STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0739

In re the Marriage of: Emily Kay Stilwagon, petitioner,
Appellant,

vs.

Shawn Bradford Stilwagon,
Respondent.

Filed January 10, 2022
Affirmed
Florey, Judge

Washington County District Court
File No. 82-FA-20-4378

Roger E. Meyer, Morrison Sund, P.L.L.C., Minnetonka, Minnesota (for appellant)

Mark R. Carver, Einhaus, Mattison, Carver & Haberman, P.A., Owatonna, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

On appeal from the district court's denial of her emergency motion, appellant argues that the district court erred by (1) denying her custody-modification motion; (2) ordering appellant's parenting time be less than the 25% statutory presumption; (3) failing to consider and rule on several of appellant's motions; (4) not giving appellant 30 days to

request a hearing in accordance with the court's order appointing a guardian ad litem; and (5) appointing a parenting consultant. We affirm.

FACTS

Appellant Emily Kay Stilwagon and respondent Shawn Bradford Stilwagon are the parents of three minor children: L.S.S., C.E.S., and E.K.S. The parties were granted joint legal custody of the three children, and appellant was awarded sole physical custody by order dated April 19, 2018.

In December 2018, respondent moved for sole physical custody of the children based on neglect and endangerment. After an evidentiary hearing, the district court awarded sole physical custody of the children to respondent, subject to appellant's parenting time every other weekend and two-hours on Tuesday evenings.

Respondent remarried and, in May 2020, he and his children moved to Stillwater (in Washington County) with his new wife and her three children. On September 8, 2020, appellant filed an emergency motion with the Steele County District Court. On appellant's motion, venue was subsequently transferred to Washington County, and on December 23, 2020, appellant filed an amended emergency motion seeking, among other things: (1) an award of "temporary sole physical custody and legal custody" of the parties' minor children; (2) an award of "all parenting time with the parties' minor children except [respondent] shall have supervised parenting time as agreed to by the parties;" and (3) the appointment of a guardian ad litem "to investigate the alleged physical abuse and sexual abuse allegations and recommend permanent custody and an appropriate parenting time schedule with conditions." In support of her motion, appellant alleged C.E.S. was being

sexually and physically abused by respondent's stepson; that respondent physically harmed E.K.S., and that the parties' children had been assaulted by respondent's wife and stepson.

A guardian ad litem was appointed and recommended that legal and physical custody, as well as parenting time, remain as currently ordered. The district court adopted the recommendations and ordered that legal and physical custody and parenting time remain as currently ordered by the Steele County District Court.

This appeal follows.

DECISION

Before addressing appellant's specific assertions of error, we note several principles that govern this court's review. First, a "reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Second, "error is never presumed." *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949). It is the appellant's duty to show that the district court erred. *Potter v. Potter*, 27 N.W.2d 784, 786 (Minn. 1947). Third, if error is shown, the mere existence of that error is, by itself, insufficient to require a reversal. The complaining party must also show that the error prejudiced the complaining party. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Loth*, 35 N.W.2d at 546 (stating that "error without prejudice is not ground for reversal") (quotation omitted)). Finally, there is no obligation on an appellate court to demonstrate or otherwise show that a challenged ruling is, in fact, correct. The supreme court recently stated: "In applying the clear-error standard, [appellate courts] will not conclude that a factfinder clearly erred unless, on the entire evidence, we are left with a definite and firm conviction that a mistake

has been committed." *In re Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotations and citations omitted). Additionally,

> [the] clear-error review does not permit an appellate court to weigh the evidence as if trying the matter *de novo*. Neither does it permit [an appellate court] to engage in fact-finding anew, even if the court would find the facts to be different if it determined them in the first instance. Nor should an appellate court reconcile conflicting evidence. Consequently, an appellate court need not go into an extended discussion of the evidence to prove or demonstrate the correctness of the findings of the trial court.

Id. at 221-22 (quotations and citations omitted); *see Engquist v. Wirtjes*, 68 N.W.2d 412, 414 (Minn. 1955) (stating that "[t]he function of an appellate court is that of review. It does not exist for the purpose of demonstrating to the litigants through a detailed statement of the evidence that its decision is right. If the length of judicial opinions is to be kept within reasonable bounds, appellate courts must more closely adhere to the purpose for which they exist"); *Wilson v. Moline*, 47 N.W.2d 865, 870 (Minn. 1951) (stating that the function of an appellate court "does not require [it] to discuss and review in detail the evidence for the purpose of demonstrating that it supports the trial court's findings," and that an appellate court's "duty is performed when [it] consider[s] all the evidence, as we have done here, and determine[s] that it reasonably supports the findings"); *Cook v. Arimitsu*, 907 N.W.2d 233, 240 n.3 (Minn. App. 2018) (applying this aspect of *Wilson* in a family law appeal); *Peterka v. Peterka*, 675 N.W.2d 353, 357-58 (Minn. App. 2004) (same).

> Rather, because the factfinder has the primary responsibility of determining the fact issues and the advantage of observing the witnesses in view of all the circumstances surrounding the

> entire proceeding, an appellate court's duty is fully performed after it has fairly considered all the evidence and has determined that the evidence reasonably supports the decision.

Kenney, 963 N.W.2d at 222. As a result, an appellate court must "fully and fairly consider the evidence, but so far only as is necessary to determine [whether that evidence] reasonably tends to support the findings of the factfinder." *Id.* at 223 (quotation omitted). And "[w]hen the record reasonably supports the findings at issue on appeal, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary." *Id.* (quotation omitted). We make these general observations because many of appellant's assertions run afoul these basic tenets of appellate practice.

I. Physical-custody modification

Appellant first challenges the district court's failure to modify the parties' parenting-time schedule and physical-custody designation. She argues that, because she requested that she be awarded "all parenting time," the district court should have treated her motion to modify parenting time as a de facto custody modification.

Our review of the record reveals that this issue was not adequately raised before the district court. Generally, a reviewing court must consider "only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele*, 425 N.W.2d at 582 (stating that appellate courts do not address questions not presented to and considered by the district court, and that even if an issue is preserved for appeal, an appellate court will not address that issue on a theory other than the theory on which the issue was addressed to the district court).

In her emergency motion, appellant sought, in relevant part, (1) an award of temporary sole physical custody and legal custody and (2) all parenting time. Appellant did not file a motion for a permanent change of custody at any point during the proceedings. Appellant now argues on appeal that the district court should have applied the "endangerment standard" set forth in Minn. Stat. § 518.18(d)(iv) (2020) for modifying custody to determine whether custody modification was warranted because, if her request for all parenting time were to be granted, it would result in a de facto custody modification and would change the primary residence of the children. However, absent some sort of argument from appellant to the district court that her motion to modify parenting time was actually a de facto custody modification, the district court did not have the opportunity to consider whether the endangerment standard should apply. Alternatively stated: Appellant is arguing that the district court erred by not applying the modification-of-custody standard that appellant did *not* ask the district court to apply. We cannot say that a district court errs by *not* doing what it was *not* asked to do.

Parties have an affirmative obligation to clearly explain to a court the relief they seek and upon what basis they seek that relief. *Cf. Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971) (holding that a claim was not before the district court when "the pleadings were general enough to have possibly made out a claim on the theory, [but] there was no language in the complaint that would alert anyone to a claim" based on that theory). Because pleadings are intended to alert the parties to the relevant claims being raised, *Rogers v. Drewry*, 264 N.W.2d 226 (Minn. 1935), general language in a pleading is only

sufficient to raise an issue if it "would alert anyone to a claim" based on that issue. *See Antonson*, 186 N.W.2d at 189.

Based on the record before us, appellant did not adequately present her de facto custody-modification argument to the district court. Appellant did not cite to Minn. Stat. §518.18(d)(iv) in any of her filings or otherwise argue that her motion amounted to a de facto custody modification. Neither the statute nor the argument was ever mentioned in appellant's motion or supporting affidavits, and she did not file a memorandum of law articulating her de facto custody-modification argument.

Appellant could have made clear that she was seeking a permanent modification of physical custody rather than temporary relief by referencing Minn. Stat. §518.18(d)(iv) in her emergency motion, filing a memorandum of law explaining that the relief requested, if granted, amounts to a de facto custody modification and that the endangerment standard applies to such de facto custody modifications. Under these circumstances, a better practice would have been to file a motion for a permanent change of custody. Moreover, appellant failed to provide this court with the transcripts of the district court proceedings to show this court exactly what she orally argued to the district court. Because this was not done, we are left to speculate.

Even assuming appellant adequately raised the issue before the district court, we conclude that appellant has not met her burden showing that the district court erred by failing to apply the endangerment standard to her emergency motion for temporary relief. It is the appellant's duty to demonstrate that the district court erred. "[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal."

Potter, 27 N.W.2d at 786 (quotation omitted). Here, appellant failed to provide any legal authority for the proposition that the district court should have applied Minn. Stat. § 518.18(d)(iv) to her emergency motion for temporary sole physical custody of the parties' children.

Because appellant did not adequately raise the issue of a de facto custody modification to the district court, it is not properly before this court.[1] Further, even if it were, appellant's reliance on the application of the endangerment standard to her temporary motion is not supported by the law. Consequently, the district court did not err by denying her emergency motion.

II. Parenting time

Appellant argues that the district court abused its discretion by ordering appellant's parenting time with the parties' minor children to be less than 25%. Specifically, appellant argues that the district court failed to address and comply with Minn. Stat. §518.175, subd. 1(g) (2020): "[i]n the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive a minimum of 25% of the parenting time for the child."

[1] At oral arguments, the parties informed this court that appellant has filed an additional child-custody-modification motion, and an evidentiary hearing has been scheduled in that case based on allegations of sexual abuse. Accordingly, appellant's request for an evidentiary hearing here based on allegations of sexual abuse is, arguably, moot. *See In re Paternity of B.J.H.*, 573 N.W.2d 99, 104-105 (Minn. App. 1988) (stating that an appeal of an issue will be dismissed as moot if the harm has been alleviated or it is impossible to award relief); *In re Inspection of Minnesota Auto Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984) (stating if, during appeal, events occur that makes decision on merits unnecessary or award of effective relief impossible, the appeal "will be dismissed as moot.").

Appellant failed to expressly raise the issue in district court, and this court will not consider an argument based on the 25% presumption when that argument has not been raised in the district court. *See Hagen v. Schirmers*, 783 NW.2d 212, 217 (Minn. App. 2010) (noting that it is "important" that the 25% parenting-time presumption was brought to the attention of the district court in that case because appellate courts do not consider matters not argued to and considered by the district court) (citing *Thiele*, 425 N.W.2d at 582); *see also Dahl v. Dahl*, 765 N.W.2d 118, 124 (directing district courts to demonstrate an awareness and application of the presumption when the issue is appropriately raised and the court awards less than 25% parenting time). Because appellant did not raise the parenting-time presumption, the issue is not properly before this court.[2]

III. Failure to rule on all motions

Appellant argues that the district court erred by failing to consider and rule on all the motions she raised and requests the case be remanded for the district court to address the additional motions.

While it is the better practice to expressly rule on each and every part of each and every motion made, we treat the district court's decision not to directly address appellant's motions as an implicit denial. *See Anderson v. Anderson*, 897 N.W.2d 828, 832 (Minn. App. 2017), *rev. granted* (Minn. Aug. 22, 2017) (stating "a district court's failure to

[2] Even if the issue were properly before this court, appellant's argument fails. The Washington County district court did not restrict or otherwise modify the parenting-time arrangement, but rather, it ordered that "both parents' parenting time remain as currently Ordered." Appellant's parenting time was already reduced below the assumed threshold by the Steele County district court by its order dated October 23, 2019. Because appellant did not challenge the October 23, 2019 order, it is outside our scope of review.

specifically address or reserve a motion constitutes a denial of that motion.") *appeal dismissed* (Minn. Jan. 30, 2018); *Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA1*, 775 N.W.2d 168, 177-78 (Minn. App. 2009) ("[S]ilence on a motion is . . . treated as an implicit denial of the motion.") (citation omitted), *rev. denied* (Minn. Jan. 27, 2010). And even if we treat the decision not to address appellant's arguments as an implicit denial of her motions, appellant does not claim that such a denial was erroneous. Additionally, appellant has not demonstrated that any of the unaddressed motions constitute an emergency. As such, based on appellant's characterization of her motion as an emergency, the district court did not err in failing to specifically address those motions.

IV. Objection to guardian ad litem report

Appellant argues that the district court erred in not affording her the full 30 days to object to the guardian ad litem's report and request a hearing.

The district court's order appointing a guardian ad litem provides: "[i]f any party objects to the [g]uardian ad [l]item's written report and recommendations, the objecting party shall contact court administration within 30 days of the date of the report to schedule a hearing. If no hearing is set after 30 days, the Court may issue its final order." The guardian ad litem's report was filed on March 26, 2021, which was only 17 days before the district court issued its order. In its order, the district court stated that the "parties had ten (10) days from receiving the Report to respond to any of the findings and recommendations by the [g]uardian at which the time the Court would formerly[sic] take the matter under advisement."

While the district court apparently made a timing error, appellant fails to assert any basis for an objection to the report and has not shown that the district court's error was prejudicial. As such, appellant fails to carry her burden. *See* Minn. R. Civ. P. 61 (2020) (requiring harmless error to be ignored); *see also Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975) (to prevail on appeal a party must show error and that error caused prejudice); *Loth*, 35 N.W.2d at 544 (stating "the burden is on the party asserting it not only to make error appear, but also that it was prejudicial.").

V. Parenting consultant

Appellant argues that the district court did not have the legal authority to appoint a parenting consultant and asks this court to reverse the district court's decision. Here, while the district court's order made reference to a parenting consultant, it did not actually appoint a parenting consultant. At most, it suggests that a parenting consultant would be a suitable form of dispute resolution to resolve the recurring issues between the parties.

Because appellant has failed to demonstrate any prejudicial error on appeal, we affirm.

Affirmed.