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*Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-0185**

In re the Marriage of:
Rachel Ann Hughes, petitioner,
Appellant,

vs.

Brian Patrick Selmser,
Respondent

**Filed August 13, 2018**
**Affirmed**
**Worke, Judge**

Itasca County District Court
File No. 31-FA-15-2236

Ellen E. Tholen, Grand Rapids, Minnesota (for appellant)

Christina C. Huson, Jennifer J. Grembowski, Maplewood, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Stauber, Judge.[*]

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[*] 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

**WORKE**, Judge

Appellant argues that the district court abused its discretion by (1) failing to recuse based on a conflict of interest and exhibiting bias, (2) denying her request for sole legal custody of the parties' children, (3) replacing the parties' parenting-time schedule with its own, and (4) failing to interview the parties' daughter to ascertain her parenting preference. We affirm.

## FACTS

Appellant-mother Rachel Ann Hughes and respondent-father Brian Patrick Selmser dissolved their marriage by stipulated judgment in 2015. The parties agreed to joint legal custody of their children while mother retained sole physical custody. The parties stipulated to a parenting-time schedule that would accommodate father's uneven work schedule.

In 2016, the parties' eldest daughter was diagnosed with various health concerns and began therapy when it became clear that a source of these concerns was the parties' divorce. The parties disagreed on the best course of treatment for their daughter. The parties also disagreed on the best way to implement the parenting-time schedule. Father alleged that mother refused to cooperate with the schedule, which affected how often he saw the children and which disrupted the children's routines. Mother countered that it was father's erratic work schedule frustrating the parenting-time schedule. But at a hearing for parenting-time assistance, the district court found that it was mother's "refusal to cooperate consistently with [f]ather and to make the accommodations required" by his work schedule

that primarily hindered father's parenting time. The district court attempted to resolve the parenting-time dispute in an order following the hearing.

In August 2017, mother filed a motion to remove the district court judge, to modify the parenting-time schedule, and to grant her sole legal custody of the children. Mother's request to remove the district court judge was based on a potential conflict of interest because mother was employed as a guardian ad litem in the Ninth Judicial District where this case was being heard.[1]

The district court denied mother's removal request as well as her request for sole legal custody of the children, finding that mother failed to show that it would be in the children's best interests to modify custody. The district court also noted that the parenting-time schedule was "not working" and that "changes need[ed] to be made—both to reduce the on-going disputes and name-calling between the parents . . . [and] to bring more predictability to the [children]." Although the district court acknowledged that parties agreed to the schedule, it found that maintaining the arrangement was not in the children's best interests. The district court modified the parenting-time schedule sua sponte. Mother appeals.

## DECISION

### *Removal*

Mother first argues that the district court abused its discretion by denying her recusal motion based on a conflict of interest. Denial of a recusal motion is within the district

[1] Four judges recused themselves from this matter before it was assigned to the Honorable Paul T. Benshoof. Neither party previously objected to Judge Benshoof's assignment.

court's discretion and should not be reversed absent a clear abuse of that discretion. *Carlson v. Carlson*, 390 N.W.2d 780, 785 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986).

Mother's claim is that her employment as a guardian ad litem for the judicial district created a conflict of interest with the judge. But, as the district court stated, mother is employed by the State of Minnesota, not the Ninth Judicial District and her argument "would disqualify every judge in the state." We agree that mother fails to show a conflict of interest warranting removal, and for this reason, the district court did not abuse its discretion in denying her motion for recusal.[2]

***Legal custody***

Mother next argues that the district erred by failing to schedule an evidentiary hearing on her motion to modify custody. Whether to hold an evidentiary hearing on a custody-modification motion depends on whether the moving party has made a prima facie showing that modification is warranted. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). A prima facie case to modify custody based on endangerment of a child requires four elements:

> (1) a change in the circumstances of the child or custodian; (2) that a modification would serve the best interests of the child; (3) that the child's present environment endangers her physical or emotional health or emotional development; and (4) that the harm to the child likely to be caused by the change of environment is outweighed by the advantage of change.

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[2] On appeal, mother also argues that the district court exhibited bias against her. Mother did not raise this claim in district court and appellate courts generally do not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). For this reason, we decline to consider mother's claim of bias because it is being raised for the first time on appeal.

*Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). A district court's decision regarding whether a party made a prima facie case to modify custody is within the district court's discretion. *Boland v. Murtha*, 800 N.W.2d 179, 183, 185 (Minn. App. 2011), *review denied* (Minn. Oct. 21, 2008). If the moving party fails to make a prima facie case for modification, the district court is required to deny the motion. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981).

The district court determined that mother's request for sole legal custody was based on the parties' disagreement about the best way to treat their daughter's medical condition—far short of the prima facie standard of showing a change in circumstances warranting modification. We agree. In support of her claim, mother cited her disagreements with father over their daughter's medications and an appropriate therapist. Mother did not make a prima facie showing of a change in circumstances, nor did she make a prima facie case that a modification would be in the children's best interests, nor did she make a prima facie case that her daughter's present environment endangered her physical or emotional well-being. Mother's request for sole legal custody was based on disagreements with father, but general disagreements do not meet the burden required to modify custody. Because the district court did not abuse its discretion by ruling that mother failed to make a prima facie case, it was required to deny mother's request to modify custody. *Boland*, 800 N.W.2d at 186.

***Parenting-time schedule***

Mother also argues that the district court erred by modifying the parties' parenting-time schedule sua sponte. The district court has broad discretion in deciding parenting-

time questions and will not be reversed absent an abuse of discretion. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017). "Reversible abuses of discretion include misapplying the law or relying on findings of fact that are not supported by the record." *Id.* (quotation omitted). A district court's findings of fact, on which a parenting-time decision is based, will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978). "It is well established that the ultimate question in all disputes over [parenting time] is what is in the best interest of the child." *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984).

The original stipulation attempted to accommodate father's erratic work schedule, but the district court found that the schedule was "not working" for either of the children. The district court acknowledged that it had unsuccessfully tried to address these problems in a previous order and that the parties' eldest daughter continued to struggle emotionally, which required a change in the status quo. The district court concluded that "changes need[ed] to be made" to reduce disputes and disruptions and to gain predictability. The district court altered the parenting-time schedule on its own accord to address ongoing issues.

Mother claims that there was "nothing unconscionable" about the existing parenting-time schedule and, therefore, the district court should not have replaced it with its own. But, as the district court stated, the overriding issue in this case is "not just a question of hours and days and overnights;" the issue is how to keep the children "safe and healthy." Neither party disputes that their eldest daughter experiences ongoing health issues and that father's work schedule is irregular, meaning that the district court's findings

of fact on these points are not clearly erroneous. Although mother extols the benefits of the original parenting-time schedule, she does little to address the district court's findings and conclusions that the schedule, in practice, was not working in the parties' or the children's best interests. Considering that the district court replaced the schedule out of concern for the best interests of the children—the principal concern in parenting-time disputes—we conclude that the district court did not misapply the law nor did it rely on facts unsupported by the record in crafting its own schedule, and therefore, did not abuse its discretion.

***Interviewing the child***

Mother finally argues that the district court abused its discretion by not interviewing their eldest daughter to determine her parenting preference. A child's reasonable preference is one of many factors courts should take into account when resolving custody and parenting-time disputes. Minn. Stat. § 518.17, subd. 1 (2016). Courts are free to interview a child to ascertain the child's preference, but an interview is not the only way to gauge this preference. *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. App. 1985). Therefore, the decision to interview a child is discretionary for the district court, which we review for an abuse of discretion. *Id.*

The district court declined to interview the parties' eldest daughter because it believed that mother was exerting "significant negative pressures" on the children. We have previously stated that a child's preference should be given only limited weight when it is influenced by a parent. *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 691 (Minn. App. 1989), *review denied* (Minn. June 21, 1989). In *Roehrdanz*, we wrote that the children's

affidavits contained "statutory language not consistent with most teenagers' vocabularies," and we used this determination, in part, to affirm that no change of circumstances warranting custody modification had been demonstrated. *Id.*

Here, the district court cited language by the parties' daughter that it believed was influenced by mother, determining that the daughter's "affidavit contains expressions and words that are simply not the language of a thirteen year old, but instead evidence [her daughter was] aping what she has undoubtedly heard and learned from [mother]." The district court provided a list of expressions in the affidavit that it found suspicious, including repeated use of the phrases "putting us [the children] first" and "put our best interests first." The district court also noted the repeated reference to the children's "best interests." The district court believed that these phrases were unusual for a thirteen-year-old girl, but commonly encountered in mother's profession as a guardian ad litem.

Based on our review of the record, we do not believe that the district court abused its discretion by declining to interview the parties' eldest daughter, who provided an affidavit to the district court explaining her preference. It would be unlikely that interviewing her would reveal new information not already expressed in her affidavit. Further, the district court's decision not to interview the parties' daughter based on suspicions about her vocabulary was not an abuse of discretion. The language used in the affidavit is repetitious and specialized. Combining these suspicions with the fact that the daughter's affidavit clearly outlined her preferences, we conclude that the district court did

not abuse its discretion by declining to interview the parties' daughter to ascertain those same preferences.[3]

**Affirmed.**

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[3] Mother also argues that the district court abused its discretion by relying on secondary sources when it declined to interview the daughter—particularly when the district court discussed its suspicions that mother exerted some form of control over the daughter. We do not comment on the district court's use of these sources but instead, we note that our discussion highlights a sufficient justification for the district court's decision to not interview the daughter, and that this decision was not an abuse of the district court's discretion.