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**STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0457**

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

vs.

John Patrick Fox,
Respondent.

**Filed December 15, 2014
Affirmed
Smith, Judge**

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

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

Laura D. Sahr Schmit, Walling, Berg & Debele, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Smith, Judge.

UNPUBLISHED OPINION

SMITH, Judge

We affirm the district court's denial of a motion for compensatory parenting time and custody modification because the district court did not abuse its discretion by finding that appellant failed to establish a prima facie case. We also affirm the district court's

requirement that appellant continue to satisfy preconditions before serving or filing future motions and its award of conduct-based attorney fees to respondent because neither action exceeds the district court's authority.

FACTS

In 2006, appellant Susan Ann Yager and respondent John Patrick Fox stipulated to the terms of a divorce decree. Yager moved to modify the terms of the decree. This court affirmed the district court's denial of Yager's motion. *Yager v. Fox*, No. A07-691, 2008 WL 2246041, at *1 (Minn. App. June 3, 2008) (*Yager I*). Following three more motions from Yager to modify her parenting time, this court again affirmed the district court's order. *Yager v. Fox*, No. A09-1365, 2010 WL 1191853, at *1 (Minn. App. Mar. 30, 2010), *pet. for review dismissed* (Minn. June 7, 2010) (*Yager II*).

In September 2011, Yager moved for compensation for 168 hours of denied parenting time or in the alternative for a change to joint physical and legal custody. This court again affirmed the district court's order, holding that the district court did not abuse its discretion by finding that Yager was not entitled to compensatory parenting time or by finding that Yager "had not made the prima facie showing required for custody modification." *Yager v. Fox*, No. A11-2138, 2012 WL 3263875, at *2-3 (Minn. App. Aug. 13, 2012), *review denied* (Minn. Oct. 16, 2012) (*Yager III*).

In December 2012, Yager again moved for compensatory parenting time or for a change in custody. The district court found Yager to be a frivolous litigant because it was "reasonably likely that [Yager would] not discontinue pursuing frivolous claims without an order imposing preconditions on serving or filing any new claims." The

district court ordered Yager to fulfill preconditions before serving or filing any future motions. She was required to (1) attempt settlement efforts, (2) attend mediation, (3) submit proposed motions to Hennepin County Family Court's Self-Help Center, and (4) then submit motions to the assigned referee for consideration.

On December 16, 2013, Yager again moved for compensatory parenting time or a change in custody. The district court denied Yager's motion for compensatory parenting time because it was based on "the same allegations [Yager had] made numerous times in previous motions." The district court also denied Yager's motion to modify custody because she failed to make a prima facie showing of endangerment or denial of parenting time. In addition, the district court required Yager to "continue to meet" preconditions before serving or filing future motions, and awarded Fox \$500 in conduct-based attorney fees and costs.

D E C I S I O N

I.

The district court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). The district court also 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). "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) (citing *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985)).

If the court finds that a person has been deprived of court-ordered parenting time, the court shall order the parent who has interfered to allow compensatory parenting time to the other parent or the court shall make specific findings as to why a request for compensatory parenting time is denied.

Minn. Stat. § 518.175, subd. 6(b) (2012).

Yager argues that the district court disregarded her evidence, which she claims was sufficient to establish that Fox improperly denied her 4,182 hours of parenting time. Because the district court found that Yager had not shown a deprivation of court-ordered parenting time, it was not required to make specific findings regarding its denial of compensatory parenting time. *See id.*

Yager has brought multiple motions for compensatory parenting time, and all of these motions have been denied. *See Yager III*, 2012 WL 3263875, at *2 (holding that the district court did not abuse its discretion by finding that Yager declined to take her summer parenting time and that she was not entitled to compensatory parenting time).¹

Here, Yager argued that Fox had denied her 4,182 hours of parenting time. Yager explained that she had seen E.F. during two therapy sessions and one lunch hour, and that her contact with P.F. had been “sporadic.” Yager provided lists of hours and dates during which she claimed she was denied parenting time. In response, Fox explained that the parties had agreed to resume Yager’s parenting time with P.F. and to resume reparative

¹ Fox argues that Yager’s claim for compensatory parenting time is barred by collateral estoppel. But collateral estoppel has limited applicability in family-law matters, *Maschoff v. Leiding*, 696 N.W.2d 834, 838 (Minn. App. 2005), and will not bar motions to modify custody, visitation, or spousal maintenance due to changed circumstances because the district court has continuing jurisdiction over these matters, *Loo v. Loo*, 520 N.W.2d 740, 743 (Minn. 1994).

therapy with E.F. Fox explained that, in summer 2013, Yager had temporarily moved to Iowa and had made no attempt to see the children. Then, after returning to the Twin Cities, Yager made no attempt to continue reparative therapy with E.F. and had some parenting time with P.F., but always returned him early. Yager is incorrect to state that Fox provided no evidence to rebut her claims and that her evidence was the only evidence presented to the district court.

Given the record before it, the district court did not abuse its discretion by finding that Yager failed to establish a prima facie showing that Fox denied her parenting time. Yager acknowledged at the motion hearing “that [P.F.] has frequently requested [an early return] and she complied with the requests” and that she discontinued therapy with E.F. when she lost insurance coverage. As with the parenting time in summer 2011, Yager simply declined to take her parenting time. *See Yager III*, 2012 WL 3263875, at *2. Because the district court did not abuse its discretion by finding that Yager did not establish a prima facie showing that she had been denied parenting time, Yager is not entitled to compensatory parenting time.

Yager seeks a modification of the custody arrangement. Even if Yager had established a prima facie showing that she had been denied parenting time, that alone cannot establish a need to modify custody. *See Szarzynski v. Szarzynski*, 732 N.W.2d 285, 293 (Minn. App. 2007) (“[W]hile deprivation of parenting time may be considered in addressing motions to modify custody, it is *not* an independently sufficient basis to modify custody.”).

Yager also argues that Fox is endangering the children. To establish a prima facie case for custody modification based on endangerment, Yager must show that (1) the circumstances of the children or parties have changed; (2) modification is necessary to serve the best interests of the children; (3) the current environment endangers the children's physical or emotional health; and (4) the benefits of the change outweigh the harms. See Minn. Stat. § 518.18(d)(iv) (2012); *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008).

In her motion before the district court, Yager argued for a change in custody because she had been denied parenting time and because Fox was alienating the children from her. As this court stated in *Yager III*, “both the district court and this court have previously rejected appellant’s alienation argument.” 2012 WL 3263875, at *3. Yager also stated in her affidavit that Fox “poses a threat of harm to the children.” This statement is conclusory, and “conclusory allegations do not support a prima facie case” for custody modification. See *In re Welfare of Children of L.L.P.*, 836 N.W.2d 563, 571 (Minn. App. 2013).

On appeal, Yager alleges additional examples of endangerment: that there had been a change in the children's circumstances, that modification would be in the best interests of the children, that the current environment was endangering the children's physical or emotional health, and that the benefits of a change in custody would outweigh the harms. But this evidence was not provided to the district court and is not part of the record on appeal. See Minn. R. Civ. App. P. 110.01 (“The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on

appeal in all cases.”). We therefore decline to analyze Yager’s additional endangerment allegations, *see Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977) (“It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.”), and hold that the district court did not err by finding that Yager failed to make a prima facie showing of endangerment.

II.

Yager next challenges the district court’s requirement that she satisfy certain preconditions before serving or filing any future motions. A district court may require a frivolous litigant to furnish security or fulfill preconditions before serving or filing a new claim or motion. Minn. R. Gen. Pract. 9.01. A frivolous litigant is defined as someone who “repeatedly relitigates or attempts to relitigate” claims that have been finally determined or someone who brings claims not grounded in fact or law. Minn. R. Gen. Pract. 9.06(b)(1), (3). It can also be someone who “repeatedly serves or files frivolous motions, pleadings, letters, or other papers, conducts unnecessary discovery, or engages in oral or written tactics that are frivolous or intended to cause delay.” Minn. R. Gen. Pract. 9.06(b)(2).

Yager argues that this case is like *Szarzynski*, wherein this court found that the district court abused its discretion by finding the appellant to be a “nuisance litigant” because it did not reference Minn. R. Gen. Pract. 9, did not provide the definition of “frivolous litigant,” and did not make any of the required findings. 732 N.W.2d at 294-95. But the district court found Yager to be a frivolous litigant in March 2013, with

reference to rule nine and the required findings. *See* Minn. R. Gen. Pract. 9.02(b). Yager did not challenge the March 2013 order finding her to be a frivolous litigant and cannot do so now in this appeal. *See* Minn. R. Gen. Pract. 9.05 (“An order requiring security or imposing sanctions under this rule shall be deemed a final, appealable order. Any appeal under this rule may be taken to the court of appeals as in other civil cases within 60 days after filing of the order to be reviewed.”).

Yager appears then to challenge the district court’s February 2014 ruling that she was required to “continue to meet” the previously imposed preconditions before serving or filing future motions. Yager argues that the district court erred by imposing preconditions without finding her to be a frivolous litigant. But the district court already found Yager to be a frivolous litigant and acted well within its authority by requiring Yager to continue fulfilling preconditions imposed in a previous and final order.

III.

Finally, Yager argues that the district court erred by awarding conduct-based attorney fees to Fox. “Conduct-based fee awards may be awarded against a party who unreasonably contributes to the length or expense of the proceeding and are discretionary with the district court.” *Szarzynski*, 732 N.W.2d at 295; *see also* Minn. Stat. § 518.14, subd. 1 (2012).

Yager argues that the fee award is erroneous because she is unable to pay it and because Fox has the means to pay his attorneys. But Yager’s and Fox’s abilities to pay are irrelevant to an award of conduct-based fees. *See Brodsky v. Brodsky*, 733 N.W.2d

471, 476 (Minn. App. 2007) (“[I]f an award of conduct-based fees is proper, it may be made regardless of the recipient’s need or the payor’s ability to pay.”).

Yager also argues that Fox did not present evidence to corroborate the amount he was seeking and that the district court did not provide “particular findings regarding fees.” Fox asked the district court to award him \$999 in attorney fees. Because Fox did not request \$1,000 or more, he was not required to include a detailed description of the work performed and the hourly rates of his attorneys. *See* Minn. R. Gen. Pract. 119.

The district court “[c]onsider[ed] the numerous, largely unsuccessful and often repetitive claims raised by [Yager] over the past two years” and concluded that it was “appropriate” to award Fox \$500 in attorney fees. In other parts of its order, the district court noted the repetitive nature of the current motion and the lack of supporting evidence provided. The district court therefore properly identified litigation conduct justifying the fee award. *See Geske v. Marcolina*, 624 N.W.2d 813, 819 (Minn. App. 2001) (remanding for the district court to identify conduct during the litigation that justifies attorney fees). And the record supports an award of conduct-based attorney fees. Yager brought the current motion after multiple unsuccessful motions to modify custody and child support, failed to provide supporting evidence for her claims, and failed to follow the preconditions the district court imposed upon her as a frivolous litigant. As a result, Yager “unreasonably contribute[d] to the length or expense of the proceeding.” *See*

Minn. Stat. § 518.14, subd. 1. The district court did not abuse its discretion by awarding conduct-based attorney fees to Fox.²

Affirmed.

² In the last sentence of her brief and in her reply brief, Yager also requests modification of her child-support obligation. We decline to address this request because Yager failed to adequately brief this issue on appeal. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (explaining that issues that are alluded to on appeal but not addressed in the argument portion of the brief are deemed waived). In addition, we decline to address several other forms of relief that Yager requests in her reply brief but did not include in her motion before the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it.” (quotation omitted)); *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (explaining that arguments not raised in a principal brief cannot be revived in a reply brief), *review denied* (Minn. Sept. 28, 1990).