STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0905

In re the Marriage of:

Julia Loxley Hynnek n/k/a Julia Loxley Kaemmer, petitioner,
Respondent,

vs.

Eric Martin Hynnek,
Appellant.

Filed August 17, 2020
Affirmed
Jesson, Judge

Washington County District Court
File No. 82-FA-10-850

Jana Aune Deach, Susan C. Rhode, Moss & Barnett, P.A., Minneapolis, Minnesota (for respondent)

Kevin S. Sandstrom, Christopher T. Nelson, Eckberg Lammers, P.C., Stillwater, Minnesota; and

Sean P. Stokes, The Law Offices of Sean P. Stokes, PLLC, Stillwater, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Schellhas, Judge.*

* 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

JESSON, Judge

A contentious co-parenting relationship resulted in the parties' children running away from their mother's home twice, being placed in foster care, and sent to a residential facility in another state. That relationship is reflected in a series of district court orders, as well as this appeal. Appellant Eric Martin Hynnek challenges several decisions made by the district court relating to the custody of his children and his parenting time. Because we discern no legal error or abuse of discretion in those decisions, we affirm.

FACTS

Appellant Eric Martin Hynnek (father) married respondent Julia Loxley Hynnek n/k/a/ Julia Loxley Kaemmer (mother) in 1999. During their marriage, the parties had two children, a son who is 17 and a daughter who is 15. In 2010, mother filed a petition to dissolve the marriage. Over a year later, the parties stipulated to a parenting plan. Pursuant to that plan, the parties had joint legal and physical custody of the children. The plan also outlined how the children's residence would be divided between the parties and contained additional provisions for holidays and vacations. The judgment and decree incorporated the parenting plan, and the district court dissolved the parties' marriage in October 2011.

Father's Parenting-Time Challenge

A few years later, after father failed to cooperate with a custody evaluation, the parenting consultant reduced father's parenting time. Father filed a motion with the district court challenging this decision. The district court agreed with father that the consultant did not have the authority to act unilaterally. As a result, the district court reinstated father's

parenting time as outlined in the parenting plan and ordered the parties to participate in a custody evaluation.

The custody evaluator completed her report and recommendation in late 2015. According to the evaluator, the children tended to speak highly of father and very critically of mother. She observed that "it appears as though [the children] understand that they are expected to provide negative information about their mother, and positive information about their father." Although the custody evaluator concluded that it was impossible to know exactly how the children were being influenced, she opined that father was "most likely the source of conflict in the parties' co-parenting relationship" based on reports about father's anger and his disregard for court orders.

Based on her conclusions, the custody evaluator recommended that the district court award temporary sole legal custody to mother. The evaluator also suggested temporarily reducing father's parenting time and ordering the family to participate in therapy. Additionally, the evaluator advised no contact between the off-duty parent and the children and suggested the appointment of a special master to oversee the co-parenting relationship and therapy.

Mother's Request to Modify Custody

Following the custody evaluation, mother filed a motion seeking to implement its recommendations. In an order issued in June 2016, the district court declined to grant mother's request for temporary sole legal custody. With regard to mother's request to reduce father's parenting time, the district court denied the motion, characterizing the decision as a "close call."

The court stated that father appeared to be the source of the children's inappropriate knowledge of their parents' disputes and observed "that the children are suffering from the negative co-parenting relationship that the parties share." Both parents bore some level of responsibility. But in particular, father needed to take steps to improve his behavior, including his anger and disregard for the court's orders and authority. Despite these findings, the court found that there was not enough evidence of endangerment to "so dramatically" reduce father's parenting time.

Instead, the district court offered father "one last chance" to comply with court orders, obtain meaningful therapy, and stop disparaging mother in front of the children. The court ordered both parties and the children to engage in therapy and required father to undergo a psychiatric evaluation. Additionally, the court required communication to cease between the off-duty parent and the children and appointed a special master with the authority to expand or reduce parenting time.

Special Master Mediation

Over roughly the next two years, the special master mediated a significant amount of conflict between the parties. Relevant to this appeal, in 2017, the special master reduced father's parenting time to only alternating weekends. This sanction stemmed from father's failure to submit a written therapy treatment plan and his revocation of his therapist's authorization to speak with the special master. Additionally, as noted by the special master, father did not minimize his negative behaviors toward mother as required by the district court and the special master.

In June 2017, the children left mother's house after midnight and rode their bikes nearly ten miles, during a thunderstorm, to father's house. According to the children, mother was emotionally and mentally abusive and said negative things about father in front of them. The special master ordered father to return the children to mother's home and denied his request to restore his parenting time. After this incident, the special master ordered each member of the family to participate in a psychological evaluation.

In November 2017, after receiving the results of that evaluation, the special master issued a report giving father an additional overnight with the children as part of his parenting time. The evaluator opined that the children's current situation was "primarily attributable" to father and that father had not responded to therapy, but also expressed that "[t]he children do benefit from having a relationship with [father]." Nevertheless, the evaluator cautioned that the benefit was "nearly outmatched by the disruption to their day to day functioning and their increased anxiety from their parents' conflict."

Roughly four months later, in March 2018, the children ran away to father's home for a second time. Police were contacted. Daughter reported to the police that mother "attacked her when she was in her bedroom on her cell phone" a little over a month earlier.[1] The court ordered father to immediately return the children to mother, but father did not comply. The children remained with father for over three weeks and missed a trip to Florida with mother over their spring break.

[1] Son corroborated daughter's accusation and stated that he saw scratches on daughter's hands. According to the children, mother threatened to prevent them from finishing the ski season if they reported the incident. Because the ski season had concluded, they were now reporting what happened.

Mother's Renewed Request to Modify Custody

After the children ran away the second time, mother filed a motion seeking temporary sole legal and physical custody and suspension of father's parenting time, alleging that the children were endangered. In her affidavit, mother explained that she would need to seek residential treatment for the children if they continued to run away. Mother noted that she was "asking for specific permission to get the children the immediate help they need," and she described investigating both programs in Minnesota and programs run by "national experts."

The district court found that mother established a prima facie case for modification of custody, and awarded her temporary sole legal and physical custody of the children, pending an evidentiary hearing scheduled roughly five months later. But during this interim time, the district court permitted father to have parenting time every other weekend. In doing so, the district court warned father that his parenting time would be suspended if he failed to return the children to mother.[2]

Father did not return the children to mother by the designated time. When police arrived to return the children to mother, father yelled at the officers, questioned their authority, and appeared to cause anxiety in the children. The children refused to return to mother's house and were placed in foster care. A few days later, out of concern that she could not keep the children safe or prevent them from running away, mother signed a

[2] The district court's order also authorized police or the sheriff to remove the children from father's home if he did not return the children to mother by the designated time.

voluntary placement agreement for the children to temporarily remain in foster care, pending a review hearing.

Father filed an emergency motion asking the court to appoint a guardian ad litem for the children, remove the judge assigned to the case, and vacate the prior order temporarily modifying custody. The district court denied the request for a guardian ad litem, finding that there was not enough evidence of abuse or neglect to support a mandatory appointment and that budget constraints precluded a permissive appointment. But, citing father's "disturbing" behavior when police came to remove the children from his home—particularly because father knew they were coming—the district court concluded that it was not in the children's best interests to be in contact with father. Accordingly, based on father's conduct and his failure to comply with the court order requiring him to return the children to mother, the district court temporarily suspended father's parenting time and prohibited him from communicating with the children.[3]

Between the district court's April 17, 2018, order suspending father's parenting time and the full evidentiary hearing on mother's motion to modify custody, the district court held at least three review hearings. At the first review hearing in late April 2018, the district court learned that mother placed the children at a residential facility in Utah, consistent with her desire to seek treatment for the children as noted in her earlier affidavit.[4]

[3] The district court also found that father did not demonstrate prejudice by the judge that would require removal.

[4] The parties dispute the characterization of the Utah facility. Mother describes it as a residential treatment facility with an emphasis on therapy. Father describes it as similar to a juvenile detention facility. Without intending to find facts, we refer to it as a residential facility.

According to mother, her decision to place the children in Utah was based on her belief that the children would continue to run away, and father's continued alienation and interference with therapy. She also noted that the children were on a waiting list for a facility in Minnesota. Father requested that the children be immediately returned to Minnesota and a guardian ad litem be appointed. Ruling from the bench, the district court denied father's motions.

At a second review hearing about one month later, the district court addressed father's renewed motion for the children's return, the appointment of a guardian ad litem, and his request for the court to conduct an in camera interview with the children. The district court denied father's motions, but ordered counsel to facilitate signing of the appropriate releases of information so father could obtain information about the children's adjustment and progress.[5]

Evidentiary Hearing Regarding Mother's Motion to Modify Custody

In September 2018, the court held an evidentiary hearing regarding mother's motion to modify custody. At that hearing, mother and the doctor who completed psychological evaluations of each family member testified. The doctor opined that the children's time in Utah had been positive for them and that immediately returning the children to Minnesota and reinstating equal parenting time would be "destructive" to the children. Further, the

[5] The district court held a third review hearing about two months later, which included discussions about the children's progress at the facility in Utah and the upcoming evidentiary hearing.

doctor believed that father had emotionally and psychologically abused the children. Father did not testify or present any evidence or witnesses at the hearing.

After extensive analysis, the district court concluded that mother demonstrated a change in circumstances and that modification of custody served the children's best interests. The district court additionally concluded that the present custodial environment endangered the children, and that any harm in changing the children's environment was outweighed by the advantage of the change. Accordingly, the district court granted mother's motion and awarded her sole legal and physical custody. With respect to father, the district court reduced his ability to communicate with the children and ordered that his parenting time remain suspended until the therapists recommended that it be reinstated.

Father filed a motion for amended findings and conclusions, which the district court denied. But the district court noted that either party could file a motion with the court regarding father's parenting time and contact with the children.[6] Neither party did so. Father appeals.[7]

[6] At oral argument before this court, father stated that his parenting time and ability to communicate with his children remains suspended.

[7] After father filed his notice of appeal, this court issued an order construing father's appeal as taken from the January 2019 order granting mother's motion to modify custody and the May 2019 order denying father's request for amended findings and conclusions.

D E C I S I O N

I. The district court did not err by finding that mother made a prima facie case that the children were endangered.

Father first argues that the district court incorrectly found that mother made a prima facie showing of endangerment to support modification of the custody arrangement.[8] A district court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Our "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).

To modify a custody order, a court must find that a change in circumstances occurred and modification is in the best interests of the children. Minn. Stat. § 518.18(d) (2018). Additionally, the court must "retain the custody arrangement or the parenting plan provision specifying the child's primary residence that was established by the prior order" unless one of the enumerated reasons applies. *Id.* One such reason is if the child's physical or emotional health and development is endangered or impaired, if the benefits of the change outweigh the likely harm caused by a change in environment. *Id.* The district court

[8] In making this argument, father does not appear to challenge the district court's order modifying custody issued after the evidentiary hearing. Rather, father focuses his arguments on the district court's April 2, 2018, determination that mother established a prima facie case for modification sufficient to warrant an evidentiary hearing. In his reply brief, father asserts that he clearly has challenged the custody determination made in the January 2, 2019, order. But the arguments in father's principal brief focus on the district court's finding that mother made a prima facie showing that the children were endangered. Accordingly, we focus our analysis on this issue.

has discretion to determine if the moving party has made a prima facie case for modification. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). But once the district court determines that a party has made a prima facie case, it must hold an evidentiary hearing on the motion. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008).

Here, the district court found that, through her affidavit, mother demonstrated "that the [c]hildren's environment with [f]ather endangers their emotional development."[9] This finding is not clearly erroneous. "When determining whether a party has established a prima facie case for child-custody modification, the court must accept the facts alleged in the movant's affidavit as true and disregard any contrary evidence." *Tarlan v. Sorensen*, 702 N.W.2d 915, 922 (Minn. App. 2005).

In her affidavit, mother stated that she believed the children's mental health was at risk based on father's behavior. Mother noted that the children believed that they must do what their father wanted or they would lose him. Stated differently, mother wrote that the children had "been placed in a position where they do not believe they can love both of their parents."

Mother also asked the court to examine prior orders and the psychological evaluations in the record. At the time of mother's motion, the record contained a custody evaluation from 2015 and a psychological evaluation from 2017. Both evaluations stated

[9] In his reply brief, father shifts his argument to his assertion that no significant change in circumstances existed in 2018. But father did not explicitly raise this argument in his principal brief. Therefore, that argument is not properly before this court. *See Szarzynski*, 732 N.W.2d at 291 n.3.

that the parties' co-parenting relationship negatively impacted the children's emotional development. And both evaluations detailed how father's behavior was detrimental to the children's relationship with mother. Further, the special master reports and district court orders spanning over three years chronicle father's negative behavior toward mother and describe how father influenced the children to view mother in a negative light. Mother's affidavit, read in the context of the entire record, provided a sufficient basis for the district court's endangerment finding.

This is particularly true because, when considering whether the movant made a prima facie showing of endangerment, the district court evaluates the movant's *allegations*. *See Amarreh v. Amarreh*, 918 N.W.2d 228, 231 (Minn. App. 2018). By pointing to evidence in the record, mother clearly alleged that the children's emotional health was endangered and that father was interfering in her relationship with the children. These allegations are sufficient to support the district court's finding. *See id.* at 231-32; *see also Lemcke v. Lemcke*, 623 N.W.2d 916, 919 (Minn. App. 2001) (explaining that repeated conduct by one parent designed to diminish a child's relationship with the other parent may be a basis to modify custody), *review denied* (Minn. June 19, 2001).[10]

[10] In passing, father argues that mother's motion to modify custody was procedurally improper. First, he contends that mother's motion was untimely because it was filed only three days before a scheduled hearing, giving father no time to prepare. But father cites no authority for this proposition. Father also contends that the motion was improper under Minnesota Statutes section 518.18(b) (2018). That statutory provision states that "[i]f a motion for modification has been heard, whether or not it was granted, unless agreed to in writing by the parties no subsequent motion may be filed within two years after disposition of the prior motion on its merits" unless an exception applies. Minn. Stat. § 518.18(b). One exception is if the court "has reason to believe that the child's present environment

II. The district court did not abuse its discretion by suspending father's parenting time and prohibiting him from contacting the children.

Father also contends that the district court's decision suspending his parenting time and prohibiting him from contacting the children constitutes an abuse of discretion. 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).

In deciding motions to modify parenting time, the court cannot restrict parenting time unless it finds that "(1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development; or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time." Minn. Stat. § 518.175, subd. 5(c)(1)-(2) (2018). And if a parent alleges that parenting time with the other parent places the child in danger of harm, "the court shall hold a hearing at the earliest possible time to determine the need to modify the order granting parenting time." *Id.*, subd. 5(d) (2018).

The district court initially suspended father's parenting time in April 2018 after he refused to return the children to mother after they ran away the second time. At an earlier hearing, the district court warned father that if he did not return the children to mother, his parenting time would be immediately suspended. Father did not comply with the court's order, despite the knowledge that he was operating on his "one last chance" after his

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may endanger the child's physical or emotional health or impair the child's emotional development." *Id.*, (c) (2018). Mother's motion falls within this exception.

previous noncompliance. Accordingly, after a hearing regarding several motions by father, the district court suspended father's parenting time temporarily and prohibited him from communicating with the children.

In doing so, the court pointed to father's "disturbing" behavior when police came to return the children to mother. Additionally, it observed that father's "decision to continue to communicate his blame of [m]other for unfavorable [c]ourt rulings to the [c]hildren" led the court to believe continued communication with father would fuel the children's anxiety and anger. And the district court concluded that it was not in the children's best interests to communicate with father at that time. In its January 2019 order following the evidentiary hearing, the district court stated that father's parenting time would remain suspended until the children's therapists recommended it be reinstated. But, in its May 2019 order, the district court qualified that holding by noting that either party could file a motion to reinstate father's parenting time.

We cannot say that the district court abused its discretion by suspending father's parenting time. Although the district court's order did not contain an explicit finding that father's parenting time would endanger the children or that father did not comply with court-ordered parenting time, such a conclusion is implicit in the district court's analysis. And we defer to implicit findings. *See Knapp v. Knapp*, 883 N.W.2d 833, 837-38 (Minn. App. 2016) (deferring to a district court's implicit resolution of factual questions). It is evident that the district court believed that time and communication with father placed the children's emotional well-being at risk. And this concern is supported by the record, particularly where father defied the court's order and refused to return the children to

mother when the court warned him that such conduct would result in the suspension of his parenting time.

Still, father contends that the district court did not comply with statutory requirements before suspending his parenting time. According to father, the district court failed to hold a hearing prior to the suspension of his parenting time. But the district court did hold a hearing on April 16, 2018, regarding several of father's motions before it issued the order suspending father's parenting time. And it is not clear from the record that father requested a further hearing on the issue of his parenting time at that time. Additionally, the court held an evidentiary hearing on mother's motion to modify custody in September 2018, which addressed several issues relevant to the question of father's parenting time. Finally, we reiterate that father had notice that certain actions on his part could lead to the suspension of his parenting time.[11] Accordingly, we conclude that, on this record, the district court acted within its discretion by temporarily suspending father's parenting time and his ability to communicate with the children.

III. The record does not establish that mother moved the children's residence out-of-state.

Next, father argues that the district court incorrectly applied the law when it failed to require mother to immediately return the children to Minnesota after she sent them to a residential facility in Utah. To the extent that this question requires us to engage in

[11] We note that, as of oral argument, father had not filed a motion with the district court seeking reinstatement of his parenting time.

statutory interpretation, we consider such questions de novo. *Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018).

Under Minnesota law, "[t]he parent with whom the child resides shall not move *the residence of the child* to another state except upon order of the court or with the consent of the other parent, if the other parent has been given parenting time by the decree." Minn. Stat. § 518.175, subd. 3(a) (2018) (emphasis added). The statute defines "residence" 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).

First, we observe that the statute requires us to analyze the *children's* residence, rather than mother's. Although mother contends that because her residence remains in Minnesota, the children's residence consequently remains here, we reject such an interpretation of the statute. The statute provides that a parent "shall not move the residence of the child to another state" without following the proper procedure. By using this phrasing, the statute contemplates a scenario—like this one—where a parent may move or seek to move the child's residence to another state, despite the parent remaining in Minnesota. In such cases, it defies logic to equate the parent's residence with the child's residence. Rather, to determine if this statute applies, we must evaluate the child's residence—not the parent's.

With that said, we conclude that the record does not establish that mother moved the children's residence to Utah. First, mother expressed her intent to seek residential treatment for the children when she sought temporary sole custody in late March 2018. In her affidavit, mother explained that she was "asking for specific permission to get the

children the immediate help they need," *which included seeking residential treatment for them*. She described "investigating" possible placements and mentioned two "national experts" with special programs who work with children in similar situations and some potential placements in Minnesota. It is clear from mother's affidavit that, in contemplating sending the children to a residential facility in another state, her intent was to seek treatment for the children, rather than permanently move their residence.

Additionally, documentation in the record about the length of the children's time in Utah is scarce. At a review hearing in late April 2018, the court learned that mother sent the children to the residential facility "less than a week earlier." And the children were still in Utah when the evidentiary hearing occurred in September 2018. This is the only information in the record explaining the length of the children's placement in Utah.[12] The limited time period during which the record shows that the children were in Utah—four to five months—fails to establish that mother moved the children's permanent residence to Utah. *See generally Grunseth v. Grunseth*, 364 N.W.2d 430, 432 (Minn. App. 1985) (suggesting, in a different context, that a child attending an out-of-town boarding school has not permanently moved), *review denied* (Minn. May 20, 1985).

[12] In the order dated January 2, 2019, the district court stated that it intended to have a review hearing "as soon as possible after the [c]hildren return to Minnesota." But the order did not explicitly state whether the children were in Minnesota or Utah at that time. Similarly, at a review hearing in February 2019, the district court noted that one purpose of the hearing was to confirm that the children had returned to Minnesota. But again, the children's location was not explicitly confirmed. At oral argument before this court, both parties agreed that the children are currently in Minnesota.

We emphasize that, when one parent seeks to place a child in an out-of-state facility for residential treatment while custody and parenting time disputes are ongoing, the best practice is to seek approval from either the other parent or the court before such a placement is made. We discourage parties from resorting to "self-help" measures and seeking approval after the fact. But here, where the record reflects that mother expressed her intent to seek residential treatment for the children to the district court and that the placement was for a relatively short period of time, we cannot say that mother moved the children's residence to another state. As a result, the district court did not abuse its discretion by declining to order the children's immediate return to Minnesota.

IV. The district court acted within its discretion by denying father's request for the appointment of a guardian ad litem.

Father also contends that the district court erred by not appointing a guardian ad litem for the children. According to father, daughter alleged that mother abused her. And he contends that Minnesota law mandates the appointment of a guardian ad litem in a dissolution proceeding where a child alleges abuse.[13]

The statute governing the appointment of a guardian ad litem provides for two types of appointments: permissive and required. Minn. Stat. § 518.165, subds. 1-2 (2018). In any dissolution proceedings where child custody is an issue, "the court *may* appoint a guardian ad litem to represent the interests of the child." *Id.*, subd. 1 (emphasis added).

[13] Although we question the procedural propriety of this argument, given that this appeal is construed as taken from the January and May 2019 district court orders, we address its substance for two reasons. First, though the guardian ad litem request was first denied in 2018, the denial is referenced by the district court in the January 2019 order. Second, mother does not argue that this argument is improperly before this court.

But, in the same type of proceeding, "if the court has reason to believe that the minor child is a victim of domestic child abuse or neglect . . . the court *shall* appoint a guardian ad litem." *Id.*, subd. 2 (emphasis added).

Here, the district court stated that the guardian ad litem program was "not currently filling permissive appointments due to budget constraints." Nothing in the record suggests that this statement was erroneous. Accordingly, the failure to order the permissive appointment of a guardian ad litem was not an abuse of discretion.

Whether the district court was required to appoint a guardian ad litem based on abuse allegations presents a closer call. The district court concluded that there was insufficient evidence of child abuse or neglect to support the mandatory appointment of a guardian ad litem.

The record reflects that daughter alleged that mother "attacked" her while she was using her cell phone. According to daughter, mother threatened to prevent the children from finishing the ski season if they told anyone about the alleged abuse.[14] The children also told police, when they were attempting to remove them from father's home, that mother was abusive. The children's allegations were reported to the appropriate social-services agency, but the record does not suggest that the agency recommended criminal charges or instituted a child-protection proceeding.

We reiterate that a district court must appoint a guardian ad litem in cases where it "has reason to believe" the child suffered domestic abuse or neglect. *Id.* And this court

[14] In a sealed exhibit, mother recounted the incident differently.

has stated that "the prudent exercise of discretion" by appointing a guardian ad litem often "serves the best interest of minor children," particularly "when the interests of the children may be different from those of the parents." *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. App. 1985). But here, the record contains somewhat vague allegations of abuse and there is nothing to suggest that social services took any further action after learning of the abuse allegations. *See Baum v. Baum*, 465 N.W.2d 598, 600 (Minn. App. 1991) (determining that the mandatory appointment of a guardian ad litem was not required where the evidence of abuse was insufficient), *review denied* (Minn. Apr. 18, 1991). These vague allegations, coupled with the extensive reports from therapists, the special master, and the district court compiled over a several-year period do not lend credence to the allegation of abuse and do not convince us that the district court had reason to believe that these children were victims of abuse.[15] Based on the particular circumstances of this case, we cannot say that the district court erred in its conclusion that the record did not require the appointment of a guardian ad litem. Reversal on this basis is not warranted.

V. The district court did not abuse its discretion by not interviewing the children about their custodial preferences.

Next, father contends the district court's failure to interview the children about their custodial preferences—and take those preferences into account—was an abuse of discretion. It is within the district court's discretion to decide whether to interview children about their parenting preferences. *Knott v. Knott*, 418 N.W.2d 505, 509 (Minn. App. 1988).

[15] Moreover, this record is clear that the district court, at least implicitly, discounted these allegations. As an appellate court, we must defer to the district court's credibility determinations. *See Knapp*, 883 N.W.2d at 837-38.

When a child is "capable by reason of age and intelligence" of stating a custodial preference, the child's 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). Under Minnesota law, if the district court determines that a child is "of sufficient ability, age, and maturity to express *an independent, reliable preference*," it must consider the child's preference when evaluating the best interests of the child before making a custody determination. Minn. Stat. § 518.17, subd. 1(a)(3) (2018) (emphasis added). But in cases where the child's custodial preference is the product of manipulation by the noncustodial parent, the district court is not required to defer to the child's preference. *See Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 691 (Minn. App. 1989), *review denied* (Minn. June 21, 1989); *Schwamb v. Schwamb*, 395 N.W.2d 732, 735 (Minn. App. 1986).

Here, the district court determined that the children's preferences would not be reliable due to father's "alienation and manipulation." In reaching this conclusion, the court noted that "[t]he record is replete with evidence that [f]ather has manipulated the [c]hildren against [m]other." Because the district court concluded that the children's preferences were unlikely to be reliable and independent, it declined to interview the children.

Based on the record in this case, the district court's decision was within its wide discretion. Although, in general, it is a better practice for the district court to interview the children and independently determine the reliability of their preferences, declining to do so here was not an error. The record contains significant evidence—compiled over several years—detailing father's negative behavior toward mother and his negative influence on

the children's attitudes toward mother.[16] Nearly every professional involved in the case suggested that father's behavior—whether intentional or not—influenced the children to view mother in a negative way. Indeed, the doctor who psychologically evaluated each member of the family described the children's sense of loyalty to their father as "extreme" and "destructive," resulting in the children "practicing alienation and defiance of legitimate authority."

The record provides ample support for the district court's conclusion that the children's custodial preferences would not be independent and reliable. As a result, the district court's decision not to interview the children and credit their custodial preferences was not an abuse of discretion. *See Schwamb*, 395 N.W.2d at 735.

VI. Removal of the district court judge was not required.

Finally, father contends that the district court abused its discretion by failing to remove the judge from the case. We review the denial of such a motion for an abuse of discretion. *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002).

Rule 63.03 of the Minnesota Rules of Civil Procedure provides that "[a] judge or judicial officer who has presided at a motion or other proceeding" may only be removed "upon an affirmative showing that the judge or judicial officer is disqualified under the Code of Judicial Conduct." Under the Minnesota Code of Judicial Conduct, a judge must disqualify himself or herself when "the judge's impartiality might reasonably be

[16] Father argues that the district court "peremptorily determined based on scant evidence that the children had been manipulated" and disregarded the children's clearly expressed preference to live with him. This "scant evidence" argument mischaracterizes the record, which is full of documentation detailing father's influence over the children.

questioned." Minn. Code Jud. Conduct Rule 2.11(A). One instance when a judge's impartiality may be questioned is when "[t]he judge has a personal bias or prejudice concerning a party." Minn. Code Jud. Conduct Rule 2.11(A)(1).

Here, the district court found that father did not affirmatively show that the judge was prejudiced or biased. This finding was within the district court's discretion. Father's motion for removal focused on his assertion that the district court lacked the authority to issue certain orders and failed to follow procedural rules. And he alleged that the district court violated his due process rights by not allowing his counsel to make arguments at the March 30, 2018, hearing.[17] But neither of these arguments constitute the necessary "affirmative showing" that the district court judge was disqualified from continuing to preside over the case for a reason outlined in the Minnesota Code of Judicial Conduct. Minn. R. Civ. P. 63.03.

Still, father contends that by "granting such extreme relief" based on a perceived lack of evidence, the district court judge demonstrated his bias against father. And, according to father, the alleged bias continued throughout the case. But caselaw is clear that prior adverse rulings "clearly cannot constitute bias." *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986). Other than adverse rulings, father does not point to evidence in the record to demonstrate judicial bias. Indeed, "[t]he mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge's

[17] Father filed a written response to mother's motion prior to the March 30, 2018, hearing. And, according to the district court, at the subsequent review hearing about two weeks later, it provided father with the opportunity to make any additional arguments not in his brief.

impartiality." *State v. Burrell*, 743 N.W.2d 596, 601-02 (Minn. 2008). Because father failed to affirmatively show that the district court judge was disqualified from presiding over the case based on the Minnesota Code of Judicial Conduct, the district court did not abuse its discretion by concluding that removal of the judge was not warranted.[18]

In sum, this case involves several years of parental conflict, expert involvement, and district court oversight. The record reflects that the district court and the experts involved provided thoughtful and thorough analysis at each step of this proceeding. We discern no abuse of discretion or legal error in the district court's decisions throughout this case. Reversal is not required.

Affirmed.

[18] Mother asserts that father is precluded from raising this argument because he failed to request that another district chief judge review the denial of the removal request. We address the substance of this argument in the interest of finality.