STATE OF MINNESOTA
IN COURT OF APPEALS
A11-306

In re the Custody of:
Y.R., J.R. and I.S.B.-T.
Julie Ann Trimbo, petitioner,
Appellant,

vs.

Kathleen Anne Trimbo,
Respondent,

Barry Rodriguez,
Respondent Below,

Harold Bauman,
Respondent Below.

Filed February 13, 2012
Affirmed
Klaphake, Judge

Sibley County District Court
File No. 72-FA-06-72

Christopher E. Morris, New Prague, Minnesota (for appellant)

Jed J. Hammell, Rippe, Hammell & Murphy, P.L.L.P., Caledonia, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Larkin, Judge.

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

KLAPHAKE, Judge

Appellant Julie Ann Trimbo challenges the district court's award of the custody of her three minor grandchildren to their mother, respondent Kathleen Anne Trimbo, arguing that the district court abused its discretion because it did not properly weigh the factors necessary for a modification of custody. Appellant also asserts that the district court abused its discretion by refusing to award her grandparent visitation time. These parties, mother and daughter, have engaged in a protracted battle over custody of respondent's children, exacerbated by their mutual hostility.

The district court made a thorough and careful analysis of the modification factors. Because the district court's findings and conclusions regarding custody modification are supported by record evidence, and because it is in the children's best interests to presently deny grandparent visitation, we conclude that the district court did not abuse its discretion. We therefore affirm.

D E C I S I O N

Our review of the district court's custody modification decision is limited to determining whether the district court abused its discretion "by making findings unsupported by the evidence or by improperly applying the law." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). Findings of fact are reviewed for clear error, and the record is viewed in the light most favorable to the findings. *Id.* Even when "the record could support a different custody award, this court may not substitute its judgment for that of the district court when reviewing custody

determinations." *Zander v. Zander*, 720 N.W.2d 360, 368 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006).

Custody Modification

Modification of a custody order issued under Minn. Stat. §§ 257C.01-.08 (2010) is handled in accordance with the procedures of Minn. Stat. § 518.18 (2010). Minn. Stat. § 257C.06. A custody order may be modified if the district court finds (1) there has been a change in circumstances since the prior order; (2) modification would be in the best interests of the child; (3) the child's current environment endangers the child's physical or emotional health or impairs the child's emotional development; and (4) the advantages to the modification outweigh any harm likely to result from the modification. Minn. Stat. § 518.18(d).[1]

1. Change in Circumstances

A change in circumstances is determined on a case-by-case basis. *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). "A change in circumstances must be significant and must have occurred since the original custody order, rather than being a continuation of conditions that existed prior to the order." *See Tarlan v. Sorensen*, 702 N.W.2d 915, 923 (Minn. App. 2005) (discussing

[1] A motion to modify a previous order cannot be brought within two years of the disposition of a prior motion, unless the district court finds that there is a persistent or willful denial of or interference with parenting time or that the child's current placement endangers the child's physical or emotional health or development. Minn. Stat. § 518.18(b), (c). Although this motion was brought within 14 months of the prior disposition, the district court made findings of endangerment and interference with parenting time.

change in circumstances in relation to a motion to modify custodial parent's ability to make decisions regarding child's health). The change in circumstances can involve either a change in the child's circumstances or in the parent's circumstances. *Goldman*, 748 N.W.2d at 285.

The most important circumstance in this matter is the parties' mutual anger. Initially grounded in respondent's early poor choices, appellant has retained residual hostility toward respondent, her daughter, and has thwarted respondent's attempts to successfully regain custody of her children. The district court found that respondent participated in co-parenting therapy and made progress in controlling her anger toward appellant; by contrast, appellant was "very defensive," missed or cancelled sessions, and "ultimately discontinued the court-ordered counseling with [parenting therapist]," something the court had considered "most important[ ]." Respondent had no contact with Barry Rodriguez, the abusive father of the two younger children, after 2008; her single meeting with Rodriguez in 2008 had caused the court to reverse its decision granting her custody of the children.[2] The court noted that if this were a child protection case, respondent would have to have shown that she had "rehabilitated herself sufficiently to regain custody of her children." This is an implicit finding that the district court was no longer troubled about earlier allegations of respondent's drug abuse and that there had been a positive change in respondent's circumstances at least.

[2] The record suggests that the purpose of this isolated incident of contact was for respondent to inform Rodriguez that their relationship was terminated.

There is sufficient evidence in the record to support the district court's findings and its conclusion that there was a change in circumstances.

2. Children's Best Interests

The best interest factors are set forth in Minn. Stat. § 257.025 (2010). *See* Minn. Stat. § 518.18(d)(i) (directing the district court to use either section 518.17 or section 257.025 to determine best interests of child when considering modification of custody). The district court considered each of 12 of the best interest factors. The court found that both parties want custody, the children are too young to express a preference, the children are well bonded to both parties and each other, both parties have a similar cultural background, and neither party is involved in an abusive relationship. These six factors were neutral.

The district court found several factors that favored appellant: she was the primary caretaker of the children, they resided with her for a longer period of time, and appellant has a more stable living situation. But in a recent case, this court, while reviewing an award of grandparent visitation, stated that the district court must consider the "potentially inequitable circumstances" that permitted a grandparent to function as the primary caretaker. *In re C.D.G.D.*, 800 N.W.2d 652, 656-57 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). This court found "persuasive support" for the father's contention that grandmother's "appointment as custodian resulted substantially from her engaging in procedural maneuvering." *Id.* at 657. Likewise here, appellant opposed all attempts to facilitate a transfer of custody to respondent.

Finally, the district court found that although the children have a close and special relationship with each of the parties and with each other, the relationship between the parties is too strained to permit joint custody and that respondent "has the best opportunity to bring up her children in a loving and flexible environment." The district court found that the parties argue in front of the children and that appellant limits or conditions respondent's visits with the children by adding unreasonable requirements. The court also found that both parties sincerely love the children but "because of their incredible hostility toward each other, they may not be able to give the children the affection and guidance that the children need. In this regard, the Court finds that [respondent] is significantly more able to provide the children with the affection and guidance they need."

The district court emphasized the hostility between the parties; while this factor alone may not be determinative, it is a legitimate consideration. *See Lemcke v. Lemcke*, 623 N.W.2d 916, 919-20 (Minn. App. 2001) ("A majority of courts, including Minnesota courts, agrees that a sustained course of conduct by one parent designed to diminish a child's relationship with the other parent is unacceptable and may be grounds for denying or modifying custody."), *review denied* (Minn. June 19, 2001).

No single best interest factor is paramount. Minn. Stat. § 257.025 (a); *see also Lemcke*, 623 N.W.2d at 920 (stating that district court must weigh and balance all factors). According to its findings and memorandum, the district court weighed and considered all the best interest factors; its findings are supported by the record evidence.

3. Endangerment

Appellant argues that the district court made no findings of endangerment and that, therefore, the modification of custody fails for lack of this critical element. We agree that the district court did not fully address the issue of endangerment in its original order. However, after appellant's motion for a new trial or amended findings, the district court stated that it considered the findings of endangerment adequate but added:

> [A] significant consideration in the endangerment finding is the conflict between [the parties]. Frankly, the Court does not need expert testimony to conclude that such conflict and uncertainty endanger the mental and emotional well-being of the children by giving them the impression (intended or not) that they are merely pawns in a power struggle between their mother and grandmother. This endangerment can only end when the Court ends its involvement in the futile attempt to convince the parties to cooperate in a co-parenting arrangement.

The court made findings that support this clear declaration of endangerment: (1) a "long history of a tumultuous relationship"; (2) appellant's interference with visitation; (3) consistent GAL recommendations and reports of interference with visitation; (4) a GAL report of a dispute before the children and the district court's own observations during trial; (5) best interest factors including a discussion of conflict and effect on the children; (6) a report of the co-parenting therapist; (7) the detrimental effect of the conflict on children; (8) "[appellant is] not capable of acting in the children's best interests when it comes to having a relationship with [respondent]"; and (9) district court's statement that co-parenting has "resulted in emotional trauma to the children."

"The concept of 'endangerment' is unusually imprecise, but a party must demonstrate a significant degree of danger to satisfy the endangerment element." *Goldman*, 748 N.W.2d at 285 (quotation omitted). The evidence of endangerment must demonstrate the child's present environment "may endanger the child's physical or emotional health or impair the child's emotional development." Minn. Stat. § 518.18(c).

The district court's findings are adequate to support a finding of endangerment to the children's emotional health based on the conflict between the parties.

4. Balance of Benefit and Harm to the Children

When making a custody determination, the district court must weigh the present circumstances. *See* Minn. Stat. § 518.18(d)(iv) (stating that court must consider whether "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 the change to the child" (emphasis added)). As noted, most of the issues appellant raises to oppose modification concern past events.

Appellant argues that she represents stability in these children's lives. Stability is often presumed to be important when weighing the balance of harm and benefit. *Geibe v. Geibe*, 571 N.W.2d 774, 780 (Minn. App. 1997); *see Tarlan*, 702 N.W.2d at 924 (stating that stability is presumed in child's best interests, but other factors can be considered). Here, the court found the balance of harm and benefit to be very close and finally concluded that one deciding factor, "though not the sole factor, is the fact that these children should be with their mother." In its January 12, 2011 order, the court repeated,

"[f]urther, to be clear, the Court finds that harm likely to be caused by a change of environment is outweighed by the advantage of a change to the children by changing their custody from [appellant] to [respondent.]" Implicit in all of the court's findings is the damage done to the children by the constant tug of war between the parties. The district court stated:

> It is the feeling of the court that the trauma associated with the possibility that the children will not have contact with the non-custodial party [appellant] is more than outweighed by the very real probability associated with the continued high level conflict between the parties that has been the hallmark of the previously Court-ordered parenting time.

The district court fully considered the four modification factors, including the best interests of the children. Its findings are supported by record evidence. This court's review is limited to determining whether the district court abused its discretion; that is, whether the district court made findings unsupported by the record or improperly applied the law. *Zander*, 720 N.W.2d at 365-66. We cannot substitute our judgment for that of the district court when reviewing custody determinations. *Id.* at 368.

Finally, we acknowledge the presumption that a natural parent, if a fit and suitable person, should have custody of his or her minor child. *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002); *Johnson-Smolak v. Fink*, 703 N.W.2d 588, 592 (Minn. App. 2005). A plurality of the United States Supreme Court has repeatedly recognized the liberty interest parents have in the "care, custody and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000).

> [T]here is a constitutional dimension to the right of parents to direct the upbringing of their children. It is cardinal with us

> that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

*Id.*at 65-66, 120 S. Ct. at 2060 (quotation omitted); *see also SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007) (acknowledging "protected fundamental right" of parent to make decisions about child). While both *Troxel* and *SooHoo* dealt with visitation rights of third parties, their recognition that a fit and suitable natural parent has an interest of constitutional dimensions in the care, custody and control of his or her child is equally applicable here.

Grandparent Visitation

We review the district court's visitation decision for an abuse of discretion. *SooHoo*, 731 N.W.2d at 825. We examine the district court's findings for clear error, while viewing the findings in the light most favorable to the district court's decision. *Id.*

We reviewed the question of grandparent visitation in *C.D.G.D.*, 800 N.W.2d at 655-62. "A parent has the fundamental right to make parenting decisions, including deciding who spends time with the child. That right has long been recognized in the common law and is constitutionally protected." *Id.* at 655. A court must give "'at least some special weight to the parent's own determination.'" *Id.* at 661 (quoting *Troxel*, 530 U.S. at 70, 120 S. Ct. at 2062). A grandparent has the burden of showing by clear and convincing evidence that visitation will not interfere with the custodial parent's relationship with the child. *Id.* at 662.

The district court made multiple findings that the continued conflict between the parties was emotionally harmful to the children and that the parties could not co-parent. The district court repeated these observations in its amended order. There is adequate support in the record for the district court's decision that grandparent visitation is not currently in the children's best interests.

Affirmed.