STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0283

In re the Custody of: N. Y. B., James Edward Bono, petitioner,
Appellant,

vs.

Megan Yvonne Hedberg,
Respondent.

Filed November 2, 2020
Affirmed; motions denied
Larkin, Judge

Anoka County District Court
File No. 02-FA-16-2165

Victoria M.B. Taylor, Shawn C. Reinke, Taylor, Krieg & Reinke, LLC, St. Paul, Minnesota (for appellant)

Susan A. Daudelin, Henschel Moberg, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant-father challenges the district court's denial of his request for parenting-time assistance, arguing that the district court erred by (1) treating his motion as one for

modification rather than as an initial proceeding to establish parenting time, (2) denying his request for parenting time based on evidence of conduct unrelated to the child, (3) denying his request for parenting time without first scheduling an evidentiary hearing, and (4) refusing to order respondent-mother to return the parties' child to Minnesota. After this appeal was filed, respondent moved to strike portions of appellant's brief and sought conduct-based attorney fees related to her motion to strike. Appellant moved to dismiss or deny respondent's motion and for conduct-based attorney fees related to respondent's motion. We affirm the district court's decision, deny respondent's motion to strike as moot, and deny both parties' requests for attorney fees.

FACTS

Appellant James Bono (father) and respondent Megan Hedberg (mother) are the parents of N.Y.B., born in September 2016. They have never been married. Shortly after the child's birth, mother petitioned the district court for an order for protection (OFP) against father. Following a hearing in November 2016, the district court granted the OFP.

In December 2016, father petitioned the district court to establish custody and parenting time. At a hearing in October 2017, the parties agreed on the record "that it is in the best interests of the minor child for [mother] to have sole legal custody and [mother] to have sole physical custody with parenting time reserved." The parties also agreed that the OFP would be amended "to allow for one-way communication from [mother] to [father] via email for the purposes of providing one time per month informational and photographic updates regarding the minor child." The district court incorporated the parties' custody

agreement into an order and judgment dated October 31, 2017. The order stated that "[t]he issue of parenting time is reserved."

In July 2019, father moved the district court for parenting-time assistance, seeking "an order finding that it is in the best interest of the child . . . to modify the prior order of this court and stipulation of the parties . . . [and] to commence parenting time with [father]." Father also requested that the district court adopt his proposed parenting-time schedule, which included programming that would allow father and the child to be introduced to one another in a safe, controlled environment. Father submitted his own six-page affidavit in support of his motion and did not request an evidentiary hearing.

After father moved for parenting-time assistance, mother and the child moved to Nevada. Mother filed a response in opposition to father's motion, along with her own affidavit stating her concerns regarding the prospect of father having parenting time "with a daughter he hasn't seen since she was days old." Mother made the following allegations regarding father. Father has a history of mental illness that predates a traumatic brain injury (TBI), which he received in 2011. Father has "significant mental health issues" which include mood swings, chronic anger, and aggressive behavior, and father offered no evidence to support his assertion that his mental health has improved. Father has a "concerning sexual desire" as evidenced by a "sex contract" between father and a previous girlfriend that "outlin[ed] the rules of their 'Daddy' and 'BabyGirl' relationship." Father has a history of domestic abuse, and the district court has issued OFPs against father. Lastly, father failed to disclose several convictions in his affidavit in support of his motion for parenting time. Mother submitted various exhibits totaling 75 pages, including the

affidavit of father's ex-girlfriend that corroborated mother's allegation regarding father's sexual desires.

Father appeared with counsel at the hearing on his motion, and the district court heard arguments from both sides. Father acknowledged the concerns raised in mother's pleadings, but he argued that it was in the child's best interests to award him parenting time. Father asked the district court to order mother to return the child to Minnesota. Father did not request an evidentiary hearing, offer to present testimony, or ask to cross-examine mother regarding her affidavit.

Relying heavily on her pleadings submitted in response to father's motion for parenting time, mother argued that it was not in the child's best interests to have parenting time with father. Mother also referenced the affidavit submitted by father in support of his motion and argued that father "ha[d] done nothing to address [the mental health concerns] in his affidavit." Mother did not request an evidentiary hearing on father's motion.

At the conclusion of the hearing, the district court took "the matter under advisement" and stated that the court would "issue an order in the near future." The district court later determined that "[i]t is not in the child's best interests to establish parenting time with [father]." The district court concluded that father "has not met his burden to modify the previous order of this court to award parenting time." The district court also concluded that there was no basis to order mother to return the child to Minnesota. The district court therefore denied father's motion for parenting-time assistance, as well as his request for an order returning the child to Minnesota. The district court described the circumstances necessary to support a future request for parenting time as follows: father "must show that

he is compliant with any prescribed medications; is actively attending all recommended therapy and is following all recommendations of the therapists he is working with; is no longer exhibiting signs of chronic anger, aggression, and violence; and has attended parenting classes."

Father moved for amended findings of fact and conclusions of law. The district court denied the motion. This appeal followed.

D E C I S I O N

In this appeal, father contends that the district court erred as follows: (1) by treating his motion as one to modify parenting time, (2) by denying parenting time based on evidence of "conduct unrelated to the child," (3) by denying parenting time without first scheduling an evidentiary hearing, and (4) by refusing to order mother to return the child to Minnesota. We address each assertion of error in turn. We then address the parties' pending motions.

I.

The district court must "grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child." Minn. Stat. § 518.175, subd. 1(a) (2018). Once paternity has been recognized, a father's parenting-time rights with an extramarital child are governed by Minn. Stat. § 518.175. *See* Minn. Stat. § 257.541, subd. 3 (2018) (applying chapter 518 to custody and parenting-time awards for unmarried parents). "In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive a minimum of 25 percent of the parenting time for the child." Minn. Stat. § 518.175, subd.

1(g) (2018). Parenting-time allocations of less than 25% can be justified by reasons related to the children's best interests. *Hagen v. Schirmers*, 738 N.W.2d 212, 218 (Minn. App. 2010).

Once a parenting-time schedule is established, modification of that schedule is governed by Minn. Stat. § 518.175, subd. 5(b) (2018). That statute provides that "[i]f modification would serve the best interests of the child, the court shall modify . . . an order granting or denying parenting time, if the modification would not change the child's primary residence." Minn. Stat. § 518.175, subd. 5(b). The rebuttable presumption in Minn. Stat. § 518.175, subd. 1(g), that a parent is entitled to 25% of parenting time, applies to a motion to modify parenting time. *Dahl v. Dahl*, 765 N.W.2d 118, 124 (Minn. App. 2009). The party moving to modify a parenting-time order has the burden of establishing that the proposed modification is in the best interests of the child. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978).

In an initial proceeding to establish parenting time, the district court must consider 12 statutory best-interests factors. *See* Minn. Stat. § 518.17, subd. 1(a) (2018) (stating that "[i]n evaluating the best interests of the child for purposes of determining issues of custody and parenting time, the court must consider and evaluate all relevant factors," and listing 12 factors bearing on the best interests of the child). Moreover, in an initial proceeding to establish parenting time, neither party has a burden to establish that parenting time is in the child's best interests. *See Thornton v. Bosquez*, 933 N.W.2d 781, 792 (Minn. 2019) (stating that in child-custody cases, neither party bears a burden of production or persuasion

concerning the bests interests of the child because the district court determines custody without regard to burdens of proof under Minn. Stat. § 518.17, subd. 1).

But in a proceeding to modify a parenting-time order, the party seeking modification has the burden of proof. *See Griffin*, 267 N.W.2d at 735 (stating that the party moving to modify a parenting-time order generally has the burden of establishing that the proposed modification is in the best interests of the child). Moreover, the district court need not consider all of the 12 statutory best-interests factors. *See Hansen v. Todnem*, 908 N.W.2d 592, 599 (Minn. 2018) (concluding, in the context of a request for additional parenting time under section 518.175, subdivision 8, that "parenting time modifications . . . do not require the same detailed, specific findings that an order establishing custody or parenting time now requires" and that the district court is required to consider "only the *relevant* best-interest factors").

"[T]he ultimate question in all disputes over [parenting time] is what is in the best interest of the child." *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984). "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) (quotation omitted). "Reversible abuses of discretion include misapplying the law or relying on findings of fact that are not supported by the record." *Id.* (quotation omitted).

Father contends that the district court erroneously treated his motion as a motion to modify parenting time and that the district court should have treated it as an initial proceeding to establish parenting time. Father argues that in doing so, the district court

erred by assigning him a burden of proof and by failing to analyze each of the statutory best-interests factors. Father relies on caselaw providing that when the issue of spousal maintenance or child support is reserved, a subsequent motion to decide such issues is treated as if the issue is being raised for the first time. *See McMahon v. McMahon*, 339 N.W.2d 898, 900 (Minn. 1983) (stating that post-reservation requests for spousal maintenance must be determined based "upon the facts and circumstances existing at the time the application . . . is made, as if the entire . . . action had been brought at the later date" (quotation omitted)); *see also Mulroy v. Mulroy*, 354 N.W.2d 66, 68-69 (Minn. App. 1984) (relying on *McMahon* and concluding that post-reservation requests for child support must be determined based on facts and circumstances existing at the time of the application for support). But father does not cite, and we are not aware of, caselaw discussing the treatment of a post-reservation motion to establish parenting time.

Mother argues that the proper treatment of such a motion is governed by Minn. Stat. § 518.175, which provides:

> The court, when issuing a parenting time order, may reserve a determination as to the future establishment or expansion of a parent's parenting time. In that event, the best interest standard set forth in subdivision 5, paragraph (a), shall be applied to a subsequent motion to establish or expand parenting time.

Minn. Stat. § 518.175, subd. 1(a). The unambiguous language of that statute indicates that if a district court reserves a determination regarding the future establishment of parenting time and there is a subsequent motion to establish parenting time—as is the case here—a "best interest standard" is applied to the motion. *Id.*

The applicable best-interest standard is purportedly found in subdivision 5, which is entitled "Modification of parenting plan or order for parenting time." Minn. Stat. § 518.175, subd. 5 (2018). Paragraph (a) of that subdivision provides:

> If a parenting plan or an order granting parenting time cannot be used to determine the number of overnights or overnight equivalents the child has with each parent, the court shall modify the parenting plan or order granting parenting time so that the number of overnights or overnight equivalents the child has with each parent can be determined. For purposes of this section, "overnight equivalents" has the meaning given in section 518A.36, subdivision 1.

Id., subd. 5(a).

Although section 518.175, subdivision 1(a), directs the district court to apply the "best interest standard" in subdivision 5(a), subdivision 5(a) does not refer to the child's best interests. Moreover, although subdivision 5(a) regards modification of parenting time, its application is limited to circumstances in which there is an existing parenting plan or order granting parenting time that must be modified to determine the number of overnights the child has with each parent. *Id*. Thus, there is an incongruence between the legislative directive that a post-reservation motion to establish parenting time shall be determined based on "the best interest standard set forth in subdivision 5, paragraph (a)" and subdivision 5(a)'s subject matter.

Mother asserts that the incongruence is explained by a 2016 amendment to Minn. Stat. § 518.175, which changed the text of subdivision 5(a). *See* 2016 Minn. Laws ch. 189, art. 15, § 16, at 232. Prior to that amendment, subdivision 5(a) contained the text that is currently set forth in subdivision 5(b). *Compare* Minn. Stat. § 518.175, subd. 5 (2014),

with Minn. Stat. § 518.175, subd. 5 (2018). Subdivision 5(b) currently provides: "[i]f modification would serve the best interests of the child, the court shall modify . . . an order granting or denying parenting time, if the modification would not change the child's primary residence." Minn. Stat. § 518.175, subd. 5(b). In sum, prior to the 2016 amendment of subdivision 5, subdivision 1(a) directed the district court to apply the best-interest standard currently set forth in subdivision 5(b) to a post-reservation motion to establish parenting time. *See* Minn. Stat. § 518.175, subd. 1(a) (2014).

It appears that when the legislature amended subdivision 5(a) in 2016, it neglected to change subdivision 1(a)'s reference to the best-interest standard in subdivision 5 from subdivision 5(a) to subdivision 5(b). We discern no other logical explanation for the disconnect resulting from subdivision 1(a)'s instruction to apply the "best interest standard" in subdivision 5(a), which does not set forth a best-interest standard, as opposed to the standard in subdivision 5(b), which specifically addresses the child's best interests. *See* Minn. Stat. § 518.175, subd. 5(b) (referring to "the best interests of the child" and stating that "[c]onsideration of a child's best interest includes a child's changing developmental needs"). We therefore treat subdivision 1(a)'s reference to subdivision 5(a) as a scrivener's error, and conclude that the legislature intended to refer to the standard currently set forth in subdivision 5(b). *See Back v. State*, 902 N.W.2d 23, 32 (Minn. 2017) (recognizing that "[a] true drafting error, often called a scrivener's error, is defined as a technical error, such as transposing characters or omitting an obviously needed word that can be rectified without serious doubt about the correct reading" (quotations omitted)); *see*

also State ex rel. Robertson v. Lane, 147 N.W. 951, 953 (Minn. 1914) (stating that "the word 'now' [was] a misprint for 'not'").

Given the plain language of subdivision 1(a) providing that a specific best-interest standard applies to a post-reservation motion to establish parenting time and our conclusion that subdivision 1(a) is meant to refer to the best-interest standard in subdivision 5(b), which governs modifications of parenting-time orders, the court correctly treated father's motion as one for modification. Thus, the district court properly assigned father a burden of proof, and the court was not required to consider each of the 12 statutory best-interests factors in its analysis.

II.

A district court is required to make findings that adequately explain its parenting-time decision so an appellate court can determine whether the district court abused its discretion. *See Rosenfeld v. Rosenfeld*, 249 N.W.2d 168, 171 (Minn. 1976) (noting, on appeal of a custody award, that findings of fact explaining a district court's exercise of its discretion are necessary to "(1) assure consideration of the statutory factors by the [district] court; (2) facilitate appellate review of the [district] court's custody decision; and (3) satisfy the parties that this important decision was carefully and fairly considered by the [district] court").

The district court found that even though father "has a history of domestic violence that started prior to his TBI," he "continues to blame his TBI and stressors related to treating his TBI for his behaviors, including his domestic assaults." The district court was also "greatly concerned with [father's] apparent lack of understanding of child

development" and the fact that the "three year old child . . . has not spent time with [father] since she was an infant." The district court was further troubled by father's "dishonesty as it relates to his criminal history, especially as it relates to the domestic violence involving several relationships."

Although the district court did not specifically refer to any of the 12 statutory best-interest factors, the record reflects its consideration of the relevant factors. For example, the district court considered father's history of domestic abuse, as well as his mental health and sexual desires. *See* Minn. Stat. § 518.17, subd. 1(a)(4), (5). The district court found that father lacks understanding of child development and is unable to provide the patient, consistent, loving, and supportive care that the child needs, reflecting the district court's consideration of additional, relevant best-interest factors. *See id*., subd. 1(a)(1), (6)-(7).

The district court noted that father failed to address any of the best-interest factors and failed to provide "any documentation detailing his progress as it relates to his TBI, mental health, chronic anger, and aggressive behaviors," which the court found "extremely concerning." The district court reasoned that "[b]ased upon [father's] substantial mental health history and violent past, desire to establish a daddy/babygirl relationship with a significant other, and dishonesty with this Court, parenting time is likely to harm the physical or mental health of the parties' minor child." Thus, the district court concluded that "[i]t is not in the child's best interests to establish parenting time with [father] at this time."

Father contends that the district court erred by denying parenting time based on evidence of "conduct unrelated to the child" that occurred before the child's birth. Father

argues that the "alleged consensual adult 'role-playing' sexual contract from 2017 between [father] and a former girlfriend" was conduct "unrelated" to a determination of whether parenting time with father was in the child's best interests.

In evaluating the best interests of the child for purposes of parenting time, the "court shall not consider conduct of a party that does not affect the party's relationship with the child." Minn. Stat. § 518.17, subd. 1(b)(4) (2018). But the court must consider "any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs." *Id.*, subd. 1(a)(5). Here, the district court expressed concern regarding father's "desire to establish a Daddy/Babygirl relationship with a previous significant other in light of the fact that [father's] child is a three-year-old little girl." The district court's statement suggests a concern for the child's safety. We cannot say that the district court abused its discretion by considering father's desire for a contractual "Daddy/Babygirl" relationship relevant to the child's safety, particularly in light of the child's age.

Having carefully reviewed the record and the district court's findings and conclusions, we are satisfied that the district court did not abuse its discretion in ruling that it was not in the child's best interests to grant father parenting time.

III.

The Minnesota Rules of General Practice state that when a party does not request a hearing, motions are "submitted on affidavits, exhibits, documents subpoenaed to the hearing, memoranda, and arguments of counsel." Minn. R. Gen. Prac. 303.03(d)(1). If a party wants to present oral testimony in support of a motion, the party must request

permission to do so "by motion served and filed not later than the filing of that party's initial motion documents." Minn. R. Gen. Prac. 303.03(d)(2). "[I]t is presumed that a motion in family law, other than a motion for contempt, will be decided without an evidentiary hearing, unless the district court determines that there is good cause for a hearing." *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. App. 2007) (citing Minn. R. Gen. Prac. 303.03(d)). "Whether to hold an evidentiary hearing on a motion generally is a discretionary decision of the district court, which we review for an abuse of discretion." *Id.*

Father contends that the district court erred by denying him parenting time without first scheduling an evidentiary hearing. But father's motion papers did not include a request for an evidentiary hearing. And when father appeared with counsel for a hearing on his motion, father did not request an evidentiary hearing. In fact, father did not request an evidentiary hearing until after the district court denied his motion and he moved for amended findings. An issue raised for the first time in a motion for amended findings is raised "too late." *Allen v. Cent. Motors, Inc.*, 283 N.W. 490, 492 (Minn. 1939) (stating that an issue first raised in a motion for amended findings is "too late"); *see Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971) (stating that an issue is raised "too late" if it is first raised in a motion for a new trial); *see also Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002) (citing these aspects of *Antonson* and *Allen* in a family-law appeal), *review denied* (Minn. Oct. 15, 2002).

On this record, the district court did not abuse its discretion by deciding the parenting-time issue without holding an evidentiary hearing.

IV.

Generally, this court reviews a district court's relocation decision for an abuse of discretion, assessing whether the court made unsupported factual findings or improperly applied the law. *Anh Phuong Le v. Holter*, 838 N.W.2d 797, 802 (Minn. App. 2013), *review denied* (Minn. Dec. 31, 2013). Issues of statutory interpretation are reviewed de novo. *Muschik v. Conner-Muschik*, 920 N.W.2d 215, 221 (Minn. App. 2018). "If the legislature's intent is clear from the plain and unambiguous language of the statute, we need not engage in further construction." *In re Welfare of Children of A.M.F.*, 934 N.W.2d 119, 122 (Minn. App. 2019).

Minnesota law provides that "[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 district court shall not allow the child's residence to be moved to another state "[i]f the purpose of the move is to interfere with *parenting time given to the other parent by the decree*." *Id.* (emphasis added).

Father contends that the district court erred by refusing to order mother to return the child to Minnesota. Father argues that mother moved the child to Nevada to interfere with his parenting time and that the district court's failure to require mother to return the child to Minnesota is therefore "inconsistent with [Minn. Stat. § 518.175, subd. 3] as a whole and applicable case law." But father does not argue that the language of the statute is ambiguous and that, therefore, it is appropriate for this court to look beyond the plain

language of the statute. The plain language of Minn. Stat. § 518.175, subd. 3, applies only if a parent "has been given parenting time by the decree." It is undisputed that mother has sole legal and sole physical custody of the child and that father has never been given court-ordered parenting time. Thus, section 518.175, subdivision 3, is inapplicable, and the district court did not abuse its discretion in denying father's request to require that mother return the child to Minnesota.

V.

We last address the parties' pending motions in this appeal. Mother moved this court to strike portions of father's brief "that make factual allegations that are not part of the record on appeal and/or are not accompanied by a reference to the record." Mother seeks conduct-based attorney fees related to her motion to strike. Father moved this court to dismiss or deny mother's motion. Father also seeks conduct-based attorney fees related to mother's motion.

The appellate record consists of the "documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. "An appellate court may not base its decision on matters outside the record on appeal . . . ." *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). This court may strike documents submitted by the parties that are outside the appellate record. *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd on other grounds*, 504 N.W.2d 758 (Minn. 1993). But if a court does not consider material that a party seeks to strike, the motion to strike is moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007).

We have not relied on the statements that are the subject of mother's motion to strike. We therefore deny the motion as moot. *See id.*; *see also In re Purported Fin. Statement in Dist. Court of Ramsey Cty.*, 745 N.W.2d 878, 882 (Minn. App. 2008) (denying motion to strike portions of respondent's brief as moot when this court did not rely on material that was the subject of the motion to strike).

As to the parties' request for conduct-based attorney fees on appeal, such an award is discretionary with this court. *Case v. Case*, 516 N.W.2d 570, 574 (Minn. App. 1994). Here, mother made a colorable argument that statements in father's brief are not supported by any evidence in the record. *See Thiele*, 425 N.W.2d at 582-83 ("An appellate court may not base its decision on matters outside the record on appeal . . . ."). But the record does not indicate bad faith by father, and the motion to strike is moot. We therefore decline to award attorney fees to either party.

Affirmed; motions denied.