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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1121**

In re the Custody of: A. N. M. L.

Jake Robert Lockwood, petitioner,
Respondent,

vs.

Morgan Nicole Nybeck,
Appellant.

**Filed April 9, 2018
Affirmed
Bjorkman, Judge**

Anoka County District Court
File No. 02-FA-14-1386

Jake Lockwood, East Bethel, Minnesota (pro se respondent)

Erik F. Hansen, Patrick C. Burns, Elizabeth M. Cadem, Burns & Hansen, P.A.,
Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and
Smith, Tracy M., Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant-mother challenges the modification of legal custody and parenting time,
arguing that the district court abused its discretion by (1) modifying legal custody without

adequate evidentiary support or consideration of the applicable factors; (2) modifying parenting time to a schedule neither party requested; and (3) sua sponte designating father's residence as the child's primary residence. We affirm.

FACTS

Appellant Morgan Nybeck (mother) and respondent Jake Lockwood (father) are the parents of one child, born in 2014. The parties never married, but they signed a recognition of parentage and father's name appears on the child's birth certificate.

Father petitioned to establish custody and parenting time. On August 5, 2015, the district court awarded the parties joint legal custody and awarded mother sole physical custody, subject to father's increasing parenting time.¹ But it did so cautiously, noting the parties' already extensive history of conflict, including mother's domestic abuse toward father during parenting-time exchanges. The district court reasoned that, while mother's domestic abuse warrants a presumption of sole legal custody to father, a sole-custody arrangement could be detrimental because "[t]he label of custodian is likely to be used by either party as a means to deprive the other parent of their proper role in the child's life." The district court determined that joint legal custody would best afford both parents the ability to "exercise an active and equal role in [the child's] life." The district court repeatedly emphasized that joint legal custody means the parties have "equal rights and responsibilities" and that if they "fail to cooperate in parenting [the child], either party may make a motion to modify legal custody."

¹ The order provided for increases in father's parenting time in September 2015 and February 2017, up to 6 overnights every 14 days.

Despite the district court's careful direction, the parties' conflict continued unabated. Mother repeatedly denied father parenting time and refused him access to the child's medical and childcare information.

On March 31, 2016, father moved to modify the custody order, citing mother's denials. Father requested sole legal custody, joint physical custody, and additional parenting time. Mother opposed the motion. After an evidentiary hearing, the district court found that mother persistently and willfully denied or interfered with father's parenting time and access to information concerning the child, from immediately after the initial custody order through the evidentiary hearing, "creating a hostile emotional environment" for the child. The district court awarded father sole legal custody, accepted the parties' agreement to joint physical custody, designated father's residence as the child's primary residence, and modified parenting time to an equal alternating-week schedule. The district court subsequently amended its order, adding a provision that "[a]ll existing orders not inconsistent with this Order shall remain in full force and effect." Mother appeals.

D E C I S I O N

I. The district court did not abuse its discretion by modifying legal custody.

A district court has "broad discretion in determining custody matters." *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008) (quotation omitted). On appeal, our review of a custody modification is "limited to whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Id.* at 281-82. We defer to a district court's findings unless they are clearly erroneous. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). A finding

is not clearly erroneous merely because the record might support a different finding; the party challenging the finding must show that the record, viewed in the light most favorable to the finding, requires the definite and firm conviction that a mistake was made. *Id.* at 474.

A district court may modify a prior custody order based on endangerment only if it finds that (1) the circumstances of the child or the parties have changed, (2) modification is necessary to serve the best interests of the child, (3) the child’s present environment “endangers the child’s physical or emotional health or impairs the child’s emotional development,” and (4) the harm likely to be caused by the modification is outweighed by its advantages to the child. Minn. Stat. § 518.18(d)(iv) (2016); *see also* Minn. Stat. § 257.541, subd. 3 (2016) (applying chapter 518 to custody and parenting-time awards for unmarried parents). The party seeking a custody modification bears the burden of establishing these factors, and the district court must make specific findings addressing each. *Crowley v. Meyer*, 897 N.W.2d 288, 293-94 (Minn. 2017).

Mother argues that the district court’s decision is deficient with respect to all four custody-modification factors. We address each one in turn.

Changed Circumstances

To warrant custody modification, the change in circumstances must have occurred since the original custody order; “it cannot be a continuation of conditions existing prior to the order.” *Spanier v. Spanier*, 852 N.W.2d 284, 288 (Minn. App. 2014) (quotation omitted). In determining whether there has been such a change of circumstances, the district court should consider “unwarranted denial of, or interference with, a duly

established parenting time schedule,” Minn. Stat. § 518.18(d), though such interference generally is not “an independently sufficient basis to modify custody,” *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 293 (Minn. App. 2007).

Mother first contends that the record does not support the district court’s finding that she willfully and persistently denied or interfered with father’s parenting time. We disagree. Father’s testimony and hundreds of pages of the parties’ written communications amply support the detailed findings that mother partially or entirely denied father parenting time at least 15 times during the 18 months between the initial custody order and the hearing on father’s motion. Mother’s insistence that her actions were not willful because she was motivated only by her desire to care for the child rings hollow. Her stated desire to care for the child does not trump father’s desire to do so—the record shows both parties are equally capable of providing appropriate care for the child. And the record belies her claim that she acted only out of concern for the child’s needs. Mother repeatedly refused to timely communicate with father about the child’s health, refused to cooperate with father’s requests for compensatory parenting time, and unreasonably denied father his parenting time even when the child’s health was not a factor. On one occasion, she made arrangements with father’s mother without his consent, depriving father of parenting time on Christmas Eve.²

² Mother also argues that father’s willful-interference claims are not credible because it was father who acted unreasonably. In weighing the disputed evidence, the district court noted both parties’ “poor judgment.” To the extent the court credited father over mother, we will not disturb that decision. *Vangsness*, 607 N.W.2d at 472.

Nor are we persuaded that mother's denial of parenting time was not persistent simply because the district court found only one instance of denial in the 11 months prior to the evidentiary hearing. Mother denied father parenting time more than a dozen times in less than seven months between the initial custody order and father's March 2016 motion to modify custody, and denied him parenting time again shortly before the hearing on that motion. She also unilaterally changed the location of parenting-time exchanges. On this record, the district court did not clearly err by finding that mother willfully and persistently denied and interfered with father's parenting time.

Mother next asserts that the parties' conflicts over parenting time do not warrant custody modification because they are neither a changed circumstance nor an independently sufficient basis for modification. We are not persuaded. To the extent that mother suggests her interference with father's parenting time cannot indicate changed circumstances because she engaged in the same obstructive behavior before the initial custody order, we reject this "disingenuous" position. *See Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). And the record reflects more than a mere continuation of that behavior. The district court recounted various instances of mother interfering with father's custodial rights and his relationship with the child, including what the court characterized as her "unfounded and egregious" accusations of sexual impropriety when father indicated willingness to apply the child's vaginal medication rather than forfeit his parenting time as mother demanded; her refusal to make the child's medical or childcare records available to father, despite his numerous requests; and her unilateral changes to childcare and preschool arrangements, over father's

objections. Because the record reflects repeated parenting-time interference despite warnings in the initial custody order against such conduct, as well as additional new conflicts between the parties, the district court did not clearly err in finding a change of circumstances.

Best Interests

When evaluating a request to modify custody, a district court must consider whether modification is “necessary to serve the best interests of the child.” Minn. Stat. § 518.18(d). Factors relevant to the child’s best interests may include the parties’ ability to cooperate in raising the child and whether domestic abuse has occurred between the parties. *See* Minn. Stat. § 518.17, subd. 1(a) (2016).

Mother argues that the district court’s best-interests findings are insufficient because they do not address all of the factors listed in Minn. Stat. § 518.17, subd. 1(a). We disagree. While the statute identifies factors that may be “relevant” to issues of custody, it does not govern custody modification—Minn. Stat. § 518.18 does. *See Hansen v. Todnem*, __ N.W.2d __, __, 2018 WL 1321370, at *2 (Minn. Mar. 14, 2018) (stating that Minn. Stat. § 518.17 applies to “initial custody determinations”). And the district court’s findings indicate that it accurately assessed the child’s best interests under Minn. Stat. § 518.18. The district court explained that awarding father sole legal custody serves the child’s best interests because “overwhelming evidence” indicates that “the parties do not have the ability to share joint legal custody.” This explanation not only points to the detailed and amply supported factual findings regarding mother’s interference with joint legal custody but also implicitly acknowledges that the initial custody order afforded the parties an

extraordinary opportunity to attempt joint legal custody despite their history of conflict and abuse.

In the initial order, the district court thoroughly analyzed the child's best interests and found that mother's domestic abuse against father "support[s] an award of sole legal custody to Father."³ The district court made no finding that mother rebutted the presumption against joint custody, instead noting "grave concerns about interactions between the parties" that make all possible custody arrangements "fraught with potential perils." The district court ultimately awarded joint legal custody only because the arrangement "possesses the greatest potential for a happy childhood for [the child]," with both parents "able to exercise an active and equal role in her life." But the record demonstrates that this potential was not realized. Instead, mother actively undermined this goal, causing joint custody to fail.

Mother contends that if either parent is given sole legal custody, it should be she because she is more experienced in caring for the child and supports father's role in the child's life. Mother ignores evidence that father has sought a more active role in meeting the child's needs, and evidence that mother has prevented him from doing so. As recounted above, mother has impeded—not supported—father's relationship with the child. By contrast, father has never interfered with mother's parenting time. While he acknowledges that he does not encourage the child's telephone contact with mother during his parenting

³ The district court referenced the domestic-abuse presumption in Minn. Stat. § 518.17, subd. 2 (2014). That provision has since been repealed, 2015 Minn. Laws ch. 30, art. 1, § 13, at 283, but the presumption continues in Minn. Stat. § 518.17, subd. 1(b)(9).

time, the record contains neither evidence nor argument that he has sought to undermine mother's relationship with the child. On this record, the district court did not clearly err in finding that the child's best interests are served by awarding father sole legal custody.

Endangerment

The concept of endangerment is "unusually imprecise." *Goldman*, 748 N.W.2d at 285 (quotation omitted). But it encompasses danger to emotional health or development, Minn. Stat. § 518.18(d)(iv), including risk of harm flowing from emotional abuse or isolation from relatives. *Geibe v. Geibe*, 571 N.W.2d 774, 779 (Minn. App. 1997). This court generally requires a showing that there has been "an actual adverse effect on the child." *In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002). But Minn. Stat. § 518.18(d)(iv) does not require a parent to wait until the child has actually been harmed to pursue custody modification; he need only show that the child's environment creates a cognizable risk of harm. *See American Heritage Dictionary* 588 (5th ed. 2011) (defining endanger as "[t]o expose to harm or danger"); *see also Sharp*, 614 N.W.2d at 263-64 (upholding finding of endangerment on testimony that mother's conduct "will cause emotional psychological damage to her child").

Mother argues that the record does not support the district court's endangerment finding because there is no evidence that the child, who was approximately three years old at the time of the modification order, was aware of, let alone negatively affected by, the conflicts between her parents. We disagree. Father's testimony and exhibits indicate that the child has consistently been exposed to hostility during parenting-time exchanges, including being physically passed between the parties during at least one protracted

argument. The child has routinely witnessed police interventions at parenting-time exchanges. Mother conceded that the child is “very aware” of the parties’ conflict and suggested to father that the child will require therapy as a result. Indeed, while mother opposes the district court’s endangerment finding, she does not appear to dispute that the parties’ conflict (which the district court attributed almost entirely to mother’s “incredibly unreasonable” behavior toward father) creates a toxic environment for the child. Given the pervasiveness of the hostility between the parties, the child’s repeated exposure to their conflict, and mother’s persistent efforts to undermine the child’s relationship with father, we see no clear error by the district court in finding that the child is endangered by this environment.

Benefits and Detriments

“Minnesota law presumes that stability in custody is in a child’s best interests.” *Weber*, 653 N.W.2d at 811. But that presumption must give way when the status quo is more harmful than beneficial. *Tarlan v. Sorensen*, 702 N.W.2d 915, 924 (Minn. App. 2005). For this reason, a finding that a child’s current environment endangers her implicitly supports a determination that the benefits of changing that environment outweigh transitional detriments. See *Geibe*, 571 N.W.2d at 778 (observing that the balance of harms may be “implicit in the other factors”).

Mother asserts that awarding father sole legal custody is detrimental because it will “depriv[e] [her] of the ability to make major decisions in [the child’s] life.” This argument underscores one of the critical reasons for the custodial modification—mother used the initial award of joint legal custody to unilaterally dictate those decisions, depriving father

of the very right she now complains of losing. By awarding father sole legal custody, the district court entitled father to make the decisions regarding the child's medical care, childcare, and education. But mother is not excluded from knowledge of those decisions going forward; the modification order requires both parties to communicate with each other about such matters. Further, we agree with the district court that the practical impact of the legal-custody modification on the child is likely minimal. More significant to the child, and to each parent's relationship with the child, is the joint physical custody arrangement to which both parties agreed. That arrangement, combined with equal parenting time, means the child will continue to spend substantial time with both parents, to her undisputed benefit. The district court did not clearly err by finding that this beneficial arrangement comes at little cost to the child's preexisting routine.

In sum, extensive evidence supports the district court's determination that the parties' persistent conflict and mother's unreasonable conduct created a hostile environment that endangered the child and made joint legal custody untenable. On this record, and in view of the unique history of this case, we conclude that the district court did not abuse its discretion by modifying legal custody.

II. The district court did not abuse its discretion by modifying parenting time.

A district court generally may modify parenting time if doing so "would serve the best interests of the child." Minn. Stat. § 518.175, subd. 5(b) (2016). We will not reverse a parenting-time decision unless the district court abused its broad 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).

Mother argues that the district court abused its discretion by modifying parenting time to an alternating-week schedule because neither party requested it. Mother identifies no authority imposing such a limitation on the district court's discretion, and we discern none from the legislature's direction that the "best interests of the child," rather than parental preferences, dictate whether and how a district court may modify parenting time. *See id.* Moreover, the record indicates that the alternating-week schedule was thoroughly litigated. Father expressly requested an alternating-week schedule at the evidentiary hearing, testifying, "I'm proposing that we kind of move more or less to my week, then your week, my week, your week type of rotation." And mother had an opportunity to voice her opposition and concerns.

Mother also challenges the adequacy of the district court's parenting-time findings. We agree that the court's order does not contain an express finding that the alternating-week schedule is in the child's best interests. But the record demonstrates that the parenting-time decision was plainly driven by the child's best interests. At the hearing, the district court stated that its goal was to "try to make certain that . . . the schedule is best for [the child] . . . and try to make these exchanges as painless as possible for her." It did so by slightly increasing father's parenting time—from six overnights every two weeks to seven—and reducing the frequency of exchanges. The district court's findings reflect its determination that the "insignificant" change is unlikely to detrimentally affect the child, and that making parenting-time exchanges as infrequent and controlled as possible is in the child's best interests. Accordingly, remand for an explicit finding is unwarranted. *Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985).

Finally, the record amply supports the alternating-week schedule. It is undisputed that parenting-time communication and exchanges are points of high conflict; reducing the number of exchanges should help reduce conflict. The schedule also affords consistency, which both parties requested for the child. And the amount of parenting time affected by the change is minimal. The district court did not abuse its discretion by modifying parenting time to an alternating-week schedule.

III. The district court did not abuse its discretion by designating the child's primary residence.

The term “primary residence” refers to “the principal dwelling or place where the child lives.” *Suleski*, 855 N.W.2d at 335. A child’s primary residence is based on more than the apportionment of parenting time. *Christensen v. Healey*, 899 N.W.2d 573, 577-78 (Minn. App. 2017) (citing *Suleski*, 855 N.W.2d at 335), *review granted* (Minn. Sept. 19, 2017). But substantial changes to parenting time may effectuate a change of primary residence. See Minn. Stat. § 518.175, subd. 5(a) (establishing best-interests-of-the-child standard for parenting-time modification “if the modification would not change the child’s primary residence”). When that happens, the change in primary residence is treated like a custody modification, and the moving party must satisfy the endangerment standard. Minn. Stat. § 518.18(d); *Christensen*, 899 N.W.2d at 579.

Mother argues that the district court abused its discretion by designating father’s residence as the child’s primary residence because neither party requested such a designation. We are not persuaded. While it is true that neither party expressly raised this issue, the related issues of custody and parenting time were squarely before the court,

affording the parties an opportunity to be heard on the statutory factors governing a change of primary residence. *Cf. Splinter v. Landsteiner*, 414 N.W.2d 213, 214 (Minn. App. 1987) (reversing custody modification when there was “no motion for modification, no affidavits addressed to that issue, no hearing, no transcript and no findings”). Because father sought to modify both the custody and parenting-time provisions of an order that effectively made mother’s residence primary, his motion reasonably raised a question whether mother’s residence was still primary. The district court elected to answer that question, and the record supports its decision.

The parties acknowledge their high degree of conflict, and both requested a detailed and specific order to reduce the potential for conflict. The district court responded by clarifying that despite joint physical custody and equal parenting time, father is the “primary” parent in terms of legal custody and residence. Such a clarification is generally permissible. *See Ayers v. Ayers*, 508 N.W.2d 515, 520 (Minn. 1993) (holding that joint physical custody arrangement does not preclude one parent’s residence being designated as primary). And the district court plainly deemed it a necessary condition to accepting the parties’ agreement to joint physical custody: “Given the history of extensive conflict between these parties, this Court is concerned about their ability to share physical custody. At this time, however, this Court will defer to their testimony that this arrangement is in the child’s best interests. Father’s residence will be the minor child’s primary residence.” We discern no abuse of discretion by the district court in designating father’s residence as primary.

Affirmed.