt. 1 (emphasis added).

II. The district court did not abuse its discretion by interviewing the parties' minor child without first obtaining confirmation by a district court judge.

Mother argues that the referee violated Minnesota Statute § 484.65 (2018) and her due-process rights by holding an evidentiary hearing to interview the parties' minor child without first issuing an order and obtaining confirmation by a district court judge and seeks to have the interview stricken from the record. We disagree.

The application of statutes to undisputed facts is a legal conclusion that we review de novo. *City of Morris v. Sax Invs.*, Inc., 749 N.W.2d 1, 5 (Minn. 2008). Upon conclusion of a case, the referee's recommended findings and final orders are subject to confirmation by a district court judge. Minn. Stat. § 484.65, subd. 10.

Here, the referee held an evidentiary hearing on father's motion to have the court interview the parties' minor child, and granted father's motion. Evidentiary rulings are not final orders. *Matter of Welfare of K.P.H.*, 289 N.W.2d 722, 724 (Minn. 1980). Therefore, the referee did not have to seek confirmation from a district court judge for his ruling on father's motion, and he was not in violation of Minnesota Statute § 484.65. Because the referee did not commit error, we need not evaluate mother's due-process claim.

III. The district court did not abuse its discretion in taking judicial notice of all adjudicative facts in the file.

Mother argues that the district court denied her an opportunity to be heard as to the propriety of taking judicial notice, thus violating her due-process rights, and erred in failing to identify with specificity the parameters of the judicial notice. We address each argument in turn.

A. Mother's due-process rights were not violated.

Mother argues that she was not given an opportunity to be heard pursuant to Minn. Evid. R. 201. This argument is belied by the record.

Under Rule 201, courts may take judicial notice of adjudicative facts in civil cases. Minn. R. Evid. 201(a). "A party is entitled, *upon timely request*, to an opportunity to be heard as to the propriety of taking judicial notice." *Id*. (emphasis added)

The transcripts for the July 20 and 21 hearings indicate that the referee informed the parties that the district court would be taking judicial notice of certain adjudicative facts. At no point during these hearings did mother request an opportunity to be heard on this issue. It was only one month after the second day of the hearing that mother objected to the taking of judicial notice in an affidavit. Mother's objection was not timely as the taking of judicial notice had already occurred.

B. The district court properly specified the parameters of the record that were subject to judicial notice.

Mother argues that the district court abused its discretion in taking judicial notice without specifying the scope of the record implicated because it rendered her unable to anticipate how to defend herself. We disagree.

"A district court's decision whether to take judicial notice of proffered facts is an evidentiary ruling that we review only for abuse of discretion." *Fed. Home Loan Mortgage Corp. v. Mitchell*, 862 N.W.2d 67, 71 (Minn. App. 2015), *review denied* (Minn. June 30, 2015). Court records and files from prior adjudicative proceedings are appropriate subjects for judicial notice. *Matter of Welfare of D.J.N.*, 568 N.W.2d 170, 174-175 (Minn. App.

1997). However, district courts may not take judicial notice of entire files without specifying which parts are being considered. *Id*.

Mother challenges the district court's decision to take judicial notice of what she describes as "all court orders in any district court, for a 10-year period."[3] However, hearing transcripts confirm that the referee specified that the district court would be taking judicial notice of "all the adjudicative facts in the file, specifically all prior orders by [the first referee] or any other judicial officer and the Court of Appeals decisions." The referee articulated, with adequate specificity, the adjudicative facts subject to judicial notice. Therefore, the district court's specification of judicial notice was proper.

IV. The district court did not abuse its discretion in denying a deviation from the presumptively appropriate child-support-obligation guidelines.

We construe mother's argument to be that the district court erred in denying her a deviation from the presumptive child-support guidelines because it incorrectly held that she failed to submit updated documentation of her income. We disagree.

A district court's order regarding child support will be reversed only if we are convinced it abused its broad discretion by resolving the matter in a manner that is against logic and the facts on the record. *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999). In considering whether to deviate from child-support guidelines, district courts consider

[3] Mother contradicts her current argument in her affidavit of August 21, 2017. In that affidavit, mother objects to the court taking judicial notice of "adjudicative facts," arguing that the district court should have taken judicial notice of the "entire record" instead. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (noting that party may not, on appeal, argue issue raised in district court that was argued to district court on different theory).

factors including, but not limited to, all of the earnings, income, and resources of each parent, including real and personal property. Minn. Stat. § 518A.43 (2018). As the party seeking a deviation, mother had the burden of demonstrating why a lower support order is necessary. *See Cty. of Anoka ex rel Hassan v. Roba*, 690 N.W.2d 322, 325 (Minn. App. 2004) (citation omitted).

In May 2017, this court remanded the matter to the district court to determine whether or not a downward deviation of child support should be granted. On remand, the district court found that mother failed to provide updated income and expense information to support her request for a deviation. After a careful and extensive review of the record, we agree with the district court that the documents supplied by mother fall short of satisfying mother's burden under Minn. Stat. §518A.28 to establish a basis for a downward deviation of child support. Because mother failed to supply the record with updated information as to her income, her claim fails.

V. The district court did not exhibit bias toward mother and did not abuse its discretion by omitting consideration of race in its evaluation of parenting-time modification.

Mother argues that the district court exhibited bias towards her and abused its discretion by omitting consideration of race in its evaluation of parenting-time modification. We address each argument in turn.

A. Bias

Mother supports her claim of bias by citing to prior adverse and allegedly erroneous rulings by the district court in her case. Prior adverse rulings, on their own, do not constitute bias. *Greer v. State*, 673 N.W.2d 151, 157 (Minn. 2004). Mother fails to offer

any other reasons or relevant legal authority to support her claim of bias. Therefore, mother's argument is forfeited. *Stephens v. Bd. Of Regents*, 614 N.W.2d 764, 770 n.4 (Minn. App. 2000) (citation omitted).

Even if we considered mother's claim of bias, it lacks merit. In support of her argument, mother cites to the district court's denials of her various motions to modify parenting time. In denying the motions, the district court held that a modification to equal parenting time was not in the best interests of the children because the parties' extensive litigation reflected their inability to co-parent their children cooperatively. The district court highlighted mother's apparent disinterest in co-parenting, "irrespective of whatever detrimental impact it had on the children." Mother argues that this holding reflects bias against her because the parties ceased litigation for the period of 2012 to 2015.

On appeal, mother fails to cite evidence that contradicts the district court's finding. *See* Minn. R. Civ. App. P. 128.02, subd. 1(c) (requiring appellant to cite the evidence supporting, directly or by reasonable inference, the finding of fact appellant is challenging). Instead, mother focuses on allegations of father's bad-faith litigation. Also, while the record supports mother's claim that litigation between the parties ceased for a time, the record shows that the parties' litigious patterns recommenced at the start of 2016. Therefore, we conclude that the district court did not exhibit bias toward mother.

B. Consideration of race

Mother claims that the district court abused its discretion in omitting consideration of race in its evaluation of parenting-time modification.

The district court has broad discretion in determining 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) (citation omitted). A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law. *Id.* (citation omitted).

On appeal, mother fails to provide any relevant legal authority to support her claim. As a result, her argument is forfeited.

Even if we were to consider her claim, it fails. The district court on remand noted that it was reviewing mother's request for parenting-time modification pursuant to Minn. Stat. § 518.175, subd. 5, which states that "all relevant factors" must be considered in evaluating the best interests of the child. Minn. Stat. § 518.17 does not include race as a factor that courts must consider. Therefore, we conclude that the district court did not abuse its discretion in omitting consideration of race in its evaluation, under § 518.17, of parenting-time modification.

VI. The district court did not err in its findings of fact regarding each parties' litigiousness and credibility.

On cross-appeal, father argues that several of the district court's findings of fact regarding the parties' litigiousness and credibility are erroneous and should be amended. We disagree.

This court reviews a district court's finding of fact for clear error. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). A finding of fact is clearly erroneous only if we are left with the definite and firm conviction that a mistake has been made. *Id.*

Father seeks to have certain findings from the chief judge's February 7, 2018 order removed from the record. They consist of:

(1) A finding that "*both* parties have brought a plethora of post-decree motions . . .";
(2) A finding that "[the referee] remained patient and fair while dealing with the *exceedingly litigious parties*"; and
(3) A finding that the referee decided to interview the parties' minor child because he "*found neither party to be credible.*"

Father seeks to have the first and second findings of fact amended because the referee acknowledged in a prior order that most filings in this case were initiated by mother. However, in the same prior order, the referee found that between March 2007 and May 2016, mother filed 113 motions and father filed 78. While it is true that mother initiated more filings than father, he was not far behind her.

Father seeks to have the third finding of fact amended because nowhere in the referee's November 9, 2017 order does the referee cite the parties' credibility as a reason for wanting to interview the parties' minor child. This finding of fact is not erroneous because the referee stated during the July 21, 2017 hearing that the parties' credibility was a motivation for interviewing the parties' minor child. *See* Minn. R. Civ. P. 52.01 (noting that findings may be stated orally and recorded in open court). The chief judge's use of the word "record" includes both trial transcripts and orders. Therefore, while it is true that the referee did not mention the parties' credibility in his prior November 9, 2017 order, the hearing transcript confirms that credibility was a reason why the referee needed to interview the parties' minor child. Therefore, since we are not left with the definite and

firm conviction that the district court made a mistake, we conclude that the district court did not abuse its discretion.

VII. Mother's motion to strike portions of father's reply brief is denied.

On July 26, 2018, mother filed a motion to strike portions of father's reply brief on the ground that father's reply brief addressed new matters not raised in mother's principal brief. We conclude that the arguments raised in father's reply brief constitute permissible rebuttal to mother's arguments on the cross-appeal issues.

A respondent/cross-appellant's reply brief must comply with rule 128.02, subdivision 4, and must be limited to the issues presented by the cross-appeal. Minn. R. Civ. App. P. 131.01, subd. 4(d)(4). Reply briefs are liberally construed to allow appellant to respond to the arguments raised by respondent, even if they are technically new matter. 3 Eric J. Magnuson, David F. Herr & Sam Hanson, *Minnesota Practice* § 128.8 (2017). To the extent that a reply brief offers a rebuttal to the arguments raised by respondent, the brief does not violate rule 128.02. *Goeman v. Allstate Ins. Co.*, 725 N.W.2d 375, 378 (Minn. App. 2006).

Father's reply brief directly rebuts mother's statement in her brief that the challenged findings were not erroneous or that any error was harmless. In view of this court's practice to liberally construe the rule defining the scope of a reply brief, we conclude that father's brief is limited to the cross-appeal issues and does not impermissibly raise new issues.

Affirmed; motion denied.