

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0440**

In re the Marriage of:
John Edward Warrington, petitioner,
Respondent,

vs.

Karen Lee Warrington,
Appellant.

**Filed March 1, 2021
Affirmed in part, reversed in part, and remanded
Slieter, Judge**

Hennepin County District Court
File No. 27-FA-16-3836

Anne M. Honsa, Deborah M. Gallenberg, Honsa Mara Landry, Minneapolis, Minnesota
(for respondent)

Matthew J. Gilbert, Gilbert Alden Barbosa PLLC, Burnsville, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Jesson, Judge; and Cochran,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant challenges the district court's decisions (1) denying her motion to modify custody, (2) denying her motion to compel discovery of respondent's flight schedule (he is a FedEx pilot), and (3) granting respondent conduct-based attorney fees. Because appellant failed to allege a *prima facie* case to modify custody and discovery of respondent's flight

schedule is unnecessary, we affirm the district court on the first two issues. However, because the district court failed to issue factual findings to enable our review of its award to respondent of conduct-based attorney fees, we reverse and remand the third issue.

FACTS

Appellant Karen Warrington and respondent John Warrington are the parents of one child, J.W. The parties' marriage was dissolved by order of the district court in July 2017. The court awarded the parties joint legal and joint physical custody of J.W., subject to each party's parenting time.

In September 2017, appellant unilaterally unenrolled J.W. from his school in Minnesota and enrolled him in a boarding school in New Hampshire. As a result of this decision by appellant, respondent served a contempt motion on appellant and a hearing was held during which respondent withdrew his motion upon learning that J.W. did not wish to see him—respondent indicated that he would not force such visits. Respondent has not had parenting time since J.W. was enrolled in boarding school.

On November 21, 2019, appellant filed a motion to modify custody seeking sole legal and sole physical custody and for parenting time "as agreed upon by the parties." Appellant additionally requested that respondent be ordered to present to appellant his flight schedules from the time of the marriage dissolution to present. Respondent opposed these motions and requested conduct-based attorney fees from appellant.

The district court concluded that appellant had "failed to establish a legal or factual basis for modifying custody and parenting time," that respondent's flight schedule was "irrelevant," and that a conduct-based attorney-fees award against appellant was warranted

as her motion “forced [respondent] to incur unnecessary legal costs.” The district court granted respondent conduct-based attorney fees. This appeal follows.

DECISION

I. The district court did not abuse its discretion by concluding that appellant failed to allege a *prima facie* basis for custody modification based upon endangerment.

Appellant’s affidavit, along with her other filings in the district court, sought modification of custody of J.W. based on endangerment, pursuant to Minn. Stat. § 518.18(d)(iv) (2020).¹ The proper appellate standard of review was set forth by this court in *Amarreh*:

[W]hen this court reviews an order denying a motion to modify custody or restrict parenting time without an evidentiary hearing, we review three discrete determinations. First, we review de novo whether the district court properly treated the allegations in the moving party’s affidavits as true, disregarded the contrary allegations in the nonmoving party’s affidavits, and considered only the explanatory allegations in the nonmoving party’s affidavits. Second, we review for an abuse of discretion the district court’s determination as to the existence of a *prima facie* case for the modification or restriction. Finally, we review de novo whether the district court properly determined the need for an evidentiary hearing.

918 N.W.2d at 230-31 (alteration in original) (quotation omitted). Appellant does not contest that the district court correctly treated the allegations in appellant’s affidavits as

¹ Appellant now argues she alleged sufficient facts to justify modification of custody based upon integration of J.W. into her home, pursuant to Minn. Stat. § 518.18(d)(iii) (2020). However, appellant’s initial affidavit relied solely upon endangerment. Therefore, the district court did not err in declining to consider the integration argument, and we need not consider it on appeal. See *Amarreh v. Amarreh*, 918 N.W.2d 228, 231 (Minn. App. 2018) (district court determines whether a party has stated a claim for modification of custody by examining the “moving party’s affidavits.”); see also *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that, generally, appellate courts consider only those questions previously presented to and considered by the district court).

true, and the record demonstrates that it did do so. Furthermore, whether a party alleges a *prima facie* case to modify custody is dispositive of whether an evidentiary hearing must occur on the motion. *Id.* at 230. As such, the dispositive issue we review is whether the district court properly exercised its discretion in concluding that appellant failed to allege a *prima facie* case for modification.

To allege a *prima facie* case for endangerment-based custody modification pursuant to section 518.18, appellant is required to allege facts which, if taken as true, would establish “(1) the circumstances of the children or custodian have changed; (2) modification would serve the children’s best interests; (3) the children’s present environment endangers their physical health, emotional health, or emotional development; and (4) the benefits of the change outweigh its detriments with respect to the children.” *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017). Evidence of all four of these elements must be produced in order to form a *prima facie* case sufficient to justify an evidentiary hearing on an endangerment-based modification motion. *See id.* However, we limit our analysis to the third element, endangerment, because, for purposes of this appeal, it is dispositive.

The district court concluded that “there is no evidence in [appellant]’s affidavit that [J.W.] is endangered in any way.” Appellant disagrees and argues that endangerment exists because denying her motion to modify custody would force J.W. to remain in a joint custody and parenting time arrangement against his wishes.

Appellant’s submissions, even if viewed as true, failed to allege endangerment of J.W. Therefore, the district court correctly determined that appellant had failed to state a *prima facie* case for an endangerment-based modification of custody.

We first note that the standard for endangerment-based modification of custody is that “the child’s *present* environment endangers the child’s physical or emotional health.” Minn. Stat. § 518.18(c) (2020) (emphasis added). Appellant has alleged prospective endangerment—what might occur if her custody motion is not granted. This allegation does not satisfy the statutory requirement because respondent is not currently compelling unwanted parenting time with J.W. and there is no indication that he would seek to do so if that order was continued.

Furthermore, while it is well established that a teenaged child’s preference is highly relevant to a claim of potential emotional endangerment, such endangerment must be “significant.” *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). It is undisputed that, regardless of the outcome of appellant’s custody motion, J.W. will continue to attend boarding school. It is also undisputed that, despite the awards in this case of joint legal and physical custody to this respondent, that J.W. both will continue to be parented solely by appellant when not at school, and will have limited or no contact with respondent. Given the record above, it was not an abuse of discretion for the district court to conclude that appellant failed to allege a *prima facie* claim of endangerment. This conclusion justified dismissal of appellant’s claim without an evidentiary hearing. *Amarreh*, 918 N.W.2d at 231.

II. The district court did not abuse its discretion by denying appellant's discovery of respondent's flight schedule.

Appellant next challenges the district court's denial of her motion to compel discovery of respondent's flight schedule. Appellant argues that respondent's flight schedules would help demonstrate respondent's inability and unwillingness to exercise parenting time and that respondent has misrepresented his flight schedule in the past to manipulate parenting time.

A district court has wide discretion in issuing discovery orders, and will not be reversed absent an abuse of discretion. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). “[Appellate courts] review a district court’s order for an abuse of discretion by determining whether the district court made findings unsupported by the evidence or by improperly applying the law.” *See id.*

The district court, in the parties’ dissolution decree, set forth a detailed parenting time schedule which specifically considered respondent’s flight schedule as a pilot with FedEx, which prevented him from having a predictable monthly schedule. As a solution, the court found it “appropriate to adopt a hybrid protocol that [would] give [appellant] priority during six months of the year and [respondent] scheduling priority during [the other six months].” Respondent was ordered by the court to send his flight schedules to appellant so as to facilitate scheduling of parenting time during his “priority” months.

In its order denying appellant’s discovery request, the district court concluded that respondent’s “flight schedule is currently irrelevant” because J.W. did not wish to see

respondent and respondent indicated that he was therefore willing to decline his right to exercise parenting time.

It is undisputed that parenting time between respondent and J.W. is not occurring. Therefore, respondent's flight schedule is not relevant. The district court did not abuse its discretion in declining to compel such discovery.

III. The district court made insufficient findings of fact to allow appellate review of its grant of conduct-based attorney fees.

Finally, appellant challenges the district court's grant to respondent of conduct-based attorney fees. "A conduct-based attorney-fee award is reviewed for an abuse of discretion." *Sanvik v. Sanvik*, 850 N.W.2d 732, 737 (Minn. App. 2014).

The district court ordered conduct-based attorney fees be paid to respondent by appellant in the amount of \$11,081. The district court's award was made pursuant to Minn. Stat. § 518.14, subd. 1 (2020), which states that a district court has discretion to award "additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding."

"The district court must make findings to explain an award of conduct-based attorney fees, whether in the dissolution proceedings or in a legitimate ancillary proceeding." *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007). The district court, explaining its award of attorney fees, repeated the language of its findings regarding the denial of appellant's modification of custody and discovery motions. These findings do not separately address how appellant "unreasonably contributed to the length and expense of the proceedings." Minn. Stat. § 518.14, subd. 1.

On remand, whether to reopen the record shall be discretionary with the district court. Additionally, if the district court exercises its discretion to order conduct-based attorney fees, it should issue findings of fact pursuant to Minn. Stat. § 518.14, subd. 1.

Affirmed in part, reversed in part, and remanded.