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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0624**

In re the Marriage of:

Jeffrey Scott Hoover, petitioner,
Appellant,

vs.

Kelly Jane Hoover,
Respondent.

**Filed March 6, 2017
Affirmed in part and remanded
Schellhas, Judge**

Dakota County District Court
File No. 19AV-FA-12-1651

Diana Longrie, Longrie Law Office, Maplewood, Minnesota (for appellant)

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Considered and decided by Hooten, Presiding Judge; Schellhas, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's orders that modify his physical custody of,
and parenting time with, his three minor children, appoint a guardian ad litem for the

children, and deny his motion for amended findings and a new evidentiary hearing. We affirm in part and remand.

FACTS

The judgment dissolving the marriage of appellant Jeffrey Hoover (father) and respondent Kelly Hoover (mother) was entered on March 13, 2013. The judgment granted the parties joint legal and physical custody of their three minor children, now ages 16, 14, and 11, and included a specific parenting-time schedule.

Father's employment requires him to carry a firearm. In March of 2014, police and child-protection officials investigated a report that father had angrily cocked his gun at his child, C.H., and that C.H. was afraid that his father was going to kill him. Police determined that the allegations were unfounded, and child-protection officials concluded that no maltreatment occurred but recommended that father accept in-home services because of concerns about him yelling at the children. Also in March of 2014, after speaking to mother by telephone while at father's house, C.H. told father that he had suicidal thoughts. Father overheard mother tell C.H. that "he needs to be frightened of [father] since [father] carr[ies] a gun" and that C.H. did not need to feel guilty about telling his therapist untrue things about father. Father believes that mother's comments to C.H. caused his suicidal thoughts.

The parties subsequently asked their parenting consultant (PC) to complete a parenting evaluation. The PC concluded that the children were being emotionally endangered and harmed in father's care and therefore temporarily reduced father's parenting time. Although both parties objected to some of the PC's opinions and

recommendations, they accepted his recommendation to engage Carol R. Tellett, M.A., L.P., to conduct a custody and parenting-time evaluation.

On January 29, 2015, Tellett orally opined to the parties' counsel that there had been "a significant change of circumstances since the parties' dissolution in March 2013 and that the current custody and parenting time arrangement ha[d] . . . endangered the children's mental health." She recommended that mother be granted sole legal and sole physical custody of the children, that father's court-ordered, unsupervised parenting time be suspended, that father's parenting time be supervised at an agency, and that a guardian ad litem (GAL) be appointed for the children. On January 30, the district court issued an ex parte order, granting mother's emergency motion for temporary sole legal and sole physical custody of the children, subject to father's supervised parenting time by an agency. On February 12, the court modified the order to allow father's parenting time to be supervised by a responsible adult instead of an agency.

At an evidentiary hearing on July 6, 2015, Tellett testified and opined that father loves his children and they love him but recommended that father have only supervised visitation with the children until he engaged in dialectical behavior therapy so that he is less prone to be angry with the children and more able to understand how his behavior affects the children. In an August 25 order, the district court found that "[father]'s consistently angry and unpredictable behavior ha[d] caused all three children increased fear and stress, to the point where circumstances have changed and their emotional development is endangered," that mother "ha[d] met her burden to prove that modification of the current physical custodial arrangement is warranted" because "[t]he evidence demonstrate[d] that

[father] endangers the emotional health of the minor children and, if similar behavior continues, will impair their emotional development.” The court granted mother sole physical custody of the minor children, leaving unchanged the parties’ joint legal custody; ordered that father’s parenting time be supervised until further order of the court, approved father’s parents as parenting-time supervisors, and ordered that the children be appointed a GAL as a permissive appointment and noted that a separate appointment order would be issued. On September 17, 2015, the court appointed a GAL. In a February 19, 2016 order, the court denied father’s motion for amended findings and a new trial.

Father appeals the orders of August 25, 2015, September 17, 2015, and February 19, 2016.

D E C I S I O N

I

Father argues that he was unfairly prejudiced by two procedural and evidentiary rulings. “Procedural and evidentiary rulings are within the district court’s discretion and are also reviewed under an abuse-of-discretion standard.” *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). “A district court’s ruling on the admissibility of evidence will only be reversed if the court abused its discretion and the abuse of discretion prejudiced the objecting party.” *Melius v. Melius*, 765 N.W.2d 411, 417 (Minn. App. 2009). Generally, “[a]n evidentiary error is not prejudicial unless it might reasonably have influenced the trier of fact and changed the result” of the proceeding. *Id.* at 418 (citing *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006)).

A

Father argues that the district court erred by failing to admit therapist Randall Pottebaum's records into evidence. Pottebaum had provided therapy to one of the parties' children, C.H. The court excluded the therapy records for lack of foundation. Before a document is admitted into evidence, it must be authenticated or identified. See Minn. R. Evid. 901(a) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

Father attempted to introduce Pottebaum's records during cross-examination of Tellett, whose written report reflects that she cited the records in her custody and parenting-time evaluation. Pottebaum's records were admissible under Minn. R. Evid. 703(b) because Tellett used the records as a basis for forming her opinion about custody and parenting time in this case. "Nothing in [Minn. R. Evid. 703] restricts admissibility of underlying expert data when inquired into on cross-examination." Minn. R. Evid. 703(b); see *State v. Morrison*, 437 N.W.2d 422, 427–28 (Minn. App. 1989) (holding that district court did not err by admitting autopsy report of autopsy physician who did not testify when testifying coroner used report as basis for forming his own opinion about cause of death), *review denied* (Minn. Apr. 26, 1989). The district court abused its discretion by not admitting Pottebaum's records into evidence.

But this court will not reverse the district court unless the error might reasonably have changed the result. Father argues that admitting Pottebaum's therapy records might have changed the result of the proceeding because the records substantiate his claim that

mother manipulated C.H. We are not persuaded. Even without Pottebaum's records, the evidentiary record contains extensive testimony about Pottebaum's opinion concerning mother's manipulation of C.H. In Tellett's custody and parenting-time evaluation, she specifically noted that Pottebaum had "concluded that [mother] was telling [C.H.] how awful [father] was," that at C.H.'s last visit, Pottebaum "told [mother] he thought she was fabricating [C.H.]'s symptoms," and that mother terminated C.H.'s therapy with Pottebaum. And Tellett testified that Pottebaum thought that "[mother] was kind of encouraging [C.H.] to say things that were not his actual experience." So, regardless of the court's exclusion of Pottebaum's records, the evidence includes Pottebaum's opinions, as summarized by Tellett in her report and testimony. And mother testified that "in the early stages with [C.H.] . . . [she] was too involved with the children in going to therapy." We therefore conclude that the court's error in excluding Pottebaum's records was harmless because their admission would not have a reasonable chance to influence the trier of fact or change the result of the proceeding. *See Melius*, 765 N.W.2d at 418 ("An evidentiary error is not prejudicial unless it might reasonably have influenced the trier of fact and changed the result of the trial."); *cf.* Minn. R. Evid. 403 (noting that "relevant" evidence can be excluded if it is "cumulative").

B

Father also complains that he was prejudiced by a break in his testimony during the third day of the hearing due to respondent's counsel's one-and-one-half-hour absence. The purpose of his complaint is difficult to understand. Parents have a constitutional right to be heard on custody issues. *Cf. In re Child of P.T.*, 657 N.W.2d 577, 586 (Minn. App. 2003)

(discussing, in context of termination of parental rights, procedural and substantive due-process rights, and explaining that “[t]he due process clause provides that the state may not deprive a person of life, liberty, or property without due process of law,” and “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner” (quotation omitted)), *review denied* (Minn. Apr. 15, 2003); *Halverson ex rel. Halverson v. Taflin*, 617 N.W.2d 448, 451 (Minn. App. 2000) (explaining that “[t]he failure to grant a parent an opportunity to be heard on custody issues is a denial of equal protection and due process”).

Here, after father’s counsel conducted her direct examination of father, she stated that she had no further questions and mother waived cross-examination. Later, father argued in a letter to the district court that his testimony was cut short and that he did not have a full and fair opportunity to be heard. In its August 25, 2015 order, the court addressed father’s claim, concluding that it was unfounded, as follows:

First, the court held the hearing after hours on the afternoon of July 6 in order to accommodate the parties; Second, at the conclusion of the hearing on July 8 the Court gave the parties the option to return the following morning to present further testimony, which both parties declined; and Third, that [mother] waived any cross examination of [father] after [father]’s testimony concluded.

Father cites no authority to support his claim that he was denied a full and fair opportunity to be heard before the district court. We conclude that his claim is without merit.

II

Father argues that the district court erred in finding that endangerment exists with respect to each of the parties’ children and that endangerment justifies the permanent

modification of father's physical custody and parenting time. "Appellate review of custody modification . . . is limited to considering whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). "Appellate court[s] set aside a district court's findings of fact only if clearly erroneous, giving deference to the district court's opportunity to evaluate witness credibility." *Id.*; see also Minn. R. Civ. P. 52.01 (stating that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"). "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*, 748 N.W.2d at 284 (quotation omitted).

"We view the record in the light most favorable to the district court's findings and defer to the district court's credibility determinations." *In re Kremer v. Kremer*, 827 N.W.2d 454, 457–58 (Minn. App. 2013), *review denied* (Minn. Apr. 16, 2013). Even if the record might support factual findings other than those the court made, the district court's findings are not defective unless no evidence exists to support the findings of the court. *Id.* at 458 ("But that the record might support findings other than those made by the district court does not show that the court's findings are defective." (quotation omitted)).

Before modifying custody, "the court must first make a two-fold finding: (1) that a change has occurred in the circumstances of the child or his custodian, and (2) that the modification of custody is necessary to serve the best interests of the child." *State ex rel. Gunderson v. Preuss*, 336 N.W.2d 546, 548 (Minn. 1983); Minn. Stat. § 518.18(d) (2016). Even if a court determines that a change has occurred and that custody modification is

necessary to serve the best interests of the child, the court must not modify custody unless the court also determines that at least one of five circumstances is present, including “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.” Minn. Stat. § 518.18(d)(iv).

Father argues that the district court erred in concluding that endangerment existed because “no less than 32 significant findings of fact are in conflict with the direct testimony of credible witnesses and the testimony of Father.” He also challenges the court’s findings that Tellett was credible, that her work was professional and neutral, and that her report was well reasoned. Father’s brief contains ten pages of complaints about Tellett’s custody evaluation and argument that the evaluation was “incomplete, utilize[d] flawed evaluation techniques, and [was] shaped by confirmation bias.” To determine whether Tellett’s work was professional and neutral and whether her report was well reasoned required the court to reconcile conflicting evidence and decide issues of witness credibility. These tasks are exclusively the province of the fact-finder. *See Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004) (stating, in case in which mother sought order for protection against father, that appellate courts “neither reconcile conflicting evidence nor decide issues of witness credibility, which are exclusively the province of the factfinder”).

The district court devoted more than four pages to a thorough analysis of the best-interests factors, before setting forth its conclusion that, “considering all relevant factors, a change in physical custody is necessary in order to protect the children’s mental and

emotional health.” The court also analyzed whether the advantage of the change in custody outweighed the possible harm and concluded that “[a]ny harm in limiting [father]’s unsupervised parenting time is outweighed by providing the children a healthy space to grow and develop until [father] can address his behaviors and better relate to the children.” Based on our thorough review of the evidence, and viewing the record in the light most favorable to the district court’s findings and giving deference to the district court’s ability to assess the credibility of witnesses, we conclude that sufficient evidence supports the district court’s conclusion that a change of circumstances occurred and that a custody and parenting-time modification is necessary to serve the children’s best interests. Sufficient evidence supports the court’s conclusion that any harm in limiting father’s parenting time is outweighed by the advantage of providing the children a healthy space to grow and develop. *Cf. Kuebelbeck v. Humphrey*, 402 N.W.2d 202, 203–05 (Minn. App. 1987) (affirming order limiting noncustodial father’s supervised visitation with his two children because of evidence that father had used past visitation to “vilify” mother and father’s impatient and aggressive conduct had caused problems for children and harmed efforts of other people to give children advantage of good relationship with each parent), *review denied* (Minn. Apr. 29, 1987). We will not disturb the district court’s findings because it was in the best position to determine how much weight to give to different pieces of evidence and to determine the credibility of witnesses giving conflicting testimony.

Because the district court made findings that are supported by the evidence, and because the court correctly applied the law, the court did not abuse its discretion by concluding that endangerment exists with respect to all three children, and that

endangerment justifies the permanent modification of father's physical custody and parenting time.

III

Father argues that the district court abused its discretion by denying his motion for permission to have his fiancée, S.M., supervise his parenting time. “Appellate courts recognize that a district court has broad discretion to decide parenting-time questions and will not reverse a parenting-time decision unless the district court abused its discretion by misapplying the law or by relying on findings of fact that are not supported by the record.” *Suleski v. Rupe*, 855 N.W.2d 330, 334 (Minn. App. 2014) (citations omitted). When a district court makes a finding of endangerment, as it did here, the district court has the authority to restrict the supervision of parenting time in a way the court finds warranted under the circumstances. See Minn. Stat. § 518.175, subd. 1(b) (2016) (stating that “the court shall restrict parenting time with [a] parent [causing endangerment] as to time, place, duration, or supervision and may deny parenting time entirely, as the circumstances warrant”).

Here, the district court denied father's motion to allow S.M. to serve as a parenting-time supervisor for two reasons. First, the court found that adding her as a supervisor “presents a conflict of interest” and, second, that adding her as a parenting-time supervisor “has been discouraged by the children's therapists and other professionals.” We agree with father that no record evidence supports the court's finding that adding S.M. as a supervisor “has been discouraged by the children's therapists and other professionals.” The court's finding therefore is clearly erroneous because it is not supported by the record. But,

considering the totality of the evidence, the court nevertheless had the discretion to deny father's request that S.M. be allowed to supervise his parenting time. This is not because the record contains any evidence to suggest that S.M. is in any way unsuitable to supervise children, but the record as a whole contains sufficient evidence that her service as a parenting-time supervisor could present a conflict of interest. We therefore conclude that the court acted within its discretion by denying father's motion to add S.M. as a parenting-time supervisor even though the decision was based, in part, on an erroneous finding. See Minn. R. Civ. P. 61 (requiring courts to ignore harmless error).

IV

Father argues that the district court erred in its permissive appointment of a GAL and, alternatively, that the court's September 17, 2015 order, appointing a GAL, supersedes the court's August 25, 2015 order. The August 25 order merely provides that "[a GAL] *will be* appointed in a separate order. The [GAL] will provide input on the progress of the case and make recommendations as to when [father]'s unsupervised parenting time can recommence." (Emphasis added.) The August 25 order does not state whether the court anticipated that the GAL appointment would be permissive or mandatory. In a "separate order" on September 17—a form order—the court appointed a GAL for the children, as a "permissive¹ appointment under Minn. Stat. § 518.165."

A court may appoint a GAL permissively

¹ The September 17, 2015 form GAL-appointment order contains endnote 1 here, which includes a description of the circumstances under which a GAL appointment is permissive, replete with statutory references and caselaw.

In all proceedings for child custody . . . where custody or parenting time with a minor child is in issue, the court *may* appoint a guardian ad litem to represent the interests of the child. The guardian ad litem shall advise the court with respect to custody and parenting time.

Minn. Stat. § 518.165, subd. 1 (2016) (emphasis added); *see also Cepek v. Cepek*, 684 N.W.2d 521, 524 (Minn. App. 2004) (“In a family court child-custody proceeding, appointment of a [GAL] for the minor child[ren] is permissive, unless the court has reason to believe that the minor child[ren] [are] victim[s] of domestic child abuse or neglect.”) (citing Minn. Stat. § 518.165, subds. 1, 2); *cf. Tischendorf v. Tischendorf*, 321 N.W.2d 405, 409 (Minn. 1982) (explaining that district court has discretion to appoint GAL). When the court makes a permissive appointment of a GAL, such GAL “shall advise the court with respect to custody and parenting time.” Minn. Stat. § 518.165, subd. 2.

This court reviews a district court’s decision to appoint a guardian ad litem for an abuse of discretion when there are no allegations of domestic child abuse or neglect. *See Reed v. Albaaj*, 723 N.W.2d 50, 59 (Minn. App. 2006). A district court can abuse its discretion either by making findings unsupported by the evidence or by improperly applying the law. *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 716 (Minn. App. 2009), *review granted* (Minn. Sept. 29, 2009) *and appeal dismissed* (Minn. Feb. 1, 2010).

In the August 25, 2015 order, the district court explained that the GAL would, “provide input on the progress of the case and make recommendations as to when [father]’s unsupervised parenting time can recommence.” In the September 17, 2015 order, the district court specifically added the following language: “Make recommendations in consultation with the children’s and parties’ therapists as to when [father] may resume

unsupervised parenting time.” This provision is entirely consistent with the August 25 order, and we therefore reject father’s argument that the September 17 order contradicts the August 25 order.

We agree with father that neither the evidence nor the district court’s findings support a mandatory appointment of a GAL for the children.² But we reject father’s argument that the September 17 order constitutes a mandatory GAL appointment; it does not. The September 17 order constitutes a permissive appointment under Minn. Stat. § 518.165, subd. 1.

Yet we are not entirely unsympathetic to father’s argument that the August 25, 2015 and September 17, 2015 orders are in conflict because the September 17 order “expands the scope of work of the GAL over that outlined in the August order.” The district court checked every box in the September 17, 2015 form order, and two of the boxes are clearly inapplicable to this case because they pertain to a GAL making recommendations about

² Under Minn. Stat. § 518.165, subd. 2 (2016), a district court must appoint a GAL in custody proceedings involving abuse or neglect:

In all proceedings for child custody . . . in which custody or parenting time with a minor child is an issue, if the court has reason to believe that the minor child is a victim of domestic child abuse or neglect, as those terms are defined in sections 260C.007 and 626.556, respectively, the court *shall* appoint a guardian ad litem. The guardian ad litem shall represent the interests of the child and advise the court with respect to custody and parenting time.

(Emphasis added.)

which party should receive temporary and permanent custody of the children. As to the other boxes, we cannot be certain about the court's intention. Even mother's counsel agreed at oral argument before this court that at least some of the GAL duties authorized in the September 17 order are inapplicable to the parties' current circumstances, explaining that the court just filled out the form and inadvertently checked all of the boxes on the form.

We conclude that the district court properly exercised its discretion by appointing a GAL for the children as a permissive appointment under Minn. Stat. § 518.165, subd. 1. Because the court mistakenly checked all of the boxes on the form order, we remand the September 17, 2015 order to the district court for correction or amendment to eliminate confusion about the GAL's duties and authority in this case.

Affirmed in part and remanded.