**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-1912**

Adam C. Steele,
Appellant,

vs.

Sarah M. Held,
Respondent.

**Filed September 3, 2019**
**Affirmed in part, reversed in part, and remanded**
**Florey, Judge**

Houston County District Court
File No. 28-FA-12-565

Adam C. Steele, La Crescent, Minnesota (pro se appellant)

Nathan P. Skemp, Joseph J. Skemp, Moen, Sheehan, Meyer, Ltd., La Crosse, Wisconsin (for respondent)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

**FLOREY**, Judge

In this appeal from the district court's orders finding appellant in contempt and denying his custody-modification motion, appellant challenges the contempt finding and a related award of attorney fees, and challenges the dismissal of his custody-modification motion. Because the district court did not abuse its discretion by holding appellant in

contempt and awarding attorney fees, we affirm in part. But because the district court did not properly consider the allegations in appellant's affidavit and abused its discretion by determining that appellant failed to make a prima facie case for modification, we reverse and remand for an evidentiary hearing on appellant's custody-modification motion.

## FACTS

Appellant Adam C. Steele is the father, and respondent Sarah M. Held is the mother, of the minor child, B.H., born in 2007. In October 2013, the district court filed an order granting appellant sole legal custody of the child and granting the parties joint physical custody. The court established a parenting-time schedule giving the parties alternate weeks with the child. Exchanges were to "occur at the south Kwik Trip Store in La Crescent." Appellant later moved to change the child-exchange location, and in February 2018, the district court filed an order denying appellant's motion.

In June 2018, respondent moved the district court to find appellant in contempt for failing to abide by the court's orders of October 2013 and February 2018. Respondent sought compensatory parenting time, an order directing appellant "to purge himself of his contemptuous conduct," and reasonable costs and attorney fees.

Respondent claimed that appellant failed to deliver the child for parenting time on June 15, 2018, at the ordered Kwik Trip location after she denied his request to meet at another location. She claimed that appellant continued to withhold the child from her based on the alleged recommendations of the child's therapist, and she had only limited interactions with the child after June 15. She also asserted that appellant had involved the child in the parties' parenting-time dispute and associated legal matters. On June 28, 2018,

the district court issued an order to show cause directing appellant to appear and explain why he should not be found in contempt.

On July 15, 2018, appellant filed a responsive motion and moved to modify custody. He filed an extensive affidavit, noting that his decision to keep the child at his home was "the culmination of years of growing mistrust and distance between [the child] and his mother." In his affidavit, he set forth the efforts he made on June 15, 2018, to complete the parenting-time exchange. He stated that his "lack of transportation is well-established." He also noted that he was eventually able to get a ride to Kwik Trip, but found that respondent was not there when he and the child arrived. He then got a ride to an area near respondent's residence, but claimed that the child "immediately refused to go." He claimed that he did not hear from respondent on the weekend following the missed exchange, and the child grew frustrated and "announced that he would not be returning to his mom's house." Appellant asserted that he contacted the child's therapist, who advised him to not return the child to respondent. Appellant claimed that, after being contacted by respondent's attorney, he called back and "handed the phone to [the child] who said clearly, 'I refuse to return to my mom's home.'"

With his affidavit, appellant attached the child's medical records, which indicated a strained relationship between the child and respondent. For example, in a January 2018 therapy session, the child stated that he was anxious with his mother and did not know what to expect regarding their relationship. The child made similar statements in March, April, and June 2018. A July 6, 2018, medical record from the child's therapist stated:

> [The child] also went on to say that until his mother begins recognizing and acknowledging some of the problems and conflict(s) between [himself] and his mother he doesn't want to see her again. He stated that recently he has tried to approach his mother with some of his concerns and stated that his mother has denied doing anything wrong. [The child] left the office today stating that he never wants to see his mother again. [Appellant] and I tried to advocate for his relationship with his mother and attempted to get more specific regarding what [the child] could do differently and what he might need from his mother to attempt to reconcile their differences but he wasn't very receptive.
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> . . . .
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> It also might be in the best interest for their relationship for [the child] to gradually transition back to his mother's [care] out of concerns that [the child] may be very resentful and opposed to a[n] immediate and full transition. I believe that a "full" transition could put added stress and strain on the relationship dynamics.

Appellant concluded his affidavit by noting:

> The level of rejection [the child] is expressing, along with his clarity and specificity shows clearly the emotional damage that is likely from the existing parenting time schedule. I have spoken to him about the possibility that the [c]ourt may order him to return to the old schedule and he became quite emotional and made it clear he would physically fight his way out of that situation and would not return to her home.

On July 25, 2018, the district court held a motion hearing on respondent's contempt motion and appellant's custody-modification motion. In August 2018, while the matter was under advisement, appellant moved to dismiss the contempt motion and again sought a custody modification. He submitted another extensive affidavit.

In September 2018, the district court filed both a contempt order against appellant and a separate order summarily denying appellant's motion to modify custody. In the contempt order, the court found that, on June 15, 2018, appellant "did not bring the child

to the exchange location at the set time," and was "90 minutes late to the child exchange." The court found that "[t]he exchange location is approximately a [one] mile walk from [appellant's] residence," and that appellant could have made it to the exchange on time. The court found that appellant's actions, which prevented the commencement of respondent's parenting time, were contemptuous.

The district court found that appellant's subsequent act of not returning the child to respondent unless the child went willingly was also contemptuous. The court noted that appellant's behavior was in direct violation of a court order, which stated that the child should not participate in parenting-time decisions.

The district court found that appellant's facilitation of a conversation between the child and respondent's attorney was also contemptuous. The court noted that appellant's "choice to inappropriately put the child on the phone with mother's counsel involved the child in parenting time decisions and is contemptuous." The court found that appellant's subsequent acts of "inappropriately involv[ing] the child in communications regarding parenting time [were] contemptuous." The district court imposed 90 days of confinement stayed on the condition that appellant comply with the district court's orders.

As for the denial of appellant's custody-modification motion, the district court acknowledged the resentment felt by the child against his mother, as evidenced by appellant's affidavit and attachments, but the court found that "[appellant's] manipulation of the existing court order [would] not be used as a basis for a custody modification," and "[a] graduated transition" of the child back to respondent's care was "absurd when a week-on week-off parenting time schedule ha[d] been in place since 2013." Ultimately, the

district court denied appellant's custody-modification motion without providing an explicit basis for the denial. In denying the custody-modification motion, the district court did not consider appellant's August 2018 filings, reasoning that the filings were "scheduled to be heard separately" in October 2018. This appeal followed.

## D E C I S I O N

### I. The district court did not abuse its discretion by holding appellant in contempt and imposing 90 days of confinement, stayed on the condition of appellant's compliance.

We first address appellant's challenges to the district court's contempt order. As a threshold matter, appellant argues that the contempt action was procedurally deficient because respondent filed both a motion for contempt and an order to show cause. He points to Minn. R. Gen. Prac. 309.01, which states that "[c]ontempt proceedings shall be initiated by notice of motion and motion or by an order to show cause served upon the person of the alleged contemnor together with motions accompanied by appropriate supporting affidavits."

For two reasons we find appellant's argument unavailing. First, we reject the assertion that initiating a contempt action by both motion and order to show cause renders the contempt action deficient. While we recognize that rule 309.01 contains the normally disjunctive "or," the advisory comment indicates that the amendment to the rule permitting the initiation of a contempt proceeding by motion or order to show cause was "intended simply to recognize that both mechanisms are available." Minn. R. Gen. Prac. 309.01 2009 advisory comm. cmt.

Second, contrary to appellant's assertion, the contempt proceedings in this case were initiated by motion, and an order to show cause was subsequently issued by the district court. Appellant stated in a June 2018 informal letter directed to the district court, "Yesterday I was e-served a [n]otice of [m]otion for a hearing on July 25, 2018." The letter was dated the same day as the district court's order to show cause, clearly indicating that appellant was served respondent's contempt motion prior to any order to show cause. While the record suggests that respondent filed a proposed order to show cause with her contempt motion, this proposed order did not initiate the proceedings.

Appellant also argues that the district court erred by hearing respondent's contempt motion despite the lack of a settlement conference. Appellant points to Minn. R. Gen. Prac. 303.03(c), which requires settlement efforts prior to a motion being heard, unless excused, for good cause, by the court. Appellant did not raise this issue until August 2018, following the contempt hearing, and the district court, expressly, declined to consider appellant's August 2018 filings, which it deemed part of a separate motion. Because appellant failed to raise the settlement issue prior to the contempt hearing and because the district court did not consider the issue, it is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that a "reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it" (quotation omitted)).

Additionally, appellant argues, without citation to authority, that the district court was deprived of "jurisdiction." We initially note that the Supreme Court cautions courts to "use[] the label 'jurisdictional' . . . only for prescriptions delineating the classes of cases

(subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 915 (2004). Because it is undisputed both that matters of civil contempt fall within the district court's adjudicatory authority, and that the district court had jurisdiction over both parties, appellant's argument does not actually go to the district court's jurisdiction. *See Moore v. Moore*, 734 N.W.2d 285, 287 n.1 (Minn. App. 2007) (noting that "courts and parties often use concepts and language associated with 'jurisdiction' imprecisely to refer to, among other things, nonjurisdictional claims-processing rules or nonjurisdictional limits on a court's authority to address a question"), *review denied* (Minn. Sept. 18, 2007). To the extent appellant is asserting a nonjurisdictional defect in the proceedings in district court, he has not otherwise developed that assertion. Therefore, it is not properly before this court. *See Dep't of Labor & Indus. v. Winntz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an inadequately briefed issue); *Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. App. 2007) (applying *Wintz* in a family-law appeal). Further, appellant has failed to assert any prejudice resulting from the lack of settlement efforts. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (declining to remand for a de minimis, technical error).

Moving to the merits, appellant argues that the district court's contempt order was erroneous because his conduct "was not contumacious and the record lacks any evidence to support that conclusion." We disagree. "The district court's decision to invoke its contempt powers is subject to reversal for abuse of discretion." *In re Welfare of Children of J.B.*, 782 N.W.2d 535, 538 (Minn. 2010); *Mower Cty. Human Servs. v. Swancutt*, 551

N.W.2d 219, 222 (Minn. 1996). A district court abuses its discretion when it makes findings of fact that are unsupported by the record, misapplies the law, or resolves the matter in a manner that is contrary to logic and the facts on record. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997).

"The purpose of the contempt power is to provide the [district] court with the means to enforce its orders." *Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986). "This power gives the [district] court inherently broad discretion to hold an individual in contempt but only where the contemnor has acted contumaciously, in bad faith, and out of disrespect for the judicial process." *Id.* (quotation omitted).

Here, the district court's findings establish that appellant could have exchanged the child with respondent on June 15, 2018, but did not. The district court specifically found that "if [appellant] and child had begun walking at the beginning of the text exchange instead of arguing with [respondent], they would have been on time." The district court did not abuse its discretion by deeming this contumacious conduct. Likewise, the district court's findings indicate that appellant, on multiple occasions, involved the child in parenting-time decisions, in contradiction to a standing court order. The district court did not abuse its discretion by deeming this contumacious conduct.

Appellant argues that the contempt order was improper because it contained "a fixed sentence with no purge conditions" and punished appellant for "both past failure to perform as well as future failures." "A civil contempt order cannot impose a fixed sentence, but must allow the contemnor to obtain release by compliance." *Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. App. 1989).

Here, the district court ordered that appellant serve 90 days in jail, but stayed that confinement on the condition that appellant comply with the district court's orders. "[W]hen confinement is directed, the party confined should be able to effect his release by compliance or, in some cases, by his agreement to comply as directed to the best of his ability." *Hopp v. Hopp*, 156 N.W.2d 212, 217 (Minn. 1968). Here, because confinement has not yet been imposed and is stayed on the condition of appellant's compliance, the district court's order was not an abuse of discretion. Appellant is yet to suffer any injury, and if confinement is ultimately imposed, the district court could, at that time, set appropriate purge conditions.

## II. The district court did not abuse its discretion by limiting appellant's testimony and evidence.

Appellant argues that the district court improperly limited his testimony at the hearing of July 25, 2018. He asserts that each time he began speaking, "the [c]ourt would interrupt" and interject counterpoints. He fails to point to any specific exchange.

A district court has broad discretion regarding the control of courtroom proceedings. *See Rice Park Props. v. Robins, Kaplan, Miller & Ciresi*, 532 N.W.2d 556, 556 (Minn. 1995) (observing that district court "has considerable discretion in . . . furthering what it has identified as the interests of judicial administration and economy"). A district court may exclude relevant evidence "if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. Decisions on evidentiary issues are within the discretion of the district court. *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015).

Based upon our review of the record, the district court did not abuse its discretion. Appellant, a self-represented litigant, was afforded an ample opportunity to offer testimony and argument. At the end of the motion hearing, the district court asked appellant if there was "[a]nything else," to which appellant replied, "I just want to say, Your Honor, I apologize for all of this."

Appellant also alludes to judicial bias and asserts that the district court judge acted in violation of rule 2.8 of the Code of Judicial Conduct. Rule 2.8 provides, in relevant part, that a judge "shall require order and decorum in proceedings before the court," and "shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity." Minn. Code Jud. Conduct Rule 2.8.

We presume that judges approach cases with a neutral and objective disposition. *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). We consider the record as a whole when addressing claims of judicial bias. *State v. Morgan*, 296 N.W.2d 397, 404 (Minn. 1980). This record, as a whole, does not reflect judicial bias. Though the district court occasionally interrupted appellant, the court's conduct was not an abuse of discretion, and appellant was given an ample opportunity to present his case.

Appellant asserts that the district court disregarded his impeachment evidence, specifically, portions of his affidavit concerning respondent's actions in 2012. At the hearing, the district court stated to appellant, in the context of the contempt proceedings, "Do you understand that we are trying to move forward and that I don't want to read anymore affidavits about 2012?" We interpret this exchange as the district court indicating

to appellant that, in terms of the contempt proceedings, the relevant evidence concerned the events giving rise to the contempt action. We see no abuse of discretion.

**III. The district court did not abuse its discretion by awarding attorney fees.**

Appellant argues that the district court erred in its award of attorney fees because the fees constituted punitive sanctions. The district court awarded the fees pursuant to Minn. Stat. § 588.11 (2018), which states:

> If any actual loss or injury to a party in an action or special proceeding, prejudicial to the person's right therein, is caused by such contempt, the court or officer, in addition to the fine or imprisonment imposed therefor, may order the person guilty of the contempt to pay the party aggrieved a sum of money sufficient to indemnify the party and satisfy the party's costs and expenses, including a reasonable attorney's fee incurred in the prosecution of such contempt, which order, and the acceptance of money thereunder, shall be a bar to an action for such loss and injury.

A district court's award of attorney fees under section 518.11 is reviewed for an abuse of discretion. *Nelson v. Nelson*, 408 N.W.2d 618, 622 (Minn. App. 1987). To uphold an award of attorney fees under section 588.11, three factors must be present: (1) "the fees must be based on proof of actual damages," (2) "the award must not penalize the contemnor," and (3) "the party receiving the fees must actually incur the fees." *Hanson v. Thom*, 636 N.W.2d 591, 593 (Minn. App. 2001).

Appellant focuses on the district court's use of the word sanctions in its award of attorney fees. The district court's order stated that "[respondent's] [m]otion for attorney[] fees as sanctions under Minn. Stat. § 588.11 in the amount of $3,618.80 is GRANTED." The district court's use of the word sanctions implies a punitive element, which belies the

remedial nature of section 518.11. *See id.* ("[A]n award of attorney fees may not be imposed on a contemnor as a penalty."). However, the record indicates that the award was based on actual attorney fees incurred by respondent in bringing the contempt action. We find no abuse of discretion in the district court's award, which properly indemnified respondent. *See Campbell v. Motion Picture Mach. Operators*, 186 N.W. 787, 789 (Minn. 1922) ("That the award may be designated as a fine does not change its character.").

## IV. The district court erred by failing to consider the allegations in appellant's affidavit as true, and abused its discretion by determining that appellant failed to make a prima facie case for modification.

Appellant argues that the district court erred by not accepting the allegations in his affidavit as true. Specifically, he challenges two findings in the district court's order denying his custody-modification motion.

The district court found that the child had seen his therapist for approximately four years, the medical records indicated that the child might be resentful towards respondent, and the therapist suggested that "a gradual transition back to [respondent] would be helpful to the child." Yet, in a subsequent finding, the district court concluded that "[a] graduated transition [was] absurd when a week-on week-off parenting time schedule ha[d] been in place since 2013." Appellant argues that this "direct contradiction" demonstrates that the district court did not accept the allegations in his affidavit as true.

Appellant points to a second district court finding that he alleges constitutes a direct contradiction. The district court found, "[Appellant] reports that the minor child is rejecting [respondent], and that it is not [his] fault." In a subsequent finding, the court concluded, "[Appellant's] manipulation of the existing court order will not be used as a

basis for a custody modification." Additionally, in a related argument, appellant asserts that the district court improperly disregarded the preferences of the child.

The party seeking a modification of custody must submit an affidavit asserting the facts on which the motion is based. Minn. Stat. § 518.185 (2018). The court must determine whether the moving party has established a prima facie case by alleging facts that, if true, would provide sufficient grounds for a modification. *See Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981). For purposes of this determination, the court must accept the alleged facts in the moving party's affidavits as true. *See id.*; *Ross v. Ross*, 477 N.W.2d 753, 755 (Minn. App. 1991).

The party seeking a custody modification based on an assertion that the child is endangered must establish four elements for a prima facie case, which are generally: (1) a change in circumstances of the child or custodian; (2) that modification would serve the child's best interests; (3) that the present environment threatens the physical or emotional health of the child; and (4) that the advantages from a change in custody outweigh the disadvantages. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997).

When reviewing the summary denial of a motion to modify custody, we review de novo whether the district court properly considered as true the allegations in the moving party's affidavits; we review for an abuse of discretion the district court's determination of whether a prima facie case for modification exists; and we review de novo whether an evidentiary hearing is required. *Boland v. Murtha*, 800 N.W.2d 179, 180 (Minn. App. 2011).

We agree that the district court improperly disregarded the allegations in appellant's affidavit and the preferences of the child. A child's preference to live with a different parent may constitute a change in circumstances sufficient to warrant an evidentiary hearing. *See Geibe*, 571 N.W.2d at 778. However, a district court may deny an evidentiary hearing "where it is obvious from the record that a child's stated preference results from manipulation by the moving party." *Id.* Here, based on the medical records submitted by appellant, it is not obvious from the record that the child's resentment towards, and strained relationship with, respondent are solely the result of appellant's manipulation. Generally, "the case law indicates that a child's motives for an expression of preference are to be considered at the evidentiary hearing stage rather than in determining whether a prima facie case has been made." *Id.* at 778-79.

Taken as true, appellant's allegations and supporting documentation, indicating a deterioration in the relationship between respondent and the child, establish a prima facie case for custody modification. The allegations qualify as a significant change in circumstances threatening the child's emotional health. *See Eckman v. Eckman*, 410 N.W.2d 385, 389 (Minn. App. 1987) (upholding modification based on child's isolation in father's home and preference for mother). The medical records stated that the child expressed unhappiness about his relationship with his mother and generally "isolates" when they are together. Appellant's affidavit indicated that the child had expressed suicidal thoughts in the past. Appellant's allegations, taken as true, establish that a modification of custody would be in the best interests of the child and would outweigh the benefits of maintaining the status quo. Because the district court abused its discretion by

determining that appellant failed to make a prima facie case for modification, we reverse and remand for an evidentiary hearing on appellant's custody-modification motion.

**Affirmed in part, reversed in part, and remanded.**