STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1785

Jennifer Gwen Loveland, petitioner,
Respondent,

vs.

Francis Joseph Brosnan,
Appellant.

Filed April 29, 2008
Affirmed; motion granted
Minge, Judge

Scott County District Court
File No. 70-2002-01797

Jennifer Loveland, 3552 Basswood Circle SW, Prior Lake, MN 55372 (pro se respondent)

Mark A. Olson, Olson Law Office, 2605 East Cliff Road, Suite 100, Burnsville, MN 55337 (for appellant)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

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

MINGE, Judge

Appellant asserts (1) that the district court abused its discretion by holding an evidentiary hearing and terminating joint legal and physical custody; and (2) that the district court erred by denying his motions for contempt and for attorney fees and by granting a parenting consultant more powers than permitted by statute. We affirm.

FACTS

Appellant Francis Brosnan (father), and respondent Jennifer Loveland (mother), are parents of a minor child, N.E.B., who was born February 9, 2001. They were never married. Their romantic relationship ended in October of 2001.

The parties signed a mediated parenting agreement that the district court adopted as an "Order for Temporary Relief" on June 4, 2003. The agreement provided for "shared" legal custody of N.E.B. but recognized that mother would have physical custody while she finished a graduate degree in nursing in Fargo, North Dakota. The agreement specified that mother would return to the Twin Cities metropolitan area with N.E.B. after she completed her degree; that N.E.B. would live in the Twin Cities metropolitan area by the time he began kindergarten; and that although N.E.B.'s primary residence would be with mother, the parties would then share both legal and physical custody.

Despite the detailed provisions of the parenting agreement, the parties had significant difficulties. Father's parenting time was limited by mother, and the parties' efforts to use an expeditor to resolve differences failed. Hostility between the parties escalated when mother finished her graduate degree and did not return to the Twin Cities metropolitan area. Instead, she enrolled N.E.B. in kindergarten in Fargo and obtained employment there. Mother filed a motion with the district court requesting modification of the parenting-time arrangement, sole custody, and permission to move N.E.B.'s permanent residence to Fargo. In response, father objected to mother's requests and moved that mother be held in contempt for violating court orders. He requested reimbursement for expenses and attorney fees, primary physical custody if mother did not

return to the Twin Cities metropolitan area, and other relief. After an evidentiary hearing, the district court ordered mother to enroll N.E.B. in school in the Twin Cities metropolitan area but granted mother sole legal and physical custody; appointed a parenting consultant; and required the parties to submit various parenting questions to a consultant, as provided in their mediated agreement. The district court denied father's motion for contempt and both parties' requests for attorney fees. Father appeals.

D E C I S I O N

I.

Father begins by challenging the district court's decision to grant an evidentiary hearing on mother's request to modify earlier orders, to alter parenting time, to grant mother sole legal and physical custody, and to grant her permission to move N.E.B.'s residence to North Dakota.

Father focuses on the right to an evidentiary hearing. He correctly points out that a party's right to an evidentiary hearing incident to a motion to modify custody depends on whether the parent requesting the hearing has made a prima facie case for modification. If the moving party fails to make a prima facie case for custody modification, the district court is required to deny the motion to modify, and no evidentiary hearing is required. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981). Typically, an appeal of a motion for an evidentiary hearing is challenging the denial of a hearing. *See, e.g., id.* (upholding denial of evidentiary hearing when moving party failed to make prima facie case); *Geibe v. Geibe*, 571 N.W.2d 774, 777-78, 780 (Minn. App. 1997) (upholding denial of evidentiary hearing and independently

determining that moving party failed to make prima facie case); *Smith v. Smith*, 508 N.W.2d 222, 227-28 (Minn. App. 1993) (upholding denial of evidentiary hearing when moving party failed to prove numerous aspects of its case). Furthermore, we made it clear in *Geibe* that we review denial of an evidentiary hearing for abuse of discretion. *Geibe*, 571 N.W.2d at 777. This discretion extends to the question of whether or not the moving party has made a prima facie case. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). Finally, we note that district courts have broad discretion to hold hearings incident to consideration of motions even if not mandated.

Here, contrary to our prior cases, father complains that the district court used its discretion to grant a hearing. But the district court was asked to decide critical issues regarding the custody and out-of-state residence of N.E.B. The parties presented disputed issues of fact, and mother made allegations regarding father's conduct and N.E.B.'s mental health. In addition, the district court was asked to decide motions to hold mother in contempt, for attorney fees, and a variety of other matters. Because of the complexity of the dispute and the record, we conclude that the district court permissibly granted an evidentiary hearing.

Father has not pointed to any prejudice resulting from the decision to hold a hearing. Thus, even if mother failed to allege a prima facie case to modify custody and was not entitled to a hearing as a matter of law, any error in holding an evidentiary hearing is harmless, and we would decline to reverse the district court's decision to hold an evidentiary hearing. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

II.

The second issue is whether the district court improperly granted mother sole legal and physical custody.

Under Minn. Stat. § 518.18(d)(i)–(iv) (2006)

> the court *shall not modify* a prior custody order or a parenting plan provision which specifies the child's primary residence unless it finds, upon the basis of facts, including unwarranted denial of, or interference with, a duly established parenting time schedule, 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 or the parenting plan provision specifying the child's primary residence that was established by the prior order unless:
>
> (i) the court finds that a change in the custody arrangement or primary residence is in the best interests of the child and the parties previously agreed, in a writing approved by a court, to apply the best interests standard in section 518.17 or 257.025, as applicable; and, with respect to agreements approved by a court on or after April 28, 2000, both parties were represented by counsel when the agreement was approved or the court found the parties were fully informed, the agreement was voluntary, and the parties were aware of its implications;
>
> (ii) both parties agree to the modification;
>
> (iii) the child has been integrated into the family of the petitioner with the consent of the other party; or
>
> (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.

(Emphasis added.)

In accordance with this statute, the parent seeking to modify custody must establish that (1) circumstances have changed involving the child or custodial parent; (2) the proposed modification would be in the child's best interests; and (3) at least one statutory basis to modify custody recited in Minn. Stat. § 518.18(d)(i)–(iv) exists. *See Frauenshuh v. Giese*, 599 N.W.2d 153, 157 (Minn. 1999) (reciting elements of a prima facie case for modification under Minn. Stat. § 518.18(d)(iii) (1998)) (superseded in part by 2000 Minn. Laws ch. 444, art. 1, § 5 at 984 (now codified at Minn. Stat. § 518.18(d)(i) (2006))); *see also Goldman v. Greenwood*, __ N.W.2d __, __, 2008 WL 821011, *3-*6 (Minn. 2008) (applying the statute and *Frauenshuh* to a question of child custody modification and a prima facie case for such a modification). "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996) (alteration omitted) (quotation omitted). Next, we turn to a consideration of each of the elements involved in a modification of custody.

A. Changed Circumstances

The first element to satisfy is a substantial change in circumstances. A court "shall not modify" a custody plan unless "a change has occurred in the circumstances of the child or the parties." Minn. Stat. § 518.18(d). "What constitutes changed circumstances for custody-modification purposes is determined on a case-by-case basis." *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). A failure to satisfy assumptions underlying a district court's ruling can constitute

the changed circumstances necessary to allow modification of that ruling. *See Hecker v. Hecker*, 568 N.W.2d 705, 709-10 & n.3 (Minn. 1997) (holding, in the maintenance-modification context, that if assumptions underlying a maintenance award are not satisfied, the failure to satisfy those assumptions can be the substantial change in circumstances justifying a modification of maintenance). Known and anticipated facts at the time of the agreement may not be relied upon to establish changed circumstances. *Cf. Beck v. Kaplan*, 566 N.W.2d 723, 726-27 (Minn. 1997) (reversing modification of maintenance when there was no evidence that the moving party "did not or could not anticipate" the allegedly changed circumstances, meaning it was not unreasonable or unfair to hold parties to negotiated agreement).

Here, there are changed circumstances. Although the district court determined that mother's desire to stay in Fargo should have been anticipated at the time of the agreement and was not a changed circumstance, there were other developments. It is evident from the record that the parties were having significant difficulty in cooperating for the benefit of their child. Although father never had the opportunity to exercise joint custody, the relationship between the parties had become highly contentious. The district court found that neither party was willing to work cooperatively with the other while making major life decisions for N.E.B. The district court noted instances of father's treatment of mother that, whatever their origin, could be fairly characterized as disrespectful or contemptuous, and stated that "[t]he Court does find that [f]ather's actions are reasonably perceived as very intimidating by [m]other." These aggravated problems in dealing with one another led to the termination of their relationship with at

least one parenting expeditor. We conclude their apparent inability to work together on important child care decisions was not foreseeable at the time of the original stipulation and constitutes a significant change in circumstances that justified the district court's ultimate elimination of joint custody.

B. Best Interests

The second element is the best interests of the child as determined pursuant to Minn. Stat. § 518.17 (2006). The paramount concern in child-related matters is the child's best interests. *Olson v. Olson*, 534 N.W.2d 547, 549 (Minn. 1995) (observing, in context of grandparent visitation dispute, "[w]e said a century ago, '[t]he cardinal principle in such matters is to regard the benefit of the infant as paramount . . .' and we have reiterated that premise in many recent cases." (quoting *Flint v. Flint*, 63 Minn. 187, 189, 65 N.W. 272, 273 (1895))).

As a result of the evidentiary hearing, the district court considered several best interest factors of N.E.B. The record supports the district court's determination that mother, as N.E.B.'s primary caretaker, has a more intimate relationship with the child; that he has a closer bond with mother's family members; and that N.E.B.'s interest in a stable home weighs in favor of staying with mother, as it is the home he has experienced to date. The district court found that, despite mother's allegations, there was no evidence of domestic abuse by father and that both parties are willing and capable of giving N.E.B. love and affection. But these considerations are inadequate to overcome those favoring mother's sole custody or to require that joint custody be pursued. Most importantly, the parties' inability to cooperate in child rearing weighs against joint custody. Joint custody

is simply not appropriate when the parties' hostility destroys cooperation. Here, although father lost joint custody, mother was required to return to the Twin Cities metropolitan area in accordance with the initial court-approved agreement. As a result, despite the loss of joint custody, father and N.E.B. both benefit from substantially more convenient visitation. We conclude that the district court did not abuse its discretion in determining that it was in N.E.B.'s best interests to modify custody as mother requested.

C. Alternatives under Minn. Stat. § 518.18(d)(i)–(iv)

The third factor is that one of the Minn. Stat. § 518.18(d)(i)–(iv) factors be satisfied. This is most often considered in the context of the "endangerment" standard represented in section 518.18(d)(iv). *See, e.g., Goldman*, __ N.W.2d at __, 2008 WL 821011 at *5. Father argues that the district court did not adhere to the proper statutory standard in considering mother's motion for modification of custody because it failed to require that she make a showing of "endangerment."

The June 4, 2003, order states that the custody arrangement agreed to by the parties was "conditioned on" the facts recited in the order and that "[i]f the [factual] conditions are not met, custody shall be determined de nov[o], under the best interests standards set forth in Minn. Stat. § 518.17." The parties may, pursuant to agreement, adhere to a "best interests" standard rather than an "endangerment" standard upon a motion to modify. *See* Minn. Stat. § 518.18(d)(i) (allowing the parties to adhere to the best-interests standard rather than a showing of endangerment if the parties have so agreed in writing and were represented by counsel). Although father disagrees that the agreement's reference to use of the best-interest standard is applicable to this dispute, we

note that the agreement clearly refers to custody conditions. Because the current dispute is largely over custody conditions, we conclude the parties' agreement to use the best-interest standard applies and that our best-interests analysis set forth in Part B, *supra* controls.

D. Conclusion

The district court carefully considered this controversy over the course of multiple hearings incident to several motions. The district court entered numerous orders, made very detailed findings, and prepared three memoranda totaling 29 pages. Based on this extensive record, we conclude that the district court did not err in granting mother sole legal and physical custody of N.E.B.[1]

III.

The third issue is whether the district court abused its discretion in refusing to hold mother in contempt of court. Father moved to hold mother in contempt for denying him parenting time and for her refusal to move back to the Twin Cities metropolitan area, both of which were covered in the court-sanctioned agreement. The district court is accorded broad discretion in finding contempt. *Tatro v. Tatro*, 390 N.W.2d 461, 464 (Minn. App. 1986). "The district court's discretion is limited in 'that such sanction is appropriate only where the alleged contemnor has acted contumaciously, in bad faith, and out of disrespect for the judicial process.'" *Estate of Stollmeyer v. May*, 580 N.W.2d 58,

[1] Mother claims that the changed-circumstance analysis is not required, because this court need only apply the more-flexible, party-selected, best-interest standard as allowed by Minn. Stat. § 518.18(e). Because we have upheld mother's custody, we do not consider that argument.

60 (Minn. App. 1998) (quoting *Minn. State Bar Ass'n v. Divorce Assistance Ass'n, Inc.*, 311 Minn. 276, 284, 248 N.W.2d 733, 740 (1976)).

The purpose of civil-contempt proceedings in a dissolution setting is to secure future compliance of a court order by one party to vindicate the rights of the other party. *See Minn. State Bar Ass'n*, 311 Minn. at 285, 248 N.W.2d at 741. Civil contempt is not designed to punish a person for past misconduct in derogation of judicial authority. *Hopp v. Hopp*, 279 Minn. 170, 175, 156 N.W.2d 212, 217 (1968). A district court has greater discretion in civil-contempt cases than in criminal-contempt cases. *Id.* at 174, 156 N.W.2d at 216.

The test whether a defendant should be found in civil contempt is (1) whether there was a failure to comply with a court order; and (2) if so, whether appropriate punishment is reasonably likely to produce compliance fully or in part. *Id.* at 175, 156 N.W.2d at 217. Once disobedience of a court order is shown, a prima facie case of contempt is made. *See Meisner v. Meisner*, 220 Minn. 559, 560, 20 N.W.2d 486, 487 (1945). The burden is then on the person charged with contempt to show that it was not in his or her power to obey the order. *Id.* Although findings would be helpful to a reviewing court, there is no requirement for findings when a contempt motion is denied. *Tatro*, 390 N.W.2d at 464.

Here, the district court concluded that mother had violated the court-sanctioned agreement with father. However, mother asserted that she believed that father did not have the right to custody of N.E.B. for more than four days at a time. At this juncture, the district court concluded that father's rights would be vindicated by ordering mother to

return to the Twin Cities metropolitan area. The district court appears to have been satisfied that mother would comply with its order without necessitating an award of contempt. Although the district court may have had a basis for finding contempt, we conclude that it did not abuse its broad discretion in declining to do so.

IV.

The fourth issue is whether the district court erred in failing to award conduct-based attorney fees. "Recovery of attorney fees must be based on either a statute or a contract." *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004). "The task of determining what, if any, sanction is to be imposed is implicated by the broad authority provided the [district] court." *Patton v. Newmar Corp*., 538 N.W.2d 116, 119 (Minn. 1995). This court reviews a district court's award of attorney fees for abuse of discretion. *In re Rollins*, 738 N.W.2d 798, 803 (Minn. App. 2007). An award of conduct-based fees under Minn. Stat. § 518.14, subd. 1 (2006), "may be made regardless of the recipient's need for fees and regardless of the payor's ability to contribute to a fee award." *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). An award of conduct-based attorney fees may be based on duplicitous and disingenuous positions that have had the effect of further delaying distribution, lengthening litigation and increasing the expense of proceedings. *Redmond v. Redmond*, 594 N.W.2d 272, 276 (Minn. App. 1999).

Minn. Stat. § 518.14, subd. 1, states:

> [T]he court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:

> (1) that the fees are necessary for the good-faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
>
> (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
>
> (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.
>
> *Nothing in this section . . . precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding*.

(Emphasis added.)

Mother filed numerous evidentiary and discovery motions. The district court acknowledged that the motions were redundant, and were repeated without a corresponding change in circumstances. However, after the evidentiary hearing, the district court stated: "Neither party is raising frivolous issues. Therefore, each party should pay their own attorney's fees." Although the district court may have had an adequate basis upon which to award conduct-based attorney fees, it is granted great latitude in determining whether to do so. We conclude that its refusal to award attorney fees is not an abuse of discretion.

V.

The fifth issue is whether the district court impermissibly granted the parenting consultant powers beyond what is permissible under Minnesota statutes. Father argues that the "parenting consultant" must adhere to the statutory powers allotted to a "parenting time expeditor" under Minn. Stat. § 518.1751, subd. 3(c) (2006). This court has addressed the different roles of an expeditor and a consultant as follows:

> A "parenting-time expedit[o]r" is a creature of statute under Minn. Stat. § 518.1751 (2006), and, under that statute, may be removed for "good cause." The term "parenting consultant" is not used in the Minnesota statutes. In practice, the term refers to a creature of contract or of an agreement of the parties which is generally incorporated into (or at least referred to in) a district court's custody ruling. Thus, statutory "parenting-time expedit[o]rs" are distinct from nonstatutory "parenting consultants."

Szarzynski, 732 N.W.2d at 293. Our state law on expeditors "does not preclude the parties from voluntarily agreeing to submit their parenting time dispute to a neutral third party . . . on a voluntary basis." Minn. Stat § 518.1751, subd. 4.

Here, the parenting-consultant arrangement is a result of the contract rather than a creature of statute. The district court found that "[t]he parties have agreed that the court may use its discretion in the language of this Order appointing the parenting consultant." Because father does not direct our attention to anything in the record that indicates that this determination by the district court is clearly erroneous, we conclude that the district court did not err in defining the scope of the powers allotted to the parenting consultant.[2]

VI.

Lastly, we address father's motion to strike portions of mother's brief that were not a part of the record. This court's determinations are limited to the record before the district court and its orders. Minn. R. Civ. App. P. 110.01. Mother represented herself pro se, and father identifies certain portions of her appellate brief that went outside of the

[2] Father's implied concern is that the parenting consultant will not award him the parenting time allotted to him in the district court's order. The district court appears to intend that father be granted at least as much time as he is allotted in the visitation schedule accompanying the order. Regardless, father may contest decisions of the parenting consultant in district court. In addition, the scope of the parenting consultant's authority may also be modified in a subsequent district court order.

record. For example, mother asserts that, in compliance with the district court's order, she has moved back to Prior Lake. Although this fact can be inferred from the district court's order, it was not explicitly contained in the record. Certain portions of mother's brief that were objected to appear to be based on her affidavit and supporting documents, and are part of the record. However, to the extent that mother's brief went beyond what was in the record, father's motion to strike is granted. In deciding this appeal, we do not consider anything outside the record before district court and its orders.

Affirmed; motion granted.

Dated: