**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-1415**

In re the Custody of H. T. J. and H. W. J., Minor Children,
Tyler Raymond Johnson, Jr., petitioner,
Respondent,

vs.

Whitney Lynne Duden,
Appellant.

**Filed July 17, 2023**
**Affirmed**
**Johnson, Judge**

Polk County District Court
File No. 60-FA-18-976

Patti J. Jensen, Ashley A. Olson, Galstad, Jensen & McCann, P.A., East Grand Forks, Minnesota (for respondent)

Jacey L. Johnston, Olivia Jureidini, Johnston Family Law, Grand Forks, North Dakota (for appellant)

Considered and decided by Johnson, Presiding Judge; Larson, Judge; and Klaphake, Judge.*

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

## NONPRECEDENTIAL OPINION

**JOHNSON**, Judge

Tyler Raymond Johnson Jr. and Whitney Lynne Duden are the parents of two children who now are ten and eight years old. When the children were younger, Johnson and Duden stipulated to joint legal custody and joint physical custody and to a parenting-time schedule. Duden later moved to modify custody and parenting time and for a finding that Johnson is in contempt of court. The district court denied Duden's motions. We conclude that the district court did not err by denying Duden's motions, that the district court did not err by denying Duden's motion for conduct-based attorney fees, and that Duden is not entitled to a new trial. Therefore, we affirm.

## FACTS

Johnson and Duden were in a long-term relationship from 2011 to 2016, during which time they lived successively in the cities of Fargo, North Dakota; Grand Forks, North Dakota; and East Grand Forks, Minnesota. They are the joint parents of two children, a son born in October 2012 and a daughter born in March 2015.

After Johnson and Duden ended their relationship, they agreed informally to share parenting time equally. In April 2018, Duden moved to Moorhead to live with a new partner. Duden enrolled the parties' son in a Moorhead school without informing Johnson.

In May 2018, Johnson petitioned the district court for, among other things, an order awarding him sole physical custody with parenting time for Duden or, in the alternative, equal parenting time if Duden were to relocate to the East Grand Forks area. In response, Duden requested sole physical custody with parenting time for Johnson.

In March 2019, the parties stipulated to an order and judgment, contingent on Duden's relocation to the East Grand Forks area or to a place within 25 miles of Johnson's East Grand Forks residence. The stipulated order awarded the parties joint legal custody, joint physical custody, and equal amounts of parenting time on a week-on-week-off basis beginning in the summer of 2019. The stipulated order also provided that, for a three-year period, if either parent relocated to a residence more than 25 miles from the other party's residence, the parent remaining in the East Grand Forks area (including Grand Forks, North Dakota) would be awarded sole physical custody. In addition, the stipulated order provided that, if one parent required child care while working, the other parent would have the right to care for the children during that time period. In August 2019, Duden moved to a home in Crookston that is 24 miles from Johnson's home in East Grand Forks, and the parties shared parenting time pursuant to the stipulated order.

In August 2020, Duden moved to modify custody and parenting time. After a stay for mediation, the district court determined in May 2021 that Duden had made a *prima facie* case for modification of custody and ordered an evidentiary hearing. Before the evidentiary hearing, Johnson filed a motion for appointment of a custody evaluator, which the district court denied in September 2021. The district court conducted an evidentiary hearing on six days in February and April of 2022. Seventeen witnesses testified, and 59 exhibits were admitted into evidence. Both parties requested conduct-based attorney fees during the evidentiary hearing and in their post-hearing memoranda.

In August 2022, the district court filed a 27-page order in which it denied Duden's motion to modify custody and parenting time, denied Duden's motion for a finding of

contempt, and denied both parties' motions for conduct-based attorney fees. Duden appeals.

## DECISION

### I. Motion to Modify

Duden's primary argument is that the district court erred by denying her motion to modify custody and parenting time.

In considering Duden's motion, the district court applied the statutory endangerment standard, and neither party has argued that a different standard applies. To obtain a modification of custody under that standard, the moving party must prove that "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." Minn. Stat. § 518.18(d)(iv) (2022). "The concept of endangerment is unusually imprecise, but a party must demonstrate a significant degree of danger to satisfy the endangerment element of section 518.18(d)(iv)." *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 v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000) (quoting *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991)), *rev. denied* (Minn. Sept. 26, 2000). In reviewing a district court's ruling on a motion to modify custody after an evidentiary hearing, this court applies a clear-error standard of review to the district court's findings of fact and an abuse-of-discretion standard of review to the district court's ultimate decision whether to modify custody. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985); *Schisel*

*v. Schisel*, 762 N.W.2d 265, 270 (Minn. App. 2009). In doing so, "we view the record in the light most favorable to the district court's findings." *Sharp*, 614 N.W.2d at 263.

In the district court, Duden sought to prove that the children are endangered in Johnson's care for several reasons. She makes two arguments on appeal.

**A.**

Duden first contends that the district court erred by rejecting her argument that the children are endangered due to incidents of a sexual nature occurring while the parties' children were in Johnson's care but not adequately supervised by him. Specifically, Duden introduced evidence that children from other families engaged in inappropriate sexual behavior while visiting Johnson's home and playing with the parties' children as Johnson and other adults were in another part of the home.

The district court examined this evidence closely and concluded that the incidents identified by Duden, while "unfortunate," did not rise to the level of endangerment. The district court found that the incidents were "apparently limited to the exposure of genitals by the other child or other children" and that "there does not appear to have been inappropriate sexualized touching or actual sexual contact by another child or children in relation to either" of the parties' children. In addition, the district court found that "[t]here was no indication that the unwanted 'tickling'" that the parties' daughter experienced was "sexualized behavior in any way." Furthermore, the district court found that "there was no malfeasance by [Johnson] in relation to" the incidents. The district court concluded that the children are not endangered while in Johnson's custody and care.

Duden contends that the district court erred by finding that the children are not endangered by the incidents. Evidence that a child has been sexually abused while in a parent's care may be sufficient to establish endangerment. *In re Welfare of V.H.*, 412 N.W.2d 389, 391-94 (Minn. App. 1987); *Haugberg v. Haugberg*, 406 N.W.2d 73, 75 (Minn. App. 1987). But in this case, the district court found that the children were not sexually abused. Rather, the district court found that the children were exposed to the words and actions of other young children of a similar age that was sexual in nature but did not involve any sexual touching. Duden challenges the factual finding that no touching occurred, but the district court's finding is supported by evidence in the record, specifically, Johnson's testimony about his knowledge of the incidents and the testimony of the children's therapist about the reports that were made to her. The district court also found, "There is no indication that the unwanted 'tickling' was sexualized behavior in any way; rather, it appears that the 'tickling' by an older male child was consistent with ordinary social play." This finding is supported by Johnson's testimony about what the parties' daughter told him and by the testimony of the mother of the boy who tickled the parties' daughter.

In connection with this issue, Duden also contends that the district court erred by citing criminal and juvenile-delinquency statutes. The district court did so in two footnotes to provide legal context for its comments that, based on the evidence presented, no child engaged in criminal sexual conduct. It is clear that the district court properly understood that criminal conduct is not a prerequisite of a finding of endangerment. The district court did not apply the elements of any criminal offense but, rather, focused on the statutory

endangerment standard applicable to custody-modification motions. Accordingly, the district court did not err merely by making incidental citations to criminal and juvenile-delinquency statutes in footnotes.

Because endangerment requires "a significant degree of danger," *see Goldman*, 748 N.W.2d at 285 (quotation omitted), and because we "view the record in the light most favorable to the district court's findings," *see Sharp*, 614 N.W.2d at 263, we conclude that the district court did not clearly err by finding that the incidents identified by Duden do not rise to the level of endangerment.

**B.**

Duden also contends that the district court erred by rejecting her argument that endangerment is demonstrated by evidence of behavioral changes in the children. Specifically, she contends that the children have engaged in "stealing, nail biting, hair pulling, and emotional outbursts." Duden asserts that the district court "failed to analyze and determine why the behavioral changes in the children . . . do[] not rise to the level of endangerment."

In its order, the district court referred to the fact that the children were seen by a therapist due to certain behavioral issues. The district court did not specifically determine whether those behavioral changes, by themselves, proved endangerment. The district court's treatment of those issues is consistent with Duden's post-hearing memorandum, in which she did not specifically argue that endangerment is proved by behavioral changes. In summarizing the evidence of endangerment, Duden's memorandum made only a brief reference to "stealing" in the context of a longer recitation of evidence. Given the way in

which Duden presented the argument, the district court did not fail to give the argument proper consideration.

Thus, the district court did not clearly err by finding that Duden did not prove endangerment and, thus, did not err by denying Duden's motion to modify custody and parenting time.

## II. Motion for Contempt

Duden also argues that the district court erred by denying her motion for a finding that Johnson is in contempt of court.

In the district court, Duden argued that Johnson "willfully and pervasively violated" paragraph 17 of the stipulated order, which provides:

> Should either party require daycare during their parenting time due to employment and the other parent is not working that day, the parent who is not working shall have the right to enjoy time with the children but only during the hours that the other parent is actually at work.

In her motion, Duden alleged that, on 11 occasions, Johnson relied on a day-care provider, his parents, or a babysitter to care for the children while he was working, without giving her the opportunity to care for the children. Johnson responded that he sometimes was required to go to work unexpectedly for a short period of time and that it was more convenient and sensible to drive the children to the day-care provider or his mother in the East Grand Forks area than to drive them to Duden's home in Crookston. The district court denied Duden's motion on the grounds that, even though Johnson had violated paragraph 17, Duden had committed similar violations and the stipulated provision "seemingly contemplated a more accommodating geographic situation," before Duden "chose to

establish her residence in Crookston . . . some 24 miles from [Johnson]'s home" and "only 1 mile within the 25-mile limit for triggering a modification under Paragraph 13 of the Judgment." The district court expressly agreed with Johnson that it would not be in the children's best interests to "spend an inordinate time on U.S. Highway 2 to gain a few hours with" Duden.

Duden sought a finding of civil constructive contempt. A finding of contempt is constructive in nature if it is "not committed in the immediate presence of the court, and of which it has no personal knowledge" and if it arises from any one of 11 specified "acts or omissions," including "disobedience of any lawful judgment, order, or process of the court." Minn. Stat. § 588.01, subd. 3, 3(3) (2022). "Civil contempt proceedings are designed to induce future performance of a valid court order, not to punish for past failure to perform." *Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. App. 1989). Indeed, in civil contempt matters, "the only objective is to secure compliance with an order." *Hopp v. Hopp*, 156 N.W.2d 212, 216 (Minn. 1968). "When the duty is performed, the concern of the court is satisfied." *Id.* We apply an abuse-of-discretion standard of review to a ruling on a contempt motion. *In re Welfare of J.B.*, 782 N.W.2d 535, 538 (Minn. 2010).

On appeal, Duden argues that the district court erred by not finding that Johnson is in contempt despite his violations of paragraph 17. The contempt power "must be exercised with great prudence." *Hampton v. Hampton*, 229 N.W.2d 139, 140-41 (Minn. 1975); *see also Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986). The district court identified valid reasons for not exercising the contempt power in this particular case. The district court did not abuse its discretion in doing so. In addition, Duden's attorney

acknowledged at oral argument in this court that, by the time of the evidentiary hearing, Johnson was in substantial compliance with paragraph 17. Because the goal of civil constructive contempt is to induce compliance with a court order rather than to punish for past noncompliance, and because Johnson was in substantial compliance with paragraph 17, contempt would have been inappropriate for an additional reason. *See Hopp*, 156 N.W.2d at 216; *Mahady*, 448 N.W.2d at 890.

Thus, the district court did not err by denying Duden's motion for a finding that Johnson is in contempt of court.

## III. Attorney Fees

Duden next argues that the district court erred by denying her request for conduct-based attorney fees.

In a custody-modification proceeding, a district court may, in its discretion, award conduct-based attorney fees and costs against a party "who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2022); *see also Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295-96 (Minn. App. 2007); *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn. App. 2001). The moving party has the burden of showing that the conduct unreasonably contributed to the length or expense of the proceeding. *Geske*, 624 N.W.2d at 818. That determination generally depends on "the impact a party's behavior has had on the costs of the litigation." *Dabrowski v. Dabrowski*, 477 N.W.2d 761, 766 (Minn. App. 1991). This court applies an abuse-of-discretion standard of review to a district court's ruling on a motion for attorney fees under section 518.14. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999); *Szarzynski*, 732 N.W.2d at 295.

In this case, both parties requested conduct-based attorney fees during the evidentiary hearing and in their post-hearing memoranda. The district court denied each party's motion. In considering the motions, the district court found that both parties asserted their rights in good faith, that neither party's attorney unreasonably contributed to the length or expense of the modification proceeding, and that an award of conduct-based attorney fees is not warranted.

On appeal, Duden contends that Johnson's attorney engaged in various actions that unnecessarily extended the length of the evidentiary hearing. Specifically, Duden contends that Johnson's attorney did not disclose witnesses and exhibits in discovery, made inappropriate comments on the record during the evidentiary hearing, made an excessive number of objections, made an unduly lengthy motion for directed verdict, and introduced evidence that inappropriately denigrated Duden. These contentions go far beyond the arguments Duden presented to the district court. In her post-hearing memorandum, Duden identified only one reason for conduct-based attorney fees and only briefly: that Johnson's attorney spent "an inordinate amount of time . . . focusing on [Duden]'s chosen occupation . . . in attempts to demean [Duden], for no ascertainable reason." The district court did not specifically mention that issue in its order. We presume that the district court considered the issue and rejected it when making its general findings of good faith and absence of unreasonable conduct. *See Kroning v. Kroning*, 356 N.W.2d 757, 760 (Minn. App. 1984). The district court did not abuse its discretion in doing so.

Thus, the district court did not err by denying Duden's request for conduct-based attorney fees.

## IV. New Trial

Duden last argues that the district court erred by not exercising reasonable control over Johnson's attorney and that, as a consequence, she is entitled to a new trial. Duden did not move for a new trial in the district court. Ordinarily, the absence of such a motion would limit the scope of our review. *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986). That is so because a motion for new trial may "eliminate the need for appellate review," "facilitate development of 'critical aspects of the record,'" and "provide the district court with the opportunity to correct its own errors." *Alpha Real Estate Co. v. Delta Dental Plan*, 664 N.W.2d 303, 309 (Minn. 2003) (quoting *Sauter*, 389 N.W.2d at 201). But a motion for new trial is not allowed in a custody-modification proceeding. *Bedner v. Bedner*, 946 N.W.2d 921, 925 n.3 (Minn. App. 2020); *Huso v. Huso*, 465 N.W.2d 719, 721 (Minn. App. 1991); *Erickson v. Erickson*, 430 N.W.2d 499, 500 n.1 (Minn. App. 1988). Because a motion for new trial is not allowed in this type of proceeding, the appellate remedy of a new trial also is not allowed. Thus, Duden is not entitled to a new trial.

**Affirmed.**