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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0098**

In re the Marriage of:  
Chastity Lynn Lund,  
f/k/a Chastity Lynn Casey, petitioner,  
Respondent,

vs.

Thomas William Casey,  
Appellant.

**Filed February 4, 2013  
Affirmed  
Peterson, Judge**

Itasca County District Court  
File No. 31-FA-07-1454

Sara-Beth Swanson, Grand Rapids, Minnesota (for respondent)

Ellen Elizabeth Tholen, Grand Rapids, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and  
Cleary, Judge.

**UNPUBLISHED OPINION**

**PETERSON**, Judge

In this custody and parenting-time dispute, appellant-father argues that the district  
court (1) erred by denying his motion to modify custody without holding an evidentiary

hearing, and (2) abused its discretion by refusing to modify custody and by reducing his parenting time. We affirm.

## **FACTS**

The marriage of appellant-father Thomas William Casey and respondent-mother Chastity Lynn Lund, f/k/a Chastity Lynn Casey, was dissolved on January 10, 2008. The parties have one child, HLC, born December 27, 2004. At the time of the dissolution, the parties stipulated to joint legal and joint physical custody of HLC, and the child resided with each parent during alternating weeks. The dissolution judgment states:

The parties recognize and agree that the schedule will have to be readjusted in the future due to school or other activities. However, any new schedule shall maintain equal (50:50) parenting time for each parent. The parties stipulate that this agreement shall be conclusively presumed to be in the best interest of the child.

In August 2010, HLC was about to start kindergarten. Recognizing that it would be difficult to maintain a 50/50 split of parenting time when the parties lived in different school districts 42 miles apart, the parties made cross-motions, each seeking to designate that party's home as the child's primary residence for school-attendance purposes. Both parties were represented by counsel, and neither requested an evidentiary hearing. The matter was submitted to the district court by affidavit, and the parties' attorneys argued their respective positions.

In a September 14, 2010 order, the district court designated mother's home as the child's primary residence. The court found that it was in HLC's best interests to live with mother. The court acknowledged that the best-interests factors under Minn. Stat.

§ 518.17 (2010) would “reflect equally favorably upon both parents,” but found that a “crucial distinction” that “weigh[ed] heavily in favor of awarding Mother primary custody” was “Mother’s status as a stay-at-home mom.” Having decided that the child would primarily live with mother during the school year, the court acknowledged that a 50/50 split in parenting time was “no longer possible given the circumstances.” It noted that “it is the Court’s intent that the parenting time shall be as close to equal as reasonably possible.” The court formulated a new schedule in which, during the school year, the child primarily lived with mother and lived with father three out of four weekends, Thursday through Sunday.<sup>1</sup> During the summer, the child primarily lived with father and lived with mother every other weekend, Friday through Sunday, and three entire weeks during the summer. This schedule resulted in an approximate 55/45 split of parenting time. Neither party appealed from this order.

In June and July 2011, the parties again filed cross-motions dealing with several issues, including parenting-time exchanges, harassment allegations, medical-dental issues, transportation costs, and attorney fees. Father moved the court to designate his home as the primary residence for school-attendance purposes and to grant mother the same parenting time that he had under the 2010 order, or to adjust the parenting-time schedule to ensure that he would continue to have nearly 50% of the parenting time. The district court heard testimony related to the harassment allegation, but for the other

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<sup>1</sup> The court noted that these weekends were based on the child having a four-day school week, and if the child were to have a five-day school week, father’s weekends would begin on Friday afternoons.

issues, including father's motion to modify custody and parenting time, the court relied on affidavits, the record, and the arguments of counsel. Because of the high incidence of conflict between the parties, the district court, in an August 13, 2011 order, established drop-off locations and limited telephone contact. The district court also denied father's motion to designate his home as the child's primary residence or, in the alternative, to grant father additional parenting time to compensate for the change in the child's school schedule.<sup>2</sup> The district court reasoned that father "failed to show a change in circumstances since the prior order, he has failed to show that retaining the present parenting time arrangement is harmful to [HLC], and he has failed to show that [HLC's] best interests would be served by the change."

Father moved for amended findings and a new trial or evidentiary hearing. In a November 21, 2011 order, the district court denied father's motion for amended findings because father failed to identify the alleged defects in the challenged findings and explain why the challenged findings were defective. Father's request for a new trial or evidentiary hearing was based on his understanding that the September 2010 order was a temporary modification of parenting time. The district court stated that the September 2010 order was a "permanent modification of parenting time that was based upon changed circumstances." The court further stated that it "considered and rejected

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<sup>2</sup> When HLC started first grade in the fall of 2011, her school week increased from four days to five days. Father's parenting time was necessarily reduced because his weekends changed from three days to two days, resulting in an overall reduction in father's parenting time to 38%.

Father's request for additional parenting time with [HLC] during the school year as unnecessarily disruptive and not in [HLC's] best interests."

Father appeals from the September 14, 2010 order, the August 13, 2011 order, and the November 21, 2011 order.

## **D E C I S I O N**

### **I.**

Father argues that he should be permitted to appeal the district court's September 14, 2010 order because he understood it to be a temporary order. But nothing in that order indicates that the district court considered the designation of mother's residence as HLC's primary residence for school-attendance purposes to be a temporary order.

A custody determination is a court decision that provides for the custody of a child, including parenting time. Minn. Stat. § 518.003, subd. 3(g) (2012). An order that "grants or denies modification of custody, [parenting time], maintenance, or child support provisions in an existing judgment or decree" is an appealable order. Minn. R. Civ. App. P. 103.03(h). The September 2010 order granted modification of custody by designating mother's home as the child's primary residence and changing the parties' parenting time. Father could have appealed the September 2010 order.

An appeal from an order must be taken "within 60 days after service by any party of written notice of its filing." Minn. R. Civ. App. P. 104.01, subd. 1. Mother's counsel served father's counsel with a notice of the filing of the order on September 14, 2010. Father's counsel served mother's counsel with a similar notice on September 24, 2010. No appeal was taken from the order after the notices of filing were served, and father's

right to appeal the September 14, 2010 order expired in 2010. *See Culver v. Culver*, 771 N.W.2d 547, 549 (Minn. App. 2009) (requiring dismissal of appeal from modification of child support order as untimely when served more than 60 days after party received notice of filing of order).

## II.

Father argues that, when considering his 2011 motion to designate his home as the child's primary residence or, in the alternative, to grant him additional parenting time to compensate for the change in the child's school schedule, the district court incorrectly required him to show endangerment to obtain a change in the September 2010 order. We disagree.

Father's motion to designate his home as the child's primary residence appears to be a motion to modify custody. *See* Minn. Stat. § 518.003, subd. 3(c) (2012) (stating that "[p]hysical custody and residence" means the routine daily care and control and the residence of the child"). Alternatively, if, as the district court observed, father's motion to designate his home and the child's primary residence was a motion "for substantial modification of parenting time," caselaw required the district court to apply the standard for modifying custody. *See, e.g., Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001) (concluding that custody-modification standards govern substantial modifications of visitation rights), *review denied* (Minn. Oct. 24, 2001); *Lutzi v. Lutzi*, 485 N.W.2d 311, 316 (Minn. App. 1992) (concluding that the standard for modifying custody governs substantial modifications of visitation rights). In either case, the standard for modifying

custody set out under Minn. Stat. § 518.18 (2012) applies to father’s motion, and the district court did not err by applying that standard.

Under Minn. Stat. § 518.18,

the court shall not modify a prior custody order . . . unless it finds, upon the basis of facts . . . that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custody arrangement . . . that was established by the prior order unless:

...

(iv) *the child’s present environment endangers the child’s physical or emotional health or impairs the child’s emotional development* and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

(*Id.* (d)(iv)<sup>3</sup> (emphasis added).

Under the plain language of the statute, father was required to show endangerment to obtain a change in the custody arrangement established in the September 2010 order. The district court denied father’s motion “because [father] has failed to show a change in circumstances since the prior order, [father] has failed to show that retaining the present parenting time arrangement is harmful to [HLC], and [father] has failed to show that [HLC’s] best interests would be served by a change.”

Father argues that if he was required to show endangerment, he was entitled to an evidentiary hearing because he established a prima facie case of endangerment. The

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<sup>3</sup> Father does not claim that a modification of custody should have been permitted under Minn. Stat. § 518.18(d)(i)-(iii) or (v).

general procedure governing a modification request is well-defined. The moving party has the burden of establishing the basis for custody modification. *Goldman v. Greenwood*, 748 N.W.2d 279, 286 (Minn. 2008). The party seeking modification of a custody order must submit affidavits that establish a prima facie case for modification. *Szarszynski v. Szarszynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). When considering those affidavits to determine whether the moving party made a prima facie case to modify custody, the district court does three things:

First, the district court must accept the facts in the moving party's affidavits as true, disregard the contrary allegations in the nonmoving party's affidavits, and consider the allegations in the nonmoving party's affidavits only to the extent they explain or contextualize the allegations contained in the moving party's affidavits. Second, the district court determines, in its discretion, whether the moving party has made a prima facie showing for the modification or restriction. Finally, whether a party makes a prima facie case to modify custody is dispositive of whether an evidentiary hearing will occur on the motion.

*Boland v. Murtha*, 800 N.W.2d 179, 183 (Minn. App. 2011) (citations, footnote, and quotation marks omitted).

This court reviews the district court's findings for clear error. *Goldman*, 748 N.W.2d at 286. This court (1) reviews de novo whether the district court accepted the moving party's allegations as true, (2) reviews for an abuse of discretion the district court's decision about whether the allegations present a prima facie case for modification, and (3) reviews de novo "whether the district court properly determined the need for an evidentiary hearing." *Boland*, 800 N.W.2d at 185.

Citing 27 pages in the appendix to his appellate brief, father argues that the evidence that he presented to the district court in support of his June 2011 motion proved eight circumstances that established a prima facie case of endangerment. Father argues that “[t]he evidence reflected interference with Father’s parent-child relationship, neglect of necessary dental care causing pain and interfering with [HLC’s] ability to even eat.” The district court concluded that the evidence did not support father’s allegation that mother endangered the child’s health by not providing adequate dental or medical care.

Based on our review of the record, we conclude that the district court properly accepted father’s allegations as true and used mother’s affidavits to provide context for father’s allegations. The evidence that father cites indicates that there has been acrimony between the parties that has inhibited their ability to communicate, but it does not indicate that the child’s present environment endangers her physical or emotional health. With respect to dental and medical care, the evidence shows that the parties disagreed about care and that the child has had dental problems. But the evidence also shows that the child visited a dentist at least five times during the first half of 2011, which indicates that the dental problems were not being neglected. The district court’s findings are not clearly erroneous, and the district court’s findings support its conclusion that father did not establish a prima facie case for custody modification. Therefore, the district court did not abuse its discretion in ruling that father failed to make a prima facie case to declare his residence to be the child’s primary residence and did not err by determining that no evidentiary hearing was required.

### III.

At the time of the dissolution, the parties agreed that the child's schedule would be readjusted due to school or other activities, but they also agreed that they would maintain equal parenting time for each parent. Father argues that the parties' parenting time could be closer to equal if the district court had granted him parenting time on the days that HLC does not have school immediately before or after a weekend and that the district court erred by reducing his parenting time below 50%.

The district court has broad discretion in deciding parenting-time issues 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 by making findings unsupported by the evidence or improperly applying the law." *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010). A district court's findings of fact, on which a parenting-time decision is based, will be upheld unless they are clearly erroneous. *Id.*

"If modification would serve the best interests of the child, the court shall modify . . . an order granting or denying parenting time, if the modification would not change the child's primary residence." Minn. Stat. § 518.175, subd. 5 (2010). The court "may not restrict parenting time unless it finds" that "parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development" or "the parent has chronically and unreasonably failed to comply with court-ordered parenting time." *Id.* "A modification of [parenting time] that results in a reduction of total

[parenting time], is not necessarily a restriction of [parenting time].” *Anderson v. Archer*, 510 N.W.2d 1, 4 (Minn. App. 1993) (quotation omitted).

We review de novo whether a change in parenting time amounts to a restriction in parenting time. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). We consider not only the amount of reduction but also the reason for the reduction. *Id.* at 124. The district court explained:

Before [HLC] started kindergarten, each party had [HLC] about 50% of the time. During the 2010-2011 school year Father still had [HLC] around 45% of the time due to [HLC’s] 4-day a week school schedule and Father having [HLC] for most of the time during the summer. When [HLC] started first grade in the fall of 2011, Father’s parenting time was necessarily impacted because [HLC] was attending school 5 days per week and Father’s weekends were reduced from 3 days to 2 days. No other aspects of the parenting time schedule changed. Now, Father has [HLC] about 38% of the time.

Father characterizes his present parenting time as a significant reduction, but any reduction in his parenting time is due to the distance between the parties and [HLC] attending school.

Despite Mother being the primary custodian of [HLC] during the school year, Father still retains a significant amount of parenting time with her. Father gets a significant majority of weekends during the school year and [HLC] resides with him primarily during the summer.

Finally, this parenting-time reduction, by itself, will not impair father and child’s relationship. . . . Father will still be spending most weekends with [HLC] throughout the year, he will have [HLC] for a significant majority of the summer, he will have alternating holidays with [HLC], he can attend [HLC’s] sporting events and other special activities, he can be involved in [HLC’s] school activities and conferences, and he can have relatively frequent telephone contact with [HLC].

The reduction in father's parenting time was based on practical reasons: the child's school attendance and the fact that the parties live in different school districts 42 miles apart. In light of these reasons for the reduction in father's parenting time, we conclude that the change in parenting time is not a restriction. The district court did not abuse its discretion by not granting father additional parenting-time on the Fridays and Mondays when HLC does not have school.

**Affirmed.**