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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1390**

In re the Custody of A. M. W.
Kelly James Wadsen, petitioner,
Respondent,

vs.

Jennifer Maggie Rosenthal,
Appellant.

**Filed July 9, 2018
Affirmed
Hooten, Judge**

Anoka County District Court
File No. 02-FA-12-566

Gretchen R. Severin, Anoka, Minnesota (for respondent)

Jennifer Rosenthal, Blaine, Minnesota (pro se appellant)

Considered and decided by Schellhas, Presiding Judge; Hooten, Judge; and
Klaphake, Judge.*

UNPUBLISHED OPINION

HOOTEN, Judge

Pro-se appellant mother challenges the district court's grant of sole physical custody to father and its modifications of the parties' parenting-time schedule. We affirm.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

The parties were never married and are the parents of a daughter, A.M.W., born in 2012. At the end of 2013, the district court granted the parties joint legal custody of A.M.W., mother sole physical custody, and the parties agreed to a parenting-time schedule. In December of 2014, father moved to modify custody, requesting sole physical and sole legal custody of A.M.W. and suspension of mother's parenting time because mother falsely reported to the police that father had placed temporary tattoos on A.M.W.'s genital area and mother had denied father parenting time since October 30, 2014. Because of its receipt of substantial email correspondence during the course of the evidentiary hearing on father's motion, the district court filed an order that "[t]he parties shall not send correspondence to the Court except with regard to scheduling matters" and that "[a]ny correspondence received by the Court that does not pertain to scheduling will not be considered."

On July 26, 2016, the district court awarded father sole legal custody of A.M.W., awarded the parties joint physical custody, and set a parenting-time schedule dividing parenting time equally between the parties. Following an extensive discussion of the evidence presented at the hearing and the best interest factors, the district court found that mother placed the temporary tattoos on A.M.W.'s genital area, that she denied father parenting time, and that mother's actions were "specifically taken to interrupt Father's relationship with A.M.W. and to deny him parenting time, potentially permanently." The district court also concluded that mother's actions "endangered A.M.W.'s emotional health and development by interrupting the father-daughter relationship and involving A.M.W. directly in that interruption as a tool." On September 2, mother filed a motion for a new

trial and amended findings.¹ Following a hearing, the district court denied mother's motion in a September 30 order. Mother later appealed the July 26 and September 30 orders, and this court affirmed. See *In re A.M.W.*, 2017 WL 4341789, at *1.

While mother's motion for a new trial was pending before the district court, A.M.W. started preschool in the school district where she was to begin kindergarten the following year—September of 2017. She attended preschool on Tuesday, Wednesday, and Thursday. Mother had A.M.W. on overnights Monday and Tuesday and was thus responsible for taking A.M.W. to preschool on Tuesday and Wednesday. For the first several weeks of the school year, mother brought A.M.W. to preschool. Beginning on October 4, the first day of school following the district court's denial of mother's motion for a new trial, mother stopped taking A.M.W. to preschool and A.M.W. began missing every Tuesday and Wednesday. Mother claimed that preschool was too far away and that she could arrange her own childcare services during her parenting time.

Father filed a motion to amend the parenting-time schedule to enable him to bring A.M.W. to school and later amended the motion to request parenting time year round with mother limited to supervised visits, alleging that mother was again engaging in conduct to interfere with his relationship with A.M.W. Following a hearing on November 22, the district court determined in a December 29 order that father had alleged sufficient facts

¹ We note that proceedings to modify custody or modify parenting time are not trials. A motion for a new trial in a proceeding to modify custody or modify parenting time “is not authorized, and an order denying such a motion is not appealable.” *Huso v. Huso*, 465 N.W.2d 719, 721 (Minn. App. 1991); see also *In re Custody of A.M.W.*, No. A16-1825, 2017 WL 4341789, at *5 (Minn. App. Oct. 2, 2017) (applying *Huso* in previous appeal in this case).

supporting endangerment to justify an evidentiary hearing and scheduled a hearing for March 13, 2017. *See* Minn. Stat. § 518.18(b)–(c) (2016). Because mother conceded at the November 22 hearing that she had not taken A.M.W. to preschool and did not believe it was necessary, the district court modified the parenting-time schedule so that father would have parenting time the night before every school day.

Following the evidentiary hearing, the district court filed a 26-page order on June 20, 2017, with detailed findings and conclusions of what custody and parenting-time arrangement was in A.M.W.’s best interest. The following is a summary of the court’s findings and conclusions.

Despite the district court’s order at the November 22 hearing that mother was to take A.M.W. to preschool on her parenting days, she did not do so. A.M.W. did not regularly attend preschool again—other than on Thursdays when father took her—until after the December 29 order altered the parenting-time schedule to ensure that father could take the child to preschool on all three school days.

Mother told father that she was “seeking professional advice” for A.M.W. and A.M.W. told father that mother had taken her to see a lady named “Jo” who was asking her questions; mother did not respond to father’s requests for more information. Mother’s therapist is Dr. Johanna Lamm. On three occasions, in October and November of 2016, mother took A.M.W. with her to her therapy appointment with Dr. Lamm. Mother had not attended therapy since April, and she did not attend any therapy sessions after those three sessions. Dr. Lamm’s therapy notes indicate that she was building rapport with A.M.W., and that in the third session Dr. Lamm talked about feelings with A.M.W.

A.M.W. was enrolled in play therapy with Ms. Gebben. During a session in early October 2016, A.M.W. told Ms. Gebben a story about father scaring his son with a knife. Ms. Gebben observed that it was a scary joke, and A.M.W. agreed. Ms. Gebben did not make a report to child protective services (CPS) because there was no concerning thematic play, A.M.W. had a neutral presentation when telling the story, did not seem afraid, and she moved on after her statement. When mother learned that Ms. Gebben did not report the incident, mother complained to Ms. Gebben's supervisor. Later, Ms. Gebben reported the incident to CPS. During an email exchange between father's wife and Ms. Gebben, Ms. Gebben informed father's wife that mother had reported that she was working with her therapist about a concern with a knife in father's home, which was something A.M.W. had brought up in therapy about a month before. Father asked A.M.W. whether anything with a knife had happened, and she said: "No, but Momma said that you chased me and [father's son] with a knife," and "[m]omma doesn't like you." CPS reviewed the report, but did not find that the report merited any further action.

On November 17, an unidentified person reported to CPS that A.M.W. had told A.M.W.'s therapist that father pointed an unloaded gun at her and pulled the trigger. Ms. Gebben told CPS that A.M.W. made no such disclosure. A.M.W. played out themes related to guns on three occasions in therapy, but the play was related to the gun providing safety, and on one occasion her play was related to police and rescue themes. Ms. Gebben did not believe A.M.W. had been exposed to guns, but that she was playing out safety themes. While the guardian ad litem (GAL) was conducting a home visit in father's home, she asked A.M.W. if anyone had told her to tell the GAL anything. "A.M.W. stated 'Momma

did,’ and after looking over her shoulder, stated that she had been told to say that Father ‘shot a gun with no bullets, but it didn’t happen.’”

Mother’s adult daughter testified that she and her younger siblings had begun recording A.M.W. when she said concerning things because her mother was not believed by the court. She testified that A.M.W. stated that her father had shot a baby deer on his property. Mother’s 12-year-old son recorded a conversation that he had with A.M.W. about guns in father’s home and A.M.W. mentioned father shooting a baby deer while A.M.W. was jumping on the trampoline. The district court did not find A.M.W.’s statements on the recording reliable because they were vague and were made in response to repeated, leading questions, especially in light of other evidence that A.M.W. had been pressured to make negative and possibly false statements about father.

Mother reported to the GAL that A.M.W. told her that father had driven up on the lawn and scared her, causing her to fall off her bike. Father testified that he had chased his children in a joking manner with his vehicle and a riding lawn mower, but that A.M.W. had never fallen off her bike and was not afraid.

Mother also reported to the GAL that father’s son had tried to drown A.M.W. in the bathtub. The district court found:

Ms. Gebben told the GAL that she had asked Mother about A.M.W. using water themes in her play, and Mother told her Father’s son tried to drown A.M.W. In a May 9, 2016, email to Mother, Ms. Gebben stated “[t]he report of [father’s son] holding [A.M.W.]’s head underwater was something she played out in a previous session and has not revisited.” From this email, it is unclear if the report Ms. Gebben mentions refers to Mother’s report and water-related play which Ms. Gebben thought was related or if she means a separate report

the child made, but as Ms. Gebben told the GAL that A.M.W. never stated that her brother tried to drown her in a bathtub it appears that Ms. Gebben is referring to Mother's report.

The GAL also testified about how the child's behavior differed at each residence. A.M.W. participates in wrestling. When she was at father's house, A.M.W. expressed enthusiasm for wrestling, telling the GAL that she loves it and showing off her wrestling outfit and moves. When asked about wrestling in mother's home, A.M.W. was quiet and mumbled, but after checking if mother was out of earshot, she told the GAL that she loves wrestling. A.M.W. also drew different family pictures and used different names in each home. At father's home, A.M.W. drew herself, father, father's wife, mother, and all of her siblings except mother's adult daughter, wrote her name as Alex, and told the GAL that she prefers Alex. But in mother's home, she only drew herself, mother, and her siblings in mother's home, and labeled herself as Lexy. She told the GAL that she likes both nicknames the same, but mother's family prefers Lexy. During an exchange of A.M.W. between father and mother, A.M.W. refused to hug father goodbye because mother might see the hug.

The district court conducted a detailed best interest analysis, concluding that "the current situation endangers A.M.W.'s emotional health and development" because A.M.W. "is torn between the parties due to their conflicted and combative relationship." While the district court recognized A.M.W. was affected "when she is in the care of each party . . . the evidence shows that in Mother's care she feels a great deal more pressure to deny her relationship with Father than she does to minimize her relationship with Mother when she is in Father's home." The district court awarded father sole physical custody,

ordered that father shall retain sole legal custody, and reduced mother's parenting time to every other weekend. Father is required to inform mother of A.M.W.'s school activities and medical appointments, but mother is not allowed to attend either without father's permission. Mother appeals. Father did not file a responsive brief and this court ordered the appeal to proceed under Minn. R. Civ. App. P. 142.03.

D E C I S I O N

“District courts have broad discretion on matters of custody and parenting time.” *Hansen v. Todnem*, 908 N.W.2d 592, 596 (Minn. 2018). On appeal, “[o]ur review is limited to whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law.” *Id.* (quotation omitted).

I. Discovery Motions

Mother argues that the district court did not rule on many discovery motions that she raised with the court. Appellate courts review a district court's discovery rulings for an abuse of discretion. *See Kielley v. Kielley*, 674 N.W.2d 770, 780 (Minn. App. 2004). All of the documents mother lists were not specifically addressed because their submission was untimely, they were not motions, the filings did not contain a motion date, the motion was made to a different judge, or the document was correspondence that violated the court's February 9, 2016 order that the parties not send correspondence to the court except with regard to scheduling matters. The district court did not abuse its discretion with regard to any of the documents mother cites in her brief.

II. Evidentiary Rulings

Mother raises several challenges to the district court's evidentiary rulings. "Procedural and evidentiary rulings are within the district court's discretion and are . . . 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).

First, mother argues that the district court's failure to rule on her request for Ms. Gebben's therapy notes and failure to act regarding her subpoena for Ms. Gebben to testify at the hearing prejudiced her ability to challenge the GAL's testimony. Ms. Gebben was served on Thursday, March 9th with a subpoena to testify at the hearing on Monday, March 13th. She informed the district court that she would not be appearing in court because of the lack of notice and "questionable nature of the subpoena." Mother, father, and Ms. Gebben signed a safe harbor agreement whereby the parties agreed that they would not call Ms. Gebben to testify or subpoena her therapy notes. The district court commented that the subpoena was "extremely late notice" and took the issue of the safe harbor agreement under advisement.

After reviewing the safe harbor agreement, the district court ruled that it "unequivocally says that the parties agree that neither parent shall subpoena the therapist or her notes to the trial, hearing, deposition, or arbitration," and that the parties' agreement binds them. Mother does not explain how the district court's ruling was in error, and the safe harbor agreement explicitly says that "[n]either parent (or the parent's legal representative) shall subpoena the therapist or his/her notes to a trial, hearing, deposition or arbitration."

Second, mother claims that she was prejudiced by the district court not ruling on the admissibility of exhibit 107 during the hearing. Exhibit 107 contains emails between Ms. Gebben and the parties. Father objected to the admission of exhibit 107, arguing that it violated the safe harbor agreement because the emails likely contained information similar to Ms. Gebben's therapy notes. The district court provisionally accepted exhibit 107 at the hearing, and ruled it admissible in its written order after having analyzed the safe harbor agreement and the exhibit. The district court took time to fully consider the issue before making its final ruling—as it did throughout this case—and there is no evidence that mother was prejudiced by the provisional acceptance of exhibit 107 at the hearing. During the hearing, the district court informed mother that it would review the exhibit subject to its final ruling on admissibility, mother testified about the exhibit, and she used the exhibit to cross-examine the GAL.

Third, mother argues that the district court excluded exhibit 101, which is a video recording of mother's 12-year-old son asking A.M.W. questions about whether father has firearms, and exhibit 103, which is an audio recording of a voicemail Ms. Gebben left for mother. The district court did not exclude the exhibits, but found that the disc on which mother submitted the exhibits did not contain any audio or video files. In addition to the disc, mother submitted transcripts of the video recording and the voicemail as exhibits. Mother claims that she was prejudiced by the district court's statement that it could not be certain of the accuracy of the transcripts because it did not have the original video or audio recording. But mother does not explain how she was prejudiced, and the district court *did* consider both exhibits in its findings of fact. However, the district court disagreed with

mother's characterization of the evidence. Given that it is the role of the district court when making custody determinations to weigh the evidence and make credibility determinations, the district court reaching a different conclusion than mother on the veracity and weight of certain evidence is not enough to show prejudice. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 472–73 (Minn. App. 2000).

III. Best Interest Factors

The district court determined that, while father did not explicitly request a change in physical custody, his request to reduce mother's parenting time from 50% to supervised visits was functionally a request for a change in physical custody, and it therefore applied the custody modification standard in Minn. Stat. § 518.18(d)(iv) (2016) to father's motion. Under Minn. Stat. § 518.18(d), the district court can only modify a prior custody order if it finds "that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child." And, Minn. Stat. § 518.17, subd. 1 (2016) requires the district court, when "determining issues of custody and parenting time," to "consider and evaluate all relevant factors, including" 12 statutory best interest factors listed in § 518.17, subd. 1. Mother raises several challenges to the district court's analysis of the best interest factors.

First, mother argues that the district court erred by failing to address factor 4. Factor 4 is "whether domestic abuse, as defined in section 518B.01, has occurred in the parents' or either parent's household or relationship; the nature and context of the domestic abuse; and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs." Minn. Stat. § 518.17, subd. 1(a)(4).

The district court explained that there was no testimony at the hearing about domestic abuse between the parties. Mother claims that the district court should have included a supposed outburst by father in its analysis. At the hearing and in response to a question from his attorney about mother's report that father's son had tried to drown A.M.W. in the bathtub, father stated that he "just found out about this incident, and it f-cking disgusts me that you're dragging my other kids." Then his attorney and the court instructed him to just answer the question and he did. Mother does not explain how father's in-court statement constitutes domestic abuse or how it has implications for A.M.W.'s "safety, well-being, and developmental needs." See Minn. Stat. § 518.17, subd. 1(a)(4). While there was testimony about domestic abuse between the parties at a prior hearing, following that hearing the district court concluded that there was no evidence that A.M.W. had been affected by the domestic abuse and thus factor 4 did not weigh in favor of either party. The district court, unlike this court, had the opportunity to observe father's testimony and is in the best position to determine if father's statement was relevant to its analysis of factor 4, and the district court did not err by not including father's statement in its analysis of factor 4.

Second, mother claims that the district court impermissibly addressed the subject-matter of factor 11. Factor 11 states that, "except in cases in which domestic abuse as described in clause (4) has occurred, the disposition of each parent to support the child's relationship with the other parent and to encourage and permit frequent and continuing contact between the child and the other parent." Minn. Stat. § 518.17, subd. 1(a)(11). Thus if domestic abuse has occurred between the parties, factor 11 is not considered. *Id.* As

such, the court noted that while there was no testimony about domestic abuse at the hearing, there was testimony about domestic abuse in the past and thus the court would not address the factor.

Mother argues that the court impermissibly addressed the subject-matter of factor 11 when analyzing factor 7. Factor 7 requires the district court to consider “the willingness and ability of each parent to provide ongoing care for the child; to meet the child’s ongoing developmental, emotional, spiritual, and cultural needs; and to maintain consistency and follow through with parenting time.” Minn. Stat. § 518.17, subd. 1(a)(7). For factor 7, the court analyzed each parent’s support for A.M.W.’s education, their support of her therapy, and their support of her extra-curricular activities. In the portion of the district court’s order to which mother cites, the district court concludes that mother has been attempting to interfere with father’s relationship with A.M.W. and was exerting pressure on A.M.W. to deny affection for father, all of which is harming A.M.W. emotionally. While mother characterizes the district court’s findings as expecting her to impermissibly support father, the district court expected mother to support A.M.W. and her needs and to not let the parties’ conflict interfere with doing what is best for A.M.W.

Mother also claims that the district court mischaracterized the domestic abuse between the parties as being mutual, but the district court stated that “in past testimony [the parties] have acknowledged that there were incidents of domestic abuse in their relationship.” The district court did not state that there was mutual violence, and the same judge presided over the previous evidentiary hearings and was thus aware that the only allegations of domestic abuse were against father.

Additionally, mother takes issue with the district court's requirement that the parties, in their post-exchange message to the other parent on Our Family Wizard, include one positive thing that they said to A.M.W. about the other parent or the other parent's parenting. At the hearing, mother characterized the requirement as a forced "love fest." However, as the district court noted, mother "showed a lack of consideration as to how the minor child might benefit from hearing the parties make positive statements about one another." And, requiring each parent to inform the other of the statement was a way to ensure compliance with the requirement. Mother also claims that the requirement violates her first amendment rights, but cites to no authority and provides no legal analysis. See *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (explaining that "[a]n assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived" (quotation omitted)).

Third, mother argues that the district court did not address A.M.W.'s mental health diagnosis in its analysis. But there was no testimony at the hearing about A.M.W.'s mental health diagnosis—the report mother cites was submitted as part of a prior hearing and was not referenced during this hearing. And mother does not explain how the district court should have factored in A.M.W.'s previous diagnosis, especially when the district court made over a page and a half of findings about A.M.W.'s therapy needs and which parent would better support A.M.W. in therapy.

Fourth, mother claims that the district court did not make detailed findings about how the significant reduction of her parenting time may harm A.M.W. See Minn. Stat. § 518.18(d)(iv). To the contrary, the district court engaged in a detailed and lengthy

analysis of how a change would affect A.M.W. and weighed the potential harms and benefits of the change. Mother also argues that granting father decision-making power over whether she can attend A.M.W.'s school events and medical appointments places her in a subservient position to her abuser. But mother does not provide a legal basis for how this argument relates to what is in A.M.W.'s best interest, nor does she explain how it would change the district court's detailed analysis that properly focused on what custody and parenting-time arrangement was in A.M.W.'s best interest. *See Schisel v. Schisel*, 762 N.W.2d 265, 270 (Minn. App. 2009) ("The bedrock principle underlying any decision affecting the custody of minor children is that their best interests must be protected and fostered. *A child's best interests* are the *fundamental focus* of custody decisions." (emphasis added)).

IV. December 29, 2016 Order and Preschool

Mother argues that the district court's December 29, 2016 order which modified parenting time did not address the best interest factors and that there was no best interest analysis for A.M.W. sitting in the car for an hour to attend preschool.

Father has legal custody, which includes the right to make education decisions for A.M.W., and mother intentionally interfered with father's education decision. *See* Minn. Stat. § 518.003, subd. 3(a) (2016). Father decided to enroll A.M.W. in preschool in the school district where she would be attending kindergarten the following year. She attended preschool on Tuesday, Wednesday, and Thursday. Mother initially took A.M.W. to preschool on the days she had parenting time, Tuesday and Wednesday, but stopped taking her on October 4—the first school day following the district court's denial of her motion

for a new trial—and the child began missing school on Tuesday and Wednesday. Mother conceded that she was not taking A.M.W. to school and did not believe it was necessary, and the court found that “[n]othing in Mother’s affidavits or argument at the [November 22] hearing indicate she is likely to become willing to transport the child to preschool.”

The district court had already conducted a best interest analysis addressing each statutory factor in its July 2016 order and determined that it was in A.M.W.’s best interests for father to have legal custody. In the December 29, 2016 order, the district court determined that a small modification to the parenting-time schedule was “in the child’s best interests because it will enable Father to ensure regular preschool attendance.” The district court did not err by determining that modifying the parenting-time schedule was in A.M.W.’s best interest. Mother intentionally interfered with father’s decision by refusing to take A.M.W. to preschool, the district court had already determined that it was in A.M.W.’s best interest for father to make education decisions for A.M.W., and the modification to the parenting-time schedule was for the sole purpose of ensuring that father’s education decision would be carried out. *See* Minn. Stat. § 518.175, subd. 5(b) (2016) (“If modification would serve the best interests of the child, the court shall modify . . . an order granting or denying parenting time, if the modification would not change the child’s primary residence.”). It is also worth noting that even after being orally ordered by the district court to take the child to preschool, mother did not comply with the district court’s order and the child did not regularly attend preschool on Tuesday and Wednesday until after the district court adjusted the parenting-time schedule in its December 29 order.

Mother also argues that not attending preschool does not constitute endangerment, presumably challenging the district court's decision in the December 29 order to grant father an evidentiary hearing based on its determination that father's submissions established a prima facie case of endangerment. But the district court addressed the harm to A.M.W.'s education by modifying the parenting-time schedule, and determined that an evidentiary hearing was necessary to address the endangerment to A.M.W.'s emotional development. That determination was based on concerns that mother is encouraging A.M.W. to make false disclosures, is placing the child in the middle of her and father's conflict, and that A.M.W. "is aware that Mother makes false statements to her about Father because of dislike or conflict between the parties." The district court did not err in determining that father had alleged facts sufficient to justify an evidentiary hearing.

V. District Court's Findings of Fact

Finally, mother makes numerous arguments challenging the district court's findings of fact and credibility determinations. "On appeal, findings of fact are accepted unless they are clearly erroneous," *Suleski v. Rupe*, 855 N.W.2d 330, 334 (Minn. App. 2014), and we defer to the district court's credibility determinations, *Vangness*, 607 N.W.2d at 472. The district court issued a 26-page order containing a detailed and thoughtful explanation of its factual findings, and after a careful review of the record, we conclude that the district court's findings of fact are supported by the evidence in the record and are not clearly erroneous. See *Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951) (stating that the function of "an appellate court does not require [it] to discuss and review in detail the evidence for the purpose of demonstrating that it supports the trial court's findings")

and an appellate court’s “duty is performed when [it] consider[s] all the evidence, as we have done here, and determine[s] that it reasonably supports the findings”); *Cook v. Arimitsu*, 907 N.W.2d 233, 240 n.3 (Minn. App. 2018) (applying this aspect of *Wilson* in a family law case), *review denied* (Minn. Apr. 17, 2018).

Affirmed.