STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0941
A19-1323

In re the Marriage of: Lisa Marie Winkowski, petitioner,
Respondent,

vs.

J. Vincent Winkowski,
Appellant.

Filed March 23, 2020
Affirmed in part, reversed in part, and remanded; motion denied
Bryan, Judge

Olmsted County District Court
File No. 55-FA-18-4416

Amber Lamers, Carrie Osowski, Dittrich & Lamers, P.A., Rochester, Minnesota (for respondent)

Thomas R. Braun, Bruce K. Piotrowski, Restovich Braun & Associates, Rochester, Minnesota; and

Lynne Torgerson, Lynne Torgerson, Esq., Minneapolis, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

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

BRYAN, Judge

First, appellant challenges the denial of his motion to modify custody. Because the district court did not err in denying the modification motion without a hearing, we affirm

this part of the decision. Second, appellant seeks review and reversal of the following requirements ordered by the district court: (1) that he lock his firearms in a gun safe at all times when the minor children are with him, and (2) that he refrain from featuring or mentioning his children in YouTube videos and remove all such videos that had already been posted on his YouTube channel. Because the district court did not include sufficient findings to permit appellate review, we reverse its decision to impose these two requirements on appellant, and we remand for further findings. On remand, the district court may reopen the record at its discretion regarding the two challenged requirements.

FACTS

Appellant J. Vincent Winkowski (father) and respondent Lisa Marie Winkowski (mother) were previously married. They are the parents of A.W. born in 2009 and C.W. born in 2014. In 2015, the parties filed their stipulation and agreement in Iowa. The Iowa district court entered judgment and dissolved the marriage in 2016. Pursuant to the Iowa Judgement and Decree, the parties share joint legal custody with mother having physical care of the children subject to father's visitation rights. By agreement of the parties, mother and the children moved to Rochester, Minnesota in 2014, prior to finalizing the divorce. Father moved to Rochester, Minnesota in 2018. Shortly after, mother registered the dissolution judgment, and the district court accepted jurisdiction.

In February and March of 2019, the parties filed several motions, including father's motion to modify custody and mother's motion to order father to remove videos of the children from the internet. Father claimed that the current custody arrangement emotionally endangered the children. The district court denied father's motion for

modification of custody without a hearing, finding that father had failed to make a prima facie showing for an endangerment-based modification. The district court expanded father's parenting time but required that he lock his firearms "in a gun safe at all times when the minor children are with him." In addition, the district court granted mother's motion and ordered father to refrain from featuring or mentioning his children in YouTube videos and to remove all such videos that had already been posted on his YouTube channel.

In support of the denial of father's custody modification motion, the district court determined that father's supporting affidavit alleged that mother's strict interpretation of their parenting time schedule resulted in emotional endangerment of the children. Specifically, the district court summarized father's allegations as including the following statements: (1) that he should have the children at least 25% of the time under Minnesota law, although he previously agreed to less than that; (2) that mother unreasonably objected to father's proposed summertime schedule; (3) that the children want to spend more time with him; (4) that A.W. was struggling with math; and (5) that C.W. was behaving poorly and throwing tantrums. The district court concluded that father failed to establish the requisite prima facie case.

In support of its decision to grant mother's motion regarding posting videos of the children online, the district court explained in a single paragraph that father and his wife regularly post videos related to survival techniques and firearms on his YouTube channel, "The Family Prepper." The district court further found that the YouTube channel has 3,500 followers and that A.W. appears prominently in at least two of the videos. There are no other findings regarding the online videos. The district court granted mother's motion,

ordering father to "refrain from featuring the minor children or mentioning their names in any YouTube videos" and requiring father to "remove the YouTube videos of his children already posted on his channel."

In her affidavit supporting her request, mother states that the videos in question were posted without her knowledge or consent, that A.W.'s full name is visible or audible at least once, and that these videos portray "military tactics, guns, how to effectively kill or harm a human, and prepping content." Mother argued that father should not post such controversial videos of A.W. online without mother's consent. Mother provided the court with a video in which an eight-year-old A.W. states she is going to teach children how to be safe with guns and how to shoot them. She demonstrates how to remove the magazine of a BB gun, describes the "fundamentals of shooting," and fires at three targets.

None of the motions filed in district court specifically requested relief related to father's use or storage of firearms at his home during his parenting time. The district court did not make any findings regarding father's use or storage of firearms. The parties' affidavits included statements regarding father's use and storage of firearms, and more generally regarding father's mental health. For example, mother's opposition to father's modification motions mentioned concerns related to father's PTSD, his obsession with guns, and preparing for the end of the world. Mother also noted that during their marriage, father purchased military equipment, guns, assault rifles, and copious amounts of ammunition. Mother also submitted a series of photos of multiple guns left out around the house. Father attached a psychological evaluation in which the evaluator notes that prior to seeking counseling in 2007, father kept a loaded firearm under his bed, was

hypervigilant, and had irrational thoughts. Mother also discussed an incident in 2012, when father accidentally discharged his gun. Bullets from the weapon penetrated the parties' garage wall and went into the neighbor's garage. There was no criminal prosecution. The district court addressed father's mental health, but did not make any factual findings specifically related to firearms. Nevertheless, the district court ordered that "[f]ather's firearms are to be safely locked in a gun safe at all times when the minor children are with him." Father appeals.[1]

D E C I S I O N

I. Mother's Motion to Supplement the Appellate Record

As a threshold matter, mother requested permission to supplement the appellate record regarding father's claims about his mental stability and his current employment status. Appellate courts rarely consider new evidence on appeal. *See* Minn. R. Civ. App. P. 110.01 (defining the record on appeal); *see also Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (stating that the appellate court may not consider matters not received in evidence below). Because the evidence relates to contested factual issues and the record below already contains numerous exhibits from both parties regarding father's mental

[1] Father filed two separate, but related appeals. By order filed August 21, 2019, this court consolidated those appeals. While father's second appeal (A19-1323) challenged the authority of the district court to make amended findings regarding child support and its determination of the support obligation, father's brief to this court addressed neither question. The supreme court has stated that issues not briefed on appeal are "waived." *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982); *see State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc*., 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an issue absent adequate briefing); *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007) (citing *Wintz*). Here, the questions are not properly before this court, and we decline to consider them.

health, mother has not established a sufficient basis for this court to admit any supplemental evidence. We deny mother's motion to supplement the record. In the future, either party may seek additional relief from the district court by filing proper motions.

II. Denial of Father's Custody Modification Motion

Father argues that the district court erred in denying his custody modification motion without an evidentiary hearing. Because the district court did not err, we affirm the portion of the district court's order denying father's modification motion.

Minnesota Statutes, section 518.18, governs the modification of custody orders. *State ex rel. Gunderson v. Preuss*, 336 N.W.2d 546, 547 (Minn. 1983). The moving party bears the burden of meeting the requirements of section 518.18. *Gordon v. Gordon*, 339 N.W.2d 269, 270-71 (Minn. 1983). Under section 518.18, the district court must first determine whether the party seeking to modify the custody arrangement has made a prima facie case for modification. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). "[I]f the party seeking to modify a custody order makes a prima facie case for modification," then the district court is required to conduct an evidentiary hearing. *Id*. To establish a prima facie case for an endangerment-based modification of custody, the moving party must allege all of the following four factors: (1) that the circumstances of the children or custodian have changed; (2) that modification would serve the children's best interests; (3) that the children's present environment endangers their physical health, emotional health, or emotional development; and (4) that the benefits of the change outweigh its detriments with respect to the children. *Id*.

When we review an order denying a motion to modify custody or restrict parenting time without an evidentiary hearing, we make three discrete determinations: (1) we review de novo whether the district court properly treated the allegations in the moving party's affidavits as true, disregarded the contrary allegations in the nonmoving party's affidavits, and considered only the explanatory allegations in the nonmoving party's affidavits, (2) we review for an abuse of discretion the district court's determination as to the existence of a prima facie case for the modification or restriction, and (3) we review de novo whether the district court properly determined the need for an evidentiary hearing. *Amarreh v. Amarreh*, 918 N.W.2d 228, 230-31 (Minn. App. 2018).

First, we conclude that the district court properly treated the allegations in father's affidavits as true. The district court determined[2] that father's supporting affidavit asserted the following factual allegations: that he should have the children at least 25% of the time under Minnesota law; that mother unreasonably objected to father's proposed summertime schedule; that the children want to spend more time with him; that A.W. had been struggling with math; and that C.W. was behaving poorly and throwing tantrums. Our de novo review of the record supports the conclusion that the district court accepted these alleged acts as true and disregarded any contradictions in mother's affidavits, except to the extent that mother's statements may explain or contextualize father's allegations.

[2] The district court properly stated the law regarding father's allegations, but made factual findings related to all of the pending motions under the same subheading: "Custody Modification." Father argues that this heading shows that the district court did not treat his allegations as true. We reject the inference that the district court expressly and correctly stated the law, and then implicitly disregarded it by the language used in its headings.

Second, we conclude that the district court did not abuse its discretion when it determined that father failed to establish a prima facie case for an endangerment-based custody modification. As noted above, a moving party requesting custody modification must first establish each of the four elements of a prima facie case. *See, e.g.*, Minn. Stat. § 518.18(d)(iv) (2019); *Goldman*, 748 N.W.2d at 284. Endangerment is not precisely defined and varies according to the circumstances of each case. *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). Not all allegations will supply prima facie evidence of endangerment. *See Geibe v. Geibe*, 571 N.W.2d 774, 779 (Minn. App. 1997) (holding that a "single incident of borderline abuse" did not establish endangerment). To make a prima facie case of endangerment, the movant must present evidence establishing that the child faces substantial danger and suffers actual adverse effects. *In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002); *Doren v. Doren*, 431 N.W.2d 558, 560 (Minn. App. 1988).

In this case, even assuming the truth of the factual allegations summarized above, the district court did not abuse its discretion in determining that father failed to make a prima facie case for modification. For instance, father's first three allegations assert that mother restricted father's contact with the children. The district court was well within its discretion to conclude that these allegations, even if true, do not state substantial danger or indicate actual adverse effects. Similarly, the district court did not abuse its discretion in concluding that A.W.'s academic struggles do not, without more, satisfy the statutory standard. Finally, while C.W.'s behavior is concerning, the district court did not abuse its discretion in concluding that such behavior is common for five-year-olds. Taken as a

whole, the district court did not abuse its discretion when it determined that father failed to establish that the current custody arrangement substantially endangers the children or causes them any actual adverse effects.

Third, we conclude that father was not entitled to an evidentiary hearing. "A district court is required under section 518.18(d) to conduct an evidentiary hearing *only if* the party seeking to modify a custody order makes a prima facie case for modification." *Goldman*, 748 N.W.2d at 284 (emphasis added). In this case, no evidentiary hearing was required given that father failed to make a prima facie case for custody modification. We affirm the district court's denial of father's custody modification motion.

III. Orders Regarding Firearms and YouTube

Father challenges the district court's decision to require that he comply with the following two conditions: (1) that he lock his firearms in a gun safe at all times when the minor children are with him, and (2) that he refrain from featuring or mentioning his children in YouTube videos and remove all such videos that had already been posted on his YouTube channel. Because the decision below did not include sufficient findings to permit meaningful appellate review of these two requirements, we remand for further findings.

District courts have broad authority to impose initial or modified limits on the time, location, frequency, duration, supervision, and other aspects of parenting time, such as requirements that a parent participate in therapy or that a parent remain sober during parenting time, based on the best interests of the children. *See, e.g.*, Minn. Stat. § 518.175, subds. 1(a),

1(b), 5 (2019); *see also, e.g.*, *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995); *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984).

In this case, the district court granted mother's motion, prohibiting father from featuring or mentioning the children in YouTube videos and requiring removal of all such videos that had already been posted on his YouTube channel. In addition, the district court imposed a requirement that father lock his firearms in a gun safe at all times when the minor children are with him. Both decisions fall within the broad discretion of the district court. In its order, however, the district court made only one finding regarding father's YouTube channel and did not make any findings regarding firearms. This court cannot meaningfully review the decisions of the district court regarding storage of firearms and father's YouTube channel without more detailed findings addressing the best interests of the children. Therefore, we reverse these two decisions and remand to the district court for further proceedings.[3] On remand, the district court may reopen the record at its discretion regarding the two conditions.

Affirmed in part, reversed in part, and remanded; motion denied.

[3] Should the district court impose any requirements that implicate either party's constitutional rights, additional findings are necessary. *See Newstrand v. Arend*, 869 N.W.2d 681, 690 (Minn. App. 2015) (holding that father's "constitutional freedom of conscience" was not violated by an order requiring father to obtain a psychological evaluation), *review denied* (Minn. Dec. 15, 2015); *Geske v. Marcolina*, 642 N.W.2d 62, 70 (Minn. App. 2002) (rejecting First Amendment challenge to injunction against publication of pictures of a father's children); *LaChapelle v. Mitten*, 607 N.W.2d 151, 163-64 (Minn. App. 2000) (best interests of the child are a compelling state interest justifying infringement on a mother's constitutional right to travel), *review denied* (Minn. May 16, 2000); *Sina v. Sina*, 402 N.W.2d 573, 576 (Minn. App. 1987) (holding that being exposed to a third religion was not in the best interests of the children, despite father's First Amendment freedom to exercise that religion).