STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2138

In re the Marriage of: Susan Ann Yager, f/k/a Susan Ann Fox, petitioner,
Appellant,

vs.

John Patrick Fox,
Respondent.

Filed August 13, 2012
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-FA-000299651

Susan A. Yager, Plymouth, Minnesota (attorney pro se)

Tara L. Smith Ruesga, Walling, Berg & Debele, Minneapolis, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

In this postdissolution appeal, appellant argues that the district court's findings on her spousal-maintenance award were clearly erroneous and that the district court abused its discretion in denying her motion for compensatory parenting time, in determining that

she had not made a prima facie case for modification of custody of the parties' children, and in awarding respondent conduct-based attorney fees. Because we see no error in the spousal-maintenance findings and no abuse of discretion in the other decisions, we affirm.

FACTS

Appellant Susan Yager and respondent John Fox were married in 1995; their children were born in 1999 and 2002. The marriage was dissolved in 2006. A stipulated parenting plan provided for the children to have their primary residence with respondent, who would be their sole decision maker, and for the appointment of a parenting consultant. Appellant was awarded temporary spousal maintenance of $2,500 per month for 60 months, a total of $150,000.

Appellant moved to reopen the dissolution judgment, to remove the provision appointing a parenting consultant, and to hold a hearing on custody and parenting time. The district court denied her motion, and this court affirmed the denial. *Yager v. Fox*, No. A07-691, 2008 WL 2246041 (Minn. App. June 3, 2008) (*Yager I*).

In 2009, the district court issued an order that, among other things, found appellant's conduct had endangered the children's welfare, granted respondent sole legal and sole physical custody, and provided each party with two nonconsecutive weeks of parenting time during summer vacations, to be agreed on by April 1 of each year. Appellant challenged the order and this court affirmed it. *Yager v. Fox*, No. A09-1365, 2010 WL 1191853 *1-2 (Minn. App. Mar. 30, 2010) (*Yager II*).

Appellant moved to modify child support, and respondent moved for $900 in attorney fees incurred in responding to her motion. A hearing was scheduled for August 2011 but stricken because appellant had not complied with an order to file motion papers and pay a filing fee; a decision on respondent's motion for attorney fees was reserved.

On Wednesday, August 24, 2011, appellant called respondent to ask for a week of parenting time. Respondent agreed to appellant having parenting time only until Friday, September 2, because Labor Day (September 5) was his holiday with the children, and he wanted to get them ready for school over the long weekend. Appellant opted to take no parenting time, but, on September 2, 2011, she moved for "back-owed spousal maintenance" and "compensation of denied parenting" or, in the alternative, a change to joint legal and physical custody. Respondent opposed the motion and reiterated his motion for attorney fees.

Following a hearing, the district court denied appellant's motion and granted respondent's motion for $900 in conduct-based attorney fees. Appellant challenges these decisions, arguing that the district court's findings on spousal maintenance are clearly erroneous and the district court abused its discretion in denying her motion for compensatory parenting time, determining that she had not made a prima facie case for the modification of custody, and awarding respondent conduct-based attorney fees.

D E C I S I O N

1. Spousal Maintenance

This court will "set aside a district court's findings of fact only if clearly erroneous. . . . Findings of fact are clearly erroneous where an appellate court is left with

the definite and firm conviction that a mistake has been made." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation and citations omitted).

Appellant was awarded $2,500 monthly in spousal maintenance with a *Karon* waiver in August 2006.[1] The district court found that respondent: (1) from August 2006 through September 2006, paid appellant $2,500 directly; (2) in October 2006, paid $2,500 to the State of Minnesota; (3) in November and December 2006, had $1,257.50 withdrawn from each of his semi-monthly paychecks and paid to appellant; (4) from January 2007 to August 2011, had $1,160.77 withdrawn from his biweekly paychecks and paid to appellant; and (5) around September 24, 2011, received a refund for overpayment of spousal maintenance from the State of Minnesota for $766.42.

Appellant argues that, from January 2007 to August 2011, she received $1,160.77 only twice a month and therefore received only $2,321.54 monthly. But the payment records provided by the state show clearly that, in some months, respondent had three biweekly paychecks, and appellant therefore received three payments.[2]

Appellant provides no evidence to refute the state's records. The district court's finding that appellant "has been paid in full and has not proven that any portion of [r]espondent's spousal maintenance obligation remains unpaid" is not clearly erroneous.

---

[1] A *Karon* waiver is a waiver of the right to seek modification of spousal maintenance. *Grachek v. Grachek*, 750 N.W.2d 328, 331 (Minn. App. 2008), *review denied* (Minn. Aug. 19, 2008).

[2] Appellant received 26 payments per year: 26 x $1,160.77 = $30,180.02, or $180.02 more per year than the $30,000 (12 x $2,500) to which appellant was entitled.

2. Parenting Time

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).[3]

The district court denied appellant's motion for compensatory parenting time, finding that appellant's decision to take no summer parenting time because respondent wanted the children home on Labor Day weekend (his holiday) so he could get them ready for school "certainly cannot be construed as [r]espondent denying parenting time to [appellant]."

Appellant argues that, in past years, "her vacation with the children would occur during the third week of August . . . ." But appellant does not refute the finding that she did not call respondent about parenting time until August 24, which was the fourth Wednesday in August.[4] Thus, the third week of August was half over by the time appellant asked for it as her usual parenting time. Nor does appellant explain why she declined to take parenting time until Friday, September 2, as respondent offered. The district court's determining that "[appellant] forfeited the one week of summer vacation time [and t]here is no basis for compensatory time" was not an abuse of discretion.

---

[3] Respondent testified that he left appellant a voice message concerning summer parenting time prior to the April 1 deadline for scheduling it; appellant testified that she never got the message. The district court noted that he found respondent's claim "credible." This court defers to a district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

[4] August 2011 began on a Monday; thus, if a week is considered to run from Sunday through Saturday, the first full week was August 7-13; the second August 14-20, and the third August 21-27.

3. Custody Modification

"A district court . . . has discretion in deciding whether a moving party makes a prima facie case to modify custody." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). The district court determined that:

> [Appellant] asserts that, pursuant to Minn. Stat. § 518.18 (2010), denial of parenting time is the basis for modifying custody of the two (2) minor children. However, [appellant] has not made even a prima facie showing of unwarranted denial or interference with parenting time or the other showings required by the statute. There is no basis for [appellant's] motion to modify custody.

Appellant argues that "[r]espondent alienated the children from their mother" and that custody with respondent prolongs and exacerbates this alienation. The children are now thirteen and nine, and they have lived with respondent for six years. The evidence appellant offers of their attachment to her is an incident seven years ago, when they were reluctant to leave her for an Early Childhood Education class. She offers no evidence that the children would now benefit from a change in custody.

Moreover, both the district court and this court have previously rejected appellant's alienation argument. *See Yager II*, 2010 WL 1191853 *1-2 (quoting and affirming district court's findings that appellant's conduct had been extreme and inappropriate, that she had "no appreciation for the impact her behavior and choices have on the children or [respondent]," and that "the fact that the children are doing well and have a good relationship with [appellant] despite her conduct is a testament to [respondent's] abilities as a parent").

The district court did not abuse its discretion in finding that appellant had not made the prima facie showing required for custody modification under Minn. Stat. § 518.18.

4. Attorney Fees

Conduct-based attorney fee awards "are discretionary with the district court." *Szarzynski*, 732 N.W.2d at 295; *see* Minn. Stat. § 518.14, subd. 1 (2010) (permitting award of conduct-based attorney fees against a party who has unreasonably contributed to length or expense of proceedings).

The district court found that

> [appellant] did unreasonably contribute to the length and expense of the proceedings. She did not have complete documentation of the spousal maintenance she had received nor did she fully understand the facts before bringing her motion regarding spousal maintenance. She declined her summer vacation time when [r]espondent agreed to most of what she requested, and she failed to seek mediation of the vacation issue before coming to Court. Her motion to modify custody is baseless. Respondent has reasonably incurred over $900 in attorney's fees defending [appellant's] motion, and a conduct-based fee award is appropriate.

Appellant raises procedural objections to the award, arguing that respondent did not submit a motion, an affidavit, or a legal memorandum to support his request for attorney fees. But respondent requested $900, and those procedural requirements pertain only to "any action or proceeding in which an attorney seeks the award, or approval, of attorneys' fees in the amount of $1,000.00 for the action, or more . . . ." Minn. R. Gen. Pract. 119.01.

Appellant's substantive challenge to the award merely reiterates her unpersuasive arguments that she is entitled to further spousal maintenance and to compensatory parenting time and that custody should be modified.

The finding that appellant has received all her spousal maintenance is not clearly erroneous, and the district court did not abuse its discretion in denying her compensatory parenting time, declining to modify custody, and awarding conduct-based attorney fees to respondent.

Affirmed.