STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1876

In re the Marriage of: Laura Sue Himley,
n/k/a Laura Sue Boero, petitioner,
Appellant,

vs.

Ryan Thomas Himley,
Respondent.

Filed August 26, 2013
Affirmed
Connolly, Judge
Dissenting, Chutich, Judge

Sherburne County District Court
File No. 71-FA-12-422

David M. Cox, Myles A. Schneider & Associates, Ltd., Elk River, Minnesota (for appellant)

J. Lee Novelli, Novelli Law Office, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Chutich, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's order concerning which school the parties' minor child should attend and its corresponding order modifying the parties'

parenting-time schedule. Appellant challenges the orders on the grounds that the district court: (1) abused its discretion in ordering that the child attend school in Edina; (2) erred in failing to apply an endangerment standard to respondent's motion or hold an evidentiary hearing; and (3) demonstrated improper bias against appellant. Because the district court applied the correct legal standards, properly considered the child's best interests in ordering the school change and in modifying the parenting-time schedule, and did not show improper bias, we affirm.

FACTS

Appellant Laura Sue Himley, now known as Laura Sue Boero, and respondent Ryan Thomas Himley are the parents of one minor child, P.H., currently age eight. After the parties separated in 2007, appellant moved to New Ulm with P.H. to live with her parents. The parties' marriage was dissolved in Brown County in early 2009 and the district court issued an order concerning custody, parenting time, child support, and financial issues related to P.H.'s care.

Appellant and respondent agreed to share joint legal custody of P.H., but each sought sole physical custody. After analyzing the statutory best-interest factors, the district court awarded them joint physical custody. The district court noted the parties' "terrible relationship with one another" and their inability to cooperate or agree on parenting issues. Despite these shortcomings, the district court found that appellant and respondent were both good parents, P.H. had a good relationship with both parents, and it would be in his best interests for the parties to share physical custody. Concerning parenting time, the district court ordered that P.H. reside with appellant in New Ulm

during the school year and with respondent (who lives in Edina) during the summer months, with each parent alternating weekends and holidays.

In June 2012, appellant and her new husband moved to Elk River to be closer to his job in Anoka. After moving, appellant accepted a teaching position in Monticello. Appellant did not inform respondent that she was moving out of New Ulm with P.H. and she took steps to enroll P.H. in school in Elk River without respondent's knowledge or consent.

After learning of appellant's move, respondent filed a motion in Sherburne County District Court[1] to require P.H. to attend school in the Edina School District and to modify the parenting-time schedule such that P.H. would primarily live with respondent during the school year. Respondent alleged that appellant only moved to Elk River to limit his contact with P.H., "choosing a home farther north than even her husband's job in Anoka." Respondent argued that attending school in Edina was in P.H.'s best interests, asserting that Edina schools are academically and athletically superior to those in Elk River and that P.H. already knew other children in Edina. He also emphasized P.H.'s close relationship with respondent's nine-year-old stepdaughter and the fact that P.H. would not have to attend daycare in Edina because respondent's work schedule allowed him to be home with the children before and after school.

Appellant opposed the motion and brought her own motion asking permission to enroll P.H. in school in Elk River. She also argued that respondent was actually seeking

[1] Respondent originally filed his motion in May 2012 in Brown County, where the divorce decree had been issued. Because appellant no longer lived in New Ulm, the Brown County District Court transferred venue to Sherburne County.

a change in custody or to restrict her parenting time, and thus must show that P.H. was endangered in her custody.

The district court held a hearing on the school issue but did not take any arguments from counsel or evidence from the parties outside of their written affidavits. The district court granted respondent's motion and ordered that P.H. attend school in Edina. The district court found that P.H. would receive a satisfactory education in either Edina or Elk River, but concluded that attending school in Edina would serve P.H.'s best interests because, among other reasons, he had existing relationships with other children in Edina, he would not need before- or after-school care, and he could further his relationship with his stepsister. The district court directed the parties to seek agreement on a new parenting-time schedule in light of the school order and the distance between Elk River and Edina. If the parties could not agree, the district court stated that it would hold a hearing and decide the parenting-time issue.

After receiving a phone call from appellant's attorney, the district court sent a letter to the parties indicating that it would receive written submissions on the parenting-time issue if the parties were unable to reach an agreement. Also in that letter, the court stated that it would only hold an evidentiary hearing if requested by either party. The district court clarified that the "hearing is intended to examine the issue of what type of parenting arrangements are in the best interests of the child in lieu of the [c]ourt's previous decision to have the child . . . attend school in the Edina School District." Neither party requested such a hearing.

The parties were unable to agree on a new parenting-time schedule and the district court held a hearing at which counsel argued, but no evidence was presented. The district court basically reversed the existing parenting-time schedule, ordering that, during the school year, respondent have parenting time with P.H. on weekdays, except Wednesday night, and every other weekend. Appellant would thus have every other weekend, along with every Wednesday night. During the summer, the schedule switches, with appellant having P.H. during the week, the parties alternating weekends, and respondent also having P.H. overnight on Wednesdays during the weeks that he does not have weekend parenting time. The district court noted that this schedule would result in more quality time with P.H. for appellant, since she does not work during the summer and "[t]he opportunity to have unstructured free time with a parent in the summer is not afforded many children these days and [P.H.] is fortunate to have that opportunity."

Appellant now challenges the district court's orders concerning P.H.'s schooling and the modified parenting-time schedule.

D E C I S I O N

I. School Order

When parents share joint legal custody, they have "equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education." Minn. Stat. § 518.003, subd. 3(b) (2012). Appellant was therefore not entitled to unilaterally enroll P.H. in school in Elk River without respondent's consent. Where joint legal custodians cannot agree on where their child should attend school, the district court must resolve the dispute based on the child's

best interests. *See Novak v. Novak*, 446 N.W.2d 422, 424 (Minn. App. 1989) ("The law makes no distinction between general determinations of custody and resolution of specific issues of custodial care."), *review denied* (Minn. Dec. 1, 1989). A child's "best interests" are defined as "all relevant factors," including those listed in Minn. Stat. § 518.17, subd. 1(a) (2012).

We review the district court's decision on an issue of legal custody, such as schooling, for an abuse of discretion. *See Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996). "A district court abuses [its] discretion by making findings unsupported by the evidence or improperly applying the law." *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010). We review factual findings under a clearly-erroneous standard and defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

In ordering that P.H. attend school in Edina, the district court found that the change was in P.H.'s best interests because he had been involved in summer sports in Edina and was familiar with the community. The district court also found that P.H. would not need before- or after-school care if he attended school in Edina because of respondent's flexible work schedule, but would need outside care if he attended school in Elk River because of appellant's work schedule as a teacher. The change was also in P.H.'s best interests, according to the district court, because it would further his close relationship with his stepsister, and he did not have existing relationships with friends or family in Elk River besides his mother and stepfather.

In addition, the district court found that one statutory factor that goes to a child's best interests, "the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child," clearly favored sending P.H. to Edina. *See* Minn. Stat. § 518.17, subd. 1(a)(13). Under this factor, the district court found that appellant had used her living situation, both early in the dissolution and in her decision to move to Elk River, to limit respondent's access to P.H. Ordering that P.H. attend school in Edina would "create more opportunities for [P.H.] to develop the relationship with his father that was thwarted by [appellant's] residence in New Ulm."

The district court's findings on all of these relevant factors are not clearly erroneous, and its conclusion that P.H. should attend school in Edina was not an abuse of discretion. Appellant moved P.H. from New Ulm to Elk River, a city where he did not yet have friends and had no existing connections. In contrast, P.H. knew other children in Edina and could further his relationship with his stepsister. Moreover, P.H. would be able to spend more quality time with respondent both before and after school, instead of having to attend daycare. We therefore affirm the order that P.H. attend school in the Edina School District.

II. Parenting Time

Appellant contends that, although termed as a motion to determine where P.H. should attend school and to modify parenting time accordingly, respondent's motion was actually one to modify custody or substantially restrict her parenting-time rights, and the district court erred in applying the best-interests standard rather than the more stringent

endangerment standard. "Determining the proper statutory standard to be applied presents a question of law." *Ayers v. Ayers*, 508 N.W.2d 515, 518 (Minn. 1993).

Our review of the record shows that all of the proceedings before the district court stemmed from respondent's original request that the court decide where P.H. should attend school. The parenting-time modification was a necessary, collateral consequence of the district court's joint-legal-custody decision concerning school choice, and cannot be construed as a motion to modify custody or restrict parenting time. Because of "[s]ignificantly changed circumstances," the district court found that a parenting-time modification was warranted "in light of the changes in [appellant's] residence and the child's school." Thus, because it would be unreasonable for P.H. to travel 80 miles round-trip from Elk River to Edina for school every day, the parenting-time change was necessary to effectuate the school order. As with other legal-custody decisions, a best-interests standard applies, *Novak*, 446 N.W.2d at 424, and the district court did not err in applying that standard in this case.

Importantly, the district court emphasized that the new summer schedule gives appellant significantly more quality time with P.H. since she is a teacher and does not work during the summers. The court was also mindful that P.H. was accustomed to living with appellant during the school year, and thus also gave her every Wednesday overnight with P.H. The court found that the new parenting-time schedule was in P.H.'s best interests as a way to "maximize [P.H.'s] time with his parents." These findings are not clearly erroneous, and the district court did not abuse its discretion in determining that the parenting-time modification was in P.H.'s best interests.

Evidentiary Hearing

Appellant also asserts that the district court should have held an evidentiary hearing on the motions. The district court generally has discretion on whether to hold an evidentiary hearing on a family-court motion.[2] *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. App. 2007). As a general rule, a party in a family-law case is entitled to an evidentiary hearing only if he or she requests a hearing. Minn. R. Gen. Pract. 303.03(d)(2). If no request is made, motions are submitted "on affidavits, exhibits, documents subpoenaed to the hearing, memoranda, and arguments of counsel." *Id.* (d)(1); *see also Doering v. Doering*, 629 N.W.2d 124, 130 (Minn. App. 2001) ("In family cases, non-contempt motions are decided without an evidentiary hearing, 'unless otherwise ordered by the court for good cause shown.'" (quoting Minn. R. Gen. Pract. 303.03(d))), *review denied* (Minn. Sept. 11, 2001). Although she makes several excuses for her failure to request an evidentiary hearing on the parenting-time issue, appellant did not do so despite the clear statement from the district court that it would not take evidence unless requested. Therefore, the district court's failure to hold a hearing is not erroneous.

[2] The parenting-time-modification statute requires the district court to hold an evidentiary hearing "at the earliest possible time" if a parent "makes specific allegations that parenting time by the other parent places the parent or child in danger of harm." Minn. Stat. § 518.175, subd. 5 (2012). Here, neither party made any specific allegations of endangerment. *See Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001) ("Substantial modifications of visitation rights require an evidentiary hearing when, by affidavit, the moving party makes a prima facie showing that visitation is likely to endanger the child's physical or emotional well being. Insubstantial modifications or adjustments of visitation, on the other hand, do not require an evidentiary hearing and are appropriate if they serve the child's best interests." (citations omitted)), *review denied* (Minn. Oct. 24, 2001).

III. Judicial Bias

Lastly, appellant contends that the district court's statements and orders demonstrate bias against her. Appellant specifically refers to the judge's statement at the hearing that "if pushed, I think I could find [endangerment]" and her interpretation of the original parenting-time order. Appellant argues that these statements "are evidence of the court's strong, personal feelings and pre-conceived notions about this case." We also note certain comments the judge made at the hearing. In discussing the school-choice issue, the judge said "I'm an Osseo grad—let me clarify that—we hated Edina." In responding to counsel's comments about P.H.'s commute from Elk River to Edina, the judge said "[a]ctually, his commute will be shorter than mine."

While we agree that these comments reflected a poor choice of words, we do not believe they demonstrate bias or lack of impartiality. *See Hooper v. State*, 680 N.W.2d 89, 93 (Minn. 2004) ("While removal is warranted when the judge's impartiality might reasonably be questioned, a[n] [appellant's] subjective belief that the judge is biased does not necessarily warrant removal."). In any event, appellant has waived this argument.

First, she failed to file a notice of removal of the judge within ten days of learning which judge would preside in the matter. *See* Minn. R. Civ. P. 63.03. After a judge has presided at a motion or other proceeding in a case the judge "may not be removed except upon an affirmative showing of prejudice on the part of the judge." *Id*. Appellant did not present the issue of bias to the district court, either in a motion to remove or in a motion

for a new trial, and we therefore decline to address it on appeal.[3] *See Braith*, 632 N.W.2d at 725; *see also Erickson v. Erickson*, 434 N.W.2d 284, 286 (Minn. App. 1989) ("On appeal from a judgment where there has been no motion for a new trial, the only questions for review are whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment."); *Gummow v. Gummow*, 375 N.W.2d 30, 34 (Minn. App. 1985) (suggesting that this court cannot consider an appellant's claims of judicial bias on appeal when the appellant never objected during trial and never made a motion that the judge recuse himself).

Affirmed.

[3] Because we affirm the district court's orders, we do not address appellant's request to have a different judge assigned upon remand.

CHUTICH, Judge (dissenting)

The majority holds that because the district court proceedings stem from Ryan Himley's request that the district court determine where P.H. attend school, its modification of the parenting-time schedule is a collateral issue also governed by the best-interests standard. Because the parenting-time modification was the primary issue before the district court and the endangerment standard applies under the facts of this case, I respectfully dissent and would reverse the district court's rulings.

After learning that his ex-wife, Laura Boero, had moved to Elk River and intended to enroll their son P.H. in school in Elk River, Himley asked the district court to (1) decide where P.H. will attend school, and (2) modify the parenting-time schedule accordingly. The district court chose to first address the school issue, without taking evidence or hearing the arguments of counsel, and then ordered that P.H. attend school in Edina. Once the school issue was decided, the distance between Elk River and Edina made the parenting-time modification in favor of Himley a foregone conclusion against which Boero had no legitimate argument. Before deciding school attendance, the district court should have first addressed the overarching parenting-time issue and applied the endangerment standard.[1]

[1] Further supporting the conclusion that parenting time was the primary issue was the district court's finding that "[e]ither Edina schools or Elk River schools will provide [P.H.] with a satisfactory education." The district court's decision was therefore not based on the relative academic and extracurricular merits of each school, but on its consideration of issues that more appropriately applied to the parenting-time modification.

A court must not modify a prior custody order unless a change in circumstances has occurred and "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development." Minn. Stat. § 518.18(d)(iv) (2012). While Himley's motion is not termed as one to change custody, this court has stated that the endangerment standard in section 518.18(d)(iv) also applies to motions that request a "substantial joint custody modification," which includes a substantial alteration of parenting-time rights. *Lutzi v. Lutzi*, 485 N.W.2d 311, 315 (Minn. App. 1992). This rule corresponds with the parenting-time-modification statute, which provides that the endangerment standard applies when one party seeks to "restrict" the other party's parenting time. Minn. Stat. § 518.175, subd. 5 (2012); *see Dahl v. Dahl*, 765 N.W.2d 118, 123–24 (Minn. App. 2009) (stating that "[a] restriction occurs when a change to parenting time is 'substantial,'" and that "[m]odifications are 'less substantial changes' in parenting time"). To determine whether a change in parenting time is a restriction or a substantial modification, courts consider the reason for the change and the amount of the reduction. *Anderson v. Archer*, 510 N.W.2d 1, 4 (Minn. App. 1993).

Concerning the amount of the reduction, under the new parenting-time order, Boero's parenting time went from about 72% to about 44%. This nearly 30% reduction in parenting time is clearly substantial and supports the conclusion that Boero's parenting time was restricted.

The reason for the change in parenting time also supports the conclusion that the change was a restriction of Boero's time with her child. The purported reason for the change was the district court's grant of Himley's request that P.H. attend school in Edina

rather than Elk River. Underlying that change, however, was Boero's move from New Ulm to Elk River. The district court implied that this move was made in bad faith because Boero was trying to further limit Himley's access to P.H. by moving to Elk River rather than to a location closer to Himley. This finding is puzzling because Boero now lives *closer* to Himley than she did when living in New Ulm.[2] The district court based its parenting-time change, at least in part, on its finding of Boero's bad faith, demonstrating that the modification was a restriction of her parenting time.

Further, the parenting-time modification statute states that "[i]f modification would serve the best interests of the child, the court shall modify . . . an order granting or denying parenting time, *if the modification would not change the child's primary residence*." Minn. Stat. § 518.175, subd. 5 (emphasis added). Although not yet interpreted by binding caselaw, this language suggests that if the modification *would* change the child's primary residence, the best-interests standard is not appropriate and the more stringent endangerment standard applies.

"Primary residence" is not a defined term either in the family-law statutes or in caselaw, although the supreme court has stated that a "primary residence" designation is not incompatible with a joint-physical-custody label. *Ayers v. Ayers*, 508 N.W.2d 515, 520 (Minn. 1993). While the original Brown County district court order determining

[2] Also troubling is the district court's interpretation of the record in Brown County concerning bad faith on Boero's part. Contrary to the district court's findings, the Brown County court ultimately concluded that Boero's move from Brooklyn Center to New Ulm after the parties' separation was reasonable. Further, the Brown County court found that Himley did not have entirely clean hands during the dissolution proceedings.

custody and parenting time did not explicitly state that Boero's home in New Ulm was P.H.'s primary residence, that conclusion can be easily inferred.

First, the Brown County order referred to Boero's home as P.H.'s "school year residence." Because the school year comprises nine months out of the year, a school-year residence can be considered a primary residence. Second, in an order issued shortly after its original custody and parenting-time decision, the Brown Count district court expressly referred to Boero's home in New Ulm as P.H.'s primary residence. Finally, even without a precise definition of "primary residence," common sense dictates that if a child spends 72% of his time with one parent, that parent's home is his primary residence.

Thus, because the district court's parenting-time order changed P.H.'s primary residence from Boero's home to Himley's home, the parenting-time modification statute further suggests that the court should have applied the endangerment standard.

In sum, the endangerment standard applies to Himley's motion because the motion involved either a substantial alteration or restriction of Boero's parenting time or a change in P.H.'s primary residence. Under established family-law procedures, if a party seeks to modify custody or substantially alter parenting time, the party must first make a prima facie showing that the child is endangered in the other party's care. *See Lutzi*, 485 N.W.2d at 317 (citing *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471 (Minn. 1981)). Only after this prima facie showing has been made is the moving party entitled to an evidentiary hearing on the modification. *Id.*; *see also Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001) ("Substantial modifications of visitation rights require an evidentiary hearing when, by affidavit, the moving party makes a prima facie showing

that visitation is likely to endanger the child's physical or emotional well being."), *review denied* (Minn. Oct. 24, 2001).

Himley's motion made absolutely no allegations that P.H. was endangered in Boero's care, let alone a sufficient prima facie showing of endangerment. Himley was therefore not even entitled to an evidentiary hearing, and thus the district court should have denied Himley's motion to modify the parenting-time schedule outright.

Despite the lack of any allegation even hinting at endangerment in Himley's motion, the district court found that "[Boero's] ongoing efforts to prevent [Himley] from being able to share in [P.H.'s] life to the same degree as [Boero] is likely to impair [P.H.'s] emotional development." In addition, during the hearing the district court stated that "if pushed, I think I could find [endangerment]." The district court's statements concerning endangerment are inappropriate because they suggest that the district court had prejudged the issue.

The district court's finding of possible "impairment" is insufficient to establish endangerment under the facts of this case because Himley did not allege that P.H. was in "a significant degree of danger." *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (stating that to meet the endangerment standard, "a party must demonstrate a significant degree of danger" (quotation omitted)). Second, it is perplexing how the district court could find endangerment when it had no evidence before it, such as the report of a guardian ad litem or parenting consultant, concerning the effects of Boero's actions on P.H.

In sum, because Himley's motion to modify parenting time was clearly the central issue in this case, the district court should have considered that motion at least contemporaneously with, if not before, the school-choice motion. Himley sought to substantially alter or restrict Boero's parenting time, and to change P.H.'s primary residence, and therefore the district court should have applied the endangerment standard and denied Himley's motion because he failed to make a prima facie showing that P.H. was endangered in Boero's care.