STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1607

In re the Marriage of:
Kurt Francis Wirtzfeld, petitioner,
Respondent,

vs.

Carlynn Jenierre Miller-Gore,
Appellant.

Filed September 17, 2012
Affirmed
Peterson, Judge

Dakota County District Court
File No. 19-F0-00-014221

Kurt F. Wirtzfeld, West St. Paul, Minnesota (pro se respondent)

Lisa D. Kontz, Dakota County Attorney, Hastings, Minnesota (for respondent)

Deanne L. Dulas, Strandemo, Sheridan & Dulas, Eagan, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this parenting-time dispute, appellant-mother argues that the district court (1) applied the wrong standard in addressing whether mother made a prima facie case for

a substantial modification of parenting time; (2) erred in denying mother's motion to appoint a parenting-time expeditor; and (3) miscalculated the amount of father's compensatory parenting time. We affirm.

FACTS

Appellant-mother Carlynn Jenierre Miller-Gore and respondent-father Kurt Francis Wirtzfeld are the parents of one minor child. Father was adjudicated the father of the child by a stipulated order filed in 2001. The order granted mother sole physical custody of the child and father increasing parenting time, culminating when the child reached age two with 48 consecutive hours every other week and two days from noon until 5:00 p.m. during his "off weeks."

In December 2009, mother filed a motion seeking temporary supervision of father's parenting time or a temporary reduction of father's parenting time, appointment of a psychologist to determine the status of father's mental health, and appointment of a parenting-time expeditor. Father filed a motion seeking additional summer parenting time, compensatory parenting time, and assistance to enforce his parenting time. Pursuant to the parties' agreement, by order filed March 9, 2010, the district court temporarily modified father's parenting time to 10:00 a.m. to 6:00 p.m. every other Saturday and Sunday of the same weekend, required father to abstain from the use of alcohol, and appointed a psychologist to conduct a full psychological evaluation of father.

In April 2010, mother brought a motion to compel father to comply with the requirement that he undergo a psychological evaluation and to require supervised

parenting time. Father filed a motion requesting that mother participate in the psychological evaluation and seeking compensatory parenting time.

At the May 11, 2010 hearing on the motions, father's counsel stated:

> If [the psychologist's] evaluation comes back stating that there are concerns for either party, then [the psychologist] will make a recommendation as to what the temporary parenting time schedule will be until we are able to file a motion with the court, either party is able to file a motion with the court to argue . . . parenting time, as well as the original motions that were filed back in January, the issues in the original motion. And we've agreed that the psychological evaluations can be used as part of court proceedings.

Mother's counsel stated:

> [W]e wanted the record to reflect very specifically that this is just a psychological evaluation. It is not a parenting time evaluation. Our hope is that this will give us the information we need to resolve the issues between the parties without having to do a full parenting time evaluation.

Pursuant to the parties' agreement reached at the May 11 hearing, the district court ordered both parties to undergo full psychological evaluations and any other assessments deemed necessary by the psychologist and required father's parenting time to be supervised until the psychologist made an interim decision to remove the requirement. If the psychological evaluations found no concerns of mental-health issues, the parenting-time schedule in effect until January 2010 would be reinstated, but, if concerns of mental-health issues were found, the psychologist would recommend a temporary parenting-time schedule pending a determination by the district court. The district court awarded father compensatory parenting time.

In September 2010, father filed a motion seeking sole legal and physical custody of the child or the immediate restoration of parenting time every other weekend. The matter was continued pending the report on the psychological evaluations. The psychologist's evaluation of father recommended that he have eight hours of parenting time every other Saturday and Sunday subject to increase as father showed compliance with treatment and abstinence requirements.

On February 11, 2011, the district court issued an order incorporating the agreement reached by the parties at the May 11, 2010 hearing. Also on February 11, 2011, the district court issued a second order granting father parenting time for eight hours Saturday and eight hours Sunday every other weekend until June 1, 2011, at which time his parenting time would revert to the original parenting-time schedule of every other weekend from Friday after school until Sunday at 6:00 p.m. and every Wednesday overnight, provided that father showed compliance with treatment and abstinence requirements. The court awarded father 240 hours of compensatory parenting time to be taken at a time mutually agreeable to the parties. Mother filed a motion for amended findings. The district court corrected clerical errors and modified the February 11, 2011 order to reflect the parties' agreements on child support but denied mother's motion for amended findings on parenting-time issues. This appeal followed.

D E C I S I O N

I.

Mother argues that the district court applied the wrong standard to determine whether she established a prima facie case for modification of parenting time. A

substantial modification of parenting time requires "an evidentiary hearing when, by affidavit, the moving party makes a prima facie showing that [parenting time] is likely to endanger the child's physical or emotional well being." *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). Whether a party has established a prima facie case for modification is committed to the district court's discretion. *Boland v. Murtha*, 800 N.W.2d 179, 184-85 (Minn. App. 2011).

Mother argues: "Pursuant to the February 1[1], 2011, Order arising out of the May 11, 201[0], hearing, the parenting time schedule which [the psychologist] recommended was to be implemented only pending further motions [to] the court." The February 11, 2011 order incorporating the parties' agreement includes the following provisions:

> 7. If the psychological evaluation for [father] states that [the psychologist] finds no concerning mental health issues, the parties will return to the parenting time schedule in place prior to January of 2010, of every other weekend from Friday through Sunday. . . .
>
> 8. If [the] psychological evaluation finds concerns of mental health issues for either party, then [the psychologist] will recommend a parenting time schedule that is in the best interests of the minor child to be implemented immediately pending further motions [to] the court. The original motion which was indefinitely continued would be heard by the Court. Each party will be required to make the necessary legal requirements of a prima facie showing for a modification. . . .
>
> 9. [The psychologist] will provide a complete copy of the psychological evaluations for both parties to each parties' respective legal counsel. The psychological evaluation may be used as part of this court proceeding. If at the prima facie hearing the Court finds that either party has met their burden

> of proof and a custody evaluation becomes necessary, the psychological evaluation . . . will be used in that process.

"The rules of contract construction apply when construing a stipulated provision in a dissolution judgment. Under those rules, the court must consider the stipulation as a whole to determine whether an ambiguity exists. If no ambiguity exists, interpretation is a question of law subject to de novo review." *Blonigen v. Blonigen*, 621 N.W.2d 276, 281 (Minn. App. 2001) (citations omitted), *review denied* (Minn. Mar. 13, 2001). But if a writing is ambiguous and extrinsic evidence is considered to resolve the ambiguity, construction is a question of fact. *Anderson v. Archer*, 510 N.W.2d 1, 4 (Minn. App. 1993). A writing is ambiguous if its language is reasonably susceptible to more than one meaning. *Landwehr v. Landwehr*, 380 N.W.2d 136, 138 (Minn. App. 1985).

The parties' agreement is ambiguous in that it did not specifically define how the psychological evaluation was to be used at the proceeding to determine whether a prima facie case had been established. In the February 11, 2011 order determining parenting time, the district court found:

> [Father] has now had a psychological evaluation, and although [the psychologist] expressed some concerns in her report, she indicated that she did not believe that [father] presented any danger to the minor child. Furthermore, she indicated that her concerns about [father] could be adequately addressed with therapy and counseling. Also, [the psychologist's] recommendations for parenting time as set forth in her September 24, 2010, letter indicate that [father] should work back up to the original parenting time schedule upon completion of certain treatment requirements. Based on this information, this Court finds that [mother] has not made a prima facie showing that [father's] parenting time will endanger the child's physical or emotional health. As a

> result, an evidentiary hearing is not necessary, nor is a full parenting time evaluation.

Mother submitted a detailed affidavit stating that father's behavior deteriorated beginning during the summer of 2006 and listing examples of his actions. But the district court, in effect, found that the parties had agreed to allow the district court to consider the psychological evaluation of father when determining whether mother had established a prima facie showing for a modification. And the district court's interpretation of the parties' agreement is a reasonable interpretation of the agreement's language and is consistent with the statements of counsel at the May 11, 2010 hearing. Based on the psychological evaluation of father, the district court did not err in determining that mother failed to establish a prima facie case or in determining the issue of parenting time without an evidentiary hearing or a full parenting-time evaluation and ordering the reinstatement of the original parenting-time schedule upon father's compliance with the conditions stated in the psychological evaluation. The requirements imposed by the district court are consistent with the psychologist's recommendations.

Mother also argues that an evidentiary hearing was required because the district court substantially reduced father's parenting time and restricted "it by setting a number of conditions which were required before parenting time would expand." When modification results in a substantial change or in a restriction of parenting time, the district court must conduct an evidentiary hearing. *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002). Because the February 11, 2011 order provided for reinstatement of the original parenting-time schedule in four months, it was not a substantial change in

or restriction of parenting time. *See Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009) (explaining how to determine whether modification amounts to substantial change or restriction). Moreover, even if there was a substantial change, mother was not the aggrieved party.

II.

Mother argues that the district court abused its discretion in not appointing a parenting-time expeditor. A district court "may appoint a parenting time expeditor to resolve parenting time disputes." Minn. Stat. § 518.1751, subd. 1 (2010). Parenting-time issues are resolved in favor of the best interests of the child and decisions based on those interests are reviewed for an abuse of discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). Although mother's affidavits detail incidents of father's hostility toward her, based on the psychological evaluation of father, we conclude that the district court did not abuse its discretion in denying mother's motion for appointment of a parenting-time expeditor.

III.

Mother argues that the district court erred in granting father 240 hours of compensatory parenting time. At the hearing on mother's motion for amended findings, father stated that he had missed two weeks of summer-vacation parenting time during the summer of 2010 in addition to the 48 hours of compensatory parenting time that the parties agreed that he was entitled to through May 11, 2010. To the extent that mother presented conflicting evidence, this court defers to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

Moreover, the district court has discretion to award compensatory parenting time in an amount exceeding that which was denied. Minn. Stat. § 518.175, subd. 6(b) (2010). The district court did not err in awarding father 240 hours of compensatory parenting time.

Affirmed.