STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2146

In re the Matter of: Stephen Shaun Boorsma, petitioner,
Respondent,

vs.

Michelle Ann Dinehart,
Appellant.

Filed September 14, 2010
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

St. Louis County District Court
File No. 69DUFA0920

Peter L. Radosevich, Esko, Minnesota (for respondent)

Arthur M. Albertson, Duluth, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

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

STONEBURNER, Judge

Appellant mother challenges the district court's denial of her motion to remove a court-ordered mediator and parenting-time expeditor. Appellant additionally argues that the district court abused its discretion by denying her motion for an order requiring respondent father to pay costs that she incurred when father changed the agreed-on site

for exchanging the child for parenting time and attorney fees incurred in bringing the motion. Because the district court did not abuse its discretion by denying mother's motions (1) to terminate mediation and use of a parenting-time expeditor; (2) to assess costs for the changed exchange site; and (3) for an award of attorney fees, we affirm in part. But, based on the purpose of mediation and parenting-time dispute resolution and the record in this case, we conclude that the district court abused its discretion by denying appellant's motion to remove the court-appointed neutrals, and we reverse that portion of the district court's order and remand for appointment of substitute neutrals.

FACTS

Appellant Michelle Dinehart (mother) and respondent Stephen Boorsma (father) were never married but lived together for more than two years and have a child together, L.L.B., born on August 14, 2008. The parties stopped living together in October 2008. Mother obtained an order for protection (OFP) against father in December 2008. Father then started a parentage action seeking joint legal and physical custody of L.L.B. By agreement of the parties, on January 20, 2009, the district court continued the hearing on mother's OFP, provided that the ex parte OFP would remain in effect, and appointed a Guardian Ad Litem (GAL) for the child to serve in both the OFP and paternity files. The GAL was instructed to make recommendations consistent with the best interests of the child.

In April 2009, the GAL recommended joint legal custody, sole physical custody in mother, and a parenting schedule providing for frequent, unsupervised visitation between father and L.L.B. The parties participated in mediation through Northland Mediation, but

were not able to reach an agreement at that time. In a subsequent hearing in June 2009, the parties were able to reach a permanent agreement on custody and a temporary agreement on parenting time. The agreements were placed on the record and accepted by the district court.

The parties agreed to permanent joint legal custody and that mother would have physical custody, subject to father's parenting time pursuant to a detailed temporary schedule that provided for 12 weeks of frequent, supervised parenting time followed by frequent, unsupervised parenting. Twenty weeks after the beginning of the agreed-on schedule, the parties were to return to mediation at Northland Mediation.[1] The parties agreed to dismissal of the OFP and to imposition of a no-contact order except for communication solely about the child through a notebook, text messages, or e-mail. The parties agreed that any violation of the no-contact order by father would be grounds for another OFP. The parties further agreed that parenting-time supervision would be provided by Lutheran Social Services (LSS) or the Duluth Family Visitation Center, and that if father elected LSS, he would be solely responsible for the costs.

Several months after the agreements were placed on the record, the parties reduced the agreements to writing and jointly submitted a proposed order to the district court. The proposed order added a provision that any disputes regarding parenting time were to be submitted to a parenting-time expeditor through Northland Mediation. The district

[1] The parties' stipulation and subsequent court order do not delineate the issues to be mediated. Father subsequently asserted that it was his understanding that the physical custody issue was to be mediated. The scope of mediation is not before us in this appeal.

court signed the proposed order. Separate individuals at Northland Mediation were appointed as mediator and parenting-time expeditor.

Almost from the moment the stipulation for parenting time was placed on the record, the parties had problems implementing their agreement. Although mediation was not to begin until the parties had 20-weeks' experience with their agreed-on parenting-time schedule, for reasons not explained in the record, the assigned mediator became immediately involved in the parties' parenting-time squabbles. Telephone conversations, recorded by mother and introduced in support of her motion to terminate use of Northland Mediation, document that the mediator assumed the duties of the parenting-time expeditor in attempting resolve day-to-day parenting-time issues. The mediator referred unresolved issues to the parenting-time expeditor only for issuance of an order.

On September 3, 2009, mother petitioned for an OFP against father alleging that father violated the no-contact order by sending several text messages that did not concern the child.[2] On September 4, 2009, the parenting-time expeditor awarded compensatory parenting time to father. The OFP was granted on September 8, 2009. Shortly thereafter, mother moved to terminate the use Northland Mediation and for review of the "visitation" schedule. Mother also sought an order requiring father to pay for any fees she incurred in using a visitation exchange location not stipulated to and for attorney fees for bringing the motion. The district court denied mother's motion in its entirety and

[2] Mother attached copies of three text messages to her petition for an OFP based on violation of the no contact order. One said "Thanks," one said "LSS," and one wished mother a "happy 1st anniversary of our daughter[']s birth," and asked if there was "1 thing that you could think of between us that [I] could do pleas[e] [t]ell me and [I] would like to do that for you as a gift on the anniversary of our beautiful daughter's birth."

mother initiated this appeal, challenging only the denial of the motion to remove Northland Mediation and award costs and attorney fees: mother does not challenge the denial of her motion to revisit the parenting-time schedule.[3]

D E C I S I O N

I. Standard of review

There are no reported cases articulating the standard of review of a district court's decision regarding termination of an alternative-dispute-resolution process or removal of a parenting-time expeditor or mediator, but 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); *see In re Welfare of J.G.W. and J.L.W.*, 429 N.W.2d 284, 286–87 (Minn. App. 1988) (applying an abuse of discretion standard to a motion to remove a child's therapist). We therefore review the district court's decisions in this appeal under an abuse-of-discretion standard.

II. The district court did not abuse its discretion by denying mother's motion to terminate use of a parenting-time expeditor.

At the hearing on mother's motion to remove Northland Mediation as mediator/parenting-time expeditor, mother argued to the district court that, due to her claims of domestic abuse, the matter should never have been referred to a parenting-time

[3] Mother did not move the district court to modify or vacate the parenting-time expeditor's order for compensatory visitation, and the validity of that order is not part of this appeal.

expeditor. On appeal, mother argues that the district court abused its discretion by denying her motion to terminate the use of a parenting-time expeditor.[4]

Minn. Stat. § 518.1751, subd. 1 (2008), provides, in relevant part, that on the district court's own motion, it may appoint a parenting-time expeditor. But subdivision 1a provides, in relevant part, that a party may not be required to refer a parenting-time dispute to a parenting-time expeditor if that party claims to be the victim of domestic abuse by the other party, unless the district court is satisfied that the parties have been advised by counsel and have agreed to use a parenting-time expeditor process and the process does not involve face-to-face meeting of the parties.

The district court interpreted the statute to make appointment of a parenting-time expeditor permissive without addressing the statutory conditions for appointment when one party has claimed to be the victim of domestic abuse contained in Minn. Stat. § 518.1751, subd. 1a. There is no evidence in the record that the parties discussed or agreed to the use of a parenting-time expeditor at the time they placed their stipulation on the record in open court, and there is no record that the district court at any time inquired about whether the parties had been advised of the statutory conditions for appointment of a parenting-time expeditor in cases of claimed domestic abuse. But the record supports the district court's finding that mother and father stipulated to the use of a parenting-time expeditor because they jointly submitted a proposed order for such appointment at a time

[4] At oral argument on appeal, counsel for mother conceded that mother is not opposed to participating in mediation and implied that she is not opposed to using a parenting-time expeditor so long as the processes are not through Northland Mediation. Because the district court ruled on mother's arguments that she should not have been ordered to use a parenting-time expeditor or ordered to mediation, we address those issues.

when both were represented by counsel. On this record, we conclude that the district court did not abuse its discretion in referring the parties to a parenting-time expeditor.

Although mother obtained another OFP after the parties were referred to the parenting-time expeditor, the OFP was based on father's violation of the no-contact order and was not based on allegations of domestic abuse.[5] We conclude that the issuance of another OFP does not affect the validity of the parenting-time expeditor referral, and the district court did not abuse it discretion by denying mother's oral motion to terminate use of a parenting-time expeditor.

III. The district court abused its discretion in denying mother's motion to remove the assigned parenting-time expeditor.

Mother argues that even if the district court did not abuse its discretion by denying her motion to terminate the use of a parenting-time expeditor, the district court abused its discretion by denying her motion to remove the assigned parenting-time expeditor. On the unique facts in this record, we agree.

> The purpose of a parenting[-]time expeditor is to resolve parenting[-]time disputes by enforcing, interpreting, clarifying, and addressing circumstances not specifically addressed by an existing parenting[-]time order, and, if appropriate, to make a determination as to whether the existing parenting[-]time order has been violated. . . .
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> . . . .
>
> A "parenting[-]time expeditor" is a neutral person authorized to use a mediation-arbitration process to resolve parenting-time disputes. A parenting[-]time expeditor shall attempt to resolve a parenting[-]time dispute by facilitating

[5] *See* Minn. Stat. § 518B.01, subd. 2 (2008), defining domestic abuse, in relevant part, as (1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury or assault; or (3) terroristic threats . . .; criminal sexual conduct . . .; or interference with an emergency call."

> negotiations between the parties to promote settlement and, if it becomes apparent that the dispute cannot be resolved by an agreement of the parties, the parenting[-]time expeditor shall make a decision resolving the dispute.

Minn. Stat. § 518.1751, subd. 1b(a), (c) (2008). Minn. Stat. § 518.1751, subd. 5a (2008), provides, in relevant part, that "[i]f a parenting[-]time expeditor has been appointed on a long-term basis, a party . . . may file a motion seeking to have the expeditor removed for good cause shown." Because the parenting-time expeditor was appointed to resolve on-going parenting-time issues in this case, we conclude that the appointment was "on a long-term basis," and we examine the record to determine if mother has shown good cause for removal.

In district court, mother asserted that the parenting-time expeditor acted on incorrect information, denied mother the same opportunity to meet with her as was given father, gave a copy of an order to father a day before mother received the order, and took parenting time from mother as a punitive measure without basis. The district court found mother's allegations to be unfounded. We do not set aside the findings of a district court unless the findings are clearly erroneous. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). On appeal, mother does not argue that the district court's finding that her specific allegations were unfounded is clearly erroneous; rather she focuses on her claims of conflict of interest; personality conflict, lack of competence, trustworthiness, honesty and organization; and domestic abuse.[6]

[6] As discussed above, domestic abuse goes to the appropriateness of use of a parenting-time expeditor, not to good cause for the removal of an appointed expeditor. *See* Minn. Stat. § 518.1751, subd. 1a(1).

These issues were raised in the district court primarily with regard to mother's motion to remove the assigned mediator. But the mediator and parenting-time expeditor work for the same entity, and the record reflects that the mediator, who supervises the parenting-time expeditor at that entity, conveyed to mother that the mediator did not have faith in the parenting-time expeditor's availability or willingness to act as an effective parenting-time expeditor. The mediator's conversations with mother imply that the mediator had considerable interaction with the parenting-time expeditor. Although the record demonstrates that mother's desire to remove the expeditor was, in part, based on her dissatisfaction with the expeditor's decisions rather than the expeditor's personality or professionalism, the record also demonstrates a blurring of the roles of mediator/expeditor, and an undermining of the expeditor's role that cannot be undone at this time. On this record, we conclude that mother has shown good cause to remove Northland Mediation from the role of parenting-time expeditor, and the district court abused its discretion by denying mother's motion to remove Northland Mediation from the role of parenting-time expeditor.

IV. The district court did not abuse its discretion by denying mother's motion to terminate the mediation process.

Minn. R. Gen. Pract. 310.01 provides, in relevant part, that "[a]ll family law matters in district court are subject to Alternative Dispute Resolution (ADR) processes as established in Rule 114" with limited exceptions. One exception is that

> [t]he court shall not require the parties to participate in any facilitative process where one of the parties claims to be the victim of domestic abuse by the other party. . . . In circumstances where the court is satisfied that the parties have

> been advised by counsel and have agreed to an ADR process that will not involve face-to-face meeting of the parties the court may direct that the ADR process be used.

Minn. Stat. § 518.619, subd. 2 (2008), provides, in relevant part, that if the court determines that there is probable cause that one of the parties, or a child of a party, has been physically abused by the other party, "the court shall not require or refer the parties to mediation or any other process that requires the parties to meet and confer without counsel, if any, present."

There is no evidence in the record that any face-to-face meetings occurred.[7] Plainly, mother agreed to mediation beginning 20 weeks after the parties' agreed-on parenting-time schedule was in place. On this record, despite mother's claims of domestic abuse, we conclude that the district court did not abuse its discretion in ordering the parties to participate in mediation or in denying mother's motion to terminate the mediation process.

V. The district court abused its discretion by denying mother's motion to remove the assigned mediator.

Minn. R. Gen. Pract. 114.02(a)(7) defines mediation as "[a] forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties." The only provision in the rules for removal of a mediator applies to the parties' right to

[7] It is disturbing that the mediator told mother in a telephone conversation that she believes that it is "ridiculous" to allow lawyers to be present in mediation and that she normally does not allow it. This is the same conversation in which the mediator, inappropriately, asserts that she is more experienced than most lawyers, lunches with the judges, and implies that she has some special influence on judicial decisions.

remove a court-selected neutral within 10 days of the appointment, and thereafter to remove only on an affirmative showing of prejudice. *See* Minn. R. Gen. Pract. 114.05(c). Here the mediator was not selected by the court therefore mother's motion is not governed by this rule.

The record demonstrates that the mediator, who was not to be involved with the parties until they had 20 weeks of experience with their agreed-on mediation process, immediately involved herself in the parenting-time disputes rather than allowing the parenting-time expeditor to perform the mediation-arbitration process defined in Minn. Stat. § 158.1751, subd. 1b(c). The record demonstrates that the mediator engaged in frequent ex parte conversations with each party and the parenting-time expeditor in which the mediator expressed, at least to mother, her own judgment on many issues involved. The mediator complained to mother that the roles of mediator and parenting-time expeditor were overlapping in this case and that she (the mediator) was actually doing the work of the parenting-time expeditor.

The parties are entitled to the services of a neutral mediator *after* they have worked with a parenting-time expeditor to implement the temporary parenting-time schedule. Given the timing, frequency, and nature of the mediator's contact with the parties in this case before mediation was to begin, we conclude that mother has demonstrated that the ability of the assigned mediator to facilitate future agreement between these parties has been compromised. We therefore reverse the district court's order denying mother's motion to remove Northland Mediation as the provider of mediation, and remand for an order (1) removing Northland Mediation from providing

mediation and/or parenting-time expeditor services; (2) giving the parties a reasonable opportunity to agree on substitute neutrals; and (3) if they cannot agree, appointing appropriate neutrals pursuant to applicable court rules.

VI. Mother's motion to require father to pay for costs she incurred in using an alternative to agreed-on exchange sites is inadequately briefed to permit meaningful review.

The parties stipulated and the district court ordered, that the supervised parenting time agreed on would occur at LSS or the Duluth Family Visitation Center and that if father elected LSS, he would bear the cost. The agreement and order provided that once unsupervised parenting time began, exchanges would take place at the elected visitation center. Mother asserts in her appellate brief, without citing any evidence in the record, that father insisted on changing the location of visitation exchanges. Mother's argument on this issue is somewhat incomprehensible, stating "[t]he expeditor change that requiring a talent to share in those costs," (which may be a typographically flawed allegation that the expeditor changed the requirement that father bear the costs of supervision at LLS to require that appellant share in those costs). Mother argues that the expeditor did not have "authority," "and that provision should have been struck," apparently referring to an uncited-to decision from the expeditor. Assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). We decline to address this issue due to inadequate briefing.

VII. The district court did not abuse its discretion by denying mother's motion for attorney fees.

The discretion to award attorney fees in family law matters rests almost entirely with the district court. *Burton v. Burton*, 365 N.W.2d 310, 312 (Minn. App. 1985), *review denied* (Minn. May 31, 1985). Here the district court denied mother's motion for attorney fees after finding that there was no basis for her motion. Although we have found merit in mother's motion to remove Northland Mediation from the roles of parenting-time expeditor and mediator, we conclude that because the record does not support an award against father of either conduct-based or need-based attorney fees, the district court did not abuse its discretion in denying attorney fees in this matter.

VIII. The district court did not abuse its discretion by failing to order an evidentiary hearing.

Mother asserts that the district court abused its discretion by failing to conduct an evidentiary hearing on her motions. "Whether to hold an evidentiary hearing on a motion generally is a discretionary decision of the district court, which [this court] reviews for an abuse of discretion." *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. App. 2007).

Mother did not identify to the district court or to this court what further evidence or testimony necessitated an evidentiary hearing. We conclude that the district court did not abuse its discretion by failing to hold an evidentiary hearing.

Affirmed in part, reversed in part, and remanded.