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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1852

In re the Custody of: B. L. F.

Cherries Chamberlain,
Appellant,

vs.

Neil Fleahman,
Respondent.

Filed August 12, 2019
Affirmed in part and reversed in part
Bjorkman, Judge

Anoka County District Court
File No. 02-FA-10-619

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Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Smith, John, 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

BJORKMAN, Judge

Appellant-mother challenges district court orders declining to modify child custody, modifying parenting time, and directing her to pay child support. We reverse the portion of the order requiring her to pay medical support, but otherwise affirm.

FACTS

Appellant Cherries Chamberlain and respondent Neil Fleahman are the parents of B.L.F., born in 2007. In April 2010, the district court issued an order for protection (OFP) requiring the parties to have no contact with each other. The OFP did not specifically find that abuse occurred. Three months later, consistent with the parties' stipulation, the court adjudicated Fleahman as B.L.F.'s father, granted the parents joint physical and legal custody of the child, and established an equal parenting-time schedule. The July 2010 order states that the parties

> agree to continue residing in either the Anoka or Coon Rapids school attendance areas at least until the minor child reaches school age. At that time, the parties agree that the minor child shall be enrolled in either the Anoka or Coon Rapids school attendance area unless the parties agree otherwise.

In subsequent orders issued between 2013 and 2015, the district court declined to modify custody and parenting time, set father's basic child-support obligation, and established a holiday parenting-time schedule. In 2015, the district court set father's basic child support at $366 per month.

In August 2017, father moved the district court to enforce the school-attendance provision because mother had moved to Rosemount and enrolled B.L.F. in an online school

for the 2017-18 school year. Father also requested sole physical custody and the right to make all school decisions for the child. In response, mother moved for sole legal custody, a reduction of father's parenting time, and the authority to decide where the child should attend school. The district court ordered an evidentiary hearing on father's custody-modification motion after finding that he had established a prima facie case of child endangerment related to the lengthy commute to and from mother's new home. But the court denied mother's motion without a hearing, finding her allegations insufficient because they were stale, not based on personal knowledge, or based on isolated incidents.

Following an evidentiary hearing, the district court denied father's motion to modify legal custody, but directed B.L.F. to attend school in the Anoka-Hennepin or Coon Rapids districts and modified parenting time. The new parenting-time schedule is seasonal. During the school year, B.L.F. resides with father and mother has parenting time on Wednesday nights until 7:30 p.m. and every other weekend. During the summer, the schedule is reversed. The district court determined that the new schedule does not modify custody because mother still has 45% of the parenting time—a "nearly equal" split. The June 2018 order also directs the parties to appear at a subsequent hearing to address child support.

Following the child-support hearing, the district court found that father has gross monthly income of $5,580.45, and mother is voluntarily unemployed with imputed gross monthly income of $1,022.31. The child-support order requires mother to pay basic

support of $50 per month, medical support of $30 per month, and 15% of the child's unreimbursed medical/dental expenses. Mother appeals.[1]

D E C I S I O N

I. The district court did not abuse its discretion by determining that mother did not establish a prima facie case for modifying custody.

A party seeking to modify custody based on child endangerment must demonstrate a prima facie case to obtain an evidentiary hearing. *Christensen v. Healey*, 913 N.W.2d 437, 440 (Minn. 2018); *see* Minn. Stat. § 518.18(d)(iv) (2018). A prima facie case is established by allegations that (1) a change in circumstances exists with regard to the child or custodial parent, (2) modification would serve the child's best interests, (3) the child is endangered either physically or emotionally by the present arrangement, and (4) the benefits of modification to the child outweigh the detriments. *Christensen*, 913 N.W.2d at 440. The district court must assume the allegations are true but has discretion to determine "whether the moving party has made a prima facie showing for the modification." *Boland v. Murtha*, 800 N.W.2d 179, 183 (Minn. App. 2011). On appeal, we review de novo whether the district court treated the moving party's allegations as true, review for abuse

[1] Father argues that the custody- and parenting-time issues are not before this court because mother did not timely appeal the June 2018 order. We disagree. Orders granting or denying motions to modify custody or parenting time are appealable as of right. Minn. R. Civ. App. P. 103.03(h). The June 2018 order was not final. It directed the parties to return to court to resolve the closely related issue of child support. The subsequent child-support order finally resolved all three issues and was therefore appealable. *See In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 754 (Minn. 2005) (defining "final order" as one that "ends the proceeding as far as the court is concerned" (quotation omitted)).

of discretion whether the party established a prima facie case, and review de novo "whether the district court properly determined the need for an evidentiary hearing." *Id.* at 185.

Mother argues that the district court abused its discretion because mother's endangerment allegations entitled her to an evidentiary hearing. She specifically points to her allegations that father's home is uninhabitable and dangerous; the child's dietary, clothing, and hygiene needs are not met by father; and domestic violence has occurred between the parents. For three reasons we are not persuaded.

First, the bulk of mother's allegations do not reference changed circumstances. Change is measured in relation to the circumstances that existed at the time of the prior custody order—here, December 2015. *See* Minn. Stat. § 518.18(d) (2018) (requiring modification of custody to be based on facts "that have arisen since the prior [custody] order"); *see also Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989) (stating that change of circumstances to support custody modification must be more than continuation of problems), *review denied* (Minn. June 21, 1989). Mother's allegations about the condition of father's home relate to the short period during which mother lived with father in 2015, before the prior custody order. "[T]he endangerment element of [Minn. Stat.] § 518.18(d)(iv) is concerned with whether the child's *present environment* endangers the child's physical or emotional health or impairs the child's emotional development." *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (quotation omitted). Mother offered no evidence to show there are any *current* concerns by law enforcement, local or school authorities, adult family members, or others regarding the condition of the child or father's home.

Likewise, the allegations of domestic abuse relate to conduct that occurred in 2015. Mother claimed that father kicked and shouted at her, which led to issuance of an OFP. Mother concedes that the related criminal complaint was dismissed; she has not alleged that father assaulted her since that time.

Second, many of mother's allegations are not based on mother's personal knowledge. *See State ex rel. Sime v. Pennebaker*, 9 N.W.2d 257, 259 (Minn. 1943) (rejecting an affidavit that contained "nothing of evidentiary worth" because it was "founded upon mere hearsay"). As noted above, mother has not seen father's home or observed his care of the child since 2015. For example, mother's assertion that father neglects B.L.F.'s food sensitivities is premised on information a physician provided to mother in 2013 that B.L.F. could have stomach issues because she "may be" lactose intolerant. Mother surmises that father's feeding B.L.F. dairy items "causes" her stomach issues and his unhealthy home condition could be causing B.L.F. to have headaches. Mother not only lacks personal information, but her allegations are too speculative to demonstrate endangerment to the child.

Third, mother's remaining allegations are legally insufficient to constitute endangerment. Mother alleges father violated an OFP by contacting her by phone in 2016. This allegation fails to establish the "significant" degree of danger required for a prima facie showing of endangerment because "in order to establish danger to a child's welfare, a parent's conduct must be shown to result in an actual adverse effect on the child." *In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002). Mother has not made this showing. Mother's allegation that the child recently returned from father's home wearing clothes

that were too small and lacking proper hygiene is, at most, an isolated instance of minor neglect not a continuing problem. *See Geibe v. Geibe*, 571 N.W.2d 774, 779 (Minn. App. 1997) (holding that "alleged single incident of borderline abuse or neglect" is insufficient showing of endangerment to support custody modification).

In sum, the district court did not abuse its discretion by concluding that mother's collective allegations fail to make a prima facie showing of child endangerment to B.L.F. and the court did not err by denying mother's request for an evidentiary hearing.

II. The district court did not abuse its discretion by modifying parenting time.

We review a district court's parenting-time decision for abuse of discretion, *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995), affirming the court's factual findings unless they are clearly erroneous, *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). "It is well established that the ultimate question in all disputes over [parenting time] is what is in the best interest[s] of the child." *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984).

A district court "shall" modify parenting time if an existing "order granting parenting time cannot be used to determine the number of overnights or overnight equivalents the child has with each parent," and modification is in the child's best interests and does not change the child's primary residence. Minn. Stat. § 518.175, subd. 5(a), (b) (2018). Mother makes various arguments with regard to parenting time, asserting that her time has been impermissibly restricted, and that the district court's endangerment, best-interests, and primary-residence findings are unsupported by the record. We address each argument in turn.

Mother first argues that by setting her parenting time at 45% the district court restricted her parenting time without making the requisite finding that "parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development." Minn. Stat. § 518.175, subd. 5(c) (2018). She also contends there is no evidence of endangerment.[2] We disagree. The district court found that the lengthy commute between mother's home and B.L.F.'s school "endangered [B.L.F.'s] emotional development, her education, . . . her mental health," and her "physical health." The record supports this finding. Father testified that the child spent two hours or more commuting each day, which caused her to be tired, stressed, anxious, and car sick. Father took the child to counseling to alleviate her anxiety. We discern no error in the district court's endangerment finding. *See Boland*, 800 N.W.2d at 186 (noting that degree of danger must be significant, but deferring to district court on determination of whether allegations are sufficient to establish endangerment to restrict parenting time).

The record likewise supports the district court's best-interests findings. In addition to the findings noted above, the district court found that the child missed 35 days of school in a five-month period, and "was absent more than 50% of the time [mother] was scheduled to take her to school." And it made detailed findings on each of the best-interests factors required by Minn. Stat. § 518.17, subd. 1(a) (2018), concluding that the modified parenting time serves the child's best interests.

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[2] For purposes of this appeal, we assume, but do not decide, that the district court restricted mother's parenting time.

Mother's challenges to these findings focus on factual disputes the court resolved against her or mischaracterize the evidence. The district court did not find mother's testimony credible in several instances, including her reasons for moving and keeping the child home from school, and her contentions concerning the condition of father's home and the care he provided to the child. In contrast, the district court relied on and found credible father's testimony. We do not reweigh evidence or make factual findings; we must defer to a district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Finally, mother challenges the district court's determination that there has been no change in the child's primary residence. As noted by the supreme court, this often-used phrase is not defined by statute. *Christensen*, 913 N.W.2d at 440. For purposes of marriage dissolution, "residence" is defined as "the place where a party has established a permanent home from which the party has no present intention of moving." Minn. Stat. § 518.003, subd. 9 (2018). In *Suleski v. Rupe*, we applied dictionary meanings to conclude that primary residence is "the principal dwelling or place where the child lives." 855 N.W.2d 330, 335 (Minn. App. 2014). Under the circumstances presented here, including the fact that the parties have historically split parenting time equally, their respective homes are both B.L.F.'s primary residences, and this statutory factor favors preserving that status quo.

In sum, the district court did not abuse its discretion by modifying parenting time because the evidence supports the district court's findings and the court applied the correct statutory criteria.

III. The district court did not err in ordering mother to pay basic child support.

Child support may be modified if there has been a substantial change in circumstances that renders the existing support order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2 (2018). "District courts have broad discretion to modify child support orders, but they must exercise this discretion within the legislative limits." *Hunley v. Hunley*, 757 N.W.2d 898, 900 (Minn. App. 2008). We will reverse a child-support order if the district court abused its discretion to reach "a clearly erroneous conclusion that is against logic and the facts on record." *Id.* (quotation omitted).

In 2015, the district court ordered father to pay $366 per month in basic child support. The October 2018 order relieves father of this obligation and requires mother to pay basic support of $50 per month and medical support of $30 per month. Mother argues that the district court erred by (1) ordering her to pay child support when neither she nor father moved to modify the prior support order, (2) calculating parenting time differently for purposes of child support and the parenting-time order, and (3) ordering her to pay medical support without evidence to rebut the statutory presumption that she could not afford it.

A district court may modify child support upon the motion of either party, Minn. Stat. § 518.39, subd. 1 (2018), but it lacks authority to modify child support if the parties do not move for modification. *Rogers v. Rogers*, 606 N.W.2d 724, 728 (Minn. App. 2000), *aff'd in part and rev'd in part*, 622 N.W.2d 813 (Minn. 2001). Father's August 2017 motion requested modification of parenting time, custody, and school enrollment, and "such other relief as the Court deems just, fair and equitable." In its order granting father's

motion, the district court directed the parties to return for an evidentiary hearing on the issue of child support. Mother did not object. Both parties participated at the hearing, and the district court decided the issue on a fully developed record. We discern no error by the district court in considering whether to modify child support.

Mother next contends that the district court abused its discretion by calculating parenting time differently for purposes of child support and parenting time. In the parenting-time order, the district court included mother's 124 overnights (34% per year) and an additional 40 days of parenting time on Wednesdays after school until 7:30 p.m. (11%), for a total of 164 days per year (46%). By contrast, in the child-support order, the district court included only mother's overnights with the child, a total of 128.5 average overnights per year (35%).

These differing calculations reflect the differences in the statutory provisions controlling child support and parenting time. Child support is awarded to ensure that a child is economically supported; parenting time is awarded to ensure a parent's access to a child. *See* Minn. Stat. §§ 518.003, subd. 5 (defining parenting time with reference to "the time a parent spends with a child"), 518A.26, subd. 20 (defining child support with reference to the "amount" contributed for the "care, support and education" of a child) (2018). In calculating the parenting-time expense adjustment for establishing child support, the district court may consider overnights and "overnight equivalents" that are "calculated by using a method other than overnights if the parent has significant time periods on separate days where the child is in the parent's physical custody and under the direct care of the parent but does not stay overnight." Minn. Stat. § 518A.36, subd. 1

(2018). Because the district court's child-support calculation complies with the statute and ensures economic support to the child, the district court did not abuse its discretion in its child-support award.

Finally, mother argues that the district court erred by ordering her to pay $30 per month in medical support for B.L.F. This argument has merit. If an obligor's basic child-support obligation is $50 for one child, which it is for mother, "the obligor is presumed unable to pay child care support and medical support." Minn. Stat. § 518A.42, subd. 2(b) (2018). The district court did not address this presumption. Because the evidence and findings of fact do not establish that the presumption was overcome, the district court abused its discretion by ordering mother to pay $30 monthly for medical support. We therefore reverse that provision of the child-support order.

Affirmed in part and reversed in part.