

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0221**

In the Matter of:

Joanne Nicola Kinney, petitioner,
Appellant,

vs.

Patrick William Kinney,
Respondent.

**Filed November 28, 2022
Reversed
Cochran, Judge**

Carver County District Court
File No. 10-FA-21-273

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(for appellant)

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Considered and decided by Wheelock, Presiding Judge; Bratvold, Judge; and
Cochran, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Appellant-wife challenges the district court's decision granting respondent-husband's motion to modify an order for protection (OFP) that runs in favor of wife and the parties' children. She argues that the district court (1) erred by failing to

adhere to statutory notice requirements and (2) abused its discretion by modifying the OFP without sufficient evidence and factual findings. We conclude that the district court abused its discretion by modifying the OFP without sufficient evidentiary support and without making any factual findings to justify modification. We therefore reverse.

FACTS

Appellant Joanne Kinney (wife) and respondent Patrick Kinney (husband) were married in 2009. Together they had two children, a son and a daughter who were born in 2010 and 2013, respectively.

In July 2021, wife petitioned the district court for an OFP against husband on behalf of herself and the couple's children. In her petition, wife alleged that husband had recently threatened her by smashing a plate during an argument and stating: "Do you want to get hit?" Wife also alleged that husband had physically and verbally abused wife and the children for many years. Among other allegations, wife claimed that, in 2020, husband threw their son onto his bed and threatened to punch him. In response, the son allegedly begged husband to stop. Later that year, husband allegedly pinned their son down and threatened to punch him for misbehaving. Wife also alleged that, in 2021, husband slapped the daughter several times for bothering him. The petition also alleged instances of emotional abuse.

In August 2021, following a hearing at which husband stipulated to the district court's grant of an OFP, the district court issued an OFP without a finding that husband committed domestic abuse. Instead, the OFP includes language that husband "understands that the order will be enforced as if there was an admission or finding of domestic abuse."

The OFP prohibits husband from contacting wife except to discuss matters involving the children. The OFP also limits husband's parenting time to one "supervised" in-person visit and three virtual visits per week. Finally, the OFP provides that it remains in effect for a period of two years "unless [the] parties agree to modify this order."

On December 13, 2021, approximately four months after the district court granted the OFP, husband moved the district court to modify the OFP to "allow [him to have] unsupervised parenting time" and for other relief. The motion was brought by husband on his own initiative and was not agreed to by wife. In his filing, husband asserted that the motion to modify the OFP was "based on the files, recordings, Affidavit in Support of Motion and proceedings within," but husband did not file an affidavit or any other documents in the OFP court file to support his motion.

On December 20, 2021, the district court held a hearing on husband's motion to modify the OFP. The district court heard the motion jointly with another motion filed by husband in the parties' pending dissolution case.¹ The hearing was limited to arguments from counsel for both parties. No witnesses testified at the hearing. To support husband's motion to modify the OFP, counsel for husband referenced affidavits apparently filed by husband in the dissolution court file but *not* made part of the OFP record. In response, wife's counsel argued that it was improper for husband's counsel to rely on documents that

¹ Under Minn. Stat. § 518B.01, subd. 6(c) (2020), a district court "may hear a motion for modification of an order for protection concurrently with a proceeding for dissolution of marriage upon notice of motion and motion." While the transcript reflects that husband filed a related motion in the dissolution proceeding, that motion is not part of the record on appeal.

were filed in a separate court file. Wife's counsel also objected on other grounds to the proposed modification of the OFP.

Two days later, the district court issued an "Amended Order for Protection After Motion to Modify" (modified OFP). The modified OFP granted husband's request for unsupervised (as opposed to supervised) parenting time and substantially increased the amount of parenting time allocated to husband. The district court did not include any findings of fact to support its decision. Nor did it otherwise explain its decision, except to state: "See Court File No. 10FA21-290." That court file number refers to the dissolution court file, which is not part of the record for this appeal.

Wife appeals.

DECISION

Wife challenges the district court's decision to modify the OFP on two grounds. First, wife argues that the district court erred as a matter of law by hearing and deciding husband's motion to modify the OFP despite husband's failure to comply with statutory notice requirements. Second, wife argues that the district court abused its discretion by modifying the OFP without sufficient evidence or findings of fact.

Before addressing wife's arguments, we first consider whether this matter is moot and conclude that it is not. We then address the merits of wife's arguments on appeal and conclude that reversal is required.

I. This matter is not moot.

In a letter to this court, husband argues that this appeal is moot because the parties have reached a “binding agreement” on parenting time that resolves the parties’ dispute.² Husband attached two emails to the letter that husband claims confirm the agreement. In response, wife argues that this court should decline to address husband’s mootness argument because a letter is not the proper procedural mechanism by which to raise the issue. Wife also disputes that the parties have a binding agreement and further states that the matter is not moot because the underlying OFP court file “has not been modified by a parenting-time agreement.”

Generally, to obtain relief from the appellate courts, an application “shall be made by serving and filing a written motion.” Minn. R. Civ. App. P. 127. A letter to the court usually is not considered to be a motion. *See id.* (defining a motion as a request for relief from the court with an explanation of the grounds for relief). Therefore, we could decline to consider husband’s mootness argument. *See id.* But, because mootness goes to jurisdiction, we conclude that it is appropriate to consider whether the appeal is moot. *See In re Guardianship of Tschumy*, 853 N.W.2d 728, 735 (Minn. 2014) (“We have dismissed appeals for lack of jurisdiction where the issues in the case were moot.”).

The doctrine of mootness requires that appellate courts “decide only actual controversies and avoid advisory opinions.” *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). An actual controversy exists when a party asserts a definite right, and the court is

² Husband did not file a responsive brief. He filed only the letter.

capable of granting the party effective relief. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). The United States Supreme Court has explained that “mootness can be described as the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Kahn*, 701 N.W.2d at 821 (quoting the same).

“[T]he general rule is that when, pending appeal, an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible, the appeal should be dismissed as moot.” *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). But “[t]he mootness doctrine is not a mechanical rule that is automatically invoked whenever the underlying dispute between the parties is settled or otherwise resolved.” *Dean v. City of Winona*, 868 N.W.2d 1, 4 (Minn. 2015). Instead, it is a “flexible discretionary doctrine” that should be applied when “a decision on the merits is no longer necessary or an award of effective relief is no longer possible.” *Id.* at 4-5 (quotation omitted). The party asserting mootness bears the burden of proving it. *Honeywell Int’l., Inc. v. Nuclear Regul. Comm’n*, 628 F.3d 568, 576 (D.C. Cir. 2010). “We consider de novo whether an appeal is moot.” *In re Civ. Commitment of Breault*, 942 N.W.2d 368, 374 (Minn. App. 2020).

Husband argues that the parties have reached a “binding agreement” on parenting time which resolves their dispute over the modified OFP and renders this appeal moot. To support his argument, husband relies on an email exchange between the parties’ attorneys discussing a stipulated agreement on parenting time. In this exchange, the attorneys

specifically note that the agreement has not yet been finalized. Husband does not offer any other proof of an agreement.

Husband has not met his burden of proof on mootness. The record before this court contains no evidence that the parties have reached a binding agreement on parenting time. Nor does the record before this court contain evidence that any agreement is intended to supersede the terms of the modified OFP. Accordingly, we conclude that this court is capable of granting wife effective relief and the issues raised in this appeal are not moot.

II. The district court abused its discretion by modifying the OFP.

We now turn to wife's contention that the district court abused its discretion by granting husband's motion to amend the OFP. Wife raises two primary arguments. First, she argues that she did not receive 30 days' prior notice of the motion hearing as required by statute and that the district court therefore erred by hearing and deciding the motion. Second, she argues that the district court's decision is not supported by sufficient evidence or findings. We address the second issue first because it is dispositive, and, as a result, we do not reach the first issue.

The Minnesota Domestic Abuse Act allows a person alleging domestic abuse to file a petition for an OFP. Minn. Stat. § 518B.01, subd. 4 (2020). "Domestic abuse" includes "the infliction of fear of imminent physical harm, bodily injury, or assault" against a family or household member. *Id.*, subd. 2(a)(2) (2020). If the petitioner demonstrates that domestic abuse occurred, the district court "may" issue an OFP and provide certain forms of relief, such as "restrain[ing] the abusing party from committing acts of domestic abuse"; "order[ing] the abusing party to have no contact with the petitioner"; and "establish[ing]

temporary parenting time . . . on a basis which gives primary consideration to the safety of the victim and the children.” *Id.*, subd. 6(a)(1), (4), (10) (2020).

The Minnesota Domestic Abuse Act also allows the district court to modify an existing OFP “[u]pon application, notice to all parties, and hearing.” *Id.*, subd. 11(a) (2020). “[T]he respondent named in the [OFP] has the burden of proving by a preponderance of the evidence that there has been a material change in circumstances and that the reasons upon which the court relied in granting or extending the [OFP] no longer apply and are unlikely to occur.” *Id.*, subd. 11(b); *Oberg v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015).

We review a district court’s decision to modify an OFP for an abuse of discretion. *See* Minn. Stat. § 518B.01, subd. 11(a) (granting district courts the discretion to modify an OFP); *Thompson ex rel. Minor Child v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018) (stating that appellate courts review the decision to grant an OFP for an abuse of discretion). A district court abuses its discretion if its findings are unsupported by the evidence, if it misapplies the law, or if its decision contradicts logic and the facts in the record. *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022); *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009) (applying the abuse-of-discretion standard in the context of OFP decisions). Although we generally defer to the district court’s findings, *Pechovnik*, 765 N.W.2d at 99, we will reverse a district court’s decision to issue an OFP if it lacks sufficient evidentiary support. *McIntosh v. McIntosh*, 740 N.W.2d 1, 10 (Minn. App. 2007).

Here, the OFP record lacks any evidence to support modification of the OFP. Husband's motion states that he seeks an order modifying the OFP to allow unsupervised parenting time and that he seeks other relief. His motion also states that it is "based on the files, recordings, Affidavit in Support of Motion and proceedings within," but husband did not file an affidavit or any other evidence in the OFP court file to support his motion. Further, at the hearing on the motion, husband did not call any witnesses to support modification of the OFP. Rather, the hearing consisted solely of arguments by counsel. While husband's counsel did reference affidavits that husband apparently filed in the parties' pending dissolution court file, those affidavits were never made part of the record in the OFP court file. And the affidavits are not part of the record in this appeal. Thus, because there is no evidence in the OFP court file to support husband's motion to modify the OFP, we conclude that the district court abused its discretion by modifying the OFP without evidentiary support. *See* Minn. Stat. § 518B.01, subd. 11(b); *Oberg*, 868 N.W.2d at 64.

Relatedly, we conclude that the district court abused its discretion by modifying the OFP without making factual findings or providing a legal basis for the modification. A district court must adequately explain the grounds for its decision to modify an OFP. *See Andrasko v. Andrasko*, 443 N.W.2d 228, 230-31 (Minn. App. 1989) (holding that a district court erred by failing to make findings to support its decision to grant an OFP). The district court's order at issue here does not include any explanation of its decision to modify the OFP. Instead, the district court's order cites to the dissolution court file, stating only "See Court File No. 10FA21-290." But, as noted above, the dissolution court file was never

made part of the record in the OFP case. And it is not part of the record before us on appeal.

In sum, there is no evidence in the OFP record supporting the district court's decision to modify the OFP, and the district court made no factual findings regarding the basis for modification. We therefore conclude that the district court abused its discretion by granting husband's motion to modify the OFP and reversal is required. *See id.* at 230 (reversing the grant of an OFP because, among other reasons, there was no evidence presented that would warrant issuance of an OFP).

The origins of this case underscore the need for reversal. In July 2021, wife alleged that husband physically and emotionally abused her and the couple's children. As a result, the district court issued an OFP that limited husband's contact with wife and the children, including a requirement that all parenting time be supervised. In modifying the OFP, the district court granted husband *unsupervised* parenting time and significantly expanded the scope and frequency of husband's visits with the children, whom husband is alleged to have abused. Given the severity of wife's allegations and the need to ensure the safety of the children, evidentiary support is necessary both to support a modification from supervised to unsupervised parenting time and to significantly increase the amount of parenting time provided to husband. Nothing in our opinion precludes husband from filing a new motion for modification with the appropriate evidentiary support.

Reversed.