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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0475**

In re the Marriage of:
Brett William Leschinsky, petitioner,
Appellant,

vs.

Sarah Elizabeth Leschinsky,
Respondent.

**Filed January 14, 2019
Affirmed
Stauber, Judge***

Hennepin County District Court
File No. 27-FA-07-1926

Amanda A. Bloomgren, Katie C. Hanson, Bloomgren Hanson Legal, PLLC, Hopkins,
Minnesota (for appellant)

Marian E. Saksena, Dewalt, Chawla + Saksena, LLC, Minneapolis, Minnesota (for
respondent)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Stauber,
Judge.

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

UNPUBLISHED OPINION

STAUBER, Judge

Appellant father challenges the district court's denial of his motion to modify parenting time, arguing that the district court erred: (1) in applying the best-interests factors in granting mother's motion to modify parenting time and denying his motion; (2) in treating his motion as a de facto motion to modify the child's primary residence, and that even if it was a motion to modify the child's primary residence, he was entitled to an evidentiary hearing; and (3) in refusing to consider father's second affidavit. We affirm.

FACTS

Appellant Brett William Leschinsky (father) and respondent Sarah Elizabeth Leschinsky (mother) married in June 2004. They are the parents of one joint minor child, M.H.L., born in 2006. Mother obtained an Order for Protection against father in November 2007, due to domestic violence. Mother and father divorced in 2008. They share joint legal custody of M.H.L. The dissolution judgment and decree awarded mother sole physical custody. Mother and father agreed to participate in mediation and use a parenting time consultant (PC). The most recent formal parenting time schedule is from 2008, when the parties agreed, through the PC, to father having every Tuesday and one overnight visit per week.

From 2008 to 2017, father continually requested that his parenting time be increased, and mother and father have come to informal agreements that increased father's parenting time. In 2009, they agreed to a schedule where father had parenting time overnight on Tuesdays and Fridays. In 2016, mother and father agreed to increase

parenting time so that M.H.L. would spend three nights per week with father. Mother reported that she agreed to some of these requests by father because she “feared his reaction” if she did not agree to his demands. In 2017, father remarried, and he now lives in a home with his wife and her daughters from a previous relationship. M.H.L. is now 12 years old and in middle school.

In the fall of 2017, father filed a motion asking the district court to modify the parenting time schedule. Specifically, asking for overnight visits every other day during the week and every other weekend. He stated that the basis for this request was that the current schedule was outdated, they need a set schedule because working out new schedules every month “has been a huge source of conflict,” and M.H.L. had requested equal time spent with each parent.

Mother opposed this request, and, in her response, proposed an alternative modification to the parenting time schedule. Mother proposed a schedule wherein father would have overnight parenting time every Tuesday, and every other weekend. This represented a decrease in parenting time for father from what the parties had been following, but an increase from the last formal parenting-time schedule.

In its January 22, 2018 order, the district court denied father’s motion for increased parenting time, granted mother’s proposed schedule, increased child support, and awarded mother attorney fees. The district court found that “[f]ather has failed to show why his proposed schedule is in [M.H.L.]’s best interests” and that his proposed schedule was not “child focused.” The district court was concerned that father appeared to be primarily focused on achieving “equal” parenting time instead of working out a schedule that was

best for M.H.L. The district court found that father failed to discuss M.H.L.’s church, extracurricular activities, or when she would see her friends, and that his proposed schedule would become even more problematic as M.H.L. got older and became involved in more serious academics and more time intensive extracurricular activities.

In contrast, the district court found “[m]other’s proposed parenting time schedule to be in the child’s best interest. It is child-focused and will maintain continuity during the school year.” The district court found that mother’s proposed schedule would decrease face-to-face contact between the parents, which the district court found would benefit the child due the parties’ inability to co-parent.

Father appeals.

D E C I S I O N

A district court has broad discretion when deciding parenting-time matters. *Hansen v. Todnem*, 908 N.W.2d 592, 596 (Minn. 2018). “Our 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). We review the district court’s factual findings for clear error. *Id.* at 599.

Under Minn. Stat. § 518.175, subd. 5(b) (2018):

If modification would serve the best interests of the child, the court shall modify the decision-making provisions of a parenting plan or an order granting or denying parenting time, if the modification would not change the child’s primary residence. Consideration of a child’s best interest includes a child’s changing developmental needs.

District courts are not required to make detailed findings on each best-interests factor under Minn. Stat. § 518.17, subd. 1(a) (2018), when deciding parenting-time modification motions; instead, district courts must consider only the relevant best-interests factors. *See id.*

In evaluating the best interests of the child for purposes of determining issues of parenting time, the district court must consider and evaluate all relevant factors, which may include:

- (1) a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development;
- (2) any special medical, mental health, or educational needs that the child may have that may require special parenting arrangements or access to recommended services;
- (3) the reasonable preference of the child, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference;
- (4) whether domestic abuse . . . has occurred in the parents' or either parent's household or relationship . . . ;
- (5) any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs;
- (6) the history and nature of each parent's participation in providing care for the child;
- (7) 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;
- (8) the effect on the child's well-being and development of changes to home, school, and community;
- (9) the effect of the proposed arrangements on the ongoing relationships between the child and each parent, siblings, and other significant persons in the child's life;
- (10) the benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent;
- (11) 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; and

(12) the willingness and ability of parents to cooperate in the rearing of their child; to maximize sharing information and minimize exposure of the child to parental conflict; and to utilize methods for resolving disputes regarding any major decision concerning the life of the child.

Minn. Stat. § 518.17, subd. 1(a).

I. The district court did not abuse its discretion in granting mother's motion to modify parenting time and denying father's motion.

Father argues that the district court did not consider all the relevant best-interests factors when it granted mother's motion and denied his motion to modify the parenting time plan. We disagree.

In its decision on the parenting-time modification motions by mother and father, the district court made detailed findings on the relevant best-interests factors: (1) the child's physical, emotional, cultural, spiritual, and other needs; (2) the effect on the child's well-being and development of changes to home, school, and community; (3) any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs; (4) the history and nature of each parent's participation in providing care for the child and; (5) the willingness and the ability of the parents to cooperate in the rearing of their child. Minn. Stat. § 518.17, subd. 1(a).

The district court first considered how father's proposed changes to M.H.L.'s home and community would affect her well-being, as well as her emotional, cultural, and spiritual needs. The district court was concerned that father's proposed schedule would require frequent transitioning between mother and father, which would impact M.H.L.'s

participation in church and extracurricular activities. The district court explained that M.H.L. “attends church with [m]other on a weekly basis and volunteers through the youth program. Her long-time friends live in her neighborhood.” The district court noted that father failed to address how, under his proposed schedule, M.H.L. would attend her church and extracurricular activities and when she would be able to see her friends. Accordingly, the district court found that these factors favored mother’s proposal because it more fully addressed M.H.L.’s physical, emotional, and spiritual needs by providing continuity for her in her school and social life.

The district court also addressed “any physical, mental, or chemical health issue of a parent that affects the child’s safety or developmental needs,” by noting that it had concerns about father’s failure to comply with the abstinence provisions in his original parenting time order. *Id.* The district court noted that “[i]n an email to [M.H.L.]’s therapist, [f]ather admits to having ‘too much to drink’ in early December 2017 and at Christmas 2017. This appears to have upset [M.H.L.] and caused her to be anxious.” The district court considered this factor and found that father’s potential issue with substance abuse has apparently had a negative impact on M.H.L.’s well-being.

The district court also considered “the history and nature of each parent’s participation in providing care for the child.” *Id.* The district court acknowledged that father’s participation in caring for M.H.L. has increased over time as the parties came to several understandings that increased the number of days that she would spend with father. However, the district court noted that mother had concerns with this evolving parenting time schedule, stating that mother “does not believe [M.H.L.] has done well with this

expanded schedule. Mother is concerned the ‘experimental’ expansion has caused [M.H.L.] stress.”

Finally, the district court considered “the willingness and ability of the parents to cooperate in the rearing of their child; to maximize sharing information and minimize exposure of the child to parental conflict.” *Id.* The district court found that father’s proposal would be “problematic because it would require a high level of co-parenting, which is clearly not happening with these parents. Father’s plan would necessitate a high number of weekly exchanges and constant communication to be effective. There is no evidence that this could be achieved in this case.” In contrast, the district court found mother’s plan to be preferable with regards to this factor because the exchanges would take place at school, which would decrease face-to-face interaction between the parents, and decrease M.H.L.’s chance of being put in the middle of any conflict between her parents.

The district court made detailed findings in its consideration of five relevant best-interests factors, explaining why they favored mother’s request to modify the parenting time schedule. Therefore, the district court did not abuse its discretion in granting mother’s motion to modify parenting time and denying father’s motion.

II. Father’s motion was a de facto motion for modification of M.H.L.’s primary residence, and the district court did not err in denying him an evidentiary hearing.

Father additionally argues that the district court erred in treating his motion as a motion to modify M.H.L.’s primary residence, and that even if this court finds his request to be a motion to modify M.H.L.’s primary residence, he was entitled to an evidentiary hearing. We are not persuaded.

The supreme court has recently addressed the issue of when a motion to increase parenting time constitutes a de facto motion to modify a child's primary residence. In *In re Custody of M.J.H.*, the child's father asked the district court to increase his parenting time, and the mother objected. 913 N.W.2d 437, 439 (Minn. 2018). The district court found that his request was a de facto motion to modify physical custody and that it would change the child's primary residence. *Id.* The supreme court agreed, finding that the father's motion was a de facto motion to modify physical custody because his "proposed modification is substantial." *Id.* at 442.

The supreme court held that:

[W]hen determining whether a motion to modify parenting time is a de facto motion to modify physical custody for purposes of deciding whether the endangerment standard applies, a court should consider the totality of the circumstances to determine whether the proposed modification is a substantial change that would modify the parties' custody arrangement. The factors considered may include the apportionment of parenting time, the child's age, the child's school schedule, and the distance between the parties' homes, but these factors are not exhaustive.

Id.

In affirming the district court, the supreme court found that it had sufficiently analyzed the child's age, school, and the distance between the parents' homes to conclude that father's motion was a substantial change that would modify the custody arrangement.

Id.

Similarly here, the district court examined the totality of the circumstances surrounding M.H.L.'s custody. The district court considered the fact that her current home

at her mother's house is less than half a mile away from her school, and that she is very involved in activities through her school and church that connect her to the community around her mother's house. The district court found that "there is no question that [m]other's home is [M.H.L.]'s primary residence." Because the totality of the circumstances support that father's proposed modification constitutes a substantial change, the district court did not err in treating father's motion as a de facto motion to modify the child's primary residence.

Once a motion is found to be a de facto motion to modify custody, the subsequent decision on whether or not to modify custody is governed by Minn. Stat. §518.18(d) (2018). "A district court is required under section 518.18(d) to conduct an evidentiary hearing only if the party seeking to modify a custody order makes a prima facie case for modification." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). To make a prima facie case for modification, a party must first show a change in circumstances and that modification is necessary to serve the child's best interests. Minn. Stat. §518.18(d) (2018). The party must then show that one of five statutory grounds supporting a modification has been met, in this case that the child has been integrated into the party's family with the consent of the other party. *Id.* Any alleged change in circumstance "must be a real change and not a continuation of ongoing problems," and the change "must be significant." *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989), *review denied* (Minn. Jun. 21, 1989). We review the district court's determination as to whether a prima facie case has been made for an abuse of discretion. *Boland v. Murtha*, 800 N.W.2d 179, 184-85 (Minn. 2011).

Here, father's affidavit asserts that the baseline custody and parenting time order is "outdated," that M.H.L. is growing up, and that she wants to spend equal time with each parent. However, nothing in his affidavit demonstrates a *significant* change in circumstances. M.H.L. continues to live primarily with mother, and the parties' issues with parenting time constitute a "continuation of ongoing problems," not a significant change in circumstances.

Furthermore, the district court found that father's motion was not in M.H.L.'s best interests. Given the district court's analysis of the best-interests factors, it did not abuse its discretion in finding that father did not meet his burden of demonstrating a prima facie case for custody modification.

Father argues that his affidavits were sufficient to establish a prima facie case for integration under Minn. Stat. § 518.18(d)(iii). The district court did not reach this issue but we note briefly that father's affidavit does not support a prima facie case for integration. Father argues that M.H.L. has been integrated into his home with his new wife and her two children "based upon a schedule that had been followed for four or five years." However, that schedule, while increasing his parenting time with M.H.L. from the original order, still only allowed father a set number of nights with M.H.L. per week.

In cases where we have found integration, the child has more thoroughly transferred to the residence of the non-custodial parent's home. See *Downey v. Zwigart*, 378 N.W.2d 639, 642 (Minn. App. 1985) (finding integration where 5-year-old child had lived with the non-custodial parent completely for all but 7 months of his life). Here, M.H.L. may have become more involved with father's family, with her mother's consent, but she did not

become completely integrated within the meaning of the statute because she still maintains and develops her life at her mother's home. Mother consented to a series of increases in parenting time for father, but M.H.L. continues to be in her mother's primary care, going to school from her mother's house and attending church in her mother's community.

Accordingly, even if father had established a prima facie showing of a significant change in circumstances and that modification was in M.H.L.'s best interests, he would not have been entitled to an evidentiary hearing because his affidavit did not demonstrate integration.

III. It was not reversible error for the district court to decline to consider father's second affidavit.

Finally, father argues that the district court committed reversible error by refusing to consider his second affidavit in its final written order, despite stating on the record that it would accept the affidavit.

Father served his amended motion to modify parenting time, with an accompanying affidavit. Mother timely served and filed a responsive motion asking the district court to deny father's motion and accept mother's proposed modifications. Mother timely submitted a supporting affidavit five days before the hearing. Father then submitted a second affidavit, which the district court called a supplemental affidavit, the night before the hearing. The district court described this affidavit as being "very, very late." The district court nonetheless admitted the affidavit on the record, "just because I don't think it's going to change anything." However, in its written order, the district court declined to consider the affidavit "due to the untimely filing."

Father argues that he should have been allowed to submit this supplemental affidavit because mother's motion proposing a modification to the parenting time schedule raised a new issue, to which he was entitled to respond.

A responding party raising a new issue other than those raised in the initial motion must serve and file its motion papers at least ten days prior to the hearing on the initial motion. Minn. R. Gen. Prac. 303.03(a)(2). Here, mother's responsive motion was filed more than ten days before the hearing, but her affidavit, which detailed her proposal to modify parenting time, was filed five days before the hearing. However, this court has determined, in unpublished cases, that when one parent raises the issue of modifying parenting time in an initial motion, the other party does not raise a new issue by proposing their own parenting time modification. Therefore, mother's motion did not raise a new issue, and father was not entitled to submit a supplemental affidavit in response.

Even if mother's motion did raise a new issue and was therefore untimely, any error in rejecting father's supplemental affidavit was harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored). The district court read father's supplemental affidavit before the hearing and stated on the record that it would not affect the court's decision. Father's supplemental affidavit included information about the distance between father's and mother's homes, information about him being chemical-free, and texts from M.H.L. indicating that she wanted to spend more time with him. None of that information would change the analysis on whether father's motion constituted a de facto motion to modify M.H.L.'s primary residence or whether father was entitled to an evidentiary hearing. Nor would it have made father's proposed plan more "child focused" or reduced

the high likelihood of conflict between the parents. Even if the district court erred in refusing to accept father's supplemental affidavit, any error was harmless under rule 61.

Affirmed.