STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0430

Nicholas David Wivinus,
Appellant,

vs.

Nicole Lynette Nelson Anderson,
Respondent.

Filed December 27, 2021
Affirmed
Cochran, Judge

Washington County District Court
File No. 82-FA-14-731

Nicholas D. Wivinus, Coon Rapids, Minnesota (pro se appellant)

Julie K. Swedback, Swedback Law, PLLC, Stillwater, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Jesson, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this appeal, appellant-father challenges the district court's order granting respondent-mother's motion to modify custody and the district court's order holding him in constructive civil contempt. Father argues that the district court (1) abused its discretion by awarding mother sole legal custody of the parties' children; (2) violated his civil and constitutional rights by modifying custody; (3) displayed judicial bias; (4) improperly

ordered father to pay for part of the costs of a custody evaluation; and (5) erred by finding him in constructive civil contempt for failing to pay his child-support obligations. We affirm.

FACTS

This case centers on a custody dispute between appellant Nicholas David Wivinus (father) and respondent Nicole Lynette Nelson Anderson (mother). The parties never married and are the parents of two minor children, now ages six and seven.

Background

In 2014, shortly after the first child was born, the parties entered into a stipulation granting the parties joint legal and joint physical custody of the child, with reasonable parenting time for each parent. In 2016, not long after the second child was born, father moved to establish custody and parenting time for the second child and to modify custody of the first child. The district court adjudicated father to be the second child's father, and it modified child support. The district court later ordered the existing custody arrangements to remain in place, with the parties having joint legal and joint physical custody of the first child and mother having sole legal and sole physical custody of the second child.

In November 2018, the parties signed a stipulation for custody and parenting time. Under the terms of the stipulation, the parties were given joint physical and joint legal custody of both children. The parties were also given equal parenting time. The stipulation provided that, "in the event of a legal custody dispute, [father] has the final decision[-]making authority with the understanding that the Parenting Consultant has the

authority to overrule a decision made solely by [father]." The district court approved the stipulation on May 22, 2019.

Motion to Modify Custody

On October 21, 2019, mother filed a motion to modify legal custody. Mother sought to amend custody based on father's "gross interference with her parenting time and conduct that has endangered the children's emotional health and well-being." She filed an accompanying affidavit, which alleged numerous incidents between May and October 2019 in which father had interfered with mother's parenting time and undermined her relationship with the children. The district court determined that mother had alleged a prima facie case for modification of custody and ordered an evidentiary hearing to be held on the motion.

The district court ordered a custody evaluation to be completed before the evidentiary hearing. The district court's order was silent as to how the parties would pay for the evaluation. Father filed a "supplemental affidavit for proceeding *in forma pauperis* for custody evaluation." He alleged that the custody evaluation was estimated to cost $4,500. He further alleged that he lacked the resources to pay half of the cost as requested by mother. For these reasons, he asked the district court to order the county to pay for his portion of costs under the in forma pauperis statute, Minn. Stat. § 563.01 (2020). The district court denied father's request. The district court determined that no provision in Minn. Stat. § 563.01 authorized the district court to order the county to pay father's costs for a custody evaluation. The parties mediated the issue and agreed to divide the costs of

the custody evaluation, with mother paying 90% and father paying 10%. The district court ordered the parties to share the fees in accordance with the agreement.

The custody evaluation was completed in December 2020 and submitted to the district court. The evaluation was based on interviews with the parents, information the parents provided, information provided by third parties, and observations of the parents and children at home and in public. The evaluation opined that, while mother supported father's relationship with the children, father refused to support mother's relationship with the children. It commented that father's emails to mother were "arrogant, pompous and belittling," and that father "appear[ed] energetically disposed to sabotage" the children's relationship with mother. The evaluation stated that father's "unwillingness to support a healthy relationship between the children and [mother] pose[d] a real and serious danger to the children's health development." For these reasons, the evaluation recommended that mother be granted sole legal custody.

The district court held the evidentiary hearing on mother's custody-modification motion. Mother testified that the parties' stipulated custody agreement gave the parties joint legal and joint physical custody, but father acted as though he had sole custody over all physical and legal custody decisions. Mother explained that, even though the stipulated agreement said that father had "final decision-making authority," that term was a misnomer because the stipulation also provided that if the parties had a disagreement, the parenting consultant would make the final decision. In mother's view, the parties "stood on equal footing" for making decisions about the children. According to mother, the district court

had informed father of this fact, but father continued to act as though he could make all decisions without mother's input.

Mother detailed multiple ways in which father interfered with her parenting time between May and October 2019. Father enrolled the children in a summer-school program and a daycare without mother's knowledge; he picked the children up during mother's parenting time and would not return the children to her until later in the day; he removed mother's name from the children's medical provider's records and canceled appointments; and he refused to allow mother's husband to pick up or drop off the children at school. Mother testified that, when she tried to enroll one child in an after-school program on her parenting-time days only, father contacted the program organizers and told them that he had sole legal custody and that mother could not make decisions about the children. Because of father's actions, the program suspended the child's enrollment temporarily until it could clarify the custody situation.

Mother also testified that the childcare center that the children were attending decided to unenroll the children because of father's "intimidation and threats" towards the staff at the facility. The district court received into evidence the email from the childcare center to mother explaining the decision to dismiss the children. The email stated that father had engaged in "repeated threats and harassment" directed at staff at the childcare center through phone calls, emails, and attacks on social media. Because of father's behavior, the email said, the staff at the center felt uncomfortable and unsafe, and the center was concerned about the staff's safety and mental health. The email also said that father had told "blatant lies" to the district court about the communications between himself and

the center. According to the email, the decision to unenroll the children was "solely due to the harassment, threats and aggressive domineer[ing]" by father.

Mother further testified about father's conduct towards her and the effect of father's behavior on the children. According to mother, father made numerous condescending remarks about her in the presence of the children. Mother testified that he practically encouraged the children to make negative comments about her and her husband, and that she believed father was trying to manipulate the children to dislike her. Mother also sensed father's influence on the children when they came back from spending time with him. She explained that, when the children returned to her care, they were "unruly" and "mean," calling her names and making inappropriate remarks. Mother did not believe that father was able to support her relationship with the children.

After the evidentiary hearing, the district court granted mother's motion to modify custody in a February 25, 2021 order. The district court found that father had "refused to cooperate with [mother], and instead attempted to undermine, interfere with, and negate her role in the children's lives at every turn." Because father had shown a pattern of making false reports, the district court found that he had "no credibility whatsoever," and it credited mother's testimony instead.[1] The district court determined that father's "outrageous behavior" endangered the children because, "[b]y interfering with the children's medical care, education, and daycare placement, [father] has jeopardized their physical and

[1] The district court also commented that father "seems to be incapable of anything other than an obnoxious, bullying posture toward" mother, and that, at the evidentiary hearing, "his inappropriate, belittling tone required the Court to admonish him on the record."

emotional health and development." For these reasons, the district court determined that mother had met her burden to show that a change of circumstances had occurred and that the children were endangered. The district court considered the statutory best-interests factors and concluded that the factors weighed in favor of granting mother's motion. Accordingly, the district court granted mother sole legal custody of the children.

Contempt Order

While mother's custody-modification motion was pending, she also filed a motion to hold father in contempt for failure to obey the district court's orders to pay child support. On February 12, 2021, the district court issued a contempt order. In the order, the district court determined that father failed to pay his child-support obligations and therefore was in constructive civil contempt of the district court's orders. The district court ordered father to be conditionally confined for up to 90 days in the county jail but stayed execution of the confinement for a period of two years subject to certain conditions. Those conditions included that: father pay his monthly child-support obligation of $181 and at least $37 toward his child-support arrears in February 2021, and that father continue to make those payments on time for every month afterwards. The order stated that if father complied with those conditions for the next 24 months, he would be deemed to have purged himself of the contempt. The order also provided that if father failed to comply with the conditions, the stay could be vacated and conditional confinement would be imposed.

Father appeals.

DECISION

Father challenges both the order modifying custody and the contempt order. He makes five arguments on appeal, arguing that the district court (1) erred by awarding mother sole legal custody of the children; (2) violated father's civil and constitutional rights when it modified custody; (3) showed judicial bias; (4) erred by ordering him to pay for part of the costs of the custody evaluation; and (5) erred by finding him in constructive civil contempt. We address each argument in turn.

I. The district court did not abuse its discretion by granting mother's motion to modify custody and awarding her sole legal custody.

Father first challenges the district court's decision to award mother sole legal custody of the children. We review a district court's custody-modification decision for an abuse of discretion. *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000), *rev. denied* (Minn. Sept. 26, 2000). Our review is limited to whether the district court made factual findings not supported by the record or misapplied the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We will sustain the district court's factual findings unless they are clearly erroneous. *Id.* Factual findings "are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotation omitted). In reviewing whether a factual finding is clearly erroneous, it is not our role to reweigh the evidence; rather our role is to review "the record to confirm that evidence exists to support the decision." *Id.* at 222. We also defer to the district court's opportunity to assess witnesses' credibility. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210

(Minn. 1988). Accordingly, we will not conclude that the district court clearly erred in making a factual finding unless, "on the entire evidence, we are left with a definite and firm conviction that a mistake has been committed." *Kenney*, 963 N.W.2d at 221 (quotation omitted).

To modify custody on the basis of child endangerment under Minn. Stat. § 518.18(d)(iv) (2020), the district court must find that four elements are met: "(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." *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017) (listing elements for making a prima facie case for modification of custody based on endangerment); *see also State ex rel. Gunderson v. Preuss*, 336 N.W.2d 546, 548 (Minn. 1983) (explaining that district court must address all four factors to modify custody). The party seeking modification of custody has the burden to show that all elements are met. *Crowley*, 897 N.W.2d at 293. We conclude that the district court did not abuse its discretion by concluding that mother met her burden on all four elements.

First, the record supports that the circumstances of the children and parents had changed since the district court's May 22, 2019 custody order approving the parties' stipulation.[2] To warrant a modification of custody, the change in circumstances must be

[2] Father measures the change of circumstances from the district court's order on August 12, 2019. In that order, the district court denied an earlier motion by mother to modify custody,

significant. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). Mother presented evidence that father repeatedly interfered with her parenting time, which impacted the children's school and daycare placements. Father changed the children's summer-school program and a daycare placement without mother's knowledge. The children's after-school program suspended the children's enrollment after father told the program that mother could not make decisions for the children. And the children's childcare center unenrolled the children because father was harassing and threatening the staff. Father's hindrance of mother's parenting time, coupled with the disruption to the children's school and daycare, is sufficient to show a significant change in circumstances.

Father nonetheless asserts that mother failed to show a significant change of circumstances because she merely raised ongoing issues that the district court had already addressed in previous orders. We disagree. Although the district court's previous orders show that the parties faced similar disputes over parenting time in the past, the evidence introduced at the hearing focused on specific incidents that occurred after the district court's May 22, 2019 order. Even when parties have faced ongoing conflicts over parenting time, the district court may find a change of circumstances based on new attempts

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determining that mother had not made a prima facie case to modify custody. Mother filed that modification motion on May 17, 2019, five days before the district court approved the parties' stipulation. In its August 12, 2019 order denying the motion, the district court reasoned that mother failed to demonstrate a change of circumstances since May 22, 2019, because all her evidence related to circumstances that existed *before* May 22. For this reason, we conclude that the district court, when considering mother's present motion, properly considered circumstances dating back to May 22, 2019. And, based on the evidence presented, we believe that mother still would have met her burden if the change of circumstances were measured from the August 12, 2019 order denying her custody-modification motion.

to interfere with parenting time. This court has "decline[d] to endorse a position that would encourage custodial parents to interfere or to continue to interfere with visitation in an attempt to prevail in a later custody dispute." *Sharp*, 614 N.W.2d at 263. Based on the substantial evidence showing father's interference with mother's parenting time since the May 22, 2019 order, the district court did not err by determining that mother had shown a significant change of circumstances.

Second, the record supports that the children's environment endangered their physical health, emotional health, or emotional development. A party must show "a significant degree of danger" to satisfy the endangerment element. *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (quotation omitted). "The existence of endangerment must be determined on the particular facts of each case." *Sharp*, 614 N.W.2d at 263 (quotation omitted). But the danger may affect only the children's emotional development. *Geibe*, 571 N.W.2d at 778. This court has recognized that "a sustained course of conduct by one parent designed to diminish a child's relationship with the other parent" may constitute endangerment. *Amarreh v. Amarreh*, 918 N.W.2d 228, 231-32 (Minn. App. 2018). In *Amarreh*, this court held that the father had shown a prima facie case for endangerment based on allegations that the mother had substantially interfered with the father's relationship with the children. *Id.* at 232.

Here, the district court heard ample evidence showing that father was substantially interfering with mother's relationship with the children. Father repeatedly disregarded mother's right to co-parent the children and acted as though he had sole control over decisions about the children. He interfered with mother's parenting time and disrupted the

children's school and daycare placements. Father also refused to support the children's relationship with mother. He made pejorative remarks about mother in front of the children, and he encouraged the children to make negative statements about her and her husband. The custody evaluation opined that father's unwillingness to support the children's relationship with mother posed a "real and serious danger" to the children's development. This evidence showing father's attempts to undermine mother's relationship with the children adequately supports the district court's determination that father's conduct endangered the children's emotional health and development.

Additionally, the record supports the district court's determinations on the remaining two elements to modify custody: that modification serves the children's best interests and the benefits of the change in custody outweigh the detriments. *Crowley*, 897 N.W.2d at 293. The district court made specific findings evaluating the best-interests factors set forth in Minn. Stat. § 518.17, subd. 1(a) (2020), as the district court was required to do. *See Abbott v. Abbott*, 481 N.W.2d 864, 867 (Minn. App. 1992) (noting that specific findings on the best-interests factors are "absolutely required"). The district court determined that most factors weighed strongly in favor of granting mother sole legal custody. The district court reasoned that father's interference with the children's medical care, education, and daycare, as well as his threatening and abusive behavior, negatively affected the children's emotional health and development. The district court also determined that mother generally supported the children's relationship with father, while father attempted to undermine mother's role in the children's lives, and that the parties' inability to cooperate with each other was primarily attributable to father. The record

supports the district court's analysis on the best-interests factors. And this court defers heavily to the district court's weighing of the factors. *Maxfield v. Maxfield*, 452 N.W.2d 219, 223 (Minn. 1990). Given the evidence of father's sustained interference with the children's relationship with mother, these considerations likewise support the determination that the benefits to the change in custody outweigh the detriments.

We add that, while joint legal custody is rebuttably presumed to be in the best interests of a child if it is requested by a party, Minn. Stat. § 518.17, subd. 1(b)(9) (2020), we have previously recognized that joint legal custody is not a preferred arrangement when the parties are unable to cooperate and communicate about parenting decisions, *Wopata v. Wopata*, 498 N.W.2d 478, 482 (Minn. App. 1993). Given the record developed at the evidentiary hearing, it would not have been appropriate for the district court to continue the existing joint-legal-custody arrangement. Based on the evidence, the district court acted within its discretion in determining that the children's best interests were better served by granting sole legal custody to mother. Thus, we conclude that the record supports the district court's determination that mother satisfied all four elements to modify custody.

For these same reasons, we reject father's related argument that the district court erred by ordering an evidentiary hearing on mother's custody-modification motion. The district court must hold an evidentiary hearing on a party's motion to modify custody if the party makes a prima facie case for modification. *Goldman*, 748 N.W.2d at 284. In determining whether a party has made a prima facie case, the district court looks to the moving party's affidavits setting forth facts to support modification, and the district court must accept the facts in those affidavits as true. *Boland v. Murtha*, 800 N.W.2d 179, 182-83

(Minn. App. 2011). Here, mother's affidavit accompanying her modification motion listed numerous specific allegations of the ways in which father had interfered with mother's parenting time and undermined her relationship with the children. The allegations in the affidavit parallel the evidence that mother later presented at the evidentiary hearing. Thus, we conclude that the allegations in mother's affidavit were sufficient to establish a prima facie case. The district court did not err by ordering an evidentiary hearing on mother's motion or by awarding mother sole legal custody of the children after the evidentiary hearing.

II. The district court did not violate father's civil and constitutional rights.

Father also argues that the district court's decision to modify custody violated his civil and constitutional rights. He maintains that the district court violated both his due-process rights and his right to parent his children. Neither argument is persuasive.

Father first argues that he was denied his due-process rights because he was unable to confront his accusers. He notes that the custody evaluators did not appear at the evidentiary hearing to support the recommendations in the custody evaluation, which the district court relied on when granting mother's motion. Father maintains that he was denied his right "to confront [the custody evaluators'] accusations and cross examine the testimony they provided as 'witnesses.'" He appears to refer to the Confrontation Clause of the Sixth Amendment of the United States Constitution. This clause applies only to criminal prosecutions. *Crawford v. Washington*, 541 U.S. 36, 42 (2004). To the extent that father's argument is based on some other provision of the Constitution, the argument is not adequately briefed and is therefore forfeited. *See Brodsky v. Brodsky*,

733 N.W.2d 471, 479 (Minn. App. 2007) (providing that this court does not consider issues that are inadequately briefed).

Father also argues that the district court's custody-modification decision impinged on his constitutional right to parent his children. Parents have a fundamental constitutional right to make decisions about the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007). But this right is not absolute, and the state may intrude on parental rights when necessary to protect children's well-being. *SooHoo*, 731 N.W.2d at 822 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

Here, the district court modified legal custody only after it determined that the endangerment standard was met under Minn. Stat. § 518.18(d). Father does not appear to challenge the constitutionality of the statute, and he argues merely that the district court's decision was unconstitutional. The district court complied with Minn. Stat. § 518.18(d), determining that father's conduct endangered the children and jeopardized their emotional health and development. The district court adequately ensured that father's constitutional right to parent his children was protected by carefully considering the statutory factors and modifying custody only after concluding that the children were endangered under the existing legal-custody arrangement. The district court did not infringe on father's parental rights by awarding sole legal custody to mother.

III. Father's judicial-bias claim is without merit.

Father also appears to raise a claim of judicial bias. He argues that the district court "repeatedly displayed bias in its [o]rders and [r]ulings favoring [mother], ignoring the best

interest of the children and subjecting [father] to barriers that [mother] was never subjected to."

We reject father's judicial-bias argument for two reasons. First, father fails to point to any specific facts in the record showing how the district court was unfairly biased against him. "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." *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971); *see also Braith v. Fischer*, 632 N.W.2d 716, 725 (Minn. App. 2001) (applying *Schoepke* in a family-law appeal), *rev. denied* (Minn. Oct. 24, 2001). Because it is not apparent on mere inspection how the district court judge may have been biased against father, this is not a basis for reversal.

Second, to the extent that we can comprehend father's argument, he primarily appears to be dissatisfied with the outcome of the proceedings. Appellate courts presume that district court judges have discharged their duties properly. *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008). Adverse rulings by a judge do not, by themselves, constitute judicial bias. *State v. Sailee*, 792 N.W.2d 90, 96 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011). The fact that the district court rejected father's arguments and granted mother sole legal custody of the children does not show that the judge was unfairly biased against him. The record does not support father's judicial-bias claim.

IV. The district court did not err by ordering father to pay for part of the costs of the custody evaluation.

Father argues that the district court erred when it "ordered" him to pay for a portion of the costs of the custody evaluation. We are not persuaded.

Father's argument relates to the district court's order denying his supplemental application "for proceeding *in forma pauperis* for custody evaluation." In that filing, father requested that the district court order the county to pay for his portion of the costs of the evaluation. The district court denied the request. But, in the challenged order, the district court did not actually "order" father to pay for any portion of the costs of the evaluation. Instead, the district court determined that there is no provision within the in forma pauperis statute, Minn. Stat. § 563.01, that would authorize the district court to require the county to pay for a custody evaluation. On that basis, the district court denied father's supplemental application to proceed in forma pauperis.

We agree with the district court's legal conclusion. While the in forma pauperis statute does authorize the payment of certain expenses for qualifying low-income individuals such as witness fees and deposition expenses, the statute does not extend to the payment of custody evaluation fees. Minn. Stat. § 563.01. The district court therefore did not err in denying father's request for the county to pay his portion of the costs of the custody evaluation.

V. Father's challenge to the contempt order is not properly before this court because the contempt order is not a final, appealable order.

Finally, father challenges the district court's order finding him in constructive civil contempt. The purpose of a civil contempt proceeding is to secure compliance with an

order of the district court. *Hopp v. Hopp*, 156 N.W.2d 212, 216 (Minn. 1968). Here, the district court's contempt order was meant to secure father's compliance with the district court's orders directing him to pay child support.

Mother contends that father's contempt argument is not properly before this court because the contempt order is not appealable. We agree. A contempt order is nonappealable if it is not a final order, but instead "is a conditional order directing punishment only if [the] defendant fails to purge himself of his contempt." *Becker v. Becker*, 217 N.W.2d 849, 850 (Minn. 1974). This court has recognized this principle on multiple occasions. *See, e.g.*, *Rohrman v. Moore*, 423 N.W.2d 717, 721 (Minn. App. 1988) (determining that father could not appeal conditional order finding him in civil contempt for failure to pay his child-support obligations); *Time-Share Sys., Inc. v. Schmidt*, 397 N.W.2d 438, 440 (Minn. App. 1986) ("A contempt order is not appealable if it is an order which directs consequences only if the defendant fails to purge himself of his contempt.").

Father's appeal is taken from the district court's February 12, 2021 order. In that order, the district court found father in constructive civil contempt, ordered him to be conditionally confined, and stayed execution of the confinement on the condition that father purge himself of the contempt by paying his monthly child-support obligations and arrears each and every month for two years beginning in February 2021. Because the district court's order was conditional and imposed punishment on father only if he failed

to purge himself of the contempt, it is a nonappealable order.[3] We therefore do not reach father's argument challenging the contempt order.

Affirmed.

[3] We assume that, if father fails to comply with the conditions of the contempt order, the district court will hold a hearing at which it will decide whether to confine father. *See Mahady v. Mahady*, 448 N.W.2d 888, 891 (Minn. App. 1989) (explaining that, after district court has issued contempt order with purge conditions, at a later stage, the obligor is entitled to a hearing to determine whether he should be confined for failure to comply with purge conditions).