STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1365

In re the Marriage of:
Susan Ann Yager,
f/k/a Susan Ann Fox,
petitioner,
Appellant,

vs.

John Patrick Fox,
Respondent.

Filed March 30, 2010
Affirmed
Crippen, Judge*

Hennepin County District Court
File No. 27-FA-000299651

Robert J. Hajek, Hajek, Meyer & Beauclaire, PLLC, Minneapolis, Minnesota (for appellant)

Nancy Z. Berg, David C. Gapen, Walling, Berg & Debele, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Worke, 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

CRIPPEN, Judge

Appellant Susan Yager argues that the district court abused its discretion by granting sole legal and physical custody to respondent John Fox, refusing to modify the parenting time award, and giving respondent permission to move out of state with the children. We affirm.

FACTS

After their marriage in 1995, the parties had two children, who are now seven and eleven years old. Their August 2006 dissolution judgment, premised on a settlement agreement, included a parenting plan that designated respondent's home as the children's primary residence and gave respondent sole decision-making authority over the children until such time as the parenting consultant determined otherwise. Appellant's parenting time, initially to be supervised, was to increase over time as prescribed in the judgment.

The district court subsequently denied appellant's motion to vacate the judgment, and this court affirmed the decision on appeal. Early in 2007, the district court denied appellant's motion for expanded parenting time because the motion was brought within one year after the judgment and appellant had not followed judgment provisions on resolution of disputes.

During July 2006, appellant's behavior at the supervision facility was such that she had to be removed by police. Thereafter, the supervision facility terminated service

to appellant.[1] Appellant's refusal to use a supervision facility resulted in her not seeing the children for a period of time. In August 2007, the parenting consultant resigned.

Late in 2007, appellant moved the district court to establish joint legal and physical custody of the children and equalize parenting time.[2] Resisting this motion, respondent also asked for court permission to move with the children to Indianapolis, Indiana. An evidentiary hearing on the motions was conducted in February 2009, following a court-ordered evaluation of the parenting time and removal issues and the district court's earlier determination that respondent had made a prima facie case of endangerment. Additional cross-motions included respondent's request for a change of custody and additional restrictions on appellant's parenting time.

The district court's subsequent order included findings that appellant's conduct had been "extreme" and "inappropriate" and that appellant had "no appreciation for the impact her behavior and choices have on the children or [respondent]." The district court further found that "[t]he fact that the children are doing well and have a good relationship with their mother despite her conduct is a testament to [respondent's] abilities as a parent." Premised on a finding that appellant's conduct endangered the welfare of the children, the district court granted sole legal and physical custody to respondent and determined that the best interests of the children were served by granting respondent the authority to move to Indianapolis with the children. The district court also concluded that

[1] This termination of service occurred after the parties had settled but prior to the entry of the written decree.

[2] Earlier in 2007, appellant's parents filed a petition to establish grandparent visitation. First consolidated with the present action, this petition was later dismissed, deemed by the district court to be an extension of appellant's parenting-time motion.

a modification of the parenting-time schedule was not in the children's best interests. This appeal follows.

D E C I S I O N

A district court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). "Even though the [district] court is given broad discretion in determining custody matters, it is important that the basis for the court's decision be set forth with a high degree of particularity." *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989) (quotation omitted).

1. Sufficiency of the Evidence

Endangerment

Appellant argues that respondent made an insufficient showing that the children's present environment endangers their physical or emotional health or emotional development. The district court made extensive findings as to endangerment, finding that the emotional health of the children was presently endangered and that their "long-term emotional development will be impaired by continued turmoil and conflict caused by [appellant's] actions"; that appellant's conduct "puts them at high risk for future emotional problems." The district court enumerated appellant's dangerous conduct and found that these actions "have caused the children to be vigilant and watchful of her."

Appellant attempts to minimize this conflict by comparing her conduct with actions of others who have been found to endanger their children; she argues that her conduct has not included physical harm or misbehavior "directed at the children." Although precedents require proof of a significant degree of danger,[3] prior cases on appalling misbehavior do not suggest a minimum threshold of proof. And the danger may be purely to a child's emotional development. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997).

The district court's determination of custody was recommended by the evaluator for Hennepin County Family Court Services. The children's therapist testified that she is no longer willing to have a professional relationship with appellant because of her inappropriate behavior, and she believes that appellant is unable to control her outbursts and volatility in the presence of the children. Respondent testified that on one occasion, appellant became so upset when he would not let her into the house that she began yelling and pounding on the door, causing damage to the deadbolt lock. The guardian ad litem testified that she found appellant to be manipulative at times and described appellant as exhibiting unpredictable behavior, volatility, and outbursts; the guardian stated that she believes that the children would be endangered emotionally by continued exposure to the level of conflict between their parents. The district court noted that appellant had left

[3] *See Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991) ("Any threat of harm to a child might arguably constitute endangerment. On the other hand, we agree with the [district] court that according to the usage of this concept in the context of child custody, the legislature likely intended to demand a showing of a significant degree of danger.").

"disturbing" voicemail messages for the children. This evidence is sufficient to support a finding of endangerment.

Appellant points to evidence that the children have done well. The district court addressed this circumstance, and nothing in the record suggests clear error in the district court's weighing of this fact with the evidence that their emotional health is and will be endangered by a continuation of current arrangements. *See* Minn. R. Civ. P. 52.01 (stating the district court's superior opportunity to examine the totality of the evidence).

Finally, we find nothing in the record to sustain appellant's claim that respondent has engaged in conduct that endangers the children.

The district court's finding that appellant was endangering the children was supported by the evidence at trial, and the district court did not abuse its discretion by granting respondent's request for sole legal and physical custody of the children.

Change in Circumstances

Appellant argues that custody should not have been modified because there were no changed circumstances. "The change of circumstances must be a real change and not a continuation of ongoing problems." *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied* (Minn. June 21, 1989). "What constitutes changed circumstances for custody-modification purposes is determined on a case-by-case basis." *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 26, 2000).

The district court explicitly found that the circumstances of the children had changed and specified a number of changes, including the cancellation of supervision

services, the resignation of the parenting consultant, and appellant's misconduct resulting in the termination of her contacts with the children's therapist. The district court also found that appellant purchased a cell phone for her daughter in an effort to subvert a district court order limiting her telephone contact with her children. Evidence of these and other acts showed an increase in the risk of harm to the children since the parenting plan was first determined. The evidence in the record supports the conclusion that circumstances changed since the parenting plan was initiated.

Modification of the Parenting Plan

Appellant argues that the district court's denial of her request for additional parenting time was an abuse of discretion because it was not supported by the evidence. Minn. Stat. § 518.175, subd. 5 (2008), governs modification of a parenting-plan schedule and only mandates that modification shall be granted if it would serve the best interests of the parties' children.

The record and the district court's order discount appellant's assertion. The district court thoroughly considered each of the best-interest factors set out in Minn. Stat. § 518.175, subd. 1 (2008). The law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). Based on an evaluation of these factors, including findings that the children were satisfied with the current arrangement, that the children suffer residual effects of being exposed to appellant's angry outbursts, and that the district court has concerns about appellant's mental health, the district court

concluded that an increase in appellant's parenting time was not in the children's best interests. This was not an abuse of discretion.

Removal

Appellant argues that the district court abused its discretion by giving respondent permission to move out of state with the children. "Appellate review of custody modification and removal cases is limited to considering whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted).

Minn. Stat. § 518.175, subd. 3 (2008), prohibits such a move except upon a court order (or adverse-party consent) and demands denial if the purpose of the move is to "interfere with parenting time given to the other parent." The statute directs the district court to apply a best-interests standard when evaluating removal and provides a nonexclusive list of factors to be considered.

The district court evaluated each of the best-interests factors articulated in the statute and determined that it was in the children's best interests for respondent to move with them to Indianapolis, Indiana. Appellant argues that the district court's relevant findings are not adequately supported by the evidence and that respondent's aim was to put distance between the parents.

The district court made detailed findings in accordance with the statutory best-interest factors. The district court found that the added benefit of the family support structure available in Indianapolis outweighed any prospective harm to the children, that

it would benefit the children to lessen the occasion for witnessing conflict or abuse between their parents, and that the move would not adversely affect appellant's relationship with the children. Nothing in the record shows clear error in these findings or an abuse of the district court's discretion on the requested move.

As already noted, the statute does not permit removal of the children if the proponent is aiming to interfere with the other parent's time with the children. Minn. Stat. § 518.175, subd. 3(a). But the district court determined that "[i]n moving out of state, it is [respondent's] hope that the frequency and severity of the conflict can be minimized. This is a legitimate basis upon which to request to move out of state since it does not necessarily entail a reduction in [appellant's] parenting time." The district court found that respondent did not request the move with the purpose of reducing parenting time, and this finding is not clearly erroneous. Moreover, appellant testified that if the move occurs she too will move to Indianapolis.

Finally, appellant argues that the order permitting the move was merely advisory because respondent's plan is not sufficiently developed. She argues that the best interests of the children cannot be determined without a more certain and immediate moving plan. An advisory opinion is one that is predicated on hypothetical facts. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 97 (Minn. App. 2009).

No doubt the district court could not approve a move request where there was no indication of the parent's intent to move, but this circumstance is not evident here. The record shows that respondent has the present intent to move to Indianapolis: he has placed his house on the market for sale; he has family that lives in Indianapolis; he

believes he could find work there because, although he is an attorney, his position does not require that he maintain an attorney license; he has explored housing in Indianapolis; and he has investigated school districts.

Under the statute, court approval must be obtained before a move occurs. Minn. Stat. § 518.175, subd. 3. Nothing in the statute suggests reason to demand that approval be preceded by housing purchases or job interviews. Respondent has adequately demonstrated his present intent to move, and the district court did not abuse its discretion in its findings or its conclusion to permit his move to Indianapolis.

2. Change in Environment

The initial parenting plan did not designate which party had legal or physical custody of the children, although it did specify that the children would live with respondent. The district court analyzed the custody modification issue under Minn. Stat. § 518.18(d) (2008), which permits modifying "a prior custody order or a parenting plan provision which specifies the child's primary residence" when this is needed for the sake of the best interests of the children because a "change has occurred in the circumstances of the child or the parents."

A second clause of the statute demands retention of the prior order unless the present environment of the children endangers their health or emotional development and the "harm likely to be caused by a change of environment" is outweighed by the advantage of the change to the children. Minn. Stat. § 518.18(d); *see Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997) (summarizing the elements of the statutory test).

Appellant argues that the sole-custody designation does not change the "environment" of the children and that the district court could not, in these circumstances, provide for modification. Similarly, she asserts that the court erroneously failed to find danger in the children's "environment." This argument is premised on a misreading of the governing statute.

The primary clause of Minn. Stat. § 518.18(d) calls for custody modification when needed due to a change "in the circumstances" of the children or the parties. Under the subsequent retention-of-arrangement clause, the court must also find that the children are endangered by their "present environment" and that advantages of a "change" in this environment outweigh likely harm. Nothing in this language suggests that "environment" in this clause differs from "circumstances" previously stated or suggests that the statute is confined to a change in residence. *See Goldman*, 748 N.W.2d at 283-84 (determining that Minn. Stat. § 518.18(d) governs alteration of custody-order language other than designation of residence).

3. Guardian ad Litem

Respondent argues that this appeal should be dismissed based on appellant's failure to serve an adverse party, the guardian ad litem. But this case is factually similar to *Theisen v. Theisen*, 405 N.W.2d 470 (Minn. App. 1987), where this argument was defeated by the failure to show that respondent has been prejudiced. At trial, the guardian ad litem's position coincided with respondent's. As in *Theisen*, the guardian

ad litem was made aware of this appeal, the guardian chose not to participate, and respondent has prevailed on appeal. 405 N.W.2d at 473.

Affirmed.