STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1308

In re the matter of: Eric Thurman Clinton, petitioner,
Respondent,

vs.

Gabriela Kathleen Linder,
Appellant.

Filed July 20, 2020
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-FA-15-5238

Zachary Smith, Vox Law, LLC, Minneapolis, Minnesota (for respondent)

Lateesa T. Ward, Ward & Ward, P.C., Minneapolis, Minnesota (for appellant)

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

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

REILLY, Judge

On appeal from the district court's denial of her motion to modify custody, without an evidentiary hearing, appellant-mother argues that the district court: (1) abused its discretion in ruling that she failed to make a prima facie case to modify custody, and should have held an evidentiary hearing on her motion, (2) awarded her insufficient parenting

time, (3) should have vacated certain judgments against her, (4) should not have awarded respondent-father conduct-based attorney fees, (5) violated her right to seek judicial relief by its award of fees against her, and (6) was biased against her. We affirm.

FACTS

Appellant-mother Gabriela Kathleen Linder and respondent-father Eric Thurman Clinton are the parents of P.L.C., who was born in 2012. Mother and father dated for a short time while mother was a law student in Minnesota. Mother and father were no longer dating when mother found out she was pregnant. Mother moved to Nevada in 2012, and P.L.C. was born there. In 2013, mother moved back to Minnesota with P.L.C. Mother, father, and P.L.C. lived together in Minnesota from October 2013 until June 2015. But mother and P.L.C. returned to Nevada in July or August 2015.

In July 2015, father petitioned the Hennepin County District Court to establish custody and parenting time. Mother filed an answer and counter-petition in September 2015. In May 2016, the district court granted mother and father joint legal custody and joint physical custody of P.L.C.[1] The district court ordered mother to return P.L.C. to Minnesota no later than July 1, 2016, and ordered parenting time as follows:

> a. If Mother returns to Minnesota: the parties shall cooperate to develop a parenting time schedule under which each parent has equal parenting time. If the parties are unable to agree on such a schedule, they shall submit the matter to mediation prior to moving the court for further assistance. Unless and until an alternative agreement or court order, Mother shall have Monday and Tuesday (including overnights), Father shall have Wednesday and Thursday (including overnights) and the

[1] The district court granted father's petition by default at his request after mother ignored the court-ordered custody evaluation.

> parties shall alternate weekends (Friday evening to Monday morning).
>
> b. If Mother remains in Nevada: Mother shall be entitled to reasonable and liberal parenting time to occur in Minnesota. Mother shall provide at least 10 days' notice of her intent to exercise parenting time in Minnesota. Father shall not unreasonably withhold parenting time when Mother is able to exercise it in Minnesota. Additionally, Mother shall be entitled to four one-week blocks of parenting time to occur in Nevada per year: twice during summer break, once during winter break, and once during spring break. All travel expenses shall be borne by [Mother].

In August 2017, father filed a motion requesting, in part, an equal, rotating holiday schedule, an increase in mother's ongoing child support to reduce her arrears, an order compelling mother to respond to father's discovery requests and sanctioning mother $1,000 for failure to cooperate with the discovery request, and an award of $3,500 in conduct-based and need-based attorney fees. Mother opposed father's motion.

On November 13, 2017, the district court issued an order granting father's requests. The district court sanctioned mother $1,000 for her "failure to cooperate with the discovery process." The district court also granted father's motion for need-based attorney fees in the amount of $1,000 and conduct-based attorney fees in the amount of $2,500. Judgment was entered on December 28, 2017, in the amount of $4,500.

In February 2018, father moved the district court for an order enforcing the terms of the November 13, 2017 order, including ordering mother to complete a passport application for P.L.C., ordering mother to "personally handle all pick-up and drop-offs" of P.L.C., making "inferred findings of fact . . . due to [mother's] failure to respond to discovery," ordering mother to drop P.L.C. off at school on time, and ordering that

mother's school-day parenting time schedule be forfeited for one school year if she has more than three unexcused late drop-offs in a school year. Father also moved the district court to sanction mother $1,000 for failing to provide discovery, to award father $999 in conduct-based and $999 in need-based attorney fees, and to grant other relief. The hearing on father's motion was scheduled for March 8, 2018, at 1:30 p.m. Mother, who had moved back to Nevada, failed to appear for the hearing.

On June 19, 2018, the district court issued an order enforcing the previous order from November 13, 2017, sanctioning mother $1,000 for failure to comply with court-ordered discovery, and awarding father $999 in need-based attorney fees and $999 in conduct-based attorney fees. Three separate judgments were entered on July 30, 2018, totaling $2,998.

On December 10, 2018, mother moved the district court for an order (1) vacating the three judgments entered on July 30, 2018; (2) modifying custody of P.L.C. and allowing P.L.C. to move to Nevada with her; (3) modifying parenting time; and (4) requiring father to provide information about incidents and injuries involving P.L.C. Father filed a motion requesting, in part, that the district court deny mother's requests, modify the parenting time schedule to allow mother one weekend per month in Minnesota, five weeks per year in Nevada, with alternating holidays.

On June 19, 2019, the district court issued an order. The district court denied mother's request for an evidentiary hearing on the modification of custody issue, ruling that mother failed to make a prima facie showing of endangerment. The district court also clarified the parenting time schedule. The district court acknowledged that mother "has a

rebuttable presumption of at least 25% of parenting time or 91 overnights per year," and also acknowledged the "practicalities and logistics of bridging the distance" between the parties who reside in different states. The district court awarded mother 21% of parenting time or 78 overnights per year and created a holiday-parenting-time schedule. The district court denied mother's request to vacate the judgments entered on July 30, 2018. The district court also granted father's request for attorney fees in the amount of $5,650. Judgment was entered on June 20, 2019. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion when it denied, without an evidentiary hearing, mother's motion to modify custody.

Mother challenges the district court's denial of her request for an evidentiary hearing on the issue of custody modification. Specifically, mother challenges the district court's determination that she failed to make a prima facie case for custody modification based on endangerment.

Under Minn. Stat. § 518.18 (d)(iv) (2018):

> the court shall retain the custody arrangement . . . specifying the child's primary residence that was established by the prior order unless: . . . the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

Before the district court holds an evidentiary hearing, the party seeking the modification must make a prima facie case for modification. *In re Custody of M.J.H.*, 913 N.W.2d 437, 440 (Minn. 2018). To make a prima facie case to modify custody based on

endangerment, the moving party must allege: "(1) the circumstances of the children or custodian have changed; (2) modification would serve the children's best interests; (3) the children's present environment endangers their physical health, emotional health, or emotional development; and (4) the benefits of the change outweigh its detriments with respect to the children." *Id.* (quoting *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017)). "Endangerment requires a showing of a significant degree of danger, but the danger may be purely to emotional development." *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997) (quotation and citation omitted). "If the affidavits accompanying the motion for modification do not allege sufficient facts to allow a court to reach the findings required by [section] 518.18, the [district] court is required to deny the motion." *Englund v. Englund*, 352 N.W.2d 800, 802 (Minn. App. 1984) (citing *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 472 (Minn. 1981)).

On appeal from an order denying, without an evidentiary hearing, a motion to modify custody, the court "review[s] three discrete determinations." *Boland v. Murtha*, 800 N.W.2d 179, 185 (Minn. App. 2011). First, this court reviews "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." *Id.* Second, this court reviews "for an abuse of discretion the district court's determination as to the existence of a prima facie case for the modification." *Id.* Finally, this court reviews "de novo whether the district court properly determined the need for an evidentiary hearing." *Id.*

In her motion to modify custody, mother argued that custody modification was warranted because father works "excessive hours," and "the extent [father's] girlfriend inserts herself into the role of mother . . . is very concerning to [mother]." Mother alleged that father's work schedule and father's "attempt to substitute [his girlfriend] as parent is emotionally damaging to the minor child." Mother also alleged endangerment based on an incident in which a dog bit P.L.C. while in the care of father and his girlfriend.

The district court noted at the outset that "in reviewing the motion papers for endangerment, the Court has (i) assumed that all of [mother's] factual averments are true; and (ii) not [relied] on any of [father's] contrary averments (although the Court has reviewed his averments and supporting materials to provide context for the Court's decision)." The district court first considered mother's allegations about the dog bite. The district court stated that mother's "averments on endangerment stemmed from one accident (the dog bite), and does not demonstrate a nexus between [father's] conduct and any physical or emotional harm suffered by the child."

The district court next considered mother's allegations about father's girlfriend and her role as "substitute mother." The district court reasoned that because P.L.C, father, and father's girlfriend live together, it "is reasonable to assume that [father's] live-in significant other would be involved in [P.L.C.'s] life." The district court also determined that mother's concerns stem from "third parties making assumptions about who [P.L.C.'s] mother is." But the district court determined that it could not rule that a prima facie case for endangerment exists based on "the assumptions of third parties."

Finally, the district court considered mother's allegations about father's work schedule and his inability to provide a "consistent and safe environment" for P.L.C. because of his busy schedule. The district court noted father "contextualizes this argument," explaining that "a majority" of the hours he works outside his full-time employment are worked while P.L.C. is in school, at camp during the summer, or while he is with his mother. The district court ruled that mother's concerns about father's work schedule do not support a prima facie case of endangerment.

Our review of the record shows that the district court treated mother's allegations as true, and only considered father's explanatory allegations where helpful to provide context for mother's allegations. On this record, mother has not shown that the district court abused its discretion in ruling that mother failed to make a prima facie case to modify custody based on endangerment. Therefore, we also conclude that the district court properly determined that an evidentiary hearing was unnecessary.

II. The district court did not abuse its discretion in its parenting-time award.

Mother makes various arguments about the district court's parenting-time award. "The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion." *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017) (quoting *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009)). "Reversible abuses of discretion include misapplying the law or relying on findings of fact that are not supported by the record." *Id*. (quotation omitted).

First, mother argues that the change in the parenting time schedule "makes it impossible for her to achieve the true joint physical custody goal contemplated by the

Custody Order" and essentially awards father sole physical custody of P.L.C.[2] Specifically, mother argues that when the district court modified the parenting time schedule, it improperly modified the custody order because she was awarded less than 50% parenting time. Mother cites no legal authority to support her claim. And this court has stated that "[j]oint physical custody does not require an absolutely equal division of time; rather, it is only necessary that physical custody of the child be the shared responsibility of the parties." *Hegerle v. Hegerle*, 355 N.W.2d 726, 731-32 (Minn. App. 1984); *see* Minn. Stat. § 518.003, subd. 3(d) (2018) (defining joint physical custody). Here, despite the allocation of parenting time, physical custody of the child is the shared responsibility of the parties. As a result, we reject mother's argument that the district court improperly modified the custody order when it modified the parenting time schedule.

Second, mother argues that the district court abused its discretion because it awarded her less than the 25% parenting time to which she is presumptively entitled under Minn. Stat. § 518.175, subd. 1(g) (2018) without a finding of endangerment. But this court has held that "[a]lthough a 'restriction' requires a finding of endangerment or noncompliance with court orders, parenting-time allocations that merely fall below the 25% presumption can be justified by reasons related to the child's best interests and considerations of what

[2] Mother asserted in her brief and at oral argument that after the district court decided her motion, mother moved back to Minnesota to be closer to P.L.C. She argues that the district court erred in denying her requested alternative relief of alternating weeks of parenting time in Minnesota. But the district court determined mother's parenting time based on the fact that mother was residing in Nevada at the time of the hearing. The district court also stated in its order that if mother moves back to Minnesota and lives in the state permanently, "the Court would entertain a motion to modify [the] parenting time schedule" after the parties attended mediation or another alternative dispute resolution process.

is feasible given the circumstances of the parties." *Hagen v. Schirmers*, 783 N.W.2d 212, 218 (Minn. App. 2010) (citation omitted). While the district court has the duty to consider the presumption, "the statute does not restrict the bases for reducing parenting time." *Id.* "The district court has broad discretion in deciding this issue." *Id*.

Here, the district court acknowledged the presumption, noting that mother "has a rebuttable presumption of at least 25% of parenting time, or 91 overnights per year." The district court also noted that it "would like to award [mother] as close to 25% of parenting time as possible under the current circumstances and distance constraints." As a result, the district court awarded mother 21% of parenting time or 78 overnights per year. The district court considered the "circumstances" namely "the practicalities and logistics of bridging the distance with a child [P.L.C.'s] age" in coming to the parenting time determination. The district court did not abuse its discretion when it awarded mother 21% parenting time under the circumstances of this case.

Third, mother argues that the district court's "refusal to allow alternating weeks of parenting time in Minnesota is unwarranted on this record." In her motion, mother requested an order "clarifying/modifying the parenting time schedule between the parties to ensure that [mother] is entitled to as close to 50% parenting time when she is physically staying in Minnesota." Mother noted in her submissions that "while [it] would be an extreme hardship" for her, she would "continue to travel[] to and from Nevada twice a month if the Court does not permit the child to move to Nevada." The district court rejected mother's proposal, stating that because mother "still primarily resides in Nevada it is not practical to award [mother] 50% parenting time as she requested and a week on week off

schedule is not favorable for a child of [P.L.C.'s] age even if [mother] were in Minnesota 50% of the time."

Mother contends that the district court "speculated that it was not in the child's best interests to alternate weeks. In light of [father's] excessive work schedule, that does not appear reasonable because the child must then spend much of his time with a third party and away from his parents." But in considering mother's motion to modify custody, the district court rejected mother's contentions over father's work schedule. The district court explained that father "contextualizes this argument," clarifying that "a majority" of the hours he works outside his full-time employment are worked while P.L.C. is in school, at camp during the summer, or while P.L.C. is with his mother. And by mother's own admission, travelling between Minnesota and Nevada every other week "would be an extreme hardship." The district court echoed this in its findings, stating that because mother lives in Nevada it is "not practical to award [mother] 50% parenting time." The district court did not abuse its discretion in denying mother's proposal for alternating weeks of parenting time in Minnesota.

Finally, mother argues that the district court "erroneously placed unfair and onerous terms on [mother's] parenting time." Mother challenges the district court's "reducing her access to the child to one weekend per month," requiring mother to provide 30 days' notice before exercising parenting time, requiring mother to take P.L.C. to scheduled activities during her parenting time, requiring mother to pick up the child for parenting time rather than relying on a third party to do so, requiring mother to pay for all expenses related to her parenting time, and allowing father's girlfriend to pick up the child rather than father.

Mother contends that these "restrictions adversely affect the parent-child relationship." Mother provides no citation to legal authority or legal analysis to support her position. The district court has broad discretion in deciding parenting-time issues, mother has failed to show affirmatively that the district court erred in imposing such terms, and no prejudicial error is obvious on mere inspection of the district court's ruling. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection."). As a result, we do not further address mother's argument on this point.

III. The district court did not abuse its discretion when it denied mother's request to vacate prior judgments.

Mother argues that prior judgments against her should have been vacated because they resulted from an abuse of the district court's discretion. Under Minn. Stat. § 518.145, subd. 2 (2018), "[o]n motion and upon terms that are just, the court may relieve a party from a judgment and decree, order, or proceeding under [chapter 518]" including "mistake, inadvertence, surprise, or excusable neglect." The moving party bears the burden of proof. *Haefele v. Haefele*, 621 N.W.2d 758, 765 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001). This court reviews a district court's decision to reopen a judgment for an abuse of discretion. *Id.* at 761. "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or rendering a decision that is against logic and the facts on record." *Knapp v. Knapp*, 883 N.W.2d 833, 835 (Minn. App. 2016).

Mother challenges the district court's order from June 19, 2018, and the three resulting judgments entered on July 30, 2018. In the June 19 order, the district court granted father's motion to enforce the previous order from November 13, 2017, and sanctioned mother $1,000 for failure to comply with court-ordered discovery.[3] The district court also awarded father additional need-based attorney fees in the amount of $999 and conduct-based attorney fees also in the amount of $999. The district court noted that mother not only failed to respond to father's motion but also failed to appear at the motion hearing on March 8, 2018.[4] Pursuant to Minn. Gen. R. Prac. 303.03(b), the district court found father's motion unopposed and awarded attorney fees. Three separate judgments were entered on July 30, 2018, totaling $2,998.

Mother moved to vacate the judgments, arguing that she "has a reasonable excuse for failing to respond to [father's] motion below or appear at the March 8, 2018 hearing." Mother argued that she did not receive father's notice of motion because she had moved back to Nevada. The district court determined that mother's failure to appear at the

[3] Mother challenges the district court's order from November 13, 2017, in which it sanctioned mother $1,000 for her "failure to cooperate with the discovery process," granted father's motion for need-based attorney fees in the amount of $1,000, and granted his motion for conduct-based attorney fees in the amount of $2,500. Judgment in the amount of $4,500 was entered on December 28, 2017. Mother acknowledges that she did not timely appeal this judgment and that the timeline for vacating that judgment had expired. Because mother did not timely challenge the district court's order from November 13, 2017, and subsequent judgment from December 28, 2017, we decline to consider her arguments.

[4] The district court provided other reasons for awarding attorney fees, including, but not limited to, mother "purposefully" causing father to expend money and time in court proceedings because mother is in a superior financial position, and mother has "unreasonably contributed to the length and expense of the proceedings." Mother does not challenge any of these findings on appeal.

scheduled hearing on March 8, 2018, did not result from "mistake, inadvertence, surprise, or excusable neglect." The district court found that on January 19, 2018, in a separate proceeding, Hennepin County moved the district court for an order finding mother in contempt for failing to pay child support. In the order to show cause, in that separate proceeding, mother was ordered to appear personally before a referee or judge at the Family Justice Center on March 8, 2018, at 1:00 p.m. A Hennepin County deputy personally served mother the order to show cause at her apartment in Minneapolis on January 28, 2018.

On February 19, 2018, father moved the district court for an order enforcing the November 13, 2017 order and other relief. The hearing on father's motion was scheduled at 1:30 p.m. to immediately follow the contempt hearing on March 8, 2018. The affidavit of service, filed February 19, 2018, shows that father's motion was served on mother by mailing it to mother's apartment. Mother failed to appear for the contempt hearing and for the hearing on father's motion. The district court reasoned that mother's failure to appear at the contempt hearing on March 8 was "unexcused" because she was required to personally appear. "And had [mother] complied with the Order to Show Cause, then she would have appeared at the hearing on [father's] motion at 1:30."

Mother challenges the district court's reasoning and its reliance on mother's unexcused absence from the contempt hearing. But the record supports the district court's findings, and we conclude that the district court did not render a decision that is against logic and the facts in the record. We discern no abuse of discretion in the district court's denial of mother's request to vacate the prior judgment.

IV. Mother's argument about prior awards of attorney fees and sanctions is not properly before the court.

Mother argues that the district court's repeated awards of attorney fees and imposition of sanctions violates her constitutional right to seek judicial relief and that sanctioning her for conduct "outside litigation" violated her right to procedural due process. We decline to consider this argument for two reasons. First, mother cites neither the record nor to any relevant legal authority to support these arguments. Because this issue is inadequately briefed we decline to consider it. *See Louden v. Louden*, 22 N.W.2d 164, 166 (Minn. 1946) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection."). Second, mother appears to challenge all previous awards of attorney fees and imposition of sanctions, but mother did not argue to the district court that these awards and sanctions violated her right to seek judicial relief. Because mother did not raise this issue below, we decline to consider it on that basis as well. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("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)).

V. The district court did not abuse its discretion when it awarded father conduct-based attorney fees.

Mother argues that the district court abused its discretion when it awarded father conduct-based attorney fees in its June 19, 2019 order. "In proceedings under chapter 518, a district court may, in its discretion, award attorney fees against a party who unreasonably contributes to the length or expense of the proceeding." *Brodsky v. Brodsky*, 733 N.W.2d

471, 476 (Minn. App. 2007) (citing Minn. Stat. § 518.14, subd. 1). Conduct-based attorney fees are warranted when a party's positions throughout the proceedings are "duplicitous and disingenuous and have had the effect of further . . . lengthening [the] litigation, and increasing the expense of [the] proceedings." *Redmond v. Redmond*, 594 N.W.2d 272, 276 (Minn. App. 1999). "A district court's attorney fee award will be reversed only for an abuse of discretion." *Haefele*, 621 N.W.2d at 767.

Mother argues that conduct-based attorney fees were improper because she "raised legitimate legal and factual arguments to support her positions" in her motion. But the district court did not award conduct-based attorney fees based on the lack of merit of mother's motion. Instead, the district court found that mother "has unreasonably contributed to the length and expense of these proceedings." Specifically, the district court found that mother has raised "largely procedural . . . requests to relitigate issues after almost every major decision in this case. This repeated, post-decision litigation has added considerable expense and time to these proceedings." Mother does not appear to object to these findings. Instead, mother appears to challenge the district court's finding that father "incurred substantial expenses related to this motion, which was brought, in part, because [mother] failed to appear at a hearing on March 8, 2018, without a reasonable excuse." Mother argues that her "reason for missing the hearing . . . was because she had not received the motion or hearing notice." Thus, mother again challenges the district court's finding that mother failed to appear at the hearing on March 8, 2018, without reasonable excuse. As detailed above, the record supports the district court's finding that mother failed to

appear at the hearing without excuse. We discern no abuse of discretion in the district court's award of attorney fees.

VI. Mother has not proved judicial bias.

Mother argues that the district court's "rulings and repeated sanctions . . . raises concerns about judicial bias." Mother essentially contends that because the district court ruled against her and imposed sanctions, the district court was biased in favor of father. But this court has held that "prior adverse rulings . . . clearly cannot constitute bias." *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986) (citing *U.S. v. Anderson*, 433 F.2d 856, 860 (8th Cir. 1970)). Thus, we reject mother's argument.

Mother also argues that the referee was biased because he "may have had a private conversation with [father] about the case prior to the hearing." Mother notes that at the beginning of the hearing on March 25, 2019, her counsel received "anecdotal information" that an off-the-record conversation occurred between the referee and father's counsel. The record shows that mother's counsel indicated that she "had a request of the Court whether the Court has had some *ex parte* communications with the . . . petitioner in this case about this case?" The referee responded, "I don't think I've ever talked to [father] outside this courtroom before." The referee asked, "Is there something that you want to get into?" to which mother's counsel responded, "not at this time." Mother argues that the referee incorrectly interpreted counsel's comment "as excluding any conversation with [father's] counsel." Even so, mother provides no explanation, argument or other citation to the record to support an argument that any conversation that *may* have occurred between the referee

and father's counsel created bias and we otherwise discern no bias. Thus, we reject mother's argument.

Affirmed.