STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0496

Trevor Thomas Hawkinson, petitioner,
Respondent,

vs.

Jill Marie Hawkinson n/k/a Jill Marie Owens,
Appellant.

Filed December 31, 2012
Affirmed
Hooten, Judge

Wright County District Court
File No. 86-F6-05-002860

Maury D. Beaulier, Maury D. Beaulier Attorney at Law, St. Louis Park, Minnesota (for respondent)

John M. Jerabek, Niemi, Jerabek & Kretchmer, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Crippen, 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

HOOTEN, Judge

In an appeal from modification of parenting time and child support, appellant mother contends that the district court clearly erred by finding: (1) that there had been a change in circumstances since the issuance of the original marriage dissolution decree; and, (2) that her children's emotional health and development were endangered as a result of her failure to provide stable and appropriate education to meet their special needs and that it abused its discretion by modifying parenting time based on its finding of endangerment. We affirm.

FACTS

Appellant Jill Owens and respondent Trevor Hawkinson were married in 1999 and divorced in 2008. During their marriage, they had two boys. Both were diagnosed with Autism Spectrum Disorder (ASD) (also known as Asperger's Syndrome), with symptoms that included social difficulties, sensory issues, repetitive behaviors, and speech delays. The younger son had particular difficulty in dealing with new or multiple people or new situations. The children were also diagnosed with dyslexia, which impairs reading skills, and dysgraphia, which involves visual-motor difficulties that impair handwriting abilities.

After the parties separated in 2007, appellant moved to Texas. As part of their separation, the parties agreed that they would share joint physical and joint legal custody of the children, and that appellant would be their primary caretaker in Texas during the school year while respondent would be their primary caretaker during the summer in Minnesota. At the time of their separation, both children had been determined by their

schools to be eligible for special education services based on their ASD diagnoses. While the older son "was performing fine in school," the younger son "was already behind academically."

After the dissolution decree was signed in 2008, appellant made multiple decisions regarding the education for her special needs children without consulting or seeking input from respondent. She initially enrolled both children at a public elementary school in Texas, but in September 2009 moved them to a school called The Education Center. In January 2010, appellant removed her younger son from The Education Center intending to homeschool him, citing separation anxiety that was only relieved when he was at home. She also believed that the public schools in Texas refused to provide special education support services. During the 2010–11 school year, appellant homeschooled her younger son while her older son remained enrolled at The Education Center.

In March 2011, appellant removed her older son from The Education Center and enrolled him in an online school called IQ Academy, claiming that one of his teachers had been rude and that he was embarrassed. Although it appears that her older son received good grades at IQ Academy, appellant eventually withdrew him so that she could homeschool him as well.

Appellant had no training or qualifications to serve as a teacher or run a homeschool. She did not appear to use any lesson plans or follow a clear curriculum. She gave grades to her sons, but did not provide an objective basis for those grades. She employed two tutors, but neither had any teaching qualifications or credentials for working with special-needs children.

In March 2011, respondent moved for a modification of the parenting schedule so that he would be the children's primary caregiver in Minnesota during the school year and appellant would be the children's primary caregiver in Texas during the summer. Respondent alleged that appellant endangered the children by neglecting their educational needs through frequent moves and school changes. He also complained that appellant failed to either notify or consult with him regarding her unilateral decisions regarding the children's education and attempted to alienate him from the children and their educators. Appellant responded by filing a counter-motion asking the district court, in relevant part, to grant her sole legal and physical custody of the children.

In response to the parties' motions, the district court held an evidentiary hearing in September and November of 2011. In the fall of 2011, appellant, without consulting with respondent, enrolled both children at Temple Christian Academy, which did not offer individualized special-needs assessments or support services for special-needs children. Appellant also chose to hold the younger child back a grade. Both boys received poor grades in their first two months at Temple Christian Academy and showed significant attendance problems.

After considering testimony from the parties, several experts, the guardian ad litem, and other witnesses, the district court found that there was a change of circumstances since the original dissolution order and that the children's "emotional health and development" were endangered as a result of appellant's failure to provide a stable and appropriate education to meet the children's special needs. Finding that respondent was better able to satisfy the children's emotional health needs and academic

development, the district court concluded that it was in the children's best interests to live with respondent in Minnesota during the school year and with appellant in Texas during the summer. However, notwithstanding this substantial change in parenting time, the district court declined to order that appellant pay child support, thereby departing downward from the amount she would have otherwise owed under the guidelines. Appellant now appeals.

D E C I S I O N

The district court has broad discretion in deciding parenting time and custody matters based on the best interests of the child and will not be reversed absent an abuse of discretion. *Hagen v. Schirmers*, 783 N.W.2d 212, 218 (Minn. App. 2010); *Schisel v. Schisel*, 762 N.W.2d 265, 270 (Minn. App. 2009). "[T]he *Nice-Petersen* doctrine governs a proposal for substantial changes of time allocation, both for joint physical custody and visitation situations." *Lutzi v. Lutzi*, 485 N.W.2d 311, 316 (Minn. App. 1992). "Fact findings are reviewed for clear error." *Hagen*, 783 N.W.2d at 215. "The appellate court defers to and does not reassess the district court's credibility determinations." *Id.*

The district court may modify parenting time in a way that changes the child's primary residence based on a finding of endangerment only if it finds four elements are met: (1) the child's circumstances have changed since the original dissolution decree; (2) modification would be in the child's best interests; (3) the child's physical or emotional health is endangered by his current environment; and (4) any harm caused by the modification would be outweighed by the benefits. *See Frauenshuh v. Giese*, 599

N.W.2d 153, 157 (Minn. 1999). The district court must explain the basis for its findings "with a high degree of particularity." *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989).

A change in circumstances must be significant, must have occurred after the entry of the last custody order, and must not be merely "a continuation of ongoing problems." *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied* (Minn. June 21, 1989). But endangerment is an imprecise, qualitative concept that can be difficult to define. *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991). To justify a modification of parenting time, endangerment must pose "a significant degree of danger" to the child. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997) (quotation omitted). The danger posed must affect the child's physical or emotional health or the child's development. *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 472 (Minn. 1981).

I.

Appellant argues that the district court's findings that there was a change of circumstances since the original dissolution decree and that the emotional health and development of the children were endangered while in her care are clearly erroneous and constitute an abuse of discretion. Based upon our review of the record and the limitations of our review, we conclude that there is substantial evidence in the record to support the district court's findings and that such findings were made with a high degree of particularity. As set forth in the well written and well-analyzed order of March 1, 2012, the district court thoroughly and painstakingly analyzed the evidence, making 130

itemized findings, followed by 52 itemized conclusions of law. These findings and conclusions were followed by an order, consisting of 34 different provisions, wherein the district court ruled on the parties' various motions and addressed their concerns.

The district court surveyed the history of changes in the children's housing and schooling since the original dissolution order, noting that the children's lack of stability caused them to fall behind "academically and socially." This lack of stability was found to be particularly problematic for these children because of their special needs, which necessitated that they receive specialized instructions and education. The district court found that, based upon the children's lagging academic performance and the failure of appellant to provide the children with consistent specialized education, the children's emotional health and development was endangered. While acknowledging that "[t]he children will suffer some emotional harm" because of the modified parenting time schedule, the district court found that the harm would be outweighed by "[t]he benefit of receiving an appropriate education from trained professionals while living in a stable home."

The district court also explicitly addressed each of the best interests factors set forth in Minnesota Statutes section 518.17, subdivision 1(a) (2012), finding that all of the factors, except for three, were neutral in determining the best interests of the children. It found that the factor regarding the length of time the children have lived in a stable, satisfactory environment and the desirability of maintaining continuity favored respondent. Finding that appellant had moved nine times with and without the children since 2007 when she relocated to Texas, the district court noted that respondent still lives

in the same home the children knew before the marriage dissolution. The district court reported that three experts and the guardian ad litem had highlighted "the need for continuity, stability, and structure for these children with ASD." It added that respondent's family unit is more stable than appellant's, who was living with her mother and was separated from her current husband by the end of the evidentiary hearing. The district court also found that, with respect to the factor regarding the capacity and disposition of the parties to provide the children with guidance and to continued education, respondent, rather than appellant, was better able to provide for the specialized education the children required as a result of their special needs.

There was substantial support for these findings. At the hearing, Dr. Janice Nici testified that both children have special needs. She recommended that the younger son, who exhibited behaviors consistent with a mild Asperger's diagnosis, be enrolled in a school with a specially designed curriculum. Dr. Nici also testified that, although the elder son did not present symptoms of Asperger's Syndrome "in that particular setting," he did show evidence of learning disabilities as well as behavioral dysfunction requiring "psychotherapy and occupational therapy." She also noted that children with autism-spectrum disorders benefit from stability.

Dorothy Lee, a professional tutor with 34 years teaching experience, also testified at the hearing. Lee, along with Sylvan Learning Center, was hired by respondent during the summer of 2011 to supplement the children's education. Lee agreed with Dr. Nici's testimony that stability is important for children with autism-spectrum disorders. She opined that it would be difficult for someone without specialized training to teach

children with ASD and that the parties' younger son began the summer reading at only a kindergarten level even though he should have been, according to his age, reading at a third-grade level. Lee testified that as a result of her tutoring, he had made significant advancements and should be able to catch up with his peers with the proper instruction and support.

Respondent presented testimony from two representatives of the schools that the children would attend in Minnesota. Nan Records, the Special Education Director in the St. Michael-Albertville school district, testified that the district's staff had been trained for and had experience with children who have autism-spectrum disorders. Jeanette Aanerud, the principal of Fieldstone Elementary School, testified that educators at her school meet every six days to assess a student's ongoing needs, and that her school tries not to hold students back because it can be detrimental to the student.

The district court also received a report from a court-appointed guardian ad litem, Isabelle Olson, who recommended that the court reverse the parenting schedule so that the children's primary residence would be in Minnesota during the school year. She testified that one of the children contradicted appellant's reports about the children's homeschooling schedule, and that the other became defensive when asked about his schoolwork, though he was willing to engage freely about other topics of conversation. Neither boy could cite a single example of a project they worked on during their time homeschooling. Reiterating concerns expressed by Lee and Dr. Nici, Olson noted that children with autism-spectrum disorders require regular schedules and she expressed concern about the frequent school changes under appellant's care.

Appellant argues that the district court erred in considering the testimony of Olson, who allegedly violated guardian ad litem program rules by failing to interview appellant as part of her evaluation and by giving an opinion regarding the modification of parenting time. In support of her argument, appellant relies on *Nicholson v. Maack*, 400 N.W.2d 160, 165 (Minn. App. 1987), claiming that "the guardian's recommendation should have been . . . dismissed" because of the flaws in the her investigation. However, the facts in *Nicholson*, a paternity action brought by a purported biological father against a child's mother, are distinguishable from this case. In *Nicholson*, the court appointed a guardian ad litem to determine whether it was in the child's best interests for paternity to be adjudicated. *Id.* at 163. The guardian ad litem joined Nicholson, the purported biological father, in bringing a motion asking that paternity be declared solely because "sociological and legal trends" were supportive of an adjudication of paternity. *Id.* at 164–65. This court reversed the district court's adjudication of paternity, finding that the guardian ad litem had never interviewed the child, her mother, the child's step-father, or the purported biological father before joining the motion and had ignored the best interests of the child. *Id.* at 165. We then remanded the case for a "proper determination of whether it is in [the child's] best interests for Nicholson to be adjudicated her father," and directed the guardian ad litem to "consider all relevant factors, including . . . at a minimum, interviews with the child, her mother, her step-father, and her biological father." *Id.*

Unlike the guardian ad litem in *Nicholson*, Olson did not base her assessment on non-case-specific "sociological and legal trends," but rather conducted an extensive

review of facts specific to this case, which included interviews with respondent and both children and a review of the children's educational records. While Olson admitted that she had received almost all of her information from respondent and had not interviewed appellant, she explained that appellant refused to respond to her requests for interviews and responded unsatisfactorily to her requests for information. Under these circumstances, appellant cannot complain about any alleged flaws in Olson's assessment that resulted from her own failures to cooperate.

Appellant also argues that the district court erred in considering Aanerud's testimony, claiming that it was tantamount to a general claim that "every time you hold a child back . . . [it] is *de facto* endangering the child." However, there is no indication that the district court used Aanerud's comment about holding children back as a substantial basis for finding endangerment. Rather, the district court focused on the instability in the children's housing and educational environment.

Appellant also argues that the district court should have considered mandating that the children be reenrolled in public school in Texas rather than relocated to Minnesota during the school year. She does not cite to any authority requiring the district court to evaluate alternatives to a proposed modification of parenting time. Her proposal also contradicts her claim that the Texas public schools did not provide support services for special-needs children. Furthermore, since appellant did not raise this argument before the district court, we need not address it further. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Under the unique circumstances in this case, taking into account the particular impact of repeated changes in housing and educational environments on children with autism-spectrum-related special needs, we conclude that the district court did not clearly err by finding that the children were endangered or abuse its discretion by ordering that the children's primary residence be changed to Minnesota during the school year.

II.

Appellant argues that the district court's modification of parenting time violates her constitutional rights as a parent. However, because appellant failed to raise any constitutional issue before the district court, we decline to address appellant's constitutional claim on appeal. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address a constitutional issue raised for the first time on appeal from a termination of parental rights).[1]

III

Finally, appellant, assuming that this court would reverse the district court's determination of parenting time and return the children to her care during the school year, argues that the district court erred by modifying the parties' child support obligations. There is no need to address her request for modification of child support because we

[1] It should be noted that appellant's reliance upon *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923), and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 45 S. Ct. 571 (1925), is misplaced. These cases are distinguishable because they involve protection of parental rights in the face of government interference with parenting choices, not protection of one parent's rights against the claims of endangerment or the best interests of children.

affirm the district court's modification of parenting time and the district court did not require appellant to pay child support.

Affirmed.