STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1204

In re the Marriage of:
Jeffrey Melvin Oien, petitioner,
Appellant,

vs.

Kathleen Susan Oien,
Respondent,

County of Carlton, intervenor,
Respondent.

Filed March 8, 2011
Reversed and remanded
Bjorkman, Judge

Carlton County District Court
File No. 09-FA-07-1649

Mia E. Thibodeau, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota (for appellant)

Kathleen Suzanne Johnson, Barnum, Minnesota (pro se respondent)

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Considered and decided by Stoneburner, Presiding Judge; Wright, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant father challenges the district court's parenting-time order, arguing that the district court abused its discretion by sua sponte restricting parenting time without holding an evidentiary hearing and making necessary factual findings, and that the change in parenting time effectively eliminates joint physical custody. We reverse and remand.

FACTS

Appellant Jeffrey M. Oien and respondent Kathleen S. Johnson (fka Kathleen S. Oien) married in March 1996 and have two minor children. On July 29, 2008, the marriage was dissolved pursuant to a judgment and decree. The parties agreed to "share joint legal and physical custody of their two children" and "negotiate between themselves and work out a mutual agreeable parenting schedule," noting that "the ultimate goal is 50/50 with the children." The judgment and decree incorporated this agreement but did not include a detailed parenting-time schedule. The district court ordered father and mother to

> work together to develop a mutually agreeable parenting schedule in which the children spend approximately 50% of their time with each parent. If they are unable to reach agreement on the parenting schedule, this issue shall be resubmitted to the Court for the court to set a schedule whereby the children spend 50% of their time with each parent.

The parties could not agree on a parenting-time schedule. In September 2009, father filed the first of several motions seeking to implement a 50-50 parenting-time

schedule pursuant to the judgment. On November 13, the district court established a temporary parenting-time schedule to serve until a review hearing scheduled for January 8, 2010, and directed the parties to submit proposed parenting-time schedules for 2010.

At the January 8 review hearing, the parties presented their proposed parenting-time schedules. On January 28, the district court issued an order establishing a parenting-time schedule for 2010. This order provided father parenting time every other weekend from Friday until Sunday and every Wednesday from after school until 8:00 p.m. By its terms, the schedule was temporary, and the district court stated that it would revisit the schedule after an April 8 review hearing.

Prior to April 8, father filed another motion to enforce a 50-50 parenting-time schedule as set out in the dissolution judgment. At the review hearing, father argued that his parenting time should increase to closer to 50%, contending that mother "is not encouraging" the children's relationship with father. Mother argued that "50/50 parenting time will not work" with the family. The guardian ad litem attended the hearing and advised the district court that "this process has been very stressful" for the children, and that "a resolution to the parenting time schedule . . . is in [the children's] best interest."

On May 17, the district court denied father's motion and ruled that the January 28 plan is the "permanent parenting time schedule." The district court awarded father an additional two non-consecutive weeks of summer vacation time with the children. The district court made no further findings of fact or conclusions of law related to parenting time in its order or on the record. This appeal follows.

D E C I S I O N

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). "A district court abuses [its] discretion [regarding parenting time] by making findings unsupported by the evidence or improperly applying the law." *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010) (citing *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985)). Findings of fact on which a parenting-time decision is based will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978). But "[d]etermining the legal standard applicable to a change in parenting time is a question of law and is subject to de novo review." *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009).

I. The district court abused its discretion by restricting parenting time without conducting an evidentiary hearing.

Father argues that the district court abused its discretion by restricting his parenting time without conducting an evidentiary hearing and without making required findings.[1] Parenting-time issues are governed by Minn. Stat. § 518.175 (2010). A district court "shall modify" an order granting or denying parenting time "[i]f modification would serve the best interests of the child" and "would not change the child's primary residence." Minn. Stat. § 518.175, subd. 5. When modification results in

[1] As an initial matter, father argues that the district court improperly acted on its own motion in modifying parenting time. We disagree. Father filed motions to implement a parenting-time schedule in accordance with the judgment and decree, and both parties understood that the primary purpose of the April 8 review hearing was to address the parenting-time schedule. The May 17 order addressed the issues from the hearing.

a substantial change in parenting time, the district court must conduct an evidentiary hearing. *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002) (remanding for an evidentiary hearing where the modification reduced parenting time by one-half of that in the prior order). Where the modification restricts parenting time, the district court is required to make particularized factual findings. *See* Minn. Stat. § 518.175, subd. 5.

To determine whether a change in parenting time is a restriction, we must first "identify the order that establishes the baseline parenting-time schedule." *Dahl*, 765 N.W.2d at 123. The baseline is generally found in "the last permanent and final order setting parenting time." *Id.* Mother argues that the district court never established a baseline parenting-time schedule and that "every other weekend" should serve as the baseline, having been the regular schedule since the January 28 temporary order. Father argues that the parties' baseline is the 50-50 arrangement reflected in the dissolution judgment because that order is "the last permanent and final order" addressing parenting time. We agree. While we note the lack of detail in the judgment,[2] it remains the last permanent and final order addressing parenting time prior to the May 17 order. The November 13 and January 28 orders were decidedly temporary and cannot serve as a baseline in this context. Accordingly, despite the reality that a 50-50 arrangement never materialized, the district court's 50-50 parenting time from the judgment and decree is the baseline from which any change should be measured.

[2] Orders for parenting time generally include, "to the extent practicable . . . a specific schedule for parenting time, including the frequency and duration of visitation and visitation during holidays and vacations, unless parenting time is restricted, denied, or reserved." Minn. Stat. § 518.175, subd. 1(c).

We next consider whether the change from the baseline "is significant enough to constitute a restriction" of parenting time. *Id*. A change in parenting time that reduces the 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). A restriction occurs when a change to parenting time is "substantial." *Matson*, 638 N.W.2d at 468. 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." *Id*.

The district court did not make findings of fact or otherwise state its reasons for reducing father's parenting time. Father argues that the modification constitutes a restriction because the judgment and decree contemplated a 50-50 arrangement and the May 17 order reduced his parenting time to "less than 25%." Mother does not dispute the magnitude of the stated reduction, but argues it is not determinative because father's parenting time, in reality, "has never exceeded 25%." But whether the parties realized the baseline parenting-time goals is not the issue. *See Dahl*, 765 N.W.2d at 123-24 (analyzing the change in parenting-time by referring directly to the "order that establishes the baseline" and concluding that a "large disparity" in parenting time between orders is "substantial"). On this record, we conclude that the reduction of father's parenting time by one-half of the original baseline percentage was substantial and constitutes a restriction of parenting time, which requires an evidentiary hearing.

II. The district court abused its discretion by failing to make required findings of fact.

A district 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." Minn. Stat. § 518.175, subd. 5. Moreover, if a restriction reduces parenting time to less than 25%, the district court must also make specific findings addressing the rebuttable presumption that each parent is entitled to 25% parenting time. *See id.*, subd. 1(e) ("In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child."); *see also Hagen*, 783 N.W.2d at 218 (failure to consider the presumption "is error"); *Dahl*, 765 N.W.2d at 124 (remanding modification where the district court awarded less than 25% parenting time without findings addressing the presumption).

The record demonstrates that the district court did not conduct an evidentiary hearing or make the required findings for restricting parenting time under Minn. Stat. § 518.175, subd. 5. And the district court did not address the rebuttable presumption. Accordingly, we reverse and remand for an evidentiary hearing and appropriate findings. We note that, in addressing these issues on remand, the district court continues to have "broad discretion" and "flexibility" in determining appropriate parenting time. *Hagen*, 783 N.W.2d at 218-19. Because we reverse on the modification issue, we do not address

father's argument that the parenting-time modification effectively deprived him of joint physical custody of the children.

Reversed and remanded.