STATE OF MINNESOTA
IN COURT OF APPEALS
A10-404
A10-406

In re the Matter of: C. O., petitioner,
Respondent,

vs.

John and Jackie Doe,
Respondents Below (A10-404),
Appellants (A10-406),

Michelle MacDonald,
Appellant (A10-404)

Filed November 23, 2010
Affirmed in part, reversed in part, and remanded; motion denied; motion granted.
Peterson, Judge

Washington County District Court
File No. 82-F6-06-0079919

Mark A. Olson, Olson Law Office, Burnsville, Minnesota (for respondent)

Mark D. Fiddler, Fiddler Law Office, Minneapolis, Minnesota; and

Jodene Jensen, Bloomington, Minnesota (for appellants John and Jackie Doe)

Michelle MacDonald, West St. Paul, Minnesota (pro se appellant)

Judith D. Vincent, Minneapolis, Minnesota (for amicus curiae private agency task force)

Randall Lee Woolery, Stillwater, Minnesota (guardian ad litem)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

PETERSON, Judge

The dispute in this case involves the ability of respondent C.O. to have contact with A.D., a child adopted by appellants John and Jackie Doe. Before the Does adopted the child, they and C.O. entered into a contact agreement, and, based on the agreement, the district court entered a contact order pursuant to Minn. Stat. § 259.58 (2008). This court previously affirmed a district court order that terminated C.O.'s contact with A.D., but the supreme court reversed this court's decision and remanded to the district court for an evidentiary hearing. *C.O. v. Doe*, No. A07-0826, 2007 WL 4111206 (Minn. App. Nov. 20, 2007), *rev'd*, 757 N.W.2d 343 (Minn. 2008). By order, the supreme court also remanded the Does' motion for attorney fees incurred in that court. On remand, the district court awarded C.O. attorney fees against the attorney who represented the Does in the supreme court, denied the Does' motion to terminate C.O.'s contact with A.D., and awarded C.O. additional attorney fees against the Does. The attorney who represented the Does in the supreme court appealed the judgment for fees against her, and the Does appealed the denial of their motion and the fee award against them. This court consolidated the appeals, and C.O. moved to strike parts of each appellant's brief. We affirm in part, reverse in part, and remand. We also grant one of C.O.'s motions and deny the other.

FACTS

This dispute between C.O., who is A.D.'s natural father, and John and Jackie Doe, who are A.D.'s adoptive parents, involves the existence and extent of C.O.'s right to have

contact with A.D. under a contact agreement that C.O. and the Does entered pursuant to Minn. Stat. § 259.58 (2008) before C.O. terminated his parental rights to A.D.

When C.O. moved to enforce his rights under the contact order, the Does moved to dismiss C.O.'s motion. The Does also asked the district court to apply the provision in the agreement that allowed the court to terminate C.O.'s contact with A.D. After hearing arguments on the motions, but without holding an evidentiary hearing, the district court granted the Does' motion, concluding that C.O.'s conduct constituted "exceptional circumstances" under section 259.58 and warranted termination of contact. This court affirmed, and the supreme court accepted review of this court's decision. *C.O. v. Doe*, No. A07-826, 2007 WL 411 (Minn. App. Nov. 27, 2007), *rev'd*, 757 N.W.2d 343 (Minn. 2008).

In the supreme court, appellant Michelle MacDonald (the Does' attorney), filed a respondent's brief, the majority of which argued, for the first time, that Minn. Stat. § 259.58 is unconstitutional. C.O.'s attorney filed a reply brief that addressed the constitutional questions and a motion to strike the constitutional arguments from the Does' brief. The supreme court granted the motion to strike and ruled that the lack of an evidentiary hearing denied C.O. due process of law. *C.O.*, 757 N.W.2d at 348 n.8, 349-52. For guidance on remand, the supreme court noted that Minn. Stat. § 259.58 does not identify who bears the burden of proof regarding motions to enforce or modify contact agreements and that, generally, that burden is on the party seeking to benefit from a statutory provision. *Id.* at 352. It also ruled that the burden of showing exceptional

circumstances that justified modification of the contact agreement was on the Does. *Id.* at 353.

After the supreme court released its opinion, C.O. moved the supreme court for attorney fees on grounds including but not limited to Minn. Stat. § 549.211 (2008). Each party also filed several other motions in the supreme court. By order, the supreme court denied most of the parties' motions but remanded to the district court C.O's motion for attorney fees incurred on appeal.

On remand, the district court held an evidentiary hearing. Because the parties made multiple additional motions in the district court, many of which involved requests by the parties to sanction another party or another party's attorney, the district court issued a series of orders. In relevant part, those orders (a) denied the Does' motion to modify or terminate the contact agreement; (b) rejected the Does' argument that Minn. Stat. § 259.58 unconstitutionally deprived them of their liberty interests in the custody, care, and control of A.D.; (c) awarded C.O. $16,350 in attorney fees from MacDonald for the fees that C.O. incurred responding to MacDonald's constitutional arguments in the supreme court; (d) awarded C.O. $95,942.65 in attorney fees from the Does for other aspects of the proceeding; (e) appointed a parenting-time expediter; and (f) denied motions by MacDonald to have C.O.'s attorney (Mark Olson) sanctioned. During the proceedings on remand, the Does retained attorney Mark Fiddler as co-counsel.

After the district court entered judgment on the fee awards, MacDonald appealed the judgment against her (A10-404). Attorney Fiddler separately appealed on behalf of the Does (A10-406). In the Does' appeal, this court granted the motion of the Private

Agency Task Force on Policy and Practice to participate as amicus. Later, this court consolidated the appeals.

The brief submitted by MacDonald challenged both the fee award against her and purported to raise issues on behalf of the Does. C.O. moved to strike the issues that MacDonald raised on the Does' behalf, as well as certain aspects of the Does' brief. C.O.'s motions were deferred to the panel assigned to consider the merits of the appeal.

D E C I S I O N

I.

A. The Does' Brief

C.O. moves to strike page 18 of the Does' brief and pages 28-33 of the Does' addendum. Page 18 of the Does' brief refers to a February 3, 2010 ex parte order by the district court suspending C.O.'s visitation with A.D. because of allegations that C.O. caused A.D. post-traumatic stress disorder. Pages 28-30 of the Does' addendum are a copy of that order and the associated notice of filing.[1] The record on appeal is the documents filed in the district court. Minn. R. Civ. App. P. 110.01. Because the order is in the file, it is part of the record on appeal and we deny C.O.'s motion to strike it. We also deny C.O.'s motion to strike the brief's reference to an order that is in the file.

[1] Pages 31-33 of Does' addendum are the order for judgment and judgment for the attorney-fee awards. Because the attorney fee awards are properly at issue in this appeal, we conclude that C.O.'s reference to those pages is a typographical error.

B. MacDonald's Brief

MacDonald argues that the district court abused its discretion by not sanctioning C.O.'s attorney. MacDonald also argues that a judge who signs an ex parte order in violation of the Minnesota Code of Judicial Conduct and fails to vacate the order, is disqualified from ruling on a sanctions request and that the conduct of C.O.'s attorney requires that he be reported to the Lawyers Board of Professional Responsibility.

1. Standing: By motion, C.O. argues that MacDonald lacks standing to argue that the district court should have sanctioned C.O.'s attorney. To have standing to appeal, an appellant must be aggrieved by the appealed ruling. *Hammerlind v. Clear Lake Star Factory Skydiver's Club*, 258 N.W.2d 590, 592 (Minn. 1977). Because MacDonald is not aggrieved by the district court's refusal to sanction C.O.'s attorney, she lacks standing to challenge that ruling.

MacDonald asserts that, in addition to pursuing appeal A10-404 on her own behalf, she also represents the Does and can raise the propriety of the district court's refusal to sanction C.O.'s attorney on their behalf. MacDonald, however, did not appeal on the Does' behalf. Her notice of appeal identifies herself, not the Does, as the appellant in A10-404. *See Sammons v. Sammons*, 642 N.W.2d 450, 456 (Minn. App. 2002) (noting that a party may appeal a "judgment that adversely affects his or her rights, even if the person was not a party to the proceeding below"). Also, her statement of the case and her briefs in A10-404 recaption the appeal to name herself as the appellant. Moreover, attorney Fiddler filed appeal A10-406 on the Does' behalf, and MacDonald has not moved to dismiss A10-406 as improper.

Because MacDonald does not represent the Does in her appeal, she lacks standing to challenge the district court's refusal to sanction C.O.'s attorney on the Does' behalf. Nor does she have standing to raise issues on the Does' behalf based on the Minnesota Rules of Professional Conduct, the Minnesota Rules for Admission to the Bar, the Minnesota Rules of the Supreme Court on Lawyer Registration, and the Minnesota Rules on Lawyers Professional Responsibility. Because MacDonald's brief raises issues on behalf of the Does, whom she does not represent in her appeal, and because MacDonald lacks standing to raise those issues, we dismiss those issues from appeal A10-404. *See Hammerlind*, 258 N.W.2d at 592 (dismissing appeals of parties not aggrieved by district court's order when those parties lacked standing to appeal).

Because we grant C.O.'s motion to strike from MacDonald's brief the arguments addressing matters that MacDonald lacks standing to appeal, we also grant C.O.'s motion to strike the associated portions of the statement of facts in MacDonald's brief.[2]

2. Disqualification of the Judge: MacDonald argues that the district court judge should have disqualified himself from ruling on C.O.'s motion for sanctions because the judge allegedly violated the code of judicial conduct. C.O. notes that MacDonald did not raise this issue in the district court. MacDonald's response to C.O.'s motion does not assert that the issue is properly before this court, and we decline to address this issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that,

[2] C.O.'s motion is unclear about whether C.O. is seeking attorney fees against MacDonald. Because the motion is not supported by the documentation required by Minn. R. Civ. App. P. 139.06, subd. 1, we conclude that C.O.'s motion does not seek attorney fees.

generally, appellate courts address only questions that were presented to and considered by the district court).

II.

The district court ordered MacDonald to pay C.O. $16,350 in attorney fees under Minn. Stat. § 549.211 (2008) for the attorney fees C.O. incurred in responding to MacDonald's briefing of the constitutionality of Minn. Stat. § 259.58 in the supreme court. MacDonald challenges this award. C.O. asks this court to affirm the award. "Attorney fees are recoverable if specifically authorized by contract or statute." *Van Vickle v. C. W. Scheurer & Sons, Inc.*, 556 N.W.2d 238, 242 (Minn. App. 1996), *review denied* (Minn. Mar. 18, 1997).

Whether to award appellate attorney fees under Minn. Stat. § 549.211 is discretionary with the appellate court. *Allstate Ins. Co. v. Allen*, 590 N.W.2d 820, 823 (Minn. App. 1999); *see* Minn. Stat. § 549.211, subd. 3, 4(b) (stating that the court "may" award attorney fees for violation of the statute); Minn. Stat. § 645.44, subd. 15 (2008) (stating that "'[m]ay' is permissive"). Under Minn. Stat. § 549.211, subd. 4(a), a party cannot file or present to the court a motion for attorney fees "unless, within 21 days after service of the motion, or another period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." The purpose of this provision is deterrence, to give the allegedly offending party an opportunity to withdraw the allegedly improper papers or otherwise correct the situation before a court orders payment of fees. *See Johnson ex rel. Johnson v. Johnson*, 726 N.W.2d 516, 518-19 (Minn. App. 2007) (stating that the safe-harbor provision of

Minn. R. Civ. P. 11.03(a)(1) is intended to give a party time to withdraw improper papers or otherwise correct the situation and that Minn. Stat. § 549.211, subd. 4(a), has an "almost identical[]" provision).

In the supreme court, MacDonald filed a brief which, for the first time in the proceeding, challenged the constitutionality of Minn. Stat. § 259.58. This forced C.O. to both brief the constitutionality of the statute and move to strike the argument. The supreme court granted C.O.'s motion to strike the constitutional arguments and later decided the appeal. After the appeal was decided, C.O. moved for attorney fees under Minn. Stat. § 549.211, among other authorities.

"A policy of deterrence is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end." *Johnson*, 726 N.W.2d at 519 (quotation omitted).[3] The district court excused C.O.'s failure to satisfy the safe-harbor provision, noting that Minn. R. Civ. App. P. 139.06, which governs attorney-fee requests on appeal, does not provide for hearings on attorney-fee motions and that C.O.'s motion was otherwise timely. These observations, however, do not address the fact that seeking fees under Minn. Stat. § 549.211 after a court makes its decision strips the statute of the deterrent effect it is intended to have.

[3] C.O. argues that *Johnson* is distinguishable from this case because it involved a pro se request for fees made in an unrelated proceeding. C.O. cites no authority setting different standards for pro se and represented parties in fee disputes under Minn. Stat. § 549.211. *Cf. Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001) (stating that "[a]though some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules"). Further, how having the request made in an unrelated proceeding makes *Johnson* distinguishable is unclear; the critical aspect of *Johnson* is that the safe-harbor provision was not satisfied.

C.O. also argues that the failure to satisfy the safe-harbor provision is not fatal to the award because Minn. Stat. § 549.211, subd. 3, allows the court to sanction an attorney. While Minn. Stat. § 549.211, subd. 3, allows a court to sua sponte invoke Minn. Stat. § 549.211, that is not the posture of this case. Here, the supreme court remanded C.O.'s motion for attorney fees. Further, any sua sponte use of Minn. Stat. § 549.211 is "subject to the conditions in this section[.]" Minn. Stat. § 549.21, subd. 3. Thus, a court's sua sponte application of Minn. Stat. § 549.211 would present the same failure-to-satisfy-the-safe-harbor defect that C.O.'s postdecision motion did.

Finally, while C.O. notes that a court has inherent authority to award sanctions, neither the district court nor the supreme court invoked its inherent authority to do so. Because Minn. Stat. § 549.211 is not satisfied here, we reverse the award of attorney fees against MacDonald.[4]

III.

The Does argue that Minn. Stat. § 259.58(c) (2008) sets a standard for modifying the contact agreement that deprives them of their due-process rights to the custody, care, and control of A.D.[5]

[4] C.O. incorrectly asserts that MacDonald defaulted on his motion for fees. MacDonald's response to the motion is in the appellate file for the prior appeal.

[5] If, as here, the state is not a party to an appeal in which a party challenges the constitutionality of a statute, the party challenging the statute must notify the attorney general of the challenge. Minn. R. Civ. App. P. 144. If, under rule 144, a party to an appeal notifies the attorney general of a challenge to a statute's constitutionality, that party is required to include proof of compliance with rule 144 in the appendix to the party's brief. Minn. R. Civ. App. P. 130.01 subd. 1(i). The Does notified the attorney general of their challenge to Minn. Stat. § 259.58 but failed to include proof of

A. Propriety of Addressing Constitutional Arguments

A party challenging the constitutionality of a statute must show "a direct and personal harm resulting from the alleged denial of constitutional rights." *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 392 (Minn. 1980). We reject C.O.'s assertion that the Does failed to assert specific harm arising from application of Minn. Stat. § 259.58. If not for the statute and the parties' agreement under the statute, the Does could terminate C.O.'s access to A.D.

Citing *Gale v. Comm'r of Taxation*, 228 Minn. 345, 352-53, 37 N.W.2d 711, 716 (1949), C.O. argues that because the Does invoked the benefits of Minn. Stat. § 259.58, they are precluded from challenging that statute. But this aspect of *Gale*, to the extent that it is still valid in the area of tax benefits, does not apply elsewhere. *See Wegan v. Village of Lexington*, 309 N.W.2d 273, 277 (Minn. 1981) (stating that parties who took advantage of a statute should not be estopped from attacking the constitutionality of that statute because estopping them would be inconsistent with "holdings permitting plaintiffs to challenge the constitutionality of various statutes while seeking benefits under the same laws").

Noting that the constitutionality of Minn. Stat. § 259.58 was not litigated in the proceeding generating the contact order, C.O. asserts that under *Wilson v. Comm'r of Revenue*, 619 N.W.2d 194, 199 (Minn. 2000), res judicata bars the Does' current constitutional challenges. The ripeness doctrine precludes courts from addressing cases

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compliance with rule 144 in the appendix to their brief. In response to this court's question during oral argument, the Does provided a copy of that notice.

lacking a redressable injury and "bars suits brought before a redressable injury exists." *State by Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 592 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). When the Does and C.O. entered the contact agreement, there had been no attempt to modify or enforce the agreement. Therefore, any argument based on a possible future motion to modify or enforce the agreement would not have been ripe. Similarly, the supreme court had yet to rule that the Does would have the burden of proof on a motion to modify the agreement. Thus, if, when they entered their agreement, the Does argued that the statute was unconstitutional because they should not have the burden of proof in a future modification or enforcement proceeding, that argument also would not have been ripe.

B. Merits of Constitutional Challenge

Under Minn. Stat. § 259.58(c),

> The court shall not modify an agreed order under this section unless it finds that the modification is necessary to serve the best interests of the minor adoptee, and:
>
> (1) the modification is agreed to by the parties to the agreement; or
>
> (2) exceptional circumstances have arisen since the agreed order was entered that justify modification of the order.

"A parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental [due-process] right." *SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007). To survive the strict scrutiny to which a third-party visitation statute is subject, the law "must advance a compelling state interest" and "be narrowly tailored to further that interest." *Id.* at 821.

1. Compelling Interest: It is undisputed that the state "has a compelling interest in promoting relationships among those in recognized family units (for example, the relationship between a child and someone in loco parentis to that child) in order to protect the general welfare of children." *SooHoo*, 731 N.W.2d at 822.

2. Narrowly Tailored: In *Troxel v. Granville*, 530 U.S. 57, 73, 120 S. Ct. 2054, 2064 (2000), the United States Supreme Court declined to set out "the precise scope of the parental due process right in the visitation context." *SooHoo*, however, notes that, to be sufficiently narrowly tailored to survive a constitutional challenge, *Troxel* requires that a third-party visitation statute give "special weight" to a fit custodian's decisions regarding visitation, not create a presumption favoring visitation and that a court must assert more than a mere best-interest analysis in support of a decision to override a fit parent's wishes. *SooHoo*, 731 N.W.2d at 820-21. The Does argue that Minn. Stat. § 259.58(c) violates each of these factors. For purposes of this appeal, we will assume that the *SooHoo*/*Troxel* analysis applies here.[6]

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[6] *Troxel* and *SooHoo* involved courts imposing visitation over the objection of the child's custodians. *See Troxel*, 530 U.S. at 61, 120 S. Ct. at 2057-58 (involving a challenge to visitation awarded under a statute that stated that "[t]he court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances"); *SooHoo*, 731 N.W.2d at 819-25 (involving a challenge to Minn. Stat. § 257C.08, subd. 4, which sets out circumstances under which the district court was required to grant visitation to a nonfoster parent). Under Minn. Stat. § 259.58(a), the district court "shall not" enter a contact order unless the prospective adoptive parents and the child's birth relatives approve the order in writing. Parties can agree to something a court cannot require. *In re LaBelle's Trust*, 302 Minn. 98, 111-12, 223 N.W.2d 400, 410 (1974); *Gatfield v. Gatfield*, 682 N.W.2d 632, 637 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). Thus, what a court can approve in a contact order is broad. The statute also prohibits entry of a contact order unless the court finds that the proposed order would be in the child's best interests. Minn. Stat. § 259.58(a).

a. Special Weight: The Does argue that Minn. Stat. § 259.58 does not give their decisions regarding A.D. the "special weight" required by *SooHoo*/*Troxel*. We disagree. Noting the general principle that a party seeking the benefit of a statute has the burden of proof under that statute, the supreme court ruled that, on remand, the Does, as the moving parties, had the burden to show that they satisfied Minn. Stat. § 259.58(c). *C.O.*, 757 N.W.2d at 352-53. Putting the burden on the party seeking to alter a contact order puts weight on the Does' decision to enter the agreement set out in that order. Therefore, the statute does not fail to put "special weight" on the Does' initial decision.

We also reject any argument by the Does that Minn. Stat. § 259.58 fails to give their subsequent decisions regarding A.D. adequate weight. The supreme court noted that Minn. Stat. § 259.58 does not preclude the parties from making their own arrangements regarding which party has the burden of proof in modification proceedings and what standard of proof applies. *C.O.*, 757 N.W.2d at 352-53 nn.11-12. Thus, the statute did not preclude the Does from setting whatever standards they wanted for addressing their subsequent decisions regarding A.D. While the supreme court left open the question of whether agreements regarding the burden and standard of proof are enforceable, in the related context of whether a stipulated contact order could include a termination provision, it stated that it would not "look behind" an agreement that had

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Cases involving modification of a stipulated order that a court found to be in a child's best interests are distinguishable from those involving a court's imposition of visitation over a custodial parent's objection. Thus, Minn. Stat. § 259.58 is distinguishable from the statutes at issue in *SooHoo* and *Troxel*, and the analysis of those cases does not squarely apply here. *See Skelly Oil Co. v. Comm'r of Taxation*, 269 Minn. 351, 371, 131 N.W.2d 632, 645 (1964) (noting that opinions must be read in light of the issue presented for decision).

been approved by the district court. *C.O.*, 757 N.W.2d at 352 n.10. Applying here that same reluctance to "look behind" an approved agreement, it is clear that what the Does assert is the *statute's* failure to give sufficient weight to their post-contact-order decisions regarding A.D. is not a function of the statute but of *their stipulation*. Accordingly, the statute does not fail to give sufficient weight to the Does' decisions regarding A.D.

b. Presumption: The Does argue that Minn. Stat. § 259.58 improperly creates a presumption in favor of visitation or contact. We disagree. Any presumption created by the statute favors the terms of any agreement reached by the parties. Absent an agreement, there is no presumption. Further, as noted, the statute does not preclude agreements from setting the standards applicable in future proceedings. Thus, even if an agreement exists, whether a presumption favoring visitation or contact exists is not a function of the statute but of the terms of the agreement. Therefore, the Does have not shown that the statute, as opposed to their agreement, improperly foists upon them an improper presumption favoring visitation or contact.

c. Parents' Wishes: The Does argue that Minn. Stat. § 259.58 fails to require the court to use more than a best-interests analysis to override the parents' decisions regarding A.D. That the parties can agree to the standards applicable to future proceedings addresses this concern; because the parties to a contact agreement can agree to the standards applicable to future proceedings, any failure to require a non-best-interests standard is not the result of the statute.

IV.

Under Minn. Stat. § 259.58(c),

> An agreed order entered under this section may be enforced by filing a petition or motion with the family court that includes a certified copy of the order granting the communication, contact, or visitation, but only if the petition or motion is accompanied by an affidavit that the parties have mediated or attempted to mediate any dispute under the agreement or that the parties agree to a proposed modification. The prevailing party may be awarded reasonable attorney's fees and costs. The court shall not modify an agreed order under this section unless it finds that the modification is necessary to serve the best interests of the minor adoptee, and:
>
> (1) the modification is agreed to by the parties to the agreement; or
>
> (2) exceptional circumstances have arisen since the agreed order was entered that justify modification of the order.

Here, there was no agreement to alter the contact order. Further, the district court found "no evidence" to support the Does' assertion of changed circumstances constituting the "exceptional circumstances" justifying modification or termination of contact and that the Does "failed to prove" that C.O. is a danger to A.D. Therefore, the district court held that "the contact agreement is enforceable."

A. Statutory Construction

The Does argue that the district court's findings show that it confused the "exceptional circumstances" standard of Minn. Stat. § 259.58(c) with the change-of-circumstances and endangerment standards used in other family litigation. Appellate courts review de novo a district court's construction of a statute. *Hisgun v. Velasco (In re*

Paternity of J.A.V.), 547 N.W.2d 374, 376 (Minn. 1996). Because Minn. Stat. § 259.58(c) requires that the "exceptional circumstances" justifying modification of a contact order "have arisen since the agreed order was entered," changed circumstances are necessary for a nonstipulated modification of a contact order, and the finding that any changes in circumstances here did not amount to "exceptional circumstances" is consistent with the statute. Similarly, because endangerment does not serve a child's best interests, the finding of no "danger or threat to the child" addresses the statutory requirement that the district court not modify a contact order "unless it finds that the modification is necessary to serve the best interests of the [child]." The Does have not shown that the district court failed to apply the "exceptional circumstances" standard of Minn. Stat. § 259.58(c).

B. Findings of Fact

The Does challenge the district court's finding that they failed to show the existence of "exceptional circumstances." Findings of fact are not set aside unless clearly erroneous. Minn. R. Civ. P. 52.01. A finding of fact is clearly erroneous if a reviewing court "is left with the definite and firm conviction that a mistake has been made." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). Appellate courts defer to district court credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Minnesota caselaw has yet to address the term "exceptional circumstances" in the context of contact orders. *C.O.*, 757 N.W.2d at 352 n.10. Generally, "exceptional" means "out of the ordinary;

uncommon; rare; superior <an exceptional achievement>." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 336 (2d ed. 1995).

1. Witness Testimony: Without citing the substantial record in this case,[7] the Does assert that C.O. is attempting to undermine the Does' authority as A.D.'s parents, that he refers to A.D. as his daughter, and that he has threatened the Does. It is unclear how much of C.O.'s alleged undermining of the Does' parental authority is a malicious attempt to subvert A.D.'s adoption and how much is a result of the acrimony of the proceedings. The latter can be partially discounted. *Cf. Berthiaume v. Berthiaume*, 368 N.W.2d 328, 332-33 (Minn. App. 1985) (affirming award of joint custody to parties who were uncooperative during dissolution but deemed able to cooperate in reaching major parenting decisions). Also, because the contact order allows C.O. to be referred to as "Papa Carlos," it is not surprising that he refers to A.D. as his "daughter." While threatening behavior by C.O. could constitute exceptional circumstances, such conduct can be addressed, as it already has been in this case at least once, by an order for protection or a harassment restraining order.

The Does assert the existence of exceptional circumstances based on their own testimony about what C.O.'s former girlfriend told them, the testimony of A.D.'s birth mother that C.O. said he would kidnap A.D. and leave the country, and C.O.'s alleged

[7] The rules and caselaw each require parties to cite the record. *See* Minn. R. Civ. App. P. 128.02, subd. 1(c) ("Each statement of a material fact shall be accompanied by a reference to the record."); *Hecker v. Hecker*, 543 N.W.2d 678, 681 n.2 (Minn. App. 1996) (stating "material assertions of fact in a brief properly are to be supported by a cite to the record" and stating such cites are "particularly important" when "the record is extensive"), *aff'd*, 568 N.W.2d 705 (Minn. 1997).

admission that he molested a nine-year-old girl. Because the district court found these assertions to be not credible and because appellate courts defer to district court credibility determinations, we reject this argument. Similarly, to the extent that Jackie Doe asserted that C.O. hit his former wife, the district court did not consider that allegation, even if true, to create exceptional circumstances. On this record, we decline to reverse the district court's refusal to find exceptional circumstances, especially when it is not clear whether the alleged events occurred.

2. Adoption of Proposed Findings: The Does challenge what they assert is the district court's "verbatim" adoption of C.O.'s proposed order. Comparing the district court's April 22, 2009 order with C.O.'s proposed order shows that while the district court substantively adopted much of what C.O. proposed, it did not adopt the proposed order verbatim. Therefore, we decline to address this argument further.

3. Best-Interests Findings: Because the Does limited C.O.'s contact with A.D., the district court awarded C.O. (as "compensatory time") visitation beyond that originally required under the contact order. The Does argue that the district court erred by doing so without making findings on A.D.'s best interests. However, Minn. Stat. § 259.58(c) does not expressly require findings on the best-interests factors in Minn. Stat. § 518.17 (2008); it requires only a finding that any modification is necessary to serve the child's best interests.

While the district court did not explicitly find that altering the contact order is in A.D.'s best interests, its October 22, 2009 order indicates that it considered the child's best interests. It states:

> I have now twice denied [the Does'] Motions to stay reinitiation of contact between [A.D.] and [C.O.]. But, I cannot overlook actual or potential emotional harm to this little girl to satisfy my belief that sooner or later, contact will occur and that it is in [A.D.'s] best interests that it be sooner rather than later. From my perspective, the longer the reconciliation is delayed the more difficult and potentially harmful it may be to the child.

This is a hotly contested case involving a record with conflicting evidence. The district court's orders include five findings that the Does or their witnesses are not credible, a finding that Jackie Doe made a number of "petty allegations" about C.O.'s conduct that, "even if" true, would not amount to "exceptional circumstances", and a finding that the Does "failed to present the Court with any legally or factually cognizable basis why the Court should stay enforcement of its Order." These findings indicate that a remand would not alter the result already reached. Therefore, we will not remand for findings that, while they might be helpful, are not expressly required by the statute. *See Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (declining to remand and affirming the district court in a child-custody case when "from reading the files, the record, and the court's findings, on remand the [district] court would undoubtedly make findings that comport with the statutory language" and reach the same result).

V.

Minn. Stat. § 259.59(c) states:

> An agreed order entered under this section may be enforced by filing a petition or motion with the family court that includes a certified copy of the order granting the communication, contact, or visitation, but only if the petition or motion is accompanied by an affidavit that the parties have mediated or attempted to mediate any dispute under the

> agreement or that the parties agree to a proposed modification. The prevailing party may be awarded reasonable attorney's fees and costs.

The Does, who sought to, among other things, enforce the termination-of-contact provision in the contact order entered on the parties' agreement, challenge the award to C.O. of $95,942.65 in attorney fees under this provision.

A. The Statute

The Does argue that courts must read the provision allowing fees to a "prevailing party" in light of the preceding sentence allowing parties to seek enforcement of a contact order, and, therefore, that the "statute awards attorneys fees to prevailing parties who bring actions to *enforce* a contact agreement, not defend their rights therein." The Does then assert that because C.O. did not appeal the 2007 denial of his motion to enforce his rights, he did not have an enforcement motion pending and, therefore, the district court could not award fees to him.

Appellate review of a district court's construction of a statute is de novo. *J.A.V.*, 547 N.W.2d at 376. The Does' argument recasts the second sentence of the statute from "[t]he prevailing party may be awarded reasonable attorney's fees and costs" – a sentence that allows whoever prevails in an enforcement dispute to be awarded fees – to "if the moving party prevails, the moving party may be awarded attorney fees." This recasting of the second sentence is inconsistent with its plain language, which does not require that a party be a movant to receive fees. The argument also conflicts with the rule that "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of

pursuing the spirit." Minn. Stat. § 645.16 (2008). The Does have not shown that, in enforcement proceedings, the language of Minn. Stat. § 259.58(c) allows fees to be awarded only to moving parties who prevail.

In *Sigurdson v. Isanti County*, 386 N.W.2d 715, 722-23 (Minn. 1986), the supreme court construed the then-existing attorney-fee provision in the Minnesota Human Rights Act, Minn. Stat. § 363.14, subd. 3 (1984). That provision stated: "In any action or proceeding brought pursuant to this section, the court, in its discretion, may allow the prevailing party, other than the department, a reasonable attorney's fee as part of the costs." Based on *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694 (1978), which considered a provision of the federal Civil Rights Act that the Minnesota Supreme Court stated was "virtually identical to section 363.14, subd. 3," the Minnesota Supreme Court adopted the U.S. Supreme Court's reading of the federal statute and limited the circumstances under which fees are available to defendants:

> Policy reasons support adoption of the federal standard for awarding attorney fees in cases brought under the Minnesota Human Rights Act. An obvious reason for enactment of subdivision 3 of section 363.14 was to encourage victims of discrimination to bring suit, particularly where the relief sought is not a large money judgment, and to make legal counsel available in these cases. Making awards of attorney fees equally available to prevailing defendants would likely produce the reverse of the intended effect. Victims with legitimate cases would be discouraged from filing suit, fearing that if they did not prevail, they might be liable for substantial attorney fees incurred by a defendant. Moreover, the typically substantial difference in resources between plaintiffs and defendants in employment discrimination cases supports the conclusion that awards of attorney fees should not be available to prevailing defendants on the same basis as to prevailing plaintiffs. We hold,

> therefore, that a [district] court may, in its discretion, award attorney fees to a prevailing defendant, pursuant to section 363.14, subd. 3, only upon a finding that the employee's action was frivolous, unreasonable, or without foundation, or was brought in bad faith.

Sigurdson, 386 N.W.2d at 722-23. The Does argue that because similar policy concerns are present in cases involving Minn. Stat. § 259.58, Minn. Stat. § 259.58(c) should be construed to allow fees only to prevailing parties who sought to enforce their rights. Therefore, the Does conclude, fees cannot be awarded to C.O. because he did not prevail on his motion to enforce his rights and he was not the plaintiff in the Does' motion to enforce their rights.

There is no federal analogue to Minn. Stat. § 259.58(c) that has been construed by the United States Supreme Court requiring or suggesting that this court read the fee provision as the Does propose to read it. Furthermore, it is far from clear that the policy of encouraging litigation in certain federal civil-rights contexts necessarily applies to the custody, visitation, and adoption contexts. The general idea in family and related areas of the law is to avoid litigation and resolve cases quickly. *See, e.g.*, Minn. Stat. § 259.58(c) (requiring proof of attempted mediation as a prerequisite to seeking enforcement in court).

B. Findings

The Does argue that the district court failed to make adequate findings to support its $95,942.65 fee award to C.O. As the district court noted, Minn. Stat. § 259.58(c) gives no guidance on fee awards, other than a requirement that the award be "reasonable." The supreme court has stated:

> Where, as authorized by statute, counsel fees are to be assessed against the adverse party in a proceeding before the court, what constitutes the reasonable value of the legal services is a question of fact to be determined by the evidence submitted, the facts disclosed by the record of the proceedings, and the court's own knowledge of the case. *Absent any statutory limitations, allowances should be made with due regard for all relevant circumstances, including the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client.*

State by Head v. Paulson, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971) (emphasis added) (citations omitted). That *Paulson* was a condemnation case does not limit application of its fee factors to that context. *See Collins v. Minn. Sch. of Bus., Inc.*, 636 N.W.2d 816, 821 (Minn. App. 2001) (reversing a denial of fees under a private-attorney-general statute and remanding, stating that "the district court should consider the factors set forth in [*Paulson*]" and a case addressing the private-attorney-general statute), *aff'd*, 655 N.W.2d 320 (Minn. 2003).

The district court made findings regarding its fee award, including that the legislature intended litigants to "tread lightly" when pursuing modification or enforcement of contact orders, that C.O. spent "over $100,000 trying to enforce the contact agreement," and that "there was no basis for [the Does] to interfere with [C.O.'s] contractual access to the child." The district court further found that the Does took a "calculated risk" when they deprived C.O. of access to A.D. and that the Does "should bear the financial burden thrust upon [C.O.]" But these findings do not address most of

the *Paulson* factors, and, given their factual nature, this court cannot address the *Paulson* factors in the first instance. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts do not find facts); *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966) (same). Therefore, we remand for findings on the *Paulson* factors regarding the fees awarded to C.O. On remand, the district court shall make adequate findings of fact to support whatever amount of fees it concludes is reasonable to award.

VI.

The district court appointed the parties' former mediator as a parenting-time expediter. The Does argue that parenting-time expediters are not available in adoption disputes. "[T]he court may appoint a parenting time expeditor to resolve parenting time disputes that occur under a parenting time order while a matter is pending under [chapter 518], chapter 257 or 518D, or after a decree is entered." Minn. Stat. § 518.1751, subd. 1 (2008). This is not a dispute under a parenting-time order; C.O. is not A.D.'s legal parent and has not been awarded parenting time. Thus, the district court's authority to appoint a parenting-time expediter to resolve a parenting-time dispute does not support the appointment of a parenting-time expediter here.

The Does also argue that the district court erred in appointing the parties' former mediator as the expeditor. Because we conclude that a parenting-time expediter is not available in this case, we need not address this argument.

Affirmed in part, reversed in part, and remanded; motion denied; motion granted.