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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1809**

In re the Matter of:

Sari Rae Sheeley, n/k/a Sari Rae Moen, petitioner,
Respondent,

vs.

James Harvey Sheeley,
Appellant.

**Filed July 24, 2017
Reversed and remanded
Schellhas, Judge**

Anoka County District Court
File No. 02-F7-04-004409

Terri A. Melcher, Fridley, Minnesota (for respondent)

Robert A. Manson, Robert A. Manson, P.A., White Bear Lake, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Schellhas, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this parenting-time dispute, appellant-father argues that the district court abused
its discretion by denying his motion for reunification therapy with his youngest child

without making best-interest findings and that the court was biased against him. We reverse and remand for proceedings not inconsistent with this opinion.

FACTS

Appellant James Sheeley (father) and respondent Sari Moen, f/k/a Sari Sheeley, (mother) are the parents of four children. J.S. is the youngest of the parties' children and the only child at issue in this appeal. Father and mother were married in 1990 and resided together with their children until October 31, 2003, when father left the home. J.S. was born in November 2003, so father has never lived with J.S.

The district court dissolved the parties' marriage on February 28, 2007, based on the parties' partial settlement agreement and after three days of trial on unresolved issues. The court adopted the parties' stipulation and granted mother "permanent sole legal and physical custody of the parties' minor children, subject to [father]'s parenting time as set forth in Conclusion of Law No. 3," which states, in relevant part, that father "shall have supervised parenting time with [J.S.] at Perspectives, at a minimum, for two hours every two weeks."¹

Throughout 2008, the district court conducted multiple evidentiary and non-evidentiary hearings in response to various motions, including mother's motion to terminate father's supervised parenting time with J.S. Father appeared pro se at these hearings. On October 20, 2008, pending the court's issuance of an order on the motions,

¹ Perspectives is a non-profit organization that, among other things, provides a parenting-time program intended to facilitate visitation between children and non-custodial parents. See PERSPECTIVES, <http://www.perspectives-family.org/programs/> (last visited July 17, 2017).

father informed the court by letter that Perspectives had terminated its supervision of his parenting time with J.S., then age four, because of J.S.'s refusal on three successive occasions to attend scheduled parenting-time sessions. Father asked the court to delay making a decision about his parenting time with J.S. until the court received an anticipated follow-up letter from the director of Perspectives. Father also asked the court to allow reunification therapy so that he could continue to have a relationship with J.S.

On October 23, 2008, the Perspectives director sent a letter to the district court, informing the court that J.S. had refused to attend three consecutive parenting-time sessions with father in August and September of 2008; that prior to the three refused sessions, J.S. had not resisted the parenting-time sessions; that neither mother nor father had “behaved at Perspectives . . . in any way that would have contributed to [J.S.]’s recent resistance”; and that it appeared to the director that father’s parenting time with J.S. needed to be “facilitated in [a] more therapeutic environment than Perspectives . . . [could] provide.” The director advised the court that both mother and father were “in agreement that due to [J.S.]’s behavior at Perspectives, a therapeutic intervention [wa]s necessary.” Apparently because both father’s and the Perspectives director’s letters were received by the court after the close of the record, the court did not consider the letters.

On January 17, 2009, the district court issued 28 pages of findings of fact, conclusions of law, and an order that, among other things, denied mother’s motion to terminate father’s supervised parenting time with J.S. and concluded, “The best interests of [J.S.] continue to be met by supervised visitation with [father] at Perspectives, allowing an increase from two to three hours in duration at the recommendation and availability of

Perspectives pursuant to its rules and policies.” But, as noted above, Perspectives was no longer supervising father’s parenting time with J.S. Thereafter, the case was reassigned to a different judge.

In March 2009, father moved pro se to reinstate his parenting time with J.S. and for an order “[d]irecting that Therapist Kathleen Fischer of ACP or Therapist Sandra Johnson of ACP be installed as therapist, to facilitate the re-continuation of visits between [father and J.S.].” Father expressed concern about mother’s suspected non-adherence to a provision in the court’s dissolution judgment that prohibits each parent from disparaging the other in front of the children or attempting to influence the children to take sides. On July 5, 2009, after non-evidentiary hearings on April 6 and June 2, the district court denied father’s motion “to reinstate visitation.” The court also noted that father had failed to pay previous attorney-fee awards to mother and therefore ordered that “any future motions by [father] require[d] the review and approval by the Court before a hearing [wa]s scheduled” and stated that “the Court may condition any future motions on the deposit of a bond or cash to assure the payment of future awards of attorney fees.”

In June 2016, father moved the district court to order the commencement of reunification therapy between father and J.S. and order mother to “cooperate and help facilitate the reunification process.”² Father represented to the court that he would pay for the reunification therapy. Mother opposed father’s motion and moved the court to, among

² Father’s counsel conceded before the district court and this court that reunification therapy is functionally necessary before father can exercise his right to parenting time with J.S., now age 13.

other things, deny father's motion for reunification therapy. The court dismissed mother's motion without prejudice as untimely. After a non-evidentiary hearing on father's motion, the court denied the motion. Father appeals.

DECISION

I

Father argues that the district court abused its discretion by denying his motion for reunification therapy without making best-interest findings. We agree. We construe father's motion for reunification therapy as a motion for assistance from the court to exercise his court-ordered parenting time with J.S. "[A] district court has broad discretion to decide parenting-time questions." *Suleski v. Rupe*, 855 N.W.2d 330, 334 (Minn. App. 2014) (citing *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995)). We "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." *Id.*

Modification of parenting time is generally governed by Minn. Stat. § 518.175, subd. 5 (2016), which provides that any modification of parenting time must "serve the best interests of the child." Minn. Stat. § 518.175, subd. 5(b). Minnesota Statutes section 518.18 (2016), sets forth the procedures that the district court must follow in modifying parenting time. "Modifications [of parenting time] are less substantial changes in parenting time." *Dahl v. Dahl*, 765 N.W.2d 118, 124 (Minn. App. 2009) (quotation omitted). "A restriction [of parenting time] occurs when a change to parenting time is substantial." *Id.* at 123 (quotation omitted). To determine whether an adjustment to parenting time

constitutes a modification or restriction, we must consider the amount of the reduction as well as the reasons for the adjustment. *Id.* at 124.

Here, the district court's January 17, 2009 order provides father with parenting time as follows:

[Father] shall continue with supervised parenting time with [J.S.] at Perspectives. [Father]'s parenting time may be two or three hours in duration every two weeks, depending upon the rules and procedures of Perspectives. [Father] may take [J.S.] off Perspectives' grounds only if [the director of Perspectives] is willing to allow such off-grounds parenting time and [J.S.] and [father] are accompanied by [the director]. If [the director] is unwilling or unable to accompany [father] and [J.S.] off-grounds, then no off-grounds parenting time shall occur.

Father has not had parenting time with J.S. since 2008 when J.S., then four years old, refused to attend scheduled supervised parenting time. In 2016, J.S. submitted a letter to the district court, stating that "[he] would absolutely refuse to see [father] again"; that "[he is] old enough to make [his] own decisions and no one can tell [him] what to do"; and that "[he is] in 7th grade and . . . not a little kid [and] no one will force [him] to see [father]."

Father maintains that without reunification therapy he has no practical way to exercise his parenting time with J.S. We agree. Given the circumstances in this case, the district court's denial of father's motion for reunification therapy restricts father's court-ordered parenting time with J.S. in such a way that it is tantamount to the elimination of father's parenting time. A court may not restrict parenting time unless "(1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development; or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time." Minn. Stat. § 518.175, subd. 5(c).

The district court did not conduct an evidentiary hearing or make a finding under Minn. Stat. § 518.175, subd. 5(c), to support the parenting-time restriction. By restricting father's parenting time after conducting only a non-evidentiary hearing in response to father's motion, the district court did not comply with the requirement that an evidentiary hearing be conducted before substantially modifying parenting time. *See Suleski*, 855 N.W.2d at 336 ("When the modification is substantial, an evidentiary hearing is required."). When a parenting-time restriction is tantamount to the elimination of parenting-time, an evidentiary hearing is required.³

II

Father argues that the district court demonstrated judicial bias by the content of the memorandum that accompanied its order, particularly the court's comment questioning father's motivations. The court noted its "concerns about the true purpose of [father]'s motion, largely based on [father]'s own affidavit."

Judicial bias claims must first be raised in the district court. *See Baskerville v. Baskerville*, 246 Minn. 496, 501, 75 N.W.2d 762, 766 (1956) ("A litigant who, in the absence of fraud or other controlling circumstance, elects to go to trial without taking timely and appropriate action to disqualify a judge for bias waives his right to assert such

³ During oral argument, respondent's counsel advised this court that remand is unnecessary because, even if the district court erred, the court would not alter the original decision. We are troubled by respondent's counsel's comment and anticipate that on remand the district court will fully consider the law and the evidence and will fulfill its duty to evaluate whether restricting father's parenting time is in J.S.'s best interests.

bias.”); *see also Jones v. Jones*, 242 Minn. 251, 262, 64 N.W.2d 508, 515 (1954) (stating that the “fundamental right [to a fair and impartial judge] may be waived by failure to seasonably assert it”). Because father did not raise his claim of judicial bias in the district court, the issue is not properly before this court, and we decline to address it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only those questions previously presented to and considered by the district court).

Reversed and remanded.