STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0927

In re the Custody of: C. W. P.;
William James Peck, petitioner,
Respondent,

vs.
Jodie Sue Simonette,
Appellant,

and
County of Nicollet,
Intervenor.

Filed April 4, 2022
Affirmed
Cleary, Judge[*]

Nicollet County District Court
File No. 52-FA-08-874

Alyssa Nelson, Blethen, Gage & Krause, PLLP, Mankato, Minnesota, (for respondent)

Jodi S. Exsted, Savage, Minnesota, (for appellant)

Considered and decided by Slieter, Presiding Judge; Connolly, Judge; and Cleary, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CLEARY, Judge

Appellant-mother argues the district court (1) erred in determining the legal standard applicable to deciding which parent makes educational decisions for a minor child; (2) clearly erred in determining the minor child's preferences; and (3) abused its discretion in awarding respondent-father conduct-based attorney fees. Because the district court applied the correct legal standard, properly construed the minor child's best interests, and made sufficient findings to support the attorney-fee award, we affirm.

FACTS

Appellant Jodi Simonette (mother) and respondent William Peck (father) are parents to C.W.P. (son), currently age 16. The parties never married and ended their relationship in 2009. Shortly thereafter, the district court order awarded joint legal custody to mother and father and sole physical custody to mother. Father was granted parenting time on alternate weekends. Mother resided in the St. Peter area while father lived in Le Sueur, until mother and son moved to St. Paul for mother to attend college. Son then enrolled at Highland Catholic School in St. Paul for fourth grade. While mother lived in St. Paul, the parents independently resolved issues of parenting time by agreeing son would live with father during summer break.

After mother graduated from college in 2019, she and son returned to the St. Peter area. Son continued his eighth-grade year at Highland Catholic School, commuting to St. Paul with mother. Highland Catholic School only offers schooling through eighth grade. Mother and father disagreed about son's best schooling option after eighth grade. Mother

planned to enroll son at Cretin-Derham Hall (CDH) in St. Paul. Father believed it was in son's best interest to attend Le Sueur-Henderson High School. Father moved for the district court to order that son attend Le Sueur-Henderson High School and to increase father's parenting time. Mother filed a counter motion asking the district court to deny father's motion and order son to attend CDH, a modification of the parenting-time schedule, and father to pay $1,000 in attorney fees. On July 24, 2020, the district court ordered an evidentiary hearing to be held on the best-interest factors and for son to enroll at Le Sueur-Henderson temporarily. The district court reserved the issues of parenting time and attorney fees.

Mother moved the district court to reconsider its July order. In August 2020, mother sent son to orientation at CDH. On August 28, father filed an emergency motion after learning mother enrolled son at CDH. Father requested a change to the parenting-time schedule "to ensure compliance with the temporary order." The district court granted father's motion and changed the temporary parenting-time schedule so "[mother] shall have parenting time every other Friday from 5 p.m. until Sunday at 5 p.m. and [father] shall have all other parenting time." Mother moved the district court to vacate the order changing the parenting-time schedule and order son to start school at CDH. After a hearing on September 3, the district court denied mother's motion for reconsideration of the July order and modified the August order to allow son to choose where he spent Thursday nights if Le Sueur-Henderson had online-learning the next day.

In November 2020, the district court held an evidentiary hearing to determine son's best interests regarding which school he should attend. After making detailed findings, the

district court ordered on January 15, 2021, that son attend Le Sueur-Henderson and "mother shall have parenting time with [son] during the school year on alternating weekends" and "father shall have [son] the rest of the time during the school year, except that the mother may have additional time during MEA break and the Christmas break." Son was ordered to spend the summer with mother except for alternating weekends to be spent with father. Mother was also ordered to pay father $1,459.50 for conduct-based attorney fees.

On March 11, 2021, mother moved to amend the January order. Mother argued the district court "used the incorrect legal standard of [b]est [i]nterests to consider the parenting time motion instead of endangerment for a de facto modification of custody." Mother also challenged the factual findings supporting the school placement and award of attorney fees. The matter came before the district court.

On May 24, 2021, the district court issued an order denying mother's motion for a new trial and that son attend school at CDH. The district court amended its May order to grant mother's motion for $1,000 in attorney fees from July 2020. The district court denied mother's other amendment because "mother's motion is basically a motion for reconsideration" and because the district court "disagree[d] with the mother's assertation that the Court applied the incorrect legal standard."

Mother appeals.

DECISION

I. Mother waived her argument that father's motion was a modification when she failed to raise it before her motion for amended findings.

Generally, "litigants are bound [on appeal] by the theory or theories, however erroneous or improvident, upon which the action was actually tried below." *Annis v. Annis*, 84 N.W.2d 256, 263 (Minn. 1957). An appellate court generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). An issue is raised "too late" if it is raised for the first time in a motion for amended findings. *Allen v. Cent. Motors, Inc.,* 283 N.W. 490, 492 (Minn. 1939). A party may also not raise an issue for the first time in a motion for a new trial. *Ellingson v. Burlington N. R.R.*, 412 N.W.2d 401, 405 (Minn. App. 1987), *rev. denied* (Minn. Nov. 13, 1987).

Father contends mother waived her argument that his motion for a change in parenting time and for son to be enrolled was a "de facto modification of custody and/or change in primary residence subject to the endangerment standard." Mother submitted her closing argument after the evidentiary hearing stating that the "correct standard" is the endangerment standard, but "Mother believes that [father's] motion that the minor child attend [Le Sueur-Henderson] should still be denied under the much lower best interests standard." Father notes that mother did not argue the endangerment standard applies because father's motion was a modification, but because mother was the "custodial parent" and had "the authority to determine" son's education under Minn. Stat § 518.176 (2020). We agree with father.

In mother's motion for amended findings, she argues for the first time that father's motion was a "de facto modification of custody per Minn. Stat. § 518.18." While mother preserved the issue of applying the endangerment standard to the issue of determining son's education, she waived the issue of whether father's motion was a "de facto modification" because she raised it for the first time in a motion for amended findings. *See Allen*, 283 N.W. at 492.

II. The district court applied the correct legal standard.

"Determining the legal standard applicable to a change in parenting time is a question of law and is subject to de novo review." *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009); *see Shearer v. Shearer*, 891 N.W.2d 72, 76 (Minn. App. 2017). Minn. Stat. § 518.17, subd. 1(a) (2020) requires the district court to make findings on the child's best interests when "determining issues of custody and parenting time."

Mother argued at the evidentiary hearing that she had the authority to make decisions about son's education absent endangerment findings because son resided with her pursuant to Minn. Stat. § 518.176 ("[T]he parent with whom the child resides may determine the child's upbringing, including education . . . unless the court after hearing finds, . . . the child's physical or emotional health is likely to be endangered"). Father argued that because mother and father shared joint legal custody both parents have equal say in educational issues in accordance with Minn. Stat. § 518.003, subd. 3(b) (2020) ("'Joint legal custody' means that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education"). Father also argued a best-interests finding would be determinative.

The district court rejected mother's argument in favor of father's citing *Novak v. Novak*, 446 N.W.2d 422, 424-25 (Minn. App. 1989), *rev. denied* (Minn. Dec. 1, 1989).

In *Novak*, this court clarified the statutory scheme by holding that though "[e]ducational decisions are specifically mentioned in both provisions . . . the specific enactment on joint legal custody supersedes the earlier provisions on powers of a physical custodian." *Id.* (citing Minn. Stat. § 645.26, subd. 4 (1988) (stating the latest of irreconcilable provision prevails)). Here, mother's argument that Minn. Stat. § 518.176 allows her to make educational decisions for son based on physical custody ignores the *Novak* holding. As such, the district court correctly determined a best-interests analysis was proper.

III. The district court correctly considered the evidence of son's preference.

A district court's findings of fact, on which a parenting-time decision is based, will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978).

Mother argues the district court clearly erred in determining "the only evidence regarding [son's] preference is the father's claim that [son] expressed to him a desire to stop commuting to school in St. Paul." At the evidentiary hearing, mother testified "[son] wanted to be with his friends" at Highland Catholic and he asked when she would move him back to St. Paul. Mother also cites testimony about son's friends at Highland Catholic. Father argues son's question about when he and mother would move back to St. Paul supports the district court's finding that son did not want to commute.

Mother and father provided testimony supporting the district court's finding that son preferred not to commute for school. While mother also provided testimony that "[son] wanted to be with his friends," the district court also found son "made friends at Le Sueur-Henderson." "When evidence relevant to a factual issue consists of conflicting testimony, the district court's decision is necessarily based on a determination of witness credibility, which we accord great deference on appeal." *Alam v. Chowdhury*, 764 N.W.2d 86, 89 (Minn. App. 2009). Here, the evidence provided is not necessarily even in conflict. Indeed, both parents agree it is not in son's best interest to commute daily from the St. Peter area to St. Paul for school—the factual determination reached by the district court. Because the district court relied on the available evidence in determining son did not want to commute to St. Paul for school, the district court's finding was not clearly erroneous.

IV. The district court did not abuse its discretion in awarding conduct-based attorney fees.

We review an award of conduct-based attorney fees for an abuse of discretion. *Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007). Minn. Stat. § 518.14 (2020) governs awards of attorney fees in family-law cases. "Nothing in [section 518.14] . . . precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1. The party moving for attorney fees has the burden to show that the conduct of the other party warrants an award. *Baertsch v. Baertsch*, 886 N.W.2d 235, 238 (Minn. App. 2016). The district court must make findings that explain the basis for an award of conduct-based attorney fees. *Brodsky*, 733 N.W.2d at 477.

Mother argues the district court failed to make sufficient factual findings to support an award of conduct-based attorney fees. Mother contends son's enrollment at Le Sueur-Henderson was dependent on the outcome of the evidentiary hearing, as stated in the temporary order from July 2020; mother, therefore, needed to preserve son's enrollment at CDH if the district court ruled in her favor after the evidentiary hearing.

The district court found husband paid $1,595 in fees resulting from filing an emergency motion after mother enrolled son at CDH and he attended orientation. The district court also found "There was no need to maintain a slot for [son at CDH] because the Court had ordered that [son] be enrolled at Le Sueur-Henderson pending the outcome of the evidentiary hearing." We defer to the district court's credibility determinations in reconciling conflicting evidence. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). The district court's findings, that husband incurred fees as a result of mother's unreasonable conduct in enrolling son at CDH and having son attend orientation despite the district court's directive, support the district court's award of conduct-based attorney fees. The district court did not abuse its discretion in awarding conduct-based attorney fees.

Affirmed.