STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1771

Cindy K. Adler,
Appellant,

vs.

Rafael Espinosa,
Respondent,

and

Rafael Espinosa,
Respondent,

vs.

Cindy K. Adler,
Appellant.

Filed October 7, 2008
Affirmed
Lansing, Judge

Hennepin County District Court
File Nos. 27-PA-FA-000052912, 27-PA-FA-000052834

John G. Westrick, Kirk M. Anderson, Westrick & McDowall-Nix, PLLP, 450 Degree of Honor Building, 325 Cedar Street, St. Paul, MN 55101 (for appellant)

Andrew J. Laufers, Dudley and Smith, P.A., 2602 U.S. Bank Center, 101 East Fifth Street, St. Paul, MN 55101 (for respondent)

Eric S. Rhem, Suite 202, 301 West Burnsville Parkway, Burnsville, MN 55337 (for guardian ad litem)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Muehlberg, Judge.*

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

LANSING, Judge

In this appeal from the district court's custody and child-support determination, Cindy Adler argues that the district court abused its discretion by modifying custody of her older child, abused its discretion by determining custody of her younger child, and erred in calculating her child-support obligation. Because the district court acted within its discretion on both custody determinations and properly calculated Adler's child-support obligation, we affirm.

F A C T S

Cindy Adler and Rafael Espinosa are the unmarried parents of MA-E, who was born on January 20, 2000, and REE, who was born on January 26, 2003. Espinosa's paternity of MA-E was adjudicated in 2001, and he formally recognized his parentage of REE in September 2003. In the 2001 paternity adjudication, the district court granted Adler sole legal and physical custody of MA-E. Although formal custody of REE was not adjudicated before this proceeding, both children lived with Adler and she functioned as their primary caregiver until August 2005.

Espinosa filed a motion to modify custody of MA-E in early 2005, requesting that he be granted sole legal and physical custody. He also brought an action under the

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

Minnesota Parentage Act, Minn. Stat. §§ 257.51-.74 (2006), requesting that he be granted sole legal and physical custody of REE. Following the initiation of these proceedings, the district court appointed a guardian ad litem (GAL). The GAL issued an interim report in August 2005, recommending that the court immediately grant Espinosa sole physical custody and primary residency of both MA-E and REE pending the outcome of the custody litigation. Following submission of informal briefs, the district court implemented the GAL's recommendation.

The custody dispute was tried over a period of six days and involved more than twenty witnesses. The district court issued its determination in December 2006 and, in January 2007, amended the determination by correcting clerical errors in Adler's parenting-time schedule and eliminating a textual inconsistency. In extensive findings the district court determined that a change had occurred in MA-E's circumstances since her initial custody determination and that Adler's sole physical and legal custody impairs MA-E's emotional development. The district court analyzed the statutory best-interests factors and, based on that analysis, granted Espinosa sole physical and legal custody of MA-E. The district court also determined, under the statutory best-interests factors, that Espinosa should have sole physical and legal custody of REE. The district court's findings considered and rejected joint custody, because of Adler's and Espinosa's inability to cooperate in parenting their children. Under the amended judgment, Adler received parenting time on alternating weekends, alternating Wednesdays, and alternating holidays. The order for child support was based on Adler's then-current income of $1,863.55 a month.

Following posttrial motions, Adler filed this appeal challenging the modification of MA-E's custody, the determination of REE's custody, and the calculation of Adler's child-support obligation.

D E C I S I O N

I

A court may not modify a custody order based on endangerment unless it finds that a significant change has occurred in the circumstances of the child or the child's custodian; that modification is necessary to serve the best interests of the child; that the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development; and that the advantages of the change in environment will outweigh the harms of change to the child. Minn. Stat. § 518.18(d)(iv) (2006); *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (identifying four elements necessary to establish prima facie case for an endangerment-based custody modification). Appellate review of custody modification centers on whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. *Goldman*, 748 N.W.2d at 284.

Adler contends that the district court abused its discretion by modifying MA-E's custody because the record fails to support the statutory requirement of endangerment and because the district court's finding of a significant change in MA-E's circumstances impermissibly relies on Adler's attempts to alienate MA-E from Espinosa. Neither argument withstands analysis.

First, the record supports the district court's conclusion that the "endangerment element" of the modification standard was satisfied. This element is satisfied if "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). This statutory standard is commonly referred to as the "endangerment element." *See, e.g.*, *Goldman*, 748 N.W.2d at 285 (referring to "endangerment element" and citing additional cases relying on "endangerment element"). But this element may be satisfied in two similar but distinct ways: it is satisfied if the "child's present environment endangers the child's physical or emotional health" or if the "child's present environment . . . impairs the child's emotional development." Minn. Stat. § 518.18(d)(iv); *see also Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997) (noting that endangerment element may be met by evidence relating "purely to emotional development").

The district court concluded for purposes of the statutory modification requirement, that MA-E's "emotional development is impaired in the environment of [Adler's] sole legal and physical custody because [Adler] will not permit the child to have a normal relationship with [Espinosa], and [Adler] will cause [MA-E] distress by systematically undermining [Espinosa's] involvement with the child." The record supports the district court's findings that provide the basis for the conclusion. The evidence established that Adler has prohibited Espinosa from having parenting time for months at a time; disparaged Espinosa to MA-E on a regular basis; has instructed MA-E about the custody battle; has exposed MA-E to undue medical and legal scrutiny in an attempt to obtain evidence that Espinosa mistreated MA-E; has "played games" with

MA-E in which they create stories about Espinosa's alleged mistreatment; and has imparted religiously intolerant information to MA-E about Espinosa and his wife. The evidence shows that when MA-E was in Adler's custody she was angry, withdrawn, and physically aggressive with other children and that her behavior improved when custody was transferred to Espinosa under the temporary order.

From this evidence, the district court could reasonably determine that MA-E's emotional development was impaired under Adler's custody. *See Theisen v. Theisen*, 405 N.W.2d 470, 474 (Minn. App. 1987) (holding that endangerment element was satisfied mainly because mother's false accusations alienated children from their father and impaired their future relationship with him).

Adler's other basis for contending that the statutory modification standard is unmet is her contention that the district court relied too heavily on Adler's attempts to alienate MA-E from Espinosa when determining that a change in circumstances had occurred. Adler bases her argument on language in *Sharp v. Bilbro* that states that "[a] denial or interference with visitation is not controlling in a custody-modification proceeding." 614 N.W.2d 260, 263 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). But the full statement in *Sharp* provides that the visitation interference must be considered along with the other custody modification factors. *Id.* *Sharp* does not say that visitation interference cannot constitute a change in circumstances for purposes of the statutory custody-modification standards. *Id.* It only makes clear that the other elements—the child's best interests, the endangerment element, and the comparative advantages and disadvantages—must also be considered. *Id.* Adler's argument simply

misreads *Sharp* and the case on which it relies, *Grein v. Grein*, 364 N.W.2d 383 (Minn. 1985). *See id.* at 386 (explaining that in determining whether interference with visitation warrants custody modification, district court must also consider other statutory elements, including child's best interests and endangerment element). The district court indisputably applied all of the statutory elements required for custody modification, not just parental alienation and denial of visitation.

II

The district court evaluated MA-E's best interests for purposes of the custody-modification motion and REE's best interests for purposes of the initial custody determination by making specific findings under each of the thirteen factors listed in Minn. Stat. § 518.17, subd. 1(a) (2006). Under Minnesota law, the best interests of the child is the paramount consideration in determining child custody—both for custody modification as well as an initial custody adjudication. *See* Minn. Stat. § 518.18(d) (2006) (requiring best-interests consideration for custody modification); Minn. Stat. § 518.17, subd. 3(a)(3) (2006) (requiring best-interests consideration in custody adjudications generally); *Olson v. Olson*, 534 N.W.2d 547, 549 (Minn. 1995) (noting that best interests of children is paramount). Adler challenges the district court's findings on nine of the thirteen factors. We address each of the disputed factors.

First, Adler argues that the district court did not properly designate Adler as the sole primary caretaker because it did not focus on the relevant time period. *See Maxfield v. Maxfield*, 452 N.W.2d 219, 221-22 (Minn. 1990) (basing primary caretaker designation on status before litigation). In fact, the district court's discussion of this

factor properly focused on the children's lives before this custody litigation. The district court stated that the children have a strong attachment to Adler; that, before the litigation, the frequency and regularity of Espinosa's access with the children was unpredictable; that Espinosa made life choices that limited his parenting time; and that Espinosa was not present for MA-E's birth. The district court's findings demonstrate that it focused on the relevant time period and properly credited Adler, not Espinosa, as the primary caretaker.

Second, Adler argues that the district court improperly evaluated the children's interrelationship with each parent by describing the parents' relationship with one another, by noting Adler's attempts to alienate the children from Espinosa, and by "prais[ing]" Espinosa's new wife and her parents. To the extent the district court discussed the parents' relationship with one another and described Adler's attempts to alienate the children from Espinosa, it was in the context of how the parents' actions affected the parent-child relationship. In this context, the district court's findings were directly relevant to its analysis of the interrelationship between parent and child. Additionally, the language that Adler describes as improper "praise" of Espinosa's new wife and her parents is the district court's analysis of how these individuals positively impact the children. This analysis was also relevant and proper.

We consolidate the third and fourth disputed factors because Adler makes a single argument on the children's adjustment to home, school, and community and the length of time the children have lived in a stable and satisfactory environment. Adler contends that the district court improperly analyzed the children's circumstances by evaluating the nearly eighteen months in which they were in Espinosa's temporary care rather than

Adler's prelitigation custody. Adler again bases her argument on *Maxfield*, 452 N.W.2d at 219. But *Maxfield* addressed the primary-caretaker analysis and did not suggest that a court may never consider changes in a child's circumstances that have occurred since the beginning of the custody proceedings. Other cases have recognized that a child's best interests requires evaluation of all events in the child's life. *See, e.g.*, *Kerkhoff v. Kerkhoff*, 400 N.W.2d 752, 756-57 (Minn. App. 1987) (stating that all events up to time of trial should be considered in determining custody), *review denied* (Minn. Apr. 23, 1987). Because the district court was required to consider "all relevant factors" under Minn. Stat. § 518.17, subd. 1(a), we find no basis for holding that the district court erred when it considered the children's progress during the eighteen months before trial.

Fifth, Adler challenges the district court's findings relating to "the permanence, as a family unit, of the existing or proposed custodial home." Minn. Stat. § 518.17, subd. 1(a)(8). She claims the district court "ignored the fact that [Adler], and the children, were living in [Espinosa]'s home in St. Paul until January 2005, and she has resided in the same apartment since June 2005." We conclude that the district court properly examined the permanence of both parents' "family units." The district court noted that Adler is a high-school graduate, that she rents an apartment in the Minneapolis suburbs, that she is working toward her undergraduate degree, and that the GAL expressed concern about Adler's judgment in her choice of romantic partners. In evaluating Adler's stability, the district court specifically stated that Adler rented Espinosa's home and lived there with the children until January 2005 and moved to her current apartment six months later.

Because the district court adequately analyzed this factor and gave due consideration to Adler's living arrangements under the stability factor, Adler's argument is unpersuasive.

Sixth, Adler argues that the district court abused its discretion when it considered the mental and physical health of all the individuals involved because it focused on Adler's "previous time as an adult entertainer" and improperly disregarded evidence that reflected negatively on Espinosa. The record does not support this argument. The district court considered Adler's work as an adult entertainer in evaluating accusations relating to psychosexual issues and, correspondingly recognized that Espinosa "was trying to present himself in an unrealistically virtuous manner" and that he has Hepatitis B. The district court properly analyzed each parent's mental and physical health.

Seventh, Adler challenges the district court's findings on the parents' comparative dispositions "to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed." Minn. Stat. § 518.17, subd. 1(a)(10). Adler argues that the district court improperly considered evidence that she made a racially insensitive remark to Espinosa about his Hispanic heritage. The district court also found that Adler taught MA-E to speak negatively about Espinosa's wife's Jewish religion. Adler's racist or insensitive remarks are exactly the type of evidence that is relevant to this factor. As the district court noted, it "call[s] into question the sincerity of [Adler's] willingness to raise the children in a manner supportive of their Hispanic-American heritage."

Eighth, Adler challenges the district court's findings on incidents of domestic abuse. The district court found that Adler's accusations of domestic abuse were not credible and credited Espinosa's accusations. The district court explained that it credited Espinosa's accusations because a police report showed that Adler admitted to hitting Espinosa on the head. The district court rejected Adler's accusations because she filed her first report of abuse "during the same month as the custody evaluation was completed" and other evidence demonstrated that Adler had falsely accused Espinosa of abuse to improve her case for custody. The record supports these findings, and we defer to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

Adler's ninth challenge is to the district court's findings on each parent's comparative disposition to encourage contact between the child and the other parent. Minn. Stat. § 518.17, subd. 1(a)(13). Adler argues that the district court improperly made this factor the sole focus "for the award of custody." The district court's careful analysis of each factor in its twenty-nine page order amply establishes that it did not exclude any factor in making its findings and conclusions. We also reject Adler's general claim that the district court's findings demonstrate bias. The findings consider negative and positive attributes of each parent. The district court observed that the children are bonded to Adler and very comfortable in her care; that Adler is a hands-on caregiver who is actively involved in parenting; and that she is a devoted mother who makes the children the focus of her life. But relying on the evaluation of the thirteen best-interests factors and on credibility determinations, which is the district court's obligation, the district court

reasonably determined that the children's best interests were served by granting Espinosa custody.

Adler's final argument on the custody determination is that the district court abused its discretion by rejecting the recommendations of the custody evaluator and the GAL. The custody evaluator issued a report in October 2005 recommending that the parents share joint legal custody of the children and that Adler have sole physical custody. At trial, the GAL recommended that the parents share joint legal and joint physical custody of the two children.

A district court is not bound by expert recommendations, and the court may reject the recommendations, without explanation, if it makes detailed findings that demonstrate full consideration of the factors addressed in the custody study. *Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991). The district court rejected the expert recommendations after carefully examining the factors set forth in Minn. Stat. § 518.17, subd. 2 (2006), which lists additional factors to be considered when a district court contemplates joint custody. The district court concluded that the parties could not successfully cooperate and exercise joint legal and joint physical custody in a way that would serve the children's best interests. The district court also explained in detail its determination that granting Espinosa sole legal and sole physical custody would serve the children's best interests. Because the district court's order includes detailed findings on each of the factors and the evidence supports the findings, the district court did not abuse its discretion when it declined to follow the expert recommendations.

The district court carefully evaluated the evidence and provided a detailed analysis of the best-interests factors. Appellate review does not allow us to reweigh the evidence. Because the district court's findings are supported by the evidence and the district court did not err in applying the law, we discern no abuse of discretion.

III

Adler's final challenge to the district court's amended judgment is that the district court's child-support order does not reflect her actual current income. Adler does not dispute that the district court's calculation of child support on a monthly income of $1,863.55 was based on her actual income at the time of the order. Instead, she emphasizes that since February 2007, more than one month after the district court entered the custody order, she has been earning only $1,520 a month, and she asks this court to amend the decree on appeal to reflect her current income.

Adler does not cite any authority indicating that a reviewing court is authorized to amend the child-support amount based on circumstances that have arisen since the entry of the district court's order. *Cf.* Minn. R. Civ. App. P. 110.01 (stating that record on appeal consists only of "papers filed in the trial court, the exhibits, and the transcript of the proceedings"); *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (stating that "[a]n appellate court . . . may not consider matters not produced and received in evidence below"). The remedy for an obligor whose income changes is to bring a motion in the district court to modify the child-support obligation. *See* Minn. Stat. § 518A.39 (2006 & Supp. 2007) (setting forth procedure for modifying child-support order).

Affirmed.