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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-822**

In re the Matter of:

Trygve Jon Norvold,  
Respondent,

vs.

Karen E. LaVine,  
Appellant.

**Filed May 29, 2012  
Affirmed  
Schellhas, Judge**

Hennepin County District Court  
File No. 27-PA-FA-000045549

Trygve Jon Norvold, Northfield, Minnesota (pro se respondent)

Michelle L. MacDonald, Athena V. Hollins, MacDonald Law Firm, LLC, West St. Paul,  
Minnesota; and

Paul E.D. Darsow, Arthur Chapman Kettering Smetak & Pikala P.A., Minneapolis,  
Minnesota (for appellant)

Nancy G. Moehle, Minneapolis, Minnesota (for guardian ad litem Jacquelyn Cardinal)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and  
Randall, Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

SCHELLHAS, Judge

In this child-custody-modification dispute in which respondent-father was awarded sole legal and physical custody of a child, appellant-mother argues that the district court erred because (1) it relied on the custody-modification standard in Minn. Stat. § 518.18(d) (2010) to issue an ex parte order temporarily granting father sole legal and physical custody of child; (2) it relied on evidence of endangerment that did not pertain to the relevant period of time; (3) it relied on section 518.18(d), which mother alleges is unconstitutional as applied; (4) section 518.18(d) requires the noncustodial parent seeking modification to prove its elements by clear-and-convincing evidence; and (5) it abused its discretion by not enforcing appellant's child-support order and not awarding attorney fees to appellant.

We decline to address the ex parte order because it is unappealable. We decline to address the constitutionality of section 518.18(d) because appellant neither raised the issue in the district court nor gave the attorney general notice that she was challenging the constitutionality of a statute, as required under Minn. R. Civ. App. P. 144. We otherwise affirm.

### FACTS

Respondent Trygve Norvold (father) obtained a two-year restraining order against appellant Karen LaVine (mother) while she was pregnant. The restraining order remained in effect when mother gave birth to W.D.L. on May 2, 2002. Upon W.D.L.'s birth, mother was the sole legal and physical custodian of W.D.L. under Minn. Stat. § 257.541,

subd. 1 (2000) (“The biological mother of a child born to a mother who was not married to the child’s father when the child was born and was not married to the child’s father when the child was conceived has sole custody of the child until paternity has been established . . . or until custody is determined in a separate proceeding . . .”).

In September 2002, father commenced a paternity action, and in 2003, the district court adjudicated father’s parentage of W.D.L. and ordered a custody and visitation evaluation.

In January 2004, the district court granted mother temporary sole legal and physical custody of W.D.L., subject to father’s right to unsupervised parenting time. Later in 2004, the parties stipulated to dismiss the custody and parenting-time action on the basis that mother would retain sole legal and physical custody of W.D.L. In 2006 and 2007, father moved the district court twice for parenting-time assistance, seeking to modify his parenting time, alleging mother’s interference with his parenting time, and seeking the court’s enforcement of his court-ordered parenting time. In a January 7, 2008 order, the court stated that mother’s “repeated denial of [father’s] parenting time is flagrant, intentional, and unsupported by law or fact,” and ordered a parenting-time schedule for father.

In September 2009, citing a March 18, 2003 order as the then-current child-custody order or judgment, father moved the district court for custody modification,

seeking sole legal and physical custody of W.D.L.<sup>1</sup> He also sought an ex parte order and/or accelerated hearing, supporting his request with an affidavit and providing the court a proposed ex parte order and a proposed order for an accelerated hearing. Noting that mother was a flight risk and had a history of abandoning the child and failing to comply with court orders, the court granted father's request for ex parte relief and granted father temporary sole legal and physical custody of the child. In a subsequent order issued on October 23, 2009, after a hearing on father's custody-modification motion, the court explained that it granted father ex parte relief because of evidence of bruises on W.D.L., evidence that mother "refused to engage the court-ordered Parenting Time Expeditor," and an educational dispute. The court found that father made a sufficient prima facie showing under Minn. Stat. § 518.18(d) to proceed with his custody-modification motion and reaffirmed father's retention of temporary sole legal and physical custody of W.D.L.

On March 4, 2011, after an evidentiary hearing, the district court granted father sole physical and legal custody of W.D.L., ordered mother to pay child support of \$336 per month, and declined to award need- or conduct-based attorney fees.

Mother's appeal follows.

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<sup>1</sup> In the motion, father identified a March 18, 2003 order as the current order or judgment regarding custody that he wanted changed. But that was incorrect. The January 7, 2008 order was the then-current order.

## DECISION

### *September 2009 Ex Parte Order*

Mother argues that the district court violated her due-process rights when it “terminated her custodial rights” in the September 2009 ex parte order without proper evidentiary support and without giving her notice and an opportunity to be heard. Mother also argues that the court erred when it used the custody-modification standard in Minn. Stat. § 518.18(d)(iv), rather than the standard in Minn. Stat. § 518.131, subd. 3(b) (2010),<sup>2</sup> when it issued the ex parte order granting custody to father. Because ex parte orders are not final and therefore not appealable, we decline to address mother’s arguments. *See Chapman v. Dorsey*, 230 Minn. 279, 287, 41 N.W.2d 438, 443 (1950) (noting that “ex parte orders are not appealable”); *see also J.W. ex rel. D.W. v. C.M.*, 627 N.W.2d 687, 696 (Minn. App. 2001) (declining to review an unappealable temporary order), *review denied* (Minn. Aug. 15, 2001). Were we to review the order, we would conclude that the court cured any due-process defects in the September 2009 ex parte order when it issued its October 23, 2009 order, in which the court made adequate findings to support its decision to grant father temporary custody. Mother received notice and an opportunity to be heard on the custody issue at the October 8, 2009 hearing.

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<sup>2</sup> We cite the most recent version of Minn. Stat. § 518.18 and Minn. Stat. § 518.131 because they have not been amended in relevant part since 2008. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm’rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, “appellate courts apply the law as it exists at the time they rule on a case” unless doing so would affect vested rights or result in a manifest injustice).

### ***March 2011 Permanent Custody Order***

Mother argues that the district court erred in its March 4, 2011 permanent custody order “because it is not supported by substantial evidence that [W.D.L.] was endangered as of September 14, 2009.”

“District courts have broad discretion in determining custody matters . . . .” *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008) (quotation omitted). “Appellate review of custody modification . . . cases is limited to considering whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law.” *Id.* at 284 (quotations omitted). We review findings of fact for clear error and give deference to the district court’s credibility determinations. *Id.* Even when “the record could support a different custody award, this court may not substitute its judgment for that of the district court when reviewing custody determinations.” *Zander v. Zander*, 720 N.W.2d 360, 368 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006).<sup>3</sup>

Mother asks that this court reverse the March 2011 order apparently on two bases: that the district court should have limited its consideration to whether mother should have been restored custody of W.D.L. and that the photographs of W.D.L.’s bruises did not establish immediate danger of physical harm. We are not persuaded. Mother confuses the

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<sup>3</sup> Respondent guardian ad litem (GAL) argues that, because mother did not move for a new trial, this court’s review is limited to determining whether the evidence supports the district court’s findings of fact and conclusions of law. But because child-support-modification proceedings are “special proceedings” within the meaning of Minn. R. Civ. App. P. 103.03(g), a motion for a new trial pursuant to Minn. R. Civ. P. 59 is “not authorized” and therefore is “unnecessary to preserve issues for appeal.” *Huso v. Huso*, 465 N.W.2d 719, 720–21 (Minn. App. 1991).

standard for an ex parte restraining order under Minn. Stat. § 518.131, subd. 3(b), with the standard for endangerment-based custody modification under Minn. Stat. § 518.18(d)(iv).

A court may issue an ex parte restraining order that grants temporary custody to a party only if a court finds that the child is in “immediate danger of physical harm.” Minn. Stat. § 518.131, subd. 3(b). In contrast, to permanently modify custody for endangerment-based reasons under section 518.18(d)(iv), a court must find that a change in circumstances has occurred; that a modification would be in the best interests of the child; that the child is endangered; and that the benefit of a change of custody would outweigh the harm. Minn. Stat. § 518.18(d)(iv). Because the March 2011 order is a permanent custody order, modification of that order was governed by section 518.18(d), and the district court was not required to make a finding on whether W.D.L. was in “immediate danger of physical harm” under section 518.131, subdivision 3(b); instead, the court was required to make findings on the four factors in section 518.18(d). Here, the court made the required findings on three of the four factors—a modification would be in the best interests of the child, the child is endangered, and the benefit of a change of custody would outweigh the harm—but did not explicitly address the change-in-circumstances factor. But the court noted that father moved to change custody after discovering W.D.L.’s bruises following his time spent with mother and being told by W.D.L. that mother might start “whipping” W.D.L. around the room. And the court made detailed findings on the 13 best-interests factors, as required by statute, *see* Minn. Stat. § 518.17, subd. 1 (2010), finding that W.D.L. “is emotionally and physically endangered

in [mother's] care” and that the benefit of a change in custody outweighed the harm. Mother does not challenge any specific finding or conclusion from the March 2011 order.

On this record, any error in failing to explicitly find changed circumstances is harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored). Specifically, the evidence of bruising on W.D.L. after being with mother and W.D.L.'s statements about mother “whipping” him around the room constitute sufficient evidence of changed circumstances. If the matter were remanded for the district court to explicitly address whether changed circumstances existed, the record is overwhelmingly clear that the district court would explicitly find changed circumstances. *See, e.g., Grein v. Grein*, 364 N.W.2d 383, 386 (Minn. 1985) (“Based upon the evidence adduced at the hearing and all the files and records before the trial court, it is clear that the court made the three findings necessary to support a modification of the original custody order.”); *In re Estate of Martignacco*, 689 N.W.2d 262, 271 (Minn. App. 2004) (“Despite the district court’s divergence from the prescribed removal procedure, we decline to remand and conclude that the procedural oversight was not an abuse of discretion in light of the specific circumstances of this case. Our conclusion is supported by the overwhelming evidence known to the district court at the time it acted . . . .”), *review denied* (Minn. Jan. 26, 2005).

The district court concluded that father met his burden to modify custody under section 518.18(d)(iv). Viewing the order in its entirety, we conclude that the court made sufficient findings under section 518.18(d)(iv).

Mother argues that the photographs of bruises on W.D.L., which father introduced at the ex parte hearing and at the November 2010 evidentiary hearing, did not establish that W.D.L. “was in *immediate* danger of physical harm at the time of the *ex parte* proceeding.” We disagree. The standard for custody modification under section 518.18(d)(iv) is endangerment, and the district court properly determined that the photographs of bruises showed that W.D.L. was being physically harmed while in mother’s care and therefore endangered.

Mother argues that the district court abused its discretion by relying on the GAL’s testimony in its “*ex parte* award of sole legal and sole physical custody to [father].” Mother’s argument is misplaced. The court issued the ex parte order in September 2009, more than one year before the GAL released her report and testified at the November 2010 custody-modification hearing. And mother’s argument that the GAL’s November 2010 testimony and report did not show endangerment is unconvincing. “The concept of endangerment is unusually imprecise, but a party must demonstrate a significant degree of danger . . . .” *Goldman*, 748 N.W.2d at 285 (quotations omitted). In her report, the GAL stated that W.D.L. reported that mother grabbed his shirt collar and pulled him, spit in his face, shook him, grabbed him so hard she left marks on him, forced him to stay up late to talk to her, and shook him awake if he fell asleep. Mother also told W.D.L. that he was “stupid, sh----, and crappy.”

Mother also points out that W.D.L.’s therapist, whose unsigned report was attached to the GAL’s report, did not state that W.D.L. was endangered. But the district court, not the GAL or the therapist, is the ultimate decision-maker, and the court may

follow or decline to follow any or all portions of the professionals' recommendations. *See Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993) (noting that a district court has discretion to not follow custody recommendations), *review denied* (Minn. Jan. 28, 1994). We therefore conclude that the district court did not abuse its discretion by relying on the GAL's report.

### ***Constitutionality of Section 518.18***

On appeal, mother argues that section 518.18 is unconstitutional as applied because it infringed on her "fundamental right as a custodial parent to make decisions concerning the care, custody, and control of her child." Mother failed to raise the constitutional argument in the district court and apparently failed to notify the attorney general in order to give the state an opportunity to intervene. *See* Minn. R. Civ. App. P. 144 (requiring notification of the attorney general); *Rutz v. Rutz*, 644 N.W.2d 489, 494 (Minn. App. 2002) (declining to address constitutional challenge to section 518.18(a) and another statute because mother did not notify the attorney general or raise the issue in the district court), *review denied* (Minn. July 16, 2002). We therefore decline to consider this issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally consider issues that were presented to, considered by, and decided by the district court).

### ***Standard of Proof in Section 518.18(d)***

Relying on *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976), mother argues that the noncustodial parent's standard of proof to modify custody under section 518.18(d) should be clear-and-convincing evidence and that the district court erred by

equalizing the standard of proof between the two parties. Identifying the applicable standard of proof is a question of law, which we review de novo. *C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008). “In general, the legislature has the power to determine the standard of proof in a statutorily created cause of action.” *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790 (Minn. 1993). Where the legislature does not provide a standard of proof, this silence reflects a “signal that the legislature intended the preponderance of the evidence standard” to apply. *Id.* The Minnesota legislature has not identified the standard of proof to be used in custody-modification cases under section 518.18(d), but we have stated that a preponderance-of-the-evidence standard applies to “[m]odification of custody under chapter 518.” *In re A.R.M.*, 611 N.W.2d 43, 49 n.2 (Minn. App. 2000).

The three-prong test in *Mathews* guides a court’s determination on the minimum standard of proof, and it requires a court “to weigh: (1) the private interests affected by the proceeding; (2) the risk of error created by the State’s chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure.” *SooHoo v. Johnson*, 731 N.W.2d 815, 823 (Minn. 2007) (quotations omitted). Mother argues that the clear-and-convincing standard should apply to custody modifications because the private interests involved are important, the best-interests and endangerment standards in section 518.18(d) invite courts to make subjective determinations, and the government’s interest “in enforcing parental rights in orders where custody has been established comports with a state’s interest in stability and finality [in] the child’s custody status.”

We conclude that a preponderance-of-the-evidence standard is appropriate in custody-modification cases. Both parents are parties to the litigation and have a fundamental right to the care, custody, and control of their children. *See Rohmiller v. Hart*, \_\_\_ N.W.2d \_\_\_, \_\_\_, 2012 WL 638028, at \*7 (Minn. Feb. 29, 2012) (noting “that a fit parent’s right to make decisions concerning the care, custody, and control of his or her children is a fundamental right protected by the federal and Minnesota constitutions”). At least one of the substantive standards—best interests—is “open to the subjective values of the judge” and risks “erroneous deprivation of private interests.” *SooHoo*, 731 N.W.2d at 823. But the state’s compelling interest “in the welfare of the child and in promoting relationships among recognized family units” is already built into the custody-modification statute by requiring the noncustodial parent to show that the child is endangered, that a custody modification would be in the child’s best interests, and that the benefits of a custody modification would outweigh the harm. *See id.* (noting that child welfare and promoting family relationships is a compelling state interest). Balancing the interests in custody-modification proceedings reveals that the appropriate standard of proof is preponderance of the evidence. Requiring a higher standard handicaps the noncustodial parent, who, along with the custodial parent, has a fundamental right to the care and custody of his or her child.<sup>4</sup>

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<sup>4</sup> Mother relies on *Troxel v. Granville*, 530 U.S. 57, 60, 120 S. Ct. 2054, 2057 (2000), but that case, unlike here, involved the standard of proof in third-party visitation statutes, where a nonparent was seeking to overcome the wishes of the parent. *Troxel*, 530 U.S. at 60, 120 S. Ct. at 2057. Here, both parties are parents and both have a fundamental right to the care, custody, and control of their child.

### ***Child Support and Attorney Fees***

Mother argues that the district court abused its discretion in its March 2011 order by “fail[ing] to enforce [father’s] child support order” when it ordered her to pay child support to father even though father was in arrears on his child-support payments to her. But mother does not support her argument with any legal authority. An 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) (quotation omitted). Here, no prejudicial error is obvious on mere inspection.

Mother also argues that the district court abused its discretion by denying her attorney fees. We disagree. On December 3, 2010, mother submitted an affidavit from her attorney asking for conduct-based attorney fees because father’s conduct “unnecessarily contributed to the length and expense of these proceedings by bringing an ex parte motion September 2009 alleging educational neglect, physical abuse and sole responsibility for lack of visitation, unproven,” and asking for need-based fees because mother was unemployed and not paid child support by father.

“Absent an abuse of discretion, this court will not disturb a trial court’s decision denying an award of attorney fees.” *Johnson v. Johnson*, 627 N.W.2d 359, 364 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001). A district court “may” award conduct-based fees and “shall” award need-based attorney fees if the statutorily described circumstances exist. Minn. Stat. § 518.14, subd. 1 (2010). Here, the record reflects that the district court did not abuse its discretion by denying mother’s request for conduct-

based fees because father's September 2009 motion had merit and did not unreasonably contribute to the length of the proceedings. *See id.* (allowing a district court to award conduct-based fees if a party "unreasonably contributes to the length or expense of the proceeding"). Likewise, our review of the record leads us to conclude that the district court was not required to award need-based attorney fees to mother. "Need-based fees shall be awarded if the district court finds that the fees are necessary for the good-faith assertion of a party's rights, that the party from whom the fees are sought has the means to pay them, and that the party to whom they are awarded does not have the means to pay them." *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 720 (Minn. App. 2009) (citing Minn. Stat. § 518.14, subd. 1), *review granted* (Minn. Sept. 29, 2009) *and appeal dismissed* (Minn. Feb. 1, 2010). Although mother's attorney accurately informed the court that mother was unemployed, mother disclosed to the court that she lived off an inheritance from her father and failed to disclose her income from that inheritance in her attorney-fee motion. Because mother did not disclose her income from her inheritance, she failed to show that she did not have the means to pay her attorney fees.

We conclude that the district court did not abuse its discretion by denying mother's request for attorney fees.

**Affirmed.**