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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1151**

Ross Ronald Olsen, petitioner,
Appellant,

vs.

Molly Erin Koop, f/k/a Molly E. Humphrey,
Respondent.

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

Crow Wing County District Court
File No. 18-FA-09-3698

Michael D. Dittberner, Linder, Dittberner, Bryant & Winter, Ltd., Edina, Minnesota (for
appellant)

Molly Erin Koop, Baxter, Minnesota (pro se respondent)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant-father challenges the district court's decision to modify custody by
awarding sole legal custody to respondent-mother. Because the district court gave both
parties sufficient notice that modification of legal custody was an issue, both parties
implicitly consented to litigating modification of custody during the evidentiary hearing,

and the district court's findings of fact were supported by record evidence, we conclude that the district court did not abuse its discretion. Therefore, we affirm.

FACTS

Appellant-father Ross Ronald Olsen and respondent-mother Molly Erin Koop are the parents of H.K.O., who was born in 2008. Olsen and Koop never married. In May 2010, pursuant to a stipulation, Olsen and Koop entered into a judgment and decree regarding custody and parenting time of H.K.O. The May 2010 order adjudicated Olsen as H.K.O.'s father, granted Koop and Olsen joint legal custody, granted Koop sole physical custody, and incorporated an agreement as to physical custody and parenting time.¹ The decree also provided for the appointment of a parenting consultant.

Olsen and Koop experienced difficulties working together, particularly with managing parenting time. In June 2012, Koop moved for the appointment of a parenting-time expeditor, requested that parenting exchanges take place at a designated center, and that Olsen's parenting time be supervised. In September 2012, the court granted Koop's motion, in part, and ordered that the parenting exchanges take place at a law enforcement center and appointed a parenting-time consultant.

In approximately July 2013, Olsen brought H.K.O. on an extended vacation without receiving Koop's permission. In response, Koop moved for Olsen's parenting time to be supervised. The district court ordered that Olsen return H.K.O. to Koop's care and suspended Olsen's parenting time for extended visits, including vacation time. Olsen

¹ Olsen was provided parenting time on alternating weekends, Wednesdays, alternating holidays, portions of school breaks, and two weeks of vacation.

continued to have unsupervised visits. In August 2013, Olsen's extended visits were reinstated.

In 2014, Lori Hanson, who had been appointed as the parenting-time consultant over a year earlier, asked the court to remove her because Olsen had become "increasingly difficult to work with," was disrespectful and argumentative, and that the "parents [were] clearly unable to communicate effectively." The court appointed Annie Merriam as the consultant to replace Hanson.

In January 2015, Merriam required that parenting exchanges occur at the Alex and Brandon Child Safety Center (Center) and that all communication between the parties occur on "Our Parenting Wizard," an online communication and scheduling tool. Merriam also directed both parties to receive psychological evaluations, and Olsen to receive an anger management evaluation.

After speaking to Olsen on the phone, the evaluator, LaDonna Scott, informed Merriam via email that Olsen had expressed "bizarre thoughts and behaviors," and was extremely focused on Koop, accusing her of "parental alienation" through use of the "silent treatment." Scott also informed Merriam that she should be aware of her own safety because Olsen's behavior was not stable. Scott described Olsen as "dangerous" and stated that she was also concerned for Koop and H.K.O.'s safety. Merriam suspended Olsen's unsupervised parenting time on January 21, 2015, and required that his visits take place at the Center. Olsen later testified that he objected to Scott completing his evaluation because he felt that she was not "fair-minded" and thus, he did not complete the evaluation at that time.

In February 2015, Olsen moved for parenting-time assistance, asked the court to grant him compensatory time, remove the parenting consultant, require Koop and her husband to have supervised parenting time, and modify the parenting-time schedule. The motion and attached affidavit made multiple references to a “conspiracy,” including that Koop and her husband were attempting to “eliminate” Olsen and were in contempt of court for failing to follow the May 2010 order regarding custody and parenting time. Olsen’s affidavit also averred that Scott’s email contained “fabrications, inflam[m]atory language, and conclusions which have no factual or logical bas[is].”

In March 2015, Koop opposed Olsen’s request for compensatory parenting time and requested that Olsen’s parenting time be supervised at the Center. In her affidavit, Koop stated she was concerned about Olsen’s “erratic behavior and anger.” Koop also stated that she had attempted to get an order for protection against Olsen but her request was denied. Koop averred that Olsen had called the police several times, asking them to check on H.K.O. and claiming that Koop’s husband was involved in criminal activity.

Also in March 2015, Olsen hired a private investigator to investigate Koop’s husband. The private investigator reported that the husband’s only conviction was for driving while impaired in 2004. Olsen reported the results of this investigation to Merriam, who rejected the information, stating that she was not concerned about Koop’s husband.

Olsen filed a second motion for parenting-time assistance in April 2015, again requesting unsupervised parenting time. This motion alleged Koop had excluded him from making decisions about H.K.O.’s care because H.K.O. had been treated for a disability

without Olsen's consent. Olsen repeated allegations that Koop's husband had a significant criminal history.

On April 27, 2015, the district court heard all pending motions, taking the issues under advisement. The following day, the district court issued an order stating that joint legal custody may no longer be in H.K.O.'s best interest and scheduling an evidentiary hearing. The court ordered Olsen to complete a psychological evaluation. Koop had previously completed a psychological evaluation, as directed by Merriam. Before the evidentiary hearing, Olsen filed additional motions and attached several affidavits and exhibits, repeating earlier allegations about Koop's husband and asserting that Koop had failed to comply with the May 2010 order.

In summer 2015, Olsen was arrested and charged with one count of felony stalking and three counts of gross misdemeanor stalking, after incidents in June and July 2015, where Olsen left pizza, toys, and documents in Koop's yard, and sent harassing communications and voicemails to Koop. As a result of these charges, Olsen started residential treatment at Minnesota Adult and Teen Challenge, where he resided during the evidentiary hearing.

The evidentiary hearing took place on September 15, 2015 and October 27-29, 2015. On the first day of the hearing, Olsen requested a continuance, which the judge denied.² The district court heard testimony from the following witnesses: Merriam; Katherine Webster, who conducted Olsen's psychological evaluation; Koop's husband;

² Olsen appeared pro se on the first day of the hearing, but was represented by counsel for the remaining hearing dates.

Koop; Olsen; and Janice Olson, Olsen's mother. Merriam testified that H.K.O. had been diagnosed with a disability and had an individualized education program (IEP) in place. Merriam also testified that Olsen has "stopped" or "sabotage[ed]" H.K.O.'s educational progress by withdrawing his permission to allow H.K.O. to complete an "IEP program." Merriam testified that Olsen alleged that there had been a "conspiracy against him" and H.K.O.'s school had failed to inform him of H.K.O.'s treatment plan and diagnosis, but she had found no evidence that this was true. Koop testified that Olsen had been asked not to return to the YMCA, which provided daycare for H.K.O., and the Center, where they had previously done parenting exchanges. According to Koop, both establishments stated that Olsen had violated their conduct codes.

On February 17, 2016, the district court issued a written order with findings of fact and granted Koop sole legal custody of H.K.O. The district court's decision also suspended Olsen's parenting time, set a review hearing to later reinstate Olsen's parenting time, reinstated Olsen's ability to have telephone contact with H.K.O., discharged Merriam as the parenting consultant, and provided for the appointment of a parenting-time expeditor.

On July 15, 2016, Olsen filed a motion for post-hearing relief. On December 11, 2016, the district court rejected the majority of Olsen's requests, but acknowledged that in one finding of fact and two conclusions of law it had "refer[ed] to other [c]ourt records" outside the record in the custody case, and that the parties had not been given a chance to be heard on those findings.³ Therefore, the district court ordered a new hearing. After the

³ Finding of fact 25 states that Olsen was charged with one count of felony stalking and three counts of gross misdemeanor stalking after incidents at Koop's home. The

hearing, the district court denied Olsen’s request to strike the challenged finding of fact and conclusions of law from the record, reasoning that it was appropriate to take judicial notice of the court records under the specific circumstances. Olsen appeals.⁴

D E C I S I O N

I. The district court did not err by directing the parties to appear for an evidentiary hearing to decide whether modifying legal custody was appropriate.

Olsen argues that the district court erred by modifying legal custody sua sponte. While both parties filed motions seeking changes to parenting time, neither party moved for modification of legal custody. After hearing the competing motions, the district court issued an order setting an evidentiary hearing on possible custody modification.

Olsen is correct that the custody modification statute appears to contemplate that custody will be modified following a motion or other request by a party. *See* Minn. Stat. § 518.18(a) (2016) (“Unless agreed to in writing by the parties, no motion to modify a custody order or parenting plan may be made earlier than one year after the date of the entry of a decree of dissolution”). Although court-initiated modification of legal

December 11 order states “conclusions of law 3, 4, and 5” but at the hearing on January 30, 2017, the court clarified that it was referring to conclusions of law 3(4) and 3(5). The relevant conclusions of law provide: 3(4) modification of custody is necessary to serve the best interest of the child when domestic abuse has occurred in the parents’ household or relationship and 3(5) any physical, mental, or chemical health issue of a parent that affects the child’s safety or developmental needs.

⁴ Koop did not file a responsive brief; consequently, this matter proceeds on the merits pursuant to Minn. R. Civ. App. P. 142.03.

custody is not directly authorized by the statute, it is not prohibited by statute and we determine that the district court did not err for three reasons.

First, Minnesota Rule of Civil Procedure 15.02 provides issues that are not raised by the parties but that “are tried by express or implied consent of the parties . . . shall be treated in all respects as if they had been raised.” Because the district court’s April order stated that legal custody was at issue, both parties were notified that custody would be addressed at the evidentiary hearing. In addition, on the first day of the hearing, the court told Olsen that it had decided in April “at the last hearing when we were here on your motions and your orders, that the Court, rather than proceeding with all of those, took all of the information and the allegations and the responses together and determined that a lot of the information warranted the setting of an evidentiary hearing to determine whether or not the current custodial status, as well as the current parenting time, continued to be in the best interest of the minor child.” Neither party objected. We conclude that the parties implicitly consented to try the custody issue.

Second, a district court’s paramount consideration is the best interests of the child. For example, a district court may reject a stipulation that provides for joint legal custody based on the best interests of the child. *See Frauenshuh v. Giese*, 599 N.W.2d 153, 158-59 (Minn. 1999) (holding that “considerable weight will be given to stipulations entered with the benefit of counsel, but the paramount consideration is the welfare and best interests of the children”), *superseded in part on other grounds by statute*, 2000 Minn. Laws ch. 444, art. 1, § 5, at 984-85 (codified at Minn. Stat. § 518.18(d)(i) (2016)); *see also Petersen v. Petersen*, 296 Minn. 147, 148, 206 N.W.2d 658, 659 (1973) (stating that courts are not

bound by stipulations); *Clark v. Clark*, 642 N.W.2d 459, 465 (Minn. App. 2002) (“[A] district court has the discretion to accept all or part of a proposed stipulation. . . .”).

Consistent with this principle, we conclude that, on this record, the district court did not abuse its discretion when it notified the parties of an evidentiary hearing to review the current custody arrangement. Here, the district court set an evidentiary hearing only after hearing the parties’ pending motions and implicitly concluding that it could not grant appropriate relief without further analysis. The district court determined that the circumstances raised by the parties indicated that the existing custody decree may no longer be in H.K.O.’s best interest. The subsequent evidentiary hearing occurred with ample notice and Olsen does not claim that he lacked adequate notice or an opportunity to respond. While court-initiated custody hearings may not be common, they may be appropriate under the circumstances, as was the case here.⁵

Third, Olsen does not argue any prejudice from the district court’s decision to set an evidentiary hearing to determine whether modification was appropriate. To prevail on appeal, an appellant must show both error and prejudice resulting from the error. *See* Minn.

⁵ Olsen relies on caselaw that is not applicable. In *Splinter v. Landsteiner*, this court overturned the district court’s sua sponte order modifying custody with “no motion for modification, no affidavits addressed to that issue, no hearing, no transcript and no findings.” 414 N.W.2d 213, 214 (Minn. App. 1987). But here the district court notified the parties of the legal custody issue, held a four-day evidentiary hearing, and issued detailed findings. Olsen also relies on *J.M.G. v. J.C.G.*, where this court overturned the district court’s sua sponte decision to transfer custody. 431 N.W.2d 592, 594 (Minn. App. 1988). In *J.M.G.*, neither party argued that the district court lacked authority to transfer custody sua sponte, but only contended that the district court abused its discretion in the final custody decision. *Id.*; *see also Hegerle v. Hegerle*, 355 N.W.2d 726, 729, 732 (Minn. App. 1984) (affirming district court’s sua sponte order to amend the custody provision of original judgment and decree).

R. Civ. P. 61 (harmless error on appeal); *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). The district court’s April 2015 order gave Olsen more than four months’ notice of the evidentiary hearing. Olsen appeared pro se on the first day of the hearing, but then was represented for the remainder of the hearing dates. And Olsen does not challenge the district court’s decision to deny his request for a continuance. Because Olsen asserts no prejudice from the district court’s decision to set an evidentiary hearing on custody modification, and the district court’s decision to do so was supported by the circumstances raised in the parties’ motions, we conclude that the district court did not err.

II. The district court’s conclusions of law were supported by its findings and its findings of fact were supported by the evidence in the record.

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).

Before modifying custody, a district court must find that the statutory requirements set forth in Minn. Stat. § 518.18 have been satisfied. *See Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017). A district court may modify legal custody when, among other things, 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). In order to establish danger to a child’s welfare, a parent’s conduct must be shown to result in “an actual adverse effect on the child.” *In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002).

A. Conclusion of law 4: Endangerment

Olsen challenges the district court’s conclusion of law that H.K.O.’s present environment endangered his physical and emotional health or impaired his emotional development. The district court found that Olsen’s “resistance to working with, or actively antagonizing, [Koop], the child’s teachers, therapists, and daycare personnel, and [Olsen]’s escalating behavior had distressed [H.K.O.] and placed his educational future in limbo, the present legal custody environment of [H.K.O.] endangers [his] emotional health.” Olsen asserted that his behavior only affected the parenting-consultant, but the district court specifically found that Olsen was “banned” from H.K.O.’s YMCA daycare and that the Center also had terminated their services due to Olsen’s behavior.

The district court also found that the parties were unable to agree or parent without the assistance of the court or a parenting consultant, and concluded that Olsen “has consistently displayed a contumacious course of conduct when dealing with [Koop][.] . . . The parties have no ability to jointly resolve disputes regarding major decisions concerning the life of the minor child.” The district court reasoned that, because Olsen and Koop were unable to make decisions about H.K.O. without involving the court system, continuing joint legal custody would endanger H.K.O.’s emotional and mental health. Other courts have reached a similar conclusion based on similar facts. *See, e.g., Andersen v. Andersen*,

360 N.W.2d 644, 646 (Minn. App. 1985) (finding that continued exposure to the parents' disagreement endangered the child's health and development by trapping her in a "tug-of-war" between the parents). Although Olsen testified that he did not think that his actions resulted in an adverse effect on H.K.O.'s emotional health, the district court was not required to accept Olsen's opinion. The district court's conclusion was supported by its findings and the record evidence.

B. Conclusion of law 5: Balancing harm and advantage of change in custody

Olsen challenges the district court's conclusion of law that the harm to be caused by a change of custody was outweighed by the advantage of the change to H.K.O. The district court found that H.K.O. was harmed by the current legal custody arrangement, his progress in school was at a standstill, and, due to Olsen's hostility toward Koop and others, timely decisions were not made consistent with H.K.O.'s best interest.

Olsen contends that no evidence supports the district court's findings. We disagree. Merriam's testimony fully supports the district court's findings. For example, Merriam testified, H.K.O. "has a disability and an IEP program, and there's a lot of things [Koop] has tried to put forward in the best interests of [H.K.O.], and it is always, and I'm saying always, stopped by [Olsen] by sabotaging records."

In addition, Olsen testified that, after initially giving permission for H.K.O. to continue IEP testing, he withdrew permission because "it became a possibility that [he] might have a legal action against the school." In response to Koop's question on cross-examination, Olsen acknowledged that the "further testing that the school recommended

[for H.K.O.]" did not happen. Based on this evidence, the district court found that Olsen had "tried to sabotage [H.K.O.'s] progress in the [IEP]." The district court implicitly found more credible Merriam's testimony that Olsen had interfered with H.K.O.'s educational progress than Olsen's testimony that he had not. We defer to a district court's credibility determinations. *In re Welfare of J.K.T.*, 814 N.W.2d 76, 90 (Minn. App. 2012), *review dismissed* (Minn. July 17, 2012).

Olsen also argues that the district court merely restated Merriam's testimony in its findings, rather than making its own independent findings. *See Dougherty v. Dougherty*, 443 N.W.2d 193, 194 n.1 (Minn. App. 1989) (requiring district court's findings to be stated affirmatively, rather than a recitation of party's claims). We disagree. Although the district court could have been more explicit in making its findings in addition to summarizing the witness testimony, the court's findings were sufficiently stated. The district court credited Merriam's testimony, stated specific findings, and then reached conclusions of law, which are described in its detailed order.

C. Additional factual findings

Olsen challenges other specific factual findings for various reasons, none of which are persuasive in light of our standard of review. First, Olsen argues that the district court's findings in paragraphs 17f and 17z are not supported by the record. Paragraph 17f states that Merriam testified that H.K.O. "ha[d] a disability," was placed on an IEP, and that "[e]verything about [the IEP] was shared by the school to both parents." Paragraph 17f also states that Olsen tried to "sabotage" H.K.O.'s success and thought there was a conspiracy between Koop and the school against him. Paragraph 17z states that the parenting-

consulting contract does not allow Merriam to modify custody, but adds that Merriam expressed the opinion that H.K.O.'s interests would be best served if Koop was granted sole legal custody. Olsen argues that the district court sustained his objection when Merriam gave her opinion on legal custody, and therefore, the finding regarding her custody opinion should not have been included in the order.

Initially, we note that, for the most part, the district court's findings in paragraph 17 were supported by the record evidence. Nonetheless, Olsen is correct that the district court sustained his objection to Merriam's opinion testimony about legal custody. Although the district court should not have included this testimony in its findings, there was sufficient record evidence supporting the district court's decision, apart from Merriam's testimony. Thus, we conclude the district court's erroneous reference to Merriam's opinion was harmless error. *See Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979); *see* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

Olsen also argues that the finding that "[e]verything about [the IEP] was shared by the school to both parents," is contradicted by the district court's later findings in paragraphs 22q, 22r, and 22s, which provide that Olsen's name was not included in IEP reports and correspondence from the school. It is true that Olsen's name was not included on at least three documents that provided information about H.K.O.'s education and disability. However, the district court specifically found that Koop informed Olsen of H.K.O.'s diagnosis and disability, as well as the name and place of H.K.O.'s school. The district court also found that Koop provided Olsen with the names of "the specialists at the school," and told Olsen to contact the "teachers and the school for more information."

Additionally, the district court found that “[Koop] received emails from [H.K.O.’s] teachers concerning meetings they had with [Olsen] regarding going over the IEP with him.” Moreover, Olsen admitted that he “went [to the school] and met with [H.K.O.’s] teachers.” The district court thus had ample support for its conclusion that “[Koop] had no reason to believe that [Olsen] did not have th[e] information” about H.K.O.’s IEP, despite the fact that his name was not on several documents. Olsen is correct that he was not provided “everything” from the school regarding H.K.O.’s IEP, and we agree that the district court’s broad language was not supported by the record. Despite this isolated error, the district court’s other findings about the information provided to Olsen were fully supported by the record evidence.

Next, Olsen contends that the district court’s findings in paragraph 22, relating to Koop’s testimony, are “problematic.” First, Olsen argues that paragraph 22a’s finding that it “ha[d] become increasingly difficult to co-parent with [Olsen] over [H.K.O.’s] lifetime, and that [Olsen] refuse[d] to work with [Koop] or professionals involved in [H.K.O.’s] life” is conclusory because there was no evidence that Olsen refused to work with educational professionals. Next, Olsen objects to paragraph 22d of the findings, where the court stated that Koop testified that Olsen’s “argumentative and threatening behavior ha[d] been a hindrance to the agencies that work with the minor child.” Olsen argues that Koop offered no testimony that Olsen had been argumentative and threatening to educational professionals involved with H.K.O. We disagree. Koop testified, and the court found, that the YMCA, where H.K.O. attended preschool, asked Olsen not to return based on violations of its code of conduct.

Next, Olsen objects to the district court's findings in paragraph 22l, which states that when H.K.O.'s learning delay was diagnosed, Koop and Olsen had regular phone calls and discussed the issue. Olsen argues that Koop acknowledged under cross-examination that she signed up H.K.O. for his IEP "without too much." This finding is nonetheless supported by Koop's testimony.

Finally, Olsen objects to the findings in paragraph 22p, which provides that Koop testified that she had no reason to believe Olsen did not have necessary information about H.K.O.'s IEP and disability. As discussed above, the district court's finding was supported by evidence.

We conclude that the district court's findings were supported by record evidence, and the district court's findings supported its conclusions of law and its decision to modify legal custody.

Affirmed.