STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1343

In re the Custody of: O.R.K.,
Jeremy Peter Kubesh, petitioner,
Appellant,

vs.

Casandra Sue Flagg,
Respondent.

Filed September 6, 2022
Affirmed
Halbrooks, Judge[*]

Anoka County District Court
File No. 02-FA-15-1239

Robert A. Manson, Robert A. Manson, P.A., Roseville, Minnesota (for appellant)

Casandra S. Flagg, St. Anthony, Minnesota (pro se respondent)

Considered and decided by Gaïtas, Presiding Judge; Cochran, Judge; and Halbrooks, Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

On appeal from the district court's denial of his motion to modify parenting time, appellant argues that the district court applied an incorrect legal standard and erred in its analysis of the best-interests factors. We affirm.

FACTS

Appellant-father Jeremy Kubesh and respondent-mother Casandra Flagg are the parents of O.R.K. (the child), born March 7, 2013. The parties were never married, and their relationship ended in early 2015. In July 2015, father petitioned for joint custody and child support. The district court adopted the parties' custody and child-support stipulations in March 2016. The parties agreed to joint legal and physical custody and a parenting-time schedule that gave father 142 overnights a year and two nonconsecutive weeks of summer vacation. The parties also agreed to communicate on Our Family Wizard, to mediate before bringing any motion to the court, and to attend a parenting class.

Since the March 2016 stipulated custody order, the parties have engaged in cross-litigation over countless issues, such as the child's therapy, communication with the child's teachers, denying or changing parenting time without notice, and various child-support claims. The parties have yet to mediate an issue before filing a motion. Father did not sign up for Our Family Wizard until 2020 and the record is not clear whether father has completed the court-ordered parenting class.

In May 2020, father filed a motion for parenting-time assistance that sought various forms of relief after learning that mother would be moving to a location over an hour away.

Father requested that the district court change the parenting-time schedule to provide for transportation, require the child to remain enrolled in the same school, and establish a week on/week off schedule. Father's accompanying affidavit also requested that he be granted sole legal and physical custody, but his formal motion did not. Father alleged that the child was "having severe [behavioral] issues at school relating to separation anxiety, parental alienation, and difficulty understanding why [the parties] are no longer together." Father believed that these issues would be exacerbated by mother relocating the child away from father, the child's extended family, and her therapist. Mother filed a countermotion seeking sole legal and physical custody and a modified parenting-time schedule that reflected the new distance between the parties' residences. The district court determined that father established a prima facie case for custody modification and scheduled an evidentiary hearing for August 2020.

Following a three-day hearing, the district court awarded sole legal and physical custody to mother in November 2020. The new parenting-time schedule provided that father would have the child for at least three weekends a month and that during the summer the parties would transition to a week on/week off schedule. The district court applied an endangerment standard for modifying custody and parenting time. The district court found that father's requests "were troubling because they do not take into consideration [the child's] needs or her close bond with her mother and sister" and that the requests "seem retaliatory because Mom would not bend to his will that she live in Columbia Heights and relent to his changing moods." The district court found:

> Neither [parent] really addresses endangerment, though the child's health is clearly endangered by parents who cannot communicate under a joint custody arrangement as these parents have demonstrated (i.e., taking a year to agree on a therapist for [the child]). The Court does not see fit to continue a joint custodial arrangement that both parents readily admit does not meet the needs of this child.

The district court observed that "[t]he bulk of the issues at this moment involve the parties' lack of healthy communication and the new challenges related to Mom's move." The district court found that father "uses his custodial rights as a weapon against Mom" and that granting mother sole custody would allow father "to solely focus his time and energy on parenting" the child. The district court determined that father's "conduct also harms [the child] because it creates a chaotic environment for a child who craves stability and structure," and that sole custody to mother would "diminish conflict between the parties over healthcare and education issues which will in-turn promote treatment by medical professionals and allow educators to focus on [the child] instead of her parents' conflicts." Father did not appeal this decision.

In April 2021, father moved to modify parenting time. He again requested that the district court order a week on/week off parenting-time schedule and restrict the parties' ability to move the child or change the child's school district. Father filed the motion after mother and the child moved back in with mother's parents and again lived within miles of father. Father's motion was based on allegations similar to those made in his previous motion, but he did not request a change in legal or physical custody. Father alleged that mother was restricting his access to the child, the child's therapist, and the child's teachers, and was monitoring his phone calls with the child. Father also alleged that mother removed

the child from therapy, kept the child enrolled in the school an hour away after moving back, and violated his right to first refusal for parenting time. Father described two incidents when police were called and the child was present and an incident when he had to take the child to urgent care because she was dropped off with a severe rash. Father also alleged that the child had recently developed a tic, gained a great deal of weight, and began wetting her pants again. Father asserted that the changes in behavior were caused by mother's ex-boyfriend and the move. Father also complained that mother was demanding and rude in her communications.

Mother filed a response and asked the district court to deny the motion in its entirety. Mother addressed each of father's claims and provided additional context. She explained that the child's therapy schedule was temporarily disrupted while the therapist worked to find time outside of the school day to limit the number of transitions for the child. Mother acknowledged that the child had gained weight but asserted that she was doing well in school and socially. Mother provided a report card that described the child as lively and indicated that she was developing friendships, making reading improvements, and gaining confidence. Mother also explained father was using an email account that his significant other had access to and, because of this, the child's school and therapist would not provide information to that email account. Father filed a responsive motion and affidavit. In addition to the relief already requested, father asked that the mediation requirement be waived and that the district court require that the parties agree in writing before the child may participate in extracurricular activities that impact parenting time.

The district court held a hearing in May 2021. Father argued that the instability created by mother's moves and her strained relationship with her own mother warranted a week on/week off schedule. He also asserted that mother's communication was "verbally abusive" and that she was preventing him from receiving information from the child's school and teachers. Mother argued that the only thing that had changed since the prior custody order was the distance between the parties' residences. She also expressed concern about father's significant other's continued involvement in the child's school, parenting-time exchanges, and therapy.

The district court denied father's parenting-time motion. The district court determined that father "failed to establish by a preponderance of the evidence that a change in circumstances has occurred that endangers the minor child while in Mom's care and custody" and failed to show "that a change in parenting time is in [the child's] best interests." The district court's order also addressed the other conflicts on which the parties requested clarification. Among other things, the district court reordered the parties to communicate on Our Family Wizard, restricted school communications to mother and father only, reordered a non-disparagement condition, ordered the parties to mediate before initiating court proceedings, prohibited mother from scheduling activities that occur primarily during father's parenting time, and appointed a parenting-time expeditor. This appeal follows.

DECISION

A district court has broad discretion when deciding parenting-time matters. *Hansen v. Todnem*, 908 N.W.2d 592, 596 (Minn. 2018). Our review "is limited to whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Id.* (quotation omitted). We review the district court's factual findings for clear error. *Id.* at 599. "[Appellate courts] will not conclude that a fact[-]finder clearly erred unless, on the entire evidence, we are left with a definite and firm conviction that a mistake has been committed." *In re Civil Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotations omitted). Father makes two arguments on appeal: that the district court applied the wrong legal standard to his motion and that the record does not support the district court's best-interests determination. We address each argument in turn.

I.

Father first argues that the district court applied the wrong legal standard to his motion. "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).

Motions to modify custody and motions to modify parenting time are subject to different legal standards. The endangerment standard[1] generally applies to motions to

[1] Under the endangerment standard, a party seeking modification must establish a prima facie case of endangerment by alleging: "(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

modify custody, whereas parenting-time modifications only require an analysis of the best interests of the child. Minn. Stat. §§ 518.175, subd. 5(b), .18(d)(iv) (2020). Because motions to modify custody and motions to modify parenting time are subject to different standards, a district court may need to determine "whether a motion to modify parenting time is a de facto motion to modify physical custody for purposes of deciding whether the endangerment standard applies." *Christensen v. Healey*, 913 N.W.2d 437, 443 (Minn. 2018). In doing so, the district court "should consider the totality of the circumstances to determine whether the proposed modification is a substantial change that would modify the parties' custody arrangement." *Id.*

Father contends that the district court errored by construing his motion as a motion to modify custody and applying the endangerment standard without first analyzing the totality of the circumstances to determine whether his motion was one to modify custody or parenting time. Father argues that his motion sought to modify parenting time, not custody, and therefore the district court erred by applying the endangerment standard. We are not persuaded.

The district court's order does state that father "failed to establish by a preponderance of the evidence that a change in circumstances has occurred that endangers the minor child while in Mom's care and custody." But the district court went on to state that "[i]n evaluating the best interests of the child to address parenting time, the Court must

---

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). If the party establishes a prima facie case, the district court must hold an evidentiary hearing to consider evidence on each factor. *Id.* at 293-94.

evaluate" the factors enumerated in Minn. Stat. § 518.17, subd. 1(a) (2020). The district court then analyzed each factor, determined that father failed to establish "that a change in parenting time is in [the child's] best interests," and denied father's "motion to modify parenting time." Thus, despite the district court's reference to the endangerment standard, the district court ultimately denied the motion because father failed to establish that a parenting-time modification was in the best interests of the child. Father's argument that the district court improperly denied his motion under the endangerment standard is therefore without merit.

II.

Father next argues that the district court erred in determining that his proposed parenting-time modification was not in the best interests of the child. "A child's best interests are the fundamental focus of custody decisions." *Vangsness v. Vangsness*, 607 N.W.2d 468, 476 (Minn. App. 2000); *see also* Minn. Stat. § 518.175, subd. 5(b) (providing that a district court may order a parenting-time modification if it "would serve the best interests of the child"). The district court's factual findings "regarding the best-interest factors are reviewed for clear error." *Hansen*, 908 N.W.2d at 599. As discussed above, the clear-error standard of review "does not permit an appellate court to weigh the evidence as if trying the matter *de novo*" or "to engage in fact-finding anew." *Kenney*, 963 N.W.2d at 221-22 (quotations omitted). Rather, appellate courts "fairly consider[] all the evidence" and determine whether "the evidence reasonably supports the [district court's] decision." *Id.* at 222.

There are twelve best-interests' factors that the district court must consider when determining issues related to parenting time. Minn. Stat. § 518.17, subd. 1(a). These include the "child's physical, emotional, cultural, spiritual, and other needs," the parents' willingness and ability to provide for those needs, and what effect the proposed parenting-time schedule would have on the child's needs and parents' abilities. The best-interests factors also consider "the child's well-being and development of changes to home, school, and community" and whether domestic abuse occurred in either parents' household. *Id.*

Here, the district court considered the 12 best-interests' factors and determined that it was not in the best interests of the child to modify parenting time. The district court found that both parties have a loving relationship with the child, are able to meet the child's needs, and are "willing and able to provide ongoing care," but that the parties are unable to meet those needs and care for the child together. The district court further explained that "[i]t is obvious the co-parenting relationship is severely broken." Additionally, the district court observed that it was not in the best interests of the child to modify parenting time such that it would "foster[] additional conflict between the parents."

Father assigns several errors to the district court's best-interests analysis. He first argues that the district court "ignore[d]" his "significant and relevant concerns regarding [mother's] instability in residence and relationships." The record belies this assertion. The district court's order notes that father raised concerns related to mother's "unstable circumstances with respect to her residence, her relationships, and employment," but determined that "[n]one of those issues are made better by a week on/week off schedule." The district court therefore considered the concerns raised by father, but determined those

concerns did not support a modification in parenting time. And as noted above, the district court was concerned that modifying the parenting-time schedule may "foster[] additional conflict between the parents." This concern is well supported by the record, which is replete with examples of the parties' inability to co-parent and the impact it has on the child.

Father next argues that the district court's analysis "inappropriately minimizes" his relationship with the child and focuses too much on the difficulty in communication between the parties. He argues that the district court's analysis improperly "considers conduct beyond the parent child relationship." We disagree. The district court does repeatedly note the parties' inability to communicate with one another and co-parent, but it is clear that the district court analyzed this conduct in light of the impact it had on the well-being of the child.

The district court found that both parents are actively involved in the child's upbringing, able to meet her needs, and willing to provide appropriate care and support. But the district court determined that the parties are unable to meet those needs together, and therefore, it was not in the best interests of the child to modify parenting time to a week on/week off schedule. Again, this finding is reasonably supported by the record. The parties have engaged in extensive litigation over issues related to child custody and parenting time and have been unable to abide by even their agreed-upon terms for resolving those issues.

The parties' inability to co-parent was such that in its previous order modifying custody to grant mother sole physical custody, the district court observed that "the child's

health is clearly endangered by parents who cannot communicate" and work together to meet the needs of the child. The district court here noted that many of those same concerns have persisted and would not be addressed by a week on/week off schedule. As discussed above, this reasoning is supported by the record. The district court's best-interests analysis does not minimize the importance of the parent-child relationship in favor of focusing on the relationship between the parties, but rather recognizes that "the co-parenting relationship is severely broken" to the point that modification of the parenting-time schedule could result in further hostility between the parties that negatively impacts the child's well-being. And because the record reasonably supports the district court's findings, we discern no clear error in the analysis.

Finally, father asserts that "[p]arents have a constitutional right to the custody and care of their children." *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). He asserts that "[i]t is normal and appropriate for parents to have equal access to their children, especially when they are so close geographically" and that "[t]o deny this is to deny a parent's right to be a parent." But father does not cite to any legal authority to support his assertion that his right to parent requires that he have "equal access." Nor does he provide any legal support or analysis to suggest that the established parenting-time schedule violates that right. We therefore decline to address this issue. *See State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address issue not adequately briefed); *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1994) ("[O]n

appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. . . . [T]he burden of showing error rests upon the one who relies upon it").

Affirmed.