STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0584

In re the Marriage of: Rebekah Lynn Green, petitioner,
Appellant,

vs.

Peter John Graffunder,
Respondent.

Filed December 17, 2018
Affirmed
Larkin, Judge

Dakota County District Court
File No. 19AV-FA-09-3487

Justin R. Anderson, Anderson Law Office, P.A., Elbow Lake, Minnesota (for appellant)

Christine J. Cassellius, Ryan J. Bies, Dougherty, Molenda, Solfest, Hills & Bauer P.A., Apple Valley, Minnesota; and

Mark McDonough, McDonough Wagner & Ho, LLP, Apple Valley, Minnesota (for respondent)

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

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

LARKIN, Judge

On appeal from an order modifying custody and parenting time, appellant-mother argues that the district court failed to adequately consider the preferences of the parties' 15-year-old child in granting respondent-father sole legal and physical custody of the child and requiring that mother's parenting time with the child be supervised. We affirm.

FACTS

Appellant-mother Rebekah Lynn Green and respondent-father Peter John Graffunder are the parents of T.G., born in 2002. Mother and father married on August 8, 2004. On June 21, 2010, the district court dissolved their marriage pursuant to a stipulated judgment and decree. The judgment and decree granted mother and father joint legal custody of T.G. and granted mother sole physical custody of T.G.

In January 2015, the district court found that father had established a prima facie case that T.G.'s environment may have been endangering his emotional health or impairing his emotional development and temporarily granted the parties joint physical and legal custody. In June 2015, the district court temporarily changed T.G.'s primary residence to father's residence so he could attend summer school. In September 2015, mother and father entered into a stipulated temporary order continuing their joint legal and physical custody of T.G. and maintaining father's residence as T.G.'s primary residence for the 2015-2016 school year. In November 2015, the district court continued the parties' temporary joint legal and physical custody of T.G. In February 2017, the district court

amended the judgment and decree pursuant to a stipulation of the parties. The amended judgment and decree grants mother and father joint legal and physical custody of T.G.

On October 11, 2017, mother moved for an order (1) granting her sole physical custody of T.G., (2) changing T.G.'s primary residence during the school year from father's residence to mother's residence, and (3) allowing father one weekend of parenting time per month. Mother also moved for an ex parte order granting her sole physical and legal custody of T.G. and restricting father's parenting time to one weekend per month. On October 26, 2017, father moved for an order (1) granting him sole physical and legal custody of T.G., (2) restricting mother's parenting time to supervised parenting time, (3) requiring mother to participate in and share expenses for T.G.'s therapy, (4) appointing a special parenting arbitrator, and (5) holding mother in contempt.

On January 3, 2018, the district court held a hearing regarding the parties' motions, at which father, mother, T.G.'s therapist, two of T.G.'s teachers, and T.G.'s maternal grandmother testified. During the hearing, mother's counsel noted that he had informed the district court that mother planned to call T.G. to testify. The district court declined to rule whether T.G. could testify, and father called T.G.'s therapist as the first witness.

T.G.'s therapist testified that T.G. had an unhealthy, skewed view of mother and father. She testified that mother was the "'favored' or 'in-parent,'" that father was the "'out' or the 'targeted' parent," and that T.G. believes that "[mother] is great and wonderful and everything is great there" but there are "all sorts of problems with [father]." T.G.'s therapist testified that when she asks T.G. to talk about his problems with father, "he has a very hard time being concrete about what the issues are" or mentions an example from a

few years ago, yet T.G. immediately brushes away any problems with mother. T.G.'s therapist testified that T.G. has too much contact with mother, that mother and T.G. have "secretive contact," and that T.G. uses a "secret code word" with mother when he "wants to indicate there's some issue going on." T.G.'s therapist further testified that she had concerns that mother's communications with T.G. are damaging the relationship between T.G. and his father.

During cross-examination, mother's counsel asked T.G.'s therapist whether T.G. should testify at the hearing. T.G.'s therapist opined that it was a "really bad idea" because it "puts him in an incredible position of loyalty." She testified that she believed that T.G. loved both of his parents and that having him testify and say negative things about either parent would be potentially damaging for him. She also testified, based on her review of T.G.'s past court documents, that he seemed to "flip-flop an awful lot," saying "one thing to one doctor and then tak[ing] it back to another." T.G.'s therapist testified that T.G.'s preference should not be given much weight because of his "emotional immaturity" and because he does not see the full effect of "the bind that he is in with his parents."

After T.G.'s therapist testified, the parties argued to the district court regarding whether T.G. should testify or be interviewed by the district court in chambers. The district court ultimately did not allow T.G. to testify or be interviewed, reasoning as follows:

> In light of what the therapist said, I'm concerned about putting the child on. To the extent that we'd have the child—the inquiry be performed by the Court outside the presence of the parents[.] . . .
>
> To the extent that it doesn't happen in the presence of the [parties], if I reference in any manner the decision or might

> even reflect—I mean, a parent might read the decision and determine that the only way I could have gone that route or find that is because of the child. I think that puts this child in a tough spot.
>
> So for that reason I'm not inclined to have the child testify in this case.

Following the hearing, the district court granted father sole legal and physical custody of T.G., ordered mother's parenting time to be supervised, appointed a parenting-time expeditor, and otherwise denied the parties' motions. The district court noted that "[T.G.]'s placement preference is deemed, in the opinion of his therapist, of limited value due to his immaturity and the undue influence by contact with [mother]" and reasoned that "[t]he child's opinion is, therefore, not of assistance to the court." Mother appeals.

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). The district court's findings must be sustained unless they are clearly erroneous. *Id.* "When determining whether findings are clearly erroneous, an appellate court views the record in the light most favorable to the [district] court's findings." *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). And "appellate courts defer to [district] court credibility determinations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). In reviewing a custody determination, the law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Id.* at 477.

The district court may not modify a prior custody order unless it finds, upon the basis of facts that have arisen since the prior order or that were unknown to the court at the time of the prior order, 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) (2018). A party seeking an endangerment-based modification of a child-custody order must show (1) the circumstances of the child or custodian have changed; (2) modification would serve the child's best interests; (3) the child's present environment endangers his physical health, emotional health, or emotional development; and (4) the benefits of the change outweigh its detriments with respect to the child. *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017); *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997).

"In evaluating the best interests of the child for purposes of determining issues of custody and parenting time, the [district court] must consider and evaluate all relevant factors," including the 12 factors listed in Minn. Stat. § 518.17, subd. 1(a) (2018). One of the best-interest factors that the district court must consider is "the reasonable preference of the child, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference." Minn. Stat. § 518.17, subd. 1(a)(3). "[T]he custodial preference of a child capable by reason of age and intelligence of expressing a preference is entitled to weight in determining which of the parents is to be awarded custody." *LaBelle v. LaBelle*, 207 N.W.2d 291, 293 (Minn. 1973).

Mother contends that the district court "failed to properly evaluate the best interests of the child for purposes of determining issues of custody and parenting time by failing to consider the testimony or preference of [T.G.]."

The district court determined that T.G.'s opinion was "not of assistance to the court" because T.G.'s therapist deemed T.G.'s placement preference to have "limited value due to his immaturity and the undue influence by contact with [mother]." That determination is supported by the district court's findings regarding mother's conduct, which are not challenged on appeal. For example, the district court found that mother has made meritless allegations of abuse against father and that mother has induced T.G. to make false claims of abuse and neglect. The district court also found that mother made over 58 calls to T.G. in a 56-day period and sent him over 100 text messages in a single month. In these text messages, mother told T.G. "that [he] was disrespected when disciplined by [father], that [father] was 'cheap' not to pay him to do chores," "that [mother] did not care if she and [T.G.] arranged secret meetings without [father's] knowledge," and that he should "ask [father] if he could live with [mother]." Finally, the district court found that T.G.'s "relationship with [father] has issues which have been caused, in part, and aggravated by [mother]."

Mother criticizes the district court's reliance on T.G.'s therapist's opinion regarding T.G.'s proposed testimony. She notes that T.G.'s therapist only had eight therapy sessions with T.G. prior to the hearing, that only one of the sessions was with T.G. alone, that father attended the other therapy sessions, and that T.G.'s therapist only had one telephone conversation with mother while in a session with T.G. Mother also notes that "[t]here was

no guardian ad litem appointed in this case who was able to advocate for the child's wishes or assert the child's preferences" at the hearing. Mother's criticism might influence us more if T.G.'s therapist's opinion was the only support for the district court's determination that T.G.'s preference was "not of assistance to the court." However, any concerns regarding the extent of contact between T.G. and his therapist are mitigated by the district court's unchallenged findings regarding mother's undue influence on T.G. Moreover, we generally defer to the fact-finder's credibility determinations and weighing of the evidence. *In re Welfare of T.D.*, 731 N.W.2d 548, 555 (Minn. App. 2007), *review denied* (Minn. July 17, 2007).

Mother also criticizes the district court for failing "to consider the request of [T.G.] in making its determination" regarding custody and parenting time. Father counters that the district court "considered [T.G.'s] preference in the best interest analysis after it excluded [him] from testifying," that the district court was aware of T.G.'s "preference for his mother over his father," and that the district court "simply found that the preference was not of assistance to the court." For the reasons that follow, we need not determine whether the district court did not consider T.G.'s preference or considered that preference and gave it no weight because, under the circumstances of this case, neither approach would constitute an abuse of discretion.

Normally, it is important for the district court to consider the wishes of a child in making a custody determination. *LaBelle*, 207 N.W.2d at 293; *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991); *Lundell v. Lundell*, 387 N.W.2d 654, 658 (Minn. App. 1986). However, the district court need not consider a child's custodial preference if the district

court does not deem the child to "be of sufficient ability, age, and maturity to express an independent, reliable preference." Minn. Stat. § 518.17, subd. 1(a)(3). This court has previously affirmed a district court's decision not to make a finding regarding children's preferences when there was "evidence in the record to support a finding that the children had been coached and that their expressed preferences were not reliable." *Schwamb v. Schwamb*, 395 N.W.2d 732, 735 (Minn. App. 1986). Because evidence in the record supports the district court's findings regarding mother's undue influence on T.G., it was within the district court's discretion not to consider T.G.'s preference.

Moreover, a child's preference should generally be "given weight to the extent that it might bear on the child's emotional well-being." *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 691 (Minn. App. 1989), *review denied* (Minn. June 21, 1989). The age of a child is a "critical factor" in deciding what weight to give to the child's preference. *Ross*, 477 N.W.2d at 756. The choice of an older teenage child is normally "an overwhelming consideration in determining the child's custody." *Id.* But the district court should only give that preference weight when the court is "convinced that it is not the product of manipulation by [a] parent." *Roehrdanz*, 438 N.W.2d at 691. When a child's preference is inappropriately influenced by a parent, it is not determinative of the child's best interests. *Id.* Thus, just as evidence of mother's undue influence on T.G. was a permissible basis for the district court to decline to consider T.G.'s preference, it was also a permissible basis for the district court to give that preference little weight when making its custody and parenting-time decisions.

Mother argues that the district court's failure to interview T.G. in chambers "did not properly allow the court to consider the child's preference or accurately evaluate the child's present environment and danger to the child that was alleged by [her]." The district court "may interview [a] child in chambers to ascertain the child's reasonable preference as to custodian, if the court deems the child to be of sufficient age to express preference." Minn. Stat. § 518.166 (2018). But "[a]n interview is not the only way to determine a child's preference." *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. App. 1985). "Whether to interview children to ascertain their preferences as to custody is within the [district] court's discretion." *Knott v. Knott*, 418 N.W.2d 505, 509 (Minn. App. 1988); *Kramer v. Kramer*, 372 N.W.2d 364, 366 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985); *Madgett*, 360 N.W.2d at 413. "In cases . . . where [a child has] been coached and already subjected to the persuasions of one or both parents, it is within the [district] court's discretion to refuse such an interview." *Schwamb*, 395 N.W.2d at 735.

T.G.'s therapist testified that mother was the "'favored' or 'in-parent'" and father was the "'out' or the 'targeted' parent." T.G.'s therapist also testified that T.G. believes that "[mother] is great and wonderful and everything is great there" and that there are "all sorts of problems with [father]." And the district court expressly found that T.G.'s "relationship with [mother] is strong" and his "relationship with [father] has issues which have been caused, in part, and aggravated by [mother]." In sum, the district court's findings indicate that it understood that T.G. preferred mother over father. Thus, it was not necessary for the district court to interview T.G. to ascertain his preference, and its failure to do so was not an abuse of discretion.

Mother also argues that because the district court did not interview T.G., it could not "determine whether [his] current environment and interaction with his father endangered him based on the household dynamic or issues the two have." Again, the district court may interview a child in chambers under Minn. Stat. § 518.166 to "ascertain the child's reasonable preference as to custodian." The plain language of Minn. Stat. § 518.166 does not suggest that an in-chambers interview should be used to investigate or uncover endangerment as mother suggests.

In sum, the district court did not abuse its discretion by deciding that T.G.'s placement preference was "not of assistance to the court" in making its custody and parenting-time determinations. Because mother does not assign any other error to the district court's custody and parenting-time determinations, we affirm.

Affirmed.