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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1938

Anthony Raymond Stang,
Appellant,

vs.

Terry Jo McGarvey,
Respondent.

Filed June 24, 2008
Affirmed in part and reversed in part
Minge, Judge

Scott County District Court
File No. 70-C-00-10591

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Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Poritsky, Judge.[*]

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

MINGE, Judge

Appellant challenges the modification of his parenting time, arguing because the move of a child's residence to a distant part of the state of Minnesota has a significant

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

impact on his parental relationship with his child, it is a substantial change and the district court erred by not holding an evidentiary hearing or making particularized findings regarding the best interests of the child. Appellant also challenges the district court's award of attorney fees to respondent. Because the district court's order did not reduce the duration of appellant's scheduled parenting time and the move was within Minnesota, it was not a "substantial modification" of appellant's parenting time, and we affirm the district court's modification order. However, because the district court did not indicate whether the attorney fee award was based on need or conduct and did not provide findings articulating the basis for the award, we reverse the award of attorney fees.

FACTS

Anthony Stang and Terri McGarvey, who never married, are the parents of a son. The boy has been in McGarvey's custody since birth. By order of April 2002, the district court adopted the parties' stipulation. It granted sole physical custody to McGarvey, ordered joint legal custody, and established parenting time.

In 2007, Stang learned that McGarvey planned to marry and move from Jordan to Dilworth to live with her son and new husband. Stang lives in Jordan. Dilworth is about 240 miles from Jordan. Stang moved the district court to restrain McGarvey from changing the boy's residence, for sole or joint physical custody, and for related modifications in the parties' child-related duties and responsibilities. McGarvey opposed the motion and moved the district court to modify Stang's parenting time in light of her proposed move to Dilworth.

Stang argued to the district court that McGarvey's proposed move to Dilworth was analogous to a move out of state and therefore should be governed by Minn. Stat. § 518.175, subd. 3 (2006), which addresses removal of a child's residence from Minnesota. He also filed an affidavit detailing his extensive involvement with his son's school, scouting, and church-related activities; his role in furnishing his son rides to school and activities and in helping with homework; and his midweek parenting time. Stang is employed and argued that he could not participate in his son's upbringing in the same way if the boy were to live in Dilworth.

The district court ruled that Stang failed to make a prima facie case to modify custody and concluded that Stang was not entitled to an evidentiary hearing regarding the modification of the parenting-time schedule. The district court also ruled that the parties needed to mediate their parenting-time problems, granted McGarvey's motion to modify Stang's parenting time, and later rejected Stang's motion to reconsider. In doing so, the district court ruled that Stang's post-decision motion was improper, that Minnesota law does not prohibit a child's physical custodian from moving the child's residence within the state, and that while Stang's parenting time might become less frequent, he had similar court-authorized parenting time under the new schedule. Finally, the district court stated that because there was no substantial modification in the amount of Stang's court-ordered parenting time, he was not entitled to an evidentiary hearing on his motion to modify custody. Stang appeals.

D E C I S I O N

I.

The first issue is whether the district court erred by finding that Minn. Stat. § 518.175, subd. 3 (2006), did not restrict McGarvey's proposed in-state move.

The plain language of Minn. Stat. § 518.175, subd. 3 precludes the parent with whom a child resides from moving the child's residence "to another state" without the permission of the court or of a parent who has parenting time. *Goldman v. Greenwood*, ___ N.W.2d ___, ___, 2008 WL 821011, at *4 (Minn. Mar. 27, 2008). Accordingly, because McGarvey's proposed move does not involve changing the child's residence to another state, the district court did not err by declining to apply that provision to the parties' dispute.

II.

The second issue is whether the district court abused its discretion in determining that the move and the resulting modification of Stang's parenting-time schedule was not sufficiently substantial to require an evidentiary hearing. The district court has broad discretion in deciding parenting-time questions based on the best interests of the child and will not be reversed absent an abuse of discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995); *Matson v. Matson*, 638 N.W.2d 462, 465 (Minn. App. 2002).

> Substantial modifications of [parenting time] require an evidentiary hearing when, by affidavit, the moving party makes a prima facie showing that [parenting time] is likely to endanger the child's physical or emotional well being. Insubstantial modifications or adjustments of [parenting time], on the other hand, do not require an evidentiary hearing and are appropriate if they serve the child's best interests.

Braith v. Fischer, 632 N.W.2d 716, 721 (Minn. App. 2001) (citations omitted), *review denied* (Minn. Oct. 24, 2001).

Here, Stang argues that the move to Dilworth, together with the modification of his parenting time constituted a "substantial modification" and that the district court erred in modifying his parenting time without affording him an evidentiary hearing. It is apparent that Stang's modified parenting-time schedule afforded him parenting time that is approximately equal to the amount of parenting time he had in the April 2002 stipulated order.[1] The crux of Stang's contention is that McGarvey's move to Dilworth changes the quality and nature of the parenting time he has with his son.

Stang cites no authority for the proposition that an in-state move per se constitutes a "substantial change" in parenting time requiring an evidentiary hearing. We applaud Stang for his involvement with his son's schooling and activities and recognize that this is not an insignificant aspect of parenting. However, absent joint physical custody or a provision in a parenting agreement or court order identifying a child's physical residence, the physical custodian has flexibility in determining his or her residence. *See* Minn. Stat. § 518.003, subd. 3(d) (2006) ("'Joint physical custody' means that the routine daily care

[1] The 2002 order gave Stang alternating weekends (52 days), two hours every Wednesday night during his work season (Stang does seasonal work), and eight hours every Wednesday during his off season. Stang also received five holidays each year. Although it appears that Stang's total number of visitation days could fluctuate under the 2002 order, depending on the length of his work season versus the off season, he enjoyed about 73 days of parenting time under the 2002 order. By contrast, the 2007 order gave Stang at least 68 days of parenting time during odd years (one weekend per month, the entire month of July, four days over the Thanksgiving holiday, and approximately 9 days during spring break) and 73 days during even years (nine days over the Christmas holiday rather than four days around Thanksgiving).

and control and the residence of the child is structured between the parties."); Minn. Stat. § 518.1705 (2006) (providing guidelines for parenting plans); *LaChapelle v. Mitten*, 607 N.W.2d 151, 162-63 (Minn. App. 2000), *review denied* (Minn. May 16, 2000) (recognizing that a district court may place geographical limits on the ability of a parent to remain the child's primary custodian). To give the non-custodial parent a substantial voice in where the custodial parent may live raises questions about the custodial parent's freedom of movement and invites vexatious disputes.

Here, the parties have never been married; there is not joint physical custody; there has never been an agreement or court order establishing the son's residence; and the district court provided Stang with a substantially equivalent amount of parenting time in its 2007 order. On this record, we conclude that the order did not result in a substantial modification of Stang's legally established parenting time and that the district court did not abuse its discretion by denying Stang's request for an evidentiary hearing.[2]

III.

The third issue is whether the district court was required to provide detailed written findings regarding whether McGarvey's move to Dilworth was in the child's best

[2] Stang further contends that an evidentiary hearing was warranted because, as a joint legal custodian, he has a right to participate in major decisions regarding the child's education, health care, and religious training. *See* Minn. Stat. § 518.003, subd. 3(a), (b) (defining "legal custody" and "joint legal custody"). Stang cites no authority for the proposition that an evidentiary hearing is required before permitting a physical custodian to move her residence within Minnesota when a non-custodial parent objects based on his status as a joint legal custodian. Moreover, because this issue was not presented to the district court, it is not properly before this court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

interests. This issue parallels the question of whether Stang was entitled to an evidentiary hearing.

This court has stated that neither clarifications nor insubstantial modifications of parenting time "need . . . be supported by findings that such modification is in the children's best interests." *Funari v. Funari*, 388 N.W.2d 751, 753 (Minn. App. 1986). As noted above, although the move of the residence of Stang's son has a practical impact on the quality of Stang's parenting opportunities, the number of days of parenting time to which Stang is legally entitled is not substantially changed. The factors that led us to conclude that the district court did not err by not holding an evidentiary hearing caution us to exercise care before requiring that the district court make written best-interest findings.

Stang cites *Moravick v. Moravick*, 461 N.W.2d 408 (Minn. App. 1990), as judicial support for his contention that the district court was required to make particularized best-interests findings in the present case. In *Moravick*, the district court reinstated visitation despite an assertion (supported by the statement of an expert) that the visitation would expose the child to dangerous circumstances and without making particularized findings regarding the child's best interests. 461 N.W.2d at 409. Here, although Stang claims that McGarvey's new husband has guns and is a "drinker," gun ownership and consumption of alcoholic beverages are legal and Stang does not provide any specific evidence that would support a claim of dangerous circumstances. The primary focus of Stang's claims is that the move to Dilworth will compromise his parenting relationship. Although we again laud Stang for his interest in and commitment to his son's school and other

activities and recognize that such parental support may be important in a child's life, the issue is not one of active endangerment as in *Moravick*. Rather, here we have a disagreement between two parents. The requirement for findings in the *Moravick* setting does not translate into a requirement here.

Given the 240-mile distance between Jordan and Dilworth, it is self-evident that Stang's existing parenting-time schedule would be unworkable after McGarvey's move. The extensive contact that Stang claims to have had with his son was largely a function of informal cooperation between the parents. It is not unusual that such cooperation is in the best interests of children. However, the law neither transforms such informal cooperation into legally binding arrangements that lock the son (and McGarvey) into continued residence in Jordan nor requires McGarvey to establish, and the district court to find, that the son's move to Dilworth is in his best interests. Such a standard would impose a new responsibility on custodial parents and the district court. This court declines to take such a step. The district court adjusted Stang's parenting time to allow a continued father-child relationship with approximately the same amount of court-ordered parenting time. We conclude that, on this record, the district court was not required to provide detailed, written, best-interests findings regarding McGarvey's move.[3]

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[3] We note that it would be helpful for a mediator, visitation expeditor, or, if necessary, ultimately the district court to specify how the parties should resolve transportation issues incident to McGarvey's move to Dilworth. Certainly Stang would have legitimate concerns that he not have to bear the expense and time-off-work burdens of going to Dilworth for all visitation.

IV.

The fourth issue is whether the district court abused its discretion by awarding McGarvey $500 for conduct-based attorney fees.

A district court *shall* award need-based attorney fees if it finds (1) the fees are necessary for a good-faith assertion of a party's rights; (2) the party from whom fees are sought has the means to pay them; and (3) the party to whom fees are awarded does not have the means to pay them. Minn. Stat. § 518.14, subd. 1(1)–(3) (2006).

A district court may also, "in its discretion," award attorney "fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding." *Id*. An award of conduct-based attorney fees under Minn. Stat. § 518.14, subd. 1, "rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion." *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). An award of conduct-based attorney fees may be made regardless of the recipient's need or the payor's ability to pay. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). However, conduct-based attorney fees must be awarded for conduct occurring during the litigation, and the district court must identify the conduct that justified the award. *Id*. at 819; *see also Kronick v. Kronick*, 482 N.W.2d 533, 536 (Minn. App. 1992) (stating that the district court must make findings regarding the basis for conduct-based attorney fees that "permit meaningful appellate review").

Because different statutory considerations govern the award of need-based versus conduct-based attorney fees, the district court must indicate whether the fee award is

based on the conduct or need and address the statutory factors for the kind of award involved. *Geske*, 624 N.W.2d at 816. Here, the district court's order did not address whether the $500 attorney fee award was based on need or conduct, and the district court declined to cite any specific reasons for either type of award. Accordingly, the attorney fee granted cannot stand as a proper need-based award.

Furthermore, the only indication in the district court's order that the district court believed Stang "unreasonably contribute[d] to the length or expense of the proceeding" is found in the opening line: "The plaintiff's latest battery of motions, despite being denominated as motions for amended findings or new trial, are really motions to reconsider the earlier ruling of this court." Although one can glean from this statement that the district court found Stang's arguments to be unpersuasive and procedurally incorrect, the district court's order provides little indication of the basis for the award.

Because the district court did not state whether the $500 award was based on need or conduct, and because the district court did not provide findings indicating the basis for the decision, we conclude that the district court abused its discretion by awarding what appears to be a conduct-based attorney fee without identifying the conduct supporting the award. Accordingly, we reverse the district court's attorney fee award.

Affirmed in part and reversed in part.

Dated: