STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1598

In re Custody Petition of:
Dominic Jerome Sublet, petitioner,
Respondent,

vs.

Lori Catherine Schulz,
Appellant.

Filed August 23, 2021
Reversed and remanded
Frisch, Judge

Rice County District Court
File No. 66-FA-15-3108

Jonathan K. Reppe, Reppe Law, PLLC, Northfield, Minnesota (for respondent)

Erin Sindberg Porter, Elizabeth G. Bentley, Matthew J. Rubenstein, Jones Day, Minneapolis, Minnesota; and

Elizabeth Vogel (pro hac vice), Domestic Violence Legal Empowerment and Appeals Project, Washington, District of Columbia (for appellant)

Considered and decided by Johnson, Presiding Judge; Bryan, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

On appeal from the district court's denial of her motion to modify custody, appellant argues that the district court failed to properly analyze whether the children were

endangered by their "present environment" as required by Minn. Stat. § 518.18(d)(iv) (2020). We reverse and remand.

FACTS

Appellant Lori Catherine Schulz (mother) and respondent Dominic Jerome Sublet (father) have five joint minor children: L.S. (age 17), B.S. (age 15), O.S. (age 13), S.S. (age 10), and A.S. (now age 9). After the parties' separation in December 2013, mother made numerous police reports of father's inappropriate behavior in the children's presence, including incidents where father kicked out the children's babysitter and locked mother out of her home, pushed mother against a wall, and threatened suicide.

Father filed a petition to establish custody and parenting time. On October 14, 2016, a district court adopted the parties' agreement to joint legal and physical custody of the children with a week-on/week-off parenting schedule for all of the children except for L.S., whom the parties agreed could choose her own parenting-time schedule.

On October 17, 2018, a district court issued an emergency ex parte order for protection (OFP) against father on behalf of O.S., S.S., and A.S. On October 25, the district court conducted a hearing on the OFP petition, found father "kicked and hit" O.S., and ordered father to have no contact with O.S., unless recommended by a therapist, for a period of two years.

Motion to Modify Custody

On July 26, 2019, mother filed a motion seeking an award of sole legal and physical custody of the five minor children. Mother also stopped sending S.S. and A.S. with father

for parenting time.[1] In her supporting affidavit, mother alleged a change in custody was in the children's best interests because parenting time with father caused the children extreme emotional distress, which father refused to acknowledge or address. Mother's motion papers included text messages mother received from S.S. during father's parenting time expressing fear, calling father "a monster" and "mean and [a]busive" and making claims such as, "He is [going to] kill me."

Father asserted in his countermotion that mother failed to make a prima facie showing of either a change in circumstances or that a modification was necessary to serve the children's best interests. Father also argued that the children's anxiety was caused by mother's "behavior and her not sticking to the parenting time schedule." The district court concluded mother made a prima facie showing of endangerment and scheduled an evidentiary hearing.

Evidentiary Hearing

The district court held the evidentiary hearing on January 24 and June 23, 2020.[2] A journal entry authored by L.S., the only exhibit received, described father's abusive behavior toward L.S., her siblings, and mother and how father "ruined so many things" for L.S. She wrote that father gave her "the worst gifts someone could receive; anxiety and the ability to spend [her] life expecting the wors[t]." A summary of the relevant testimony follows.

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[1] The last day S.S. and A.S. had parenting time with father was on or around July 22, 2019.

[2] A lengthy continuance in the evidentiary hearing occurred due to the Minnesota Judicial Branch's response to the COVID-19 pandemic.

Mother's Testimony

Mother testified about an incident that occurred in November 2016 (approximately one month following the award of joint custody) where she was attempting to pick up the children for her parenting time and father came "trucking it" toward her and repeatedly screamed, in the presence of B.S., S.S., and O.S., "Get the f[-]ck off my property." Mother testified that father said, "Get back in your f[-]cking car," and then proceeded to slam the door on her leg and push against it. When mother attempted to call 911, father took her cell phone and "threw it and kicked it across the driveway." B.S. "hit [father] with a stick" in an attempt to defend mother and called 911. Mother testified that B.S. stopped spending parenting time with father after that incident.

Mother described a pattern where, when an older sibling ceased parenting time with father, the next oldest child would experience a noticeable decline in emotional and mental health. After B.S. stopped spending parenting time with father following the 2016 domestic-violence incident, mother noticed O.S. "started to have a massive decline . . . emotionally and mentally." Prior to the evidentiary hearing, mother had filed a copy of an emergency ex parte order for protection (OFP) issued by a district court on October 17, 2018, against father on behalf of O.S., S.S., and A.S. Mother also filed a district court's order following a hearing on the OFP petition. The district court found father "kicked and hit" O.S. and granted the OFP on behalf of O.S. Mother testified that when O.S. stopped having parenting time with father after the OFP was in place, A.S. and especially S.S. began having more difficulties during father's parenting time. Mother testified that she

believed this was because "their older brother was like a safety net for them" and that she noticed this pattern "with each child as they ceased going down the line."

Mother testified that when father's parenting time was approaching, sometimes starting the day prior, S.S. would lock herself in the bathroom and "scream[] and cry[] upwards of six or seven hours," and A.S. would "tak[e] off on his bike." Mother stated that she attempted to communicate with father about the children's distress "many . . . times throughout the years," but father responded with indifference or with "belligerent messages." Mother also explained that father had opportunities to address these issues in a therapeutic setting, but instead argued with the children about their experiences.

Mother testified she that stopped sending S.S. and A.S. to father for parenting time for their safety. She explained that she "would get calls from school with concerns about the children reporting wanting to harm themselves or being hurt." She also testified that father had caused the children to experience "significant emotional and psychological issues" and that the children "made huge improvements" academically, emotionally, and mentally and had "come out of their shell[s]" since ceasing parenting time with father.

Mother further testified that she did not bring a motion to modify custody immediately after the 2016 domestic-violence incident because she did not understand that was an option and explained that she did attempt to obtain an OFP, but that "the circumstances were very unclear to [her] at the time and [she] missed the court date."

L.S.'s Testimony

L.S. testified that she stopped having parenting time with father approximately five years before the hearing because of the trauma she experienced from father's abuse. L.S.

described an incident where father broke L.S.'s new cell phone because he was angry that L.S. was afraid and attempted to call mother for help. She recalled another incident where father threatened to kill himself in front of her and her siblings. L.S. also described an incident where she "had a panic attack" during a dance competition because father showed up after L.S. had expressed that she did not want him there.

B.S.'s Testimony

B.S. testified that he stopped having parenting time with father after an incident that occurred in November 2016 where father was "slamming" mother's foot in the car door while she was attempting to pick the children up and B.S. hit father with a stick in defense of his mother. B.S. admitted to lacking firsthand knowledge of what had occurred during father's parenting time since that incident, but testified that his younger siblings "always cried and complained on the day [mother] had to drop them off, and they never wanted to go" with father.

Grandmother's Testimony

The children's maternal grandmother testified about improvements she observed in the children since they discontinued parenting time with father, including seeing them "smile a lot more." She noted that after L.S. and B.S. stopped spending parenting time with father, they became less fearful of men. She also testified that S.S. previously did not "speak much out in front of people," and that since living solely with mother, S.S.'s confidence improved. Grandmother also explained that prior to O.S. receiving an OFP against father, O.S. "would have violent anger," and that since he stopped having contact

with father his confidence improved, he no longer seemed angry, and "he handle[d] stress a lot better."

Gonzalez's Testimony

Melissa Gonzalez, a parent to schoolmates of the children, testified about an incident where the children were waiting at their bus stop in her vehicle to protect them from the rain when father had approached "gesturing" and "yelling." Gonzalez testified that father eventually "visibly took a deep breath" and "settled down" and informed Gonzalez that he was taking the children. Gonzalez testified that one of the children objected to leaving with father, but that she instructed the children to go with him.

Father's Testimony

Father testified that the children did "rather well" with the week-on/week-off parenting schedule, but that issues arose when mother changed the schedule with "little or no notice." Father explained that his parenting time was disrupted in November 2016 when a domestic-abuse no-contact order (DANCO) prohibited him from having contact with the children, but that the district court agreed to lift the DANCO with respect to the children if father submitted "counselor's notes saying that parenting time [with father] was important for the kids." Father stated that he submitted a counselor's note, that the DANCO was lifted with respect to the children, and that the domestic-violence charges were eventually dismissed. Father testified that "the kids seemed to be doing well and adjusting" after that.

Father denied emotionally or physically abusing any of the children and testified that he did not understand why mother would not allow him to see them. Father admitted that he had not attended domestic-violence counseling or personal therapy since O.S. was

granted an OFP against him, but contended that he attempted to resolve the issue with mother and received no response.

Antony's Testimony

Kirsten Antony, father's girlfriend, testified that she and her ten-year-old son had lived with father since 2016. Antony also testified that the children "just loved being around [father]" and "begged to go to work with him." Antony recalled the November 2016 domestic-violence incident, but was unable to recall B.S. hitting father with a stick. Antony testified that O.S. had called the police out to address safety concerns two additional times while she was present.

Reuvers's Testimony

Gayle Reuvers, a family acquaintance, testified that she did not believe the allegations of abuse against father and that she thought the children would benefit from having both parents in their lives. Reuvers also testified that she believed that mother and L.S. acted more like "a couple" than a parent and child, that mother's "parenting style is to be a friend" and that "[n]obody disciplines [the children]" during mother's parenting time.

District Court's Order

On October 21, 2020, the district court issued an order denying mother's request to modify custody. The district court's analysis of the testimony of L.S., B.S., the children's grandmother, Gonzalez, and mother follows.[3]

[3] The district court did not analyze the testimony of father's witnesses (father, Antony, and Reuvers), reasoning that mother "bore the burden, and was unable to prove the requisite elements necessary for modification of custody."

The district court found L.S. and B.S. both testified credibly about their experiences with father, but noted neither had direct knowledge of what occurred during father's parenting time after they stopped spending time with him. The district court found grandmother "testified credibly regarding the children's recent behavior and apparent improved well-being" but noted grandmother had "no firsthand knowledge of [f]ather's parenting" since the 2016 custody order was issued. The district court found Gonzalez "testified credibly about the 'bus stop incident,'" but noted that incident occurred approximately four years ago and found the testimony did not demonstrate father's "present parenting style is physically or emotionally endangering to the boys or would have impaired their emotional development."

The district court found mother "generally testified credibly about her experiences and perceptions regarding the children's emotional state as related to their relationship with [f]ather," but found mother's "decision to ignore the current custody agreement and prevent the children's contact with their [f]ather to be damaging to her credibility as a mature and reasonable parent." The district court also found mother:

> presented no evidence indicative of the *present* status of [f]ather's parenting or the *present* environment provided for the children by [f]ather. In part, [m]other hindered a "present endangerment" finding by significantly delaying her modification request after the 2016 and 2018 domestic incidents while simultaneously denying [f]ather his parenting rights. The direct evidence [m]other offered of [f]ather's parenting or household environment was all one year or older at the time of the hearing.

The district court found that mother "failed to meet her burden of proof that the children [were] endangered in [f]ather's care at the time of the evidentiary hearing,"

reasoning there had been "no recent incidents that give rise to the conclusion that the children would be endangered in the [f]ather's care presently" and that "[m]other relies heavily on [f]ather's past behaviors, all of which occurred in the past." This appeal follows.

DECISION

We limit our review of a district court's determination on a motion to modify custody "to considering whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). We give deference to a district court's credibility determinations and will only set aside its findings of fact if clearly erroneous. *Id.* "Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted). We review a district court's statutory interpretation de novo. *Thornton v. Bosquez*, 933 N.W.2d 781, 790 (Minn. 2019). "If the plain language of a statute is clear and free from ambiguity, the court's role is to enforce the language of the statute and not explore the spirit or purpose of the law." *Nelson v. Nelson*, 866 N.W.2d 901, 903 (Minn. 2015) (quotation omitted).

A motion to modify child custody brought pursuant to Minn. Stat. § 518.18(d)(iv), requires the movant to prove, among other things, that the "present environment endangers the child's physical or emotional health or impairs the child's emotional development." In *Hassing v. Lancaster*, we recognized that the "present environment" analyzed under Minn. Stat. § 518.18(d)(iv) refers to "the last judicially created environment, not an alternate care

arrangement," and that a district court must consider the "circumstances in which the child is currently found." 570 N.W.2d 701, 703 (Minn. App. 1997).

Here, the district court found that mother failed to show that "the children [were] endangered in [f]ather's care *at the time of the evidentiary hearing*" (emphasis added) and faulted mother for citing "no recent incidents that give rise to the conclusion that the children would be endangered in [f]ather's care presently." The district court concluded that "[e]ven if the child was previously endangered, the court must determine whether the child 'remain[s] endangered in the [parent's] care at the time of the modification hearing.'" And although the district court noted the domestic-abuse incidents reported in November 2016 and October 2018 "with extreme concern" and credited "testimony regarding the children's exhibited negative behaviors prior to visitation with [f]ather [as] troubling," it found mother was unable "to present evidence connecting the children's behaviors to any specific *recent* conduct by [f]ather." The district court ultimately discounted evidence of "[f]ather's past behaviors, all of which occurred in the past" without analyzing whether such incidents constituted endangerment.

Mother argues the district court replaced the modification standard set forth in *Hassing* with "a legal standard of its own invention" when it declined to consider evidence of endangerment that was "one year or older at the time of the hearing." We agree. The district court did not follow our directive in *Hassing*. The district court failed to consider whether the parenting time provisions of the October 2016 custody order subjected the children to a risk of danger to their physical or emotional health. It failed to analyze whether mother established that the children were endangered by their "present

environment," which dates back to the last judicially created environment, i.e., the October 2016 custody order. Although the district court correctly concluded that mother, as the movant, bore "the burden of proving all four elements of 518.18(d)[(iv)]," it erred by concluding that mother failed to meet her burden because she presented no evidence of what it characterized as "recent" conduct of endangerment by father. The district court specifically found that "[m]other presented no evidence indicative of the *present* status of [f]ather's parenting or the *present* environment" and that the "direct evidence [m]other offered of [f]ather's parenting was all one year or older at the time of the hearing." The district court therefore summarily concluded that mother "failed to meet her burden of proof that the children are endangered in [f]ather's care *at the time of the evidentiary hearing*." (Emphasis added.)

Although the district court credited testimony about two domestic-abuse incidents occurring after the entry of the October 2016 custody order, noted those incidents with "extreme concern," and described "[m]other's testimony regarding the children's exhibited negative behaviors prior to visitation with [f]ather" as "troubling," the district court did not conduct any substantive analysis of whether the evidence of father's parenting since the October 2016 order satisfied mother's burden to demonstrate endangerment of the children's physical or emotional health or impairment of the children's emotional development. Instead of weighing this evidence, the district court summarily disregarded those incidents as not "recent" enough for consideration in an endangerment analysis and arbitrarily limited the time period of relevant endangerment incidents to what it described alternatively as "recent" events and those occurring within one year from the date of the

evidentiary hearing. These timing mechanisms find no basis in Minnesota law and are contrary to the definition of "present environment" set forth in *Hassing*.[4]

Our decision in *Hassing* makes clear that a district court must consider both the current conditions and the history of care in analyzing whether the children are endangered by the last judicially created environment. 570 N.W.2d at 703. *Hassing* involved a mother who was found to have provided her child inadequate care for several years but who had recently made significant improvements in her parenting skills. *Id.* The district court *only* considered the history of care in determining the child was endangered in the "present environment." *Id.* We reversed the district court's decision "[b]ecause the trial court findings *disregard[ed]* the circumstances of [mother] at the time of the hearing," specifically, the substantial improvements she had made. *Id.* at 703-04 (emphasis added). *Hassing* did not elevate current conditions over history of care, but rather stands for the proposition that a district court may not entirely disregard relevant evidence in a Minn. Stat. § 518.18(d)(iv) endangerment analysis. *Hassing* requires a district court to analyze all evidence presented relevant to a determination of whether the children are endangered under the last judicially created environment, including history of care and current

[4] "[A] precedential opinion of this court has immediate precedential effect, which is not limited by the availability or grant of further appellate review." *State v. Chauvin*, 955 N.W.2d 684, 695 (Minn. App. 2021). "The district court, like [the court of appeals], is bound by supreme court precedent and the published opinions of the court of appeals." *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010).

circumstances. Here, the district court erred when it categorically dismissed the credited evidence of endangerment presented by mother as not recent enough for *any* consideration.

Father's argument that the district court properly analyzed the children's "present environment," because it "considered prior conditions as well as more recent conditions at the time of the evidentiary hearing" is contradicted by the findings set forth in the district court's order. The district court did not weigh, and instead dismissed, evidence of "prior conditions" simply because those incidents "occurred in the past." The district court also did not analyze "recent conditions," instead finding no incidents tended to show endangerment within the year preceding the evidentiary hearing, and then, notwithstanding the credited testimony regarding father's abuse, found that mother did not "present evidence connecting the children's behaviors to any specific *recent* conduct by [f]ather."[5]

The district court also did not consider the history of care in its endangerment analysis. In *Hassing*, we noted, "[t]he history of a child's care is a relevant consideration in addressing the child's current circumstances" because it "may indicate what can be presently expected" and assist the district court to "determine whether [a party's] history poses a continuing danger to the child." *Id.* Father's argument that a district court may

[5] The district court did not begin the evidentiary hearing until six months after mother filed the modification motion and did not conclude the hearing until almost one year after the filing of the motion. We observe that the children had no parenting time with father at all in the year preceding the evidentiary hearing and therefore, no evidence could have existed of "recent conditions" involving father, as defined by the district court. But in the year preceding the *filing* of the modification motion by mother, father did in fact have parenting time with the children, and during that time, a district court found that father "kicked and hit" O.S. Such conduct resulted in an OFP prohibiting father from contacting O.S. for two years unless recommended by a therapist.

entirely disregard relevant history of care evidence presented when determining endangerment misinterprets our decision in *Hassing*.

And while we agree with father that a district court has the discretion to "evaluate the present environment within the context of the present time . . . where, depending on the incident, a sufficient amount of time has passed, and perhaps there has been: *rehabilitation, growth, counseling, or a multitude of other potential changes*" (emphasis added), the district court here did not conduct such an analysis. And we observe that unlike the circumstances in *Hassing*, father presented no evidence of efforts to improve his parenting or his relationship with his children following the abuse incident giving rise to the OFP. In fact, father conceded at the evidentiary hearing that he had not attended domestic-violence counseling or personal therapy since the entry of the OFP and made no assertion that he had taken any steps toward "rehabilitation" or "growth." The evidence presented related to father's history of care, the effect of his actions on the children, and the improvement in the children since they stopped parenting time with father.

Accordingly, the district court improperly interpreted Minn. Stat. § 518.18(d)(iv) and failed to follow *Hassing* when it limited its endangerment consideration to the existence of "recent" abuse allegations or those occurring only in the year preceding the evidentiary hearing. And while a district court may, in weighing the evidence, consider its age, *Hassing* does not allow a district court to categorically decline to weigh evidence solely due to its age. Our decision in *Hassing* plainly requires a district court to analyze evidence presented relevant to endangerment under the last judicially created environment,

including history of care, and does not support other temporal limitations applied by the district court. *Id.* at 703.

We reverse and remand this matter to the district court to determine whether mother met her burden of proving, based on all relevant evidence presented, that the "present environment," as defined in *Hassing*, "endangers the child[ren]'s physical or emotional health or impairs the child[ren]'s emotional development." Minn. Stat. § 518.18(d)(iv).

Reversed and remanded.