STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2016

Thomas W. Raymond,
Respondent,

vs.

Melissa K. Schulz,
f/k/a Melissa K. Steffen,
Appellant.

Filed September 22, 2009
Affirmed in part as modified, reversed in part, and remanded
Schellhas, Judge

Hennepin County District Court
File No. 27PAFA46070

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Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges a district court order that modifies parenting time and reduces respondent's child-support obligation. We modify the holiday parenting-time schedule to match the schedule that the district court found to be in the child's best

interests and affirm, as modified. But because the district court erred in imputing income to mother without following one of three allowed methods, we also reverse in part and remand.

FACTS

Appellant-mother Melissa K. Schulz and respondent-father Thomas W. Raymond are the parents of one minor child, born June 13, 2001. Father signed a voluntary recognition of parentage in July 2001. In January 2002, a child support magistrate (CSM) ordered father to pay $1,570 per month as child support. In November 2002, father filed a complaint seeking, among other things, adjudication of parentage, joint legal and joint physical custody, and a custody and parenting-time study. At that time, father resided in Mound and mother resided in Eden Prairie.

In November 2003, a family court referee issued an order adopting the recommendations of a custody and parenting-time evaluation,[1] which included recommendations that: (1) mother have physical custody; (2) the parties have joint legal custody; (3) father have parenting time every Wednesday and every other Saturday for four weeks; and (4) after four weeks, father's time expand to include an overnight on father's Saturday. The district court approved the referee's order.

In December 2007, father moved the district court for relief related to custody and parenting time. Including amendments to his original motion, father sought: (1) a

[1] The district court referred to the evaluation as a "custody and visitation evaluation." "In 2000, legislation was passed replacing the term 'visitation' with 'parenting time' . . . ." *In re the Welfare of B.K.P.*, 662 N.W.2d 913, 914 n.1 (Minn. App. 2003). "Minnesota statutes now refer to parenting time, not visitation." *Id.* Accordingly, "parenting time" will be used instead of "visitation."

custody and parenting-time evaluation; (2) an evidentiary hearing on custody, parenting time, and financial issues; (3) a prohibition against mother's relocation outside of a specific area that included Hennepin County, Carver County, parts of Scott County, and parts of Dakota county; (4) joint legal custody with detailed provisions; (5) an award of sole physical custody to father with specifically scheduled parenting time for mother; and (6) alternatively, an altered temporary parenting-time schedule, if the district court permitted mother to relocate outside of the area specified by father. Mother opposed the motion and moved the district court to modify father's parenting time to one weekday evening in Mankato and every other weekend from Friday to Sunday.

In April 2008, a family court referee denied father's motion to modify custody and to prevent mother from moving with the minor child. The referee ruled that father must provide evidence of endangerment to justify modification of custody and had not done so, and that, so long as mother shares equally in transporting the minor child, the court "does not take issue with her move." But the referee granted father's motion to modify his parenting-time schedule; expanding father's parenting time to include every other weekend from Friday to Sunday during the school year, one weekday evening in Mankato during the school year, and additional parenting time under a specific holiday schedule. The district court approved the order.

In May 2008, both parties were granted permission to move for reconsideration, and a hearing was scheduled on June 30, 2008. Both parties filed motions for reconsideration; father also filed a motion for amended findings; and in her responsive motion, mother also sought amended findings. At the hearing in June, father's counsel

argued that the district court lacked jurisdiction to consider mother's motion for amended findings because it was untimely. Mother argued that, as a responsive motion, her motion for amended findings was timely.

In September 2008, the family court referee issued an order that changed father's parenting time and decreased his child-support obligation. The referee ordered that, during the minor child's school year, her primary residence would be with mother. Father was granted parenting time that consisted of Friday to Sunday on alternating weekends, one overnight per week, and holiday parenting time, including every spring break, Martin Luther King Day weekend, President's Day weekend, Memorial Day weekend, Labor day weekend, MEA weekend, and every weekend following Thanksgiving Day, even when the minor child spent Thanksgiving Day with mother. The referee also ordered that, during the summer, the minor child's primary residence would be with father and mother would have parenting time Friday to Sunday on alternating weekends and one overnight per week. But the referee also specifically found that no change in the minor child's primary residence would occur if the parenting-time schedule "would flip-flop" and mother would have parenting time in the summer months. The referee reasoned that, unless the parenting-time schedule "were flip-flopping for over six months at a time in favor of [father], the minor child's primary residence remains the same over the course of the year—it is [mother's] residence with the difference in the summer months being that [father] has more parenting time." Additionally, after finding a substantial change in circumstances in the form of a decrease in father's income, the referee modified father's child-support obligation and imputed income to mother for

purposes of the child-support calculation. The district court approved the referee's September 2008 order, and this appeal follows.

D E C I S I O N

Mother challenges the district court's parenting-time and child-support rulings. Father opposes mother's arguments and argues that the scope of review is limited because mother failed to file a timely motion for amended findings or new trial after the April 2008 order.

I. Scope of Review

Father argues that our scope of review is limited because mother failed to timely move for amended findings or a new trial after the April 2008 order. Father cites *Baker v. Baker*, 733 N.W.2d 815, 819 (Minn. App. 2007), *rev'd on other grounds*, 753 N.W.2d 644 (Minn. 2008), for the rule that in the absence of a motion for a new trial, the scope of review is limited to properly raised substantive legal issues, whether the evidence supports the findings of fact, and whether the findings support the conclusions of law and judgment. The orders at issue in this appeal addressed modification of custody, parenting time, and child support. Proceedings to modify custody, parenting time, and child support are "special proceedings." *Angelos v. Angelos*, 367 N.W.2d 518, 520 (Minn. 1985). A motion for a new trial is not necessary to preserve issues for appeal in special proceedings. *Huso v. Huso*, 465 N.W.2d 719, 721 (Minn. App. 1991).

II. Parenting Time

The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion. *Olson v. Olson*, 534 N.W.2d 547,

550 (Minn. 1995). A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). A district court's findings of fact underlying a parenting-time decision will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978).

Mother challenges the district court's parenting-time ruling by arguing that: (1) the summer parenting-time schedule constitutes a restriction of mother's parenting time that required an evidentiary hearing and a finding of endangerment; (2) the district court improperly changed the minor child's primary residence; (3) even if the summer parenting-time ruling constitutes a modification of parenting time, rather than a restriction, the court made inadequate findings to support its ruling; and (4) the court erred by ordering a holiday schedule that differs from father's proposed holiday schedule after finding that father's proposed holiday schedule was in the child's best interests.

A. Modification or Restriction

A district court may modify parenting time if modification serves the best interests of the child, if the modification would not change the child's primary residence. Minn. Stat. § 518.175, subd. 5 (2008). But a court "may not restrict parenting time unless it finds that: (1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development; or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time." *Id.* "'Parenting time' means the time a parent spends with a child regardless of the custodial designation regarding the child." Minn. Stat. § 518.15, subd. 5 (2008).

Prior to amendment, Minn. Stat. § 518.175, subd. 5 (1998), pertained to the modification of "visitation rights," rather than "parenting time." "Visitation rights" referred to time to which a non-custodial parent was entitled to spend with a minor child. Minn. Stat. § 518.175, subds. 1, 5 (1998). Through an amendment to the statute, the term "parenting time" was substituted for "visitation." *In re the Welfare of B.K.P.*, 662 N.W.2d 913, 914 n.1 (Minn. App. 2003). Because the amended statutory language in subdivision 5, which is applicable to this case, limits the court's authority to restrict parenting time, we must address mother's argument that the district court's increase in father's parenting time during the summer constitutes a restriction of her parenting time that was unauthorized in the absence of an evidentiary hearing and findings that mother endangered the minor child or was noncompliant with father's court-ordered parenting time. The parties do not dispute that the court made no such findings, and father does not argue that the evidence would support such findings.

A reduction in the total amount of time a parent has with a child is not necessarily a restriction of parenting time. *Danielson v. Danielson*, 393 N.W.2d 405, 407 (Minn. App. 1986). "Insubstantial parenting-time modifications or adjustments do not require an evidentiary hearing." *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002). A restriction is a "more substantial reduction[]" or "greater alteration" of parenting-time rights. *See Lutzi v. Lutzi*, 485 N.W.2d 311, 315 (Minn. App. 1992) (stating that, under section 518.175, subdivision 5, the best-interest standard governs modifications except in cases of "more substantial reductions of visitation," and that a restriction involves "greater alteration of visitation rights").

To determine if parenting time is restricted, we look "at both the reasons for the change and the amount of reduction of the parenting-time rights." *Matson*, 638 N.W.2d at 468. We have previously concluded that parenting time was restricted when there was a slow erosion of parenting time from 14 weeks per year to five and one-half weeks per year, *Clark v. Clark*, 346 N.W.2d 383, 385-86 (Minn. App. 1984), *review denied* (Minn. June 12, 1984), and when parents went from equal time to one parent having the child for nine months of the year, *Lutzi*, 485 N.W.2d at 315. By contrast, this court concluded a change was insubstantial where it was caused by a move to a different state and when, excluding time the children were sleeping or in school, the parents were left with nearly equal parenting time. *Anderson v. Archer*, 510 N.W.2d 1, 4-5 (Minn. App. 1993).

In her argument that the district court's change in her parenting time was substantial and constituted a restriction, mother approaches the court's change in the parties' parenting time by considering only the change in parenting time during the summer. Mother does not address the change in parenting time by considering the parties' parenting time over the course of the year, as the family court referee did. As above noted, the referee specifically found that no change in the minor child's primary residence would occur if the parenting-time schedule "would flip-flop" and mother would have parenting time in the summer months, reasoning that, unless the parenting-time schedule "were flip-flopping for over six months at a time in favor of [father], the minor child's primary residence remains the same *over the course of the year*—it is [mother's] residence with the difference in the summer months being that [father] has more parenting time." (Emphasis added.) Mother provides no authority for the proposition

that a court should determine the applicability of Minn. Stat. § 518.175, subd. 5, i.e., whether a proposed change constitutes a modification or a restriction, based on a consideration of only part of a year or a specific period during the year, such as summer, and we have found no authority. *See Danielson*, 393 N.W.2d at 407 (looking at a change to *total* "visitation time"). Based on our consideration of the parties' total parenting time over the course of the year, we note that mother has the vast majority of parenting time even after the court's change in the parties' parenting time during the summer. We therefore conclude that the change in parenting time is not substantial enough to constitute a restriction. Because the change was not a restriction, mother is incorrect that an evidentiary hearing and a finding of endangerment were required under Minn. Stat. § 518.175, subd. 5.

B. Primary Residence

Mother argues that the district court improperly changed the minor child's primary residence, arguing that the district court's order resulted in either a change of custody or an improper change in primary residence ordered as part of a modification of parenting time.

For her change-of-custody argument, mother relies on Minn. Stat. § 518.18(d) (2008), which provides, in part, that

> the court shall not modify a prior custody order or a parenting plan provision which specifies the child's primary residence unless it finds, upon the basis of facts, including unwarranted denial of, or interference with, a duly established parenting time schedule, that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the

> parties and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custody arrangement or the parenting plan provision specifying the child's primary residence that was established by the prior order . . . .

Mother's argument is based on her assumption that the district court changed mother's physical custody of the minor child. But the court left mother's physical custody of the child intact. Mother's assumption that the court changed the prior custody order therefore is incorrect and her reliance on section 518.18(d) is misplaced.

For her change-in-primary-residence argument, mother relies on Minn. Stat. § 518.175, subd. 5, which provides that a court may modify parenting time "if the modification would not change the child's primary residence," and asserts that the district court's order changed the minor child's primary residence during the summer. As previously noted, the district court rejected mother's argument that a change in primary residence would occur if the child resided with father during the summer, as do we. Although we do not adopt the district court's reasoning that a change in primary residence occurs only if the parenting-time schedule "were flip-flopping for over six months at a time in favor of father," we are not persuaded that the court changed the child's primary residence by ordering that she reside with father during the summer. In our view, the district court merely expanded father's parenting time during the summer, leaving intact the child's primary residence with mother during the school year. We therefore conclude that the district court did not impermissibly change the minor child's primary residence in connection with its modification of parenting time under Minn. Stat. § 518.175, subd. 5.

C. Findings

Mother argues that even if the district court modified, rather than restricted, her parenting time, it made inadequate findings. Findings of fact are generally required when a district court modifies parenting time. *See Moravick v. Moravick*, 461 N.W.2d 408, 409 (Minn. App. 1990) (addressing modification of visitation). Because the district court has broad discretion in dissolution cases, it is "especially important that the basis for the court's decision be set forth with a high degree of particularity." *Wallin v. Wallin*, 290 Minn. 261, 267, 187 N.W.2d 627, 631 (1971).

The district court found that expansion of father's parenting time would serve the minor child's best interests because it would allow her: regular contact with father during the school year; the ability to maintain her relationship with both parents; and extended time with father during the summer. These findings explicitly address the child's best interests and are sufficient to support the district court's modification of parenting time.

D. Holiday Schedule

Mother argues that the district court abused its discretion by ordering the holiday parenting-time schedule after finding that father's different, proposed holiday schedule was in the minor child's best interests. Mother is correct that the holiday parenting-time schedule ordered by the court differs from father's proposed holiday schedule and that the district court found father's proposed schedule to be in the child's best interests. In his proposed holiday schedule, in addition to other time, father sought parenting time on: alternate Easter weekends; alternate Thanksgiving Day and the following weekend; and all school quarter days. The district court found father's proposed holiday parenting-time

schedule to be in the minor child's best interests but ordered a holiday schedule that differs from father's proposed schedule by: granting father all weekends following Thanksgiving Day, regardless of whether the child spends Thanksgiving Day with father or mother; alternating between father and mother the Easter holiday without mentioning the weekend that includes Easter; and excluding mention of school quarter days.[2]

We agree that the district court abused its discretion in ordering a holiday parenting-time schedule that differs from the schedule that the court found to be in the minor child's best interests. We therefore modify the court's holiday parenting-time ruling to include the holiday parenting-time schedule proposed by father. We affirm the district court's holiday parenting-time ruling, as modified.

III. Child Support

Mother argues that the district court erred by: (1) failing to make findings regarding the parties' means, the minor child's best interests, and whether the child-support modification would create a hardship for mother, the obligee; and (2) imputing income to mother.

A. Findings

An appellate court reviews the district court's order modifying child support for an abuse of discretion. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). An abuse of discretion occurs when the district court resolves the matter in a manner that is "against logic and the facts on [the] record." *Id.*

[2] The record does not include an explanation or definition of a "school quarter day."

A child-support order may be modified upon a showing of a substantial change in circumstances that makes the current order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2008). "Substantially increased or decreased gross income of an obligor or obligee" can make an order unreasonable or unfair. *Id.* In certain circumstances, a substantial change will be presumed and the unreasonableness and unfairness of an order will be rebuttably presumed. *Id.*, subd. 2(b). These circumstances exist when:

> [T]he application of the child support guidelines in section 518A.35, to the current circumstances of the parties results in a calculated court order that is at least 20 percent and at least $75 per month higher or lower than the current support order or, if the current support order is less than $75, it results in a calculated court order that is at least 20 percent per month higher or lower . . . .

Id. When the 20 percent/$75 difference is shown, the presumption of substantial change is irrebuttable. *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009).

When a district court does not deviate from the presumptive child-support obligation, it must make written findings that state: (1) each parent's gross income; (2) each parent's parental income for child support (PICS); and (3) any other significant evidentiary factors affecting the child support determination. Minn. Stat. § 518A.37, subd. 1 (2008). When a court deviates from the presumptive child-support obligation, best-interests findings are required. *Id.*, subd. 2 (2008).

Here, mother argues that the district court erred in failing to consider the parties' financial circumstances, including the obligor's ability to pay and the obligee's need for support, the child's needs, and the child's best interests. But neither party asked the

district court to base child support on factors other than income, and the district court therefore appropriately made findings regarding each parent's gross income and PICs. *See also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court must generally consider only the issues that were presented to and considered by the district court). We conclude that the district court's findings comply with section 518A.37, subdivision 1.

Mother also argues that because this is the first modification under the income-shares model, the district court was required to consider whether the modification would create a hardship for the obligee. Mother cites Minn. Stat. § 518A.39, subd. 2(k) (2008), which provides that "the modification of basic support may be limited if the amount of the full variance would create hardship for either the obligor or the obligee." But mother has not established that the district court must address this subdivision when neither party argues for its application. Because mother did not argue before the district court that the child-support modification would create a hardship, and never asked that the modification be denied under subdivision 2(k), mother has waived this issue. *See Thiele*, 425 N.W.2d at 582. We therefore reject mother's argument that the district court's findings are inadequate to support the child-support ruling.

B. Imputation

Mother argues that the district court erred in imputing income to her. A court must base child support on "potential income" if a parent is "voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income." Minn. Stat. § 518A.32, subd. 1 (2008). "Determination of potential

income must be made according to one of three methods": (1) "the parent's probable earnings level based on employment potential, recent work history, and occupational qualifications"; (2) the actual amount of unemployment compensation or worker's compensation benefit received; or (3) "the amount of income a parent could earn working full time at 150 percent of the current federal or state minimum wage, whichever is higher." *Id.*, subd. 2 (2008). A parent is not considered voluntarily unemployed, underemployed, or employed on a less than full-time basis if, among other circumstances, the parent shows that the circumstance "is temporary and will ultimately lead to an increase in income," or is "a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child." *Id.*, subd. 3 (2008).

The district court found that mother's income in 2007 was $23,000, without deducting business expenses, and that in 2005 mother earned net monthly income of $2,915. The court then found mother had "the ability to earn, at a minimum, $23,000 annually absent any business expenses" and found that it was "appropriate to impute gross income to [mother] of $1,917 per month." We agree with mother that the findings are inadequate to support the imputation. The findings do not address whether mother was unemployed, underemployed, or employed on a less than full-time basis. The findings appear to impute income to mother by relying on her gross receipts as a self-employed person. Reliance upon gross receipts as a self-employed person is not one of the allowed methods of imputing income under section 518A.32. Moreover, Minn. Stat. § 518A.30 (2008), provides that, for purposes of child support, a self-employed person's gross income is gross receipts minus ordinary and necessary business expenses. We

therefore reverse the district court's determination of mother's income and remand for additional findings.

Affirmed in part as modified, reversed in part, and remanded.