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Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A11-460

In re the Marriage of:
Timothy William Wormer, petitioner,
Appellant,

vs.

Michelle Ann Jackson, f/k/a Michelle Ann Wormer,
Respondent.

Filed December 12, 2011
Reversed and remanded
Ross, Judge

Scott County District Court
File No. 70-FA-1997-09067

Jodi S. Exsted, Exsted Legal Services, LLC, Shakopee, Minnesota (for appellant); and

John F. Wagner, McDonough, Wagner & Ho, L.L.P., Apple Valley, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Harten, Judge.*

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

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

ROSS, Judge

The district court modified the parties' child-custody schedule, reducing father Timothy Wormer's previously equal parenting time with the two children to four overnights in every 14-day period. Wormer argues that the modification reflects an abuse of discretion. We hold that the district court may have "restricted" Wormer's parenting time under Minnesota Statutes section 518.175, subdivision 5 (2010) without making the required findings. The district court also found that the children had stated a preference to live with mother Michelle Jackson, but the record does not include evidence to support that finding. We therefore reverse and remand for additional findings.

FACTS

Timothy Wormer and Michelle Jackson (formerly Michelle Wormer) were married in 1994 and had two children before they divorced in May 1998. The district court dissolving the marriage ordered joint legal and physical custody of the children. It ordered a parenting-time schedule that consisted of eight overnights with Jackson and six with Wormer every two weeks, and a holiday schedule that alternated every year. The parties eventually informally shifted to an equal schedule in which each parent spent seven days with the children during every two-week period.

Scott County moved the district court in May 2000 for an increase in Wormer's child-support obligation and reimbursement for daycare expenses. When Wormer opposed the motion, he asked the court to modify the parenting-time schedule. Consistent

with Wormer's request, in January 2001 the district court ordered the parties to follow an equal parenting-time schedule.

From 2002 to 2009 the children attended school in Jordan, where Wormer lived, and the parties followed a 50-50 parenting-time schedule. In August 2009 the parties agreed that the children would attend school in Waconia and reside in Jackson's home. After the children moved to Jackson's home, the parties informally followed a schedule in which Wormer had the children on alternating weekends and every Wednesday overnight. To accommodate Wormer, they also later changed the schedule such that the children were with Wormer on alternating weekends from Saturday night to Monday morning, and they reduced the frequency that the children were with him on Wednesdays overnight.

The parties became less mutually cooperative, and Wormer suggested that the children return to school in Jordan. Jackson disagreed. In May 2010 Jackson moved the district court for sole physical custody. Wormer asked the district court to reconfirm the formal equal-time arrangement, but Jackson sought a schedule closer to the informal schedule the parties had been following. The district court appointed a guardian ad litem, who opined that the children were adjusted to the informally adopted schedule and recommended that Wormer have parenting time every other weekend, Wednesday from four to eight p.m., and one other unspecified weeknight.

The district court denied Jackson's motion for sole physical custody, but it modified the school-year parenting-time schedule. It ordered a schedule in which Wormer would have parenting time during the school year only on every other weekend,

every Wednesday overnight, one week during Christmas break, and one week during spring break. Wormer moved for a new trial or for an order consistent with the January 2001 equal-parenting-time order. The district court denied Wormer's motion. This appeal follows.

D E C I S I O N

Wormer challenges the district court's order modifying parenting time. The district court has broad discretion in deciding parenting time. *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010). We review an order modifying parenting time for an abuse of that discretion. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). The district court abuses its discretion when its findings are clearly erroneous or when it improperly applies the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985).

The district court's discretion to modify a parenting-time schedule is partially confined by a statutory limitation not to "restrict" parenting time without finding that the existing schedule will endanger the children or impair their emotional development or that the restricted parent has chronically and unreasonably failed to follow the plan. Minn. Stat. § 518.175, subd. 5 (2010). Wormer argues that his parenting-time reduction constitutes a "restriction" under section 518.175 without the fact findings necessary to support the restriction. We must therefore decide whether Wormer's parenting time may have been effectively restricted, a decision that requires us to consider the amount of and the reasons for the reduction. *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002).

Determining whether the amount of a parenting-time reduction is so substantial that it "restricts" one parent's time requires us to identify the baseline from which to measure the reduction. *Dahl*, 765 N.W.2d at 123. We have held that the last final and permanent order defining parenting time establishes the baseline for this comparison. *Id.* Based on that holding, it is clear to us that the district court used the wrong baseline for comparison. The district court deemed the reduction too insignificant to require the additional findings because it measured the reduction from the parenting schedule of the 1998 dissolution judgment. But that schedule was not the proper baseline; three years after that 1998 judgment, in January 2001, the district court altered the arrangement while it decided a motion that had "proposed change of custody." In doing so, it ordered that "both parties shall continue to have joint . . . custody . . . *pursuant to the equal time schedule*" that a guardian ad litem had submitted to the court. Because that 2001 equal-parenting-time order was the most current permanent, final order setting the parties' parenting-time rights, the district court should have used it as the baseline schedule from which to measure the extent of the 2010 reduction.

The extent of Wormer's reduction in parenting time from the correct baseline seems substantial, but given the erroneous baseline determination, the district court has not yet addressed whether it constitutes a restriction. The 2010 modification left Wormer with parenting-time every other weekend from Saturday noon to Monday 6:45 a.m. (42.75 hours) and from every Wednesday 5:00 p.m. to Thursday 6:45 a.m. (13.75 hours). It also allowed Wormer one week of Christmas break and one week at spring-break (336 hours) and left unchanged the alternating holiday schedule of four days per parent (96

hours). The district court ordered the parties to follow the same 12-week summer break schedule from the dissolution judgment, with six out of 14 days to Wormer (864 hours) and eight to Jackson (1,152 hours). We realize there are other ways to measure the time and that the district court may deem some other method to be more appropriate, but this hourly comparison is sufficient to inform us that, at least under one method, the district court's modification leaves the children with Wormer only about 30% (2,701 hours) of each year and with Jackson about 70% of the year (6,059 hours). And on that same hourly comparison, the change constitutes roughly a 40% parenting-time reduction for Wormer.

The district court's failure to use the correct baseline when it found that its parenting-time decision was not a restriction is a misapplication of law, and a misapplication of law is an abuse of discretion. We cannot know on this record how the district court would have resolved this parenting-time dispute had it used the correct baseline. We do not know, for example, whether it would have recognized the substantial parenting-time drop as a "restriction" under section 518.175, and, if so, whether it would have found facts that justify the restriction. We observe that Jackson now contends that the presumption under subdivision 1(e) that each parent receive at least 25% parenting time establishes that a substantial parenting-time reduction to a percentage higher than 25% (like Wormer's 30%) cannot, as a matter of law, constitute a restriction. But we have never so held, and we do not address the argument because the district court did not address it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only questions presented to and decided by the district court).

The district court should first determine the factual *and* legal issues before we review its decisions, even on matters of de novo review. Whether to reopen the record on remand to resolve the factual issues and address the legal questions is within the district court's discretion.

Wormer also argues that the district court's findings regarding the preferences of the children are not supported by the record. The argument is persuasive. One of the statutory factors to weigh when assessing the children's best interests is "the reasonable preference of the child[ren] if . . . of sufficient age." Minn. Stat. § 518.17, subd. 1(a)(2) (2010). The district court found that "[i]n the summer of 2009 the children expressed their wish to spend more time with their mother, a reasonable request by two teen-age girls," and that "[t]he children remain committed to spending more time with [Jackson] and remaining in the Waconia schools." A step or two seem to have been missed in tracing the children's stated preferences to preferences that would support the parenting-time change. The guardian ad litem recommended that the children remain in the Waconia schools, but her report does not state any preferences of the children regarding residence or time with either parent. Jordan and Waconia are within reasonable commuting range (about 20 miles apart) and the record indicates that the children had split their time between both parents equally during all or part of the period in which they attended school in Jordan. That former arrangement suggests that the children's stated preference for one school over the other does not necessarily equate to a stated preference for either residence or for more or less time with either parent. The district court on

remand therefore also should clarify any preferences or address the propriety of relying on the children's school preference as support for modification.

Wormer also argued in his brief that the district court abused its discretion by failing to order therapy for the children after the guardian ad litem recommended it. His counsel at oral argument conceded the weakness of this argument, and we see no basis to address it.

Reversed and remanded.