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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0658**

In re the Custody of: B. L. F.,
Cherries Chamberlain,
Appellant,

vs.

Neil Fleahman,
Respondent.

**Filed February 16, 2021
Affirmed
Bjorkman, Judge**

Anoka County District Court
File No. 02-FA-10-619

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Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges the denial of her motions to modify custody and parenting time, arguing that the district court abused its discretion by (1) striking her memorandum of law, (2) denying her custody motion without an evidentiary hearing, (3) denying her

parenting-time motions, (4) declining to appoint a guardian ad litem (GAL), (5) ordering the child to cease therapy with her current therapist, (6) excluding the therapist's letters, and (7) limiting future filings containing the child's health information. Because the district court did not abuse its discretion, we affirm.

FACTS

Appellant-mother Cherries Chamberlain and respondent-father Neil Fleahman are the parents of B.L.F., born in 2007. In 2010, the parties agreed to share legal and physical custody and equal parenting time, despite a history of conflict between them. By June 2018, the district court had denied the parties' opposing motions for custody modification but modified parenting time to a seasonal schedule that mostly placed B.L.F. with father in Coon Rapids during the school year and with mother in Rosemount the rest of the year.¹ The modification effectively reduced mother's parenting time from half to 45%. Mother appealed, and we affirmed the district court's decisions. *Chamberlain v. Fleahman*, No. A18-1852 (Minn. App. Aug. 12, 2019).

In early December 2019, mother again moved for sole legal and sole physical custody. And she asked the district court to reduce father's parenting time to every other weekend "not to include overnights," modify the holiday parenting-time schedule, and appoint a GAL. She did not provide a supporting memorandum of law, but submitted a 14-page affidavit with exhibits. Mother alleged that the June 2018 parenting-time modification constitutes a substantial change in the child's circumstances and that living

¹ The parenting-time modification addressed mother's decision to move to Rosemount, a substantial distance from the agreed-to school-attendance area.

with father endangers B.L.F.'s physical and emotional health. She relied substantially on statements B.L.F.'s therapist made to her and a letter the therapist wrote to the district court regarding B.L.F.'s treatment.

Father opposed mother's motions and moved to terminate B.L.F.'s therapy with her current therapist whom mother had selected without his input. Mother responded with a second affidavit, and another letter from B.L.F.'s therapist.

At the motion hearing, mother clarified that she was asserting two changed circumstances: the 2018 parenting-time modification and B.L.F.'s move from elementary school to middle school. The district court questioned whether either is a recognized ground for modifying custody. Mother offered no legal authority so the court ordered her to submit a memorandum "identifying legal authority for her argument" that a school transition or a court-ordered parenting-time change "creates the change of circumstances required for a modification of custody." Mother filed a memorandum in which she reiterated concerns about B.L.F.'s welfare and argued that B.L.F.'s "strong preference not to live with her father" constitutes a change in circumstances. The court struck the memorandum as nonresponsive.

In a subsequent order, the district court denied mother's custody motion, reasoning that she failed to establish a prima facie case of substantially changed circumstances or endangerment. The court also denied mother's motions regarding parenting time and appointment of a GAL, and granted father's motion to terminate B.L.F.'s current therapy, ordering the parties to find a mutually agreeable therapist for the child. And the court concluded that the therapist's letters violated B.L.F.'s therapist-patient confidentiality,

excluded them, ordered the parties not to disclose them, and ordered the parties not to file any such records without the court's permission. Mother appeals.

DECISION

I. The district court did not abuse its discretion by striking mother's nonresponsive posthearing memorandum.

The Minnesota Rules of General Practice establish timelines for filing and responding to motions. Minn. R. Gen. Prac. 303.03(a). A moving party is not required to file a memorandum of law, but if she elects to do so, she must submit it along with her motion at least 21 days before the hearing. Minn. R. Gen. Prac. 303.02(a), .03(a)(1). A district court has discretion to sanction a party for noncompliance with these rules, Minn. R. Gen. Prac. 303.03(b), but may relax enforcement if “the interests of justice would be best served by relieving a party from formal compliance,” *Lee v. Lee*, 749 N.W.2d 51, 62 (Minn. App. 2008) (quotation omitted), *aff'd in part, rev'd in part on other grounds*, 775 N.W.2d 631 (Minn. 2009). We will not disturb a district court's procedural rulings absent an abuse of discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). A district court abuses its discretion if it makes findings not supported by the evidence or misapplies the law. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009).

Mother argues that the district court abused its discretion by striking her posthearing memorandum because it presented caselaw pertinent to custody modification. We disagree. Mother sought custody modification on two specific grounds, neither of which she supported with legal authority. Rather than strictly enforcing rule 303.03, the district

court afforded mother the opportunity to submit a posthearing memorandum for the specific purpose of identifying legal authority to support her existing arguments. She did not do so. Instead, she filed a memorandum that proposed an entirely new ground for modifying custody. The district court acted well within its broad discretion by striking mother's nonresponsive memorandum.

II. The district court did not abuse its discretion by determining that mother failed to make a prima facie case for custody modification.

A party seeking to modify custody based on child endangerment must demonstrate a prima facie case to obtain an evidentiary hearing. *Christensen v. Healey*, 913 N.W.2d 437, 440 (Minn. 2018). To do so, she must allege that (1) circumstances of the child or custodial parent have changed since the prior custody order, (2) modifying custody would serve the child's best interests, (3) the child is endangered either physically or emotionally by the present arrangement, and (4) the benefits of modification outweigh the detriments. *Id.*; see Minn. Stat. § 518.18(d)(iv) (2020).

The district court must accept the facts in the moving party's affidavits as true, but "conclusory" allegations do not warrant an evidentiary hearing. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007). The court may also consider the allegations in the nonmoving party's affidavits "to the extent they explain or contextualize" the moving party's allegations. *Amarreh v. Amarreh*, 918 N.W.2d 228, 230 (Minn. App. 2018). The district court has discretion to determine whether the moving party made a prima facie showing for modification. *Boland v. Murtha*, 800 N.W.2d 179, 183 (Minn. App. 2011). On appeal, we review de novo whether the district court treated the moving party's

allegations as true, but we will not disturb a district court's determination that the party failed to make a prima facie case absent an abuse of discretion. *Id.* at 185.

The district court determined that mother failed to make a prima facie case as to changed circumstances or endangerment. Mother challenges both aspects of that decision. Neither challenge is persuasive.

Change of Circumstances

What constitutes changed circumstances for purposes of Minn. Stat. § 518.18(d) (2020) depends on a case-by-case analysis. *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). But there must be real change, not a continuation of ongoing problems. *Spanier v. Spanier*, 852 N.W.2d 284, 288 (Minn. App. 2014); *see also Barr v. Barr*, 416 N.W.2d 189, 192 (Minn. App. 1987) (reasoning that conflict between parents was not a change but continuation of circumstances known at the time of existing custody order). And the change must be “significant.” *Spanier*, 852 N.W.2d at 288 (quotation omitted). Changes that merely effectuate a district court's order are not significant. *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 690 (Minn. App. 1989) (affirming denial of custody-modification motion based on children's move to mother's house, as ordered, because it was not a “meaningful change”), *review denied* (Minn. June 21, 1989).

Mother sought custody modification based on two changes—B.L.F.'s transition from elementary to middle school and the June 2018 modification of parenting time. But as in the district court, she cites no authority for the proposition that such changes rise to the requisite significance to warrant custody modification. Indeed, she acknowledged at

oral argument that she has found no such authority. And our independent research revealed none. On this record, we conclude the district court did not abuse its discretion by determining that mother failed to make a prima facie case of significantly changed circumstances.²

Endangerment

Endangerment is an “unusually imprecise” concept. *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (quotation omitted). Nonetheless, the party seeking custody modification must demonstrate “a significant degree of danger.” *Id.* (quotation omitted). A parent’s conduct is dangerous to a child’s welfare if it is “shown to result in an actual adverse effect on the child.” *Weber*, 653 N.W.2d at 811. “[L]ack of endangerment is fatal to a motion to modify custody.” *Szarzynski*, 732 N.W.2d at 292.

Mother alleges that father endangers B.L.F.’s physical health by failing to (1) cook for her regularly and feed her a gluten- and lactose-free diet, (2) provide her appropriate clothing and hygiene items, and (3) decorate her bedroom or increase the temperature of his “freezing” home to help her feel comfortable. The district court reasoned that these

² Mother’s primary argument on appeal is the same she advanced in the stricken posthearing memorandum—that B.L.F.’s preference not to live with father constitutes a change in circumstances. Although this argument is not properly before us, we observe that a district court need not conduct an evidentiary hearing regarding a child’s stated preference as to custodial parent if “it is obvious from the record” that the preference “results from manipulation by the moving party.” *In re Weber*, 653 N.W.2d 804, 810 (Minn. App. 2002) (quotation omitted). The district court, which has been involved with these parties and this child since 2010, found that mother’s own allegations and the history of this case indicate she is manipulating B.L.F., alienating her from father, and inappropriately drawing her into the parties’ conflict. Accordingly, even if mother’s alternative arguments were properly before this court, they would not establish a prima facie case of significantly changed circumstances.

allegations, when viewed in context, do not establish a prima facie case of endangerment. The record supports this determination. Mother's affidavits reveal that B.L.F. has ready access to food and is able to prepare some food for herself. And mother does not allege that B.L.F. has suffered any ill effects from the food that father gives her.³ Similarly, mother indicates that she regularly buys clothing, bedding, and hygiene items for B.L.F., but that does not mean that father fails to do so, as he explained in his affidavit. And father's decision to keep his home at 69 degrees—cooler than B.L.F. prefers—and the fact he has not decorated her room as she wishes do not constitute physical endangerment.

Most of mother's allegations focus on B.L.F.'s emotional health. She claims that living with father during the school year has harmed B.L.F. emotionally, alleging that (1) her grades are uncharacteristically "horrible"; (2) her social relationships are suffering; (3) she is experiencing mental-health challenges that necessitate therapy; (4) father is "mean" to her or ignores her; and (5) father is "frequently drunk." Mother contends the district court improperly failed to take her allegations as true. The record defeats this contention. The court repeatedly acknowledged that it must accept the truth of mother's allegations and indicated it was doing so. But it also accurately noted that it was not required to accept "conclusory" allegations, *Szarzynski*, 732 N.W.2d at 292, or precluded

³ The district court stated that mother failed to present "medical verification" that B.L.F. is lactose intolerant and gluten intolerant. This statement is in error because mother submitted a school form, completed by a physician, that indicates B.L.F. is allergic to dairy and gluten. But the error is harmless because the focus of the court's analysis was the lack of any allegation that the child has suffered harm from her diet. See Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

from considering father’s explanations as context, *Amarreh*, 918 N.W.2d at 230. The district court considered each allegation of endangerment in turn; we do the same.

Grades. Mother alleges that B.L.F. had always been a “straight A” student but her grades during the fall 2019 term were “horrible.” But the documents mother submitted show that, for the fall term, B.L.F. received A’s in most of her classes; she struggled in some, with her grades going up and down over the course of the term; and as of a report issued just days before the December motion hearing, she had all A’s except for an incomplete D- and an incomplete F. Mother acknowledged at the hearing that B.L.F. was working to complete coursework she missed because of a mid-term illness, and that doing so would raise her incomplete grades.⁴ The district court did not abuse its discretion by determining that mother failed to establish a *prima facie* case of endangerment based on B.L.F.’s school performance.

Social relationships. Mother alleges that B.L.F. no longer has friends at school or in father’s neighborhood, and that her only remaining friend “constantly ditches her a lot.” The district court noted that these allegations are concerning but do not identify a specific basis for believing that B.L.F. is endangered in father’s home. We see no abuse of discretion by the district court.

⁴ One of the documents mother submitted is a November 22, 2019 letter from the school principal recognizing that B.L.F. “is typically an A student” but “struggled” in some classes that term. Mother correctly notes that the district court mischaracterized the letter as indicating B.L.F. had A’s in every class except one in which she had a B. But the error is harmless since mother’s documents and argument overall indicate some academic challenges that B.L.F. was in the process of remedying—not emotional endangerment.

Mental health.⁵ The district court noted that mother’s concerns about B.L.F.’s mental health are not based on mother’s personal knowledge but almost entirely on hearsay—mother reciting B.L.F.’s therapist’s reports of B.L.F.’s statements. *See State ex rel. Sime v. Pennebaker*, 9 N.W.2d 257, 259 (Minn. 1943) (rejecting an affidavit that contained “nothing of evidentiary worth” because it was “founded upon mere hearsay”). The court also observed that B.L.F.’s need for therapy is neither a changed circumstance—both parents have taken her to therapy sessions in the past—nor uniquely attributable to father. The district court did not abuse its discretion by determining that mother’s allegations regarding B.L.F.’s mental health do not establish a prima facie case that she is emotionally endangered in father’s care.

Father’s treatment of B.L.F. The district court noted that the allegations that father is “mean” to B.L.F. or “ignores” her are nonspecific (or conclusory) and therefore insufficient to warrant an evidentiary hearing. And it considered the two pages of excerpts from text messages between B.L.F. and father that mother submitted to show that father does not respond promptly. These brief excerpts indicate that father consistently responded to B.L.F.’s messages within a minute or so, once took eight minutes to respond, and once did not send a responsive text message—communication habits that the district court noted are unremarkable when viewed in the context of the text messages that mother submitted

⁵ Mother relies substantially on, and relates details from, B.L.F.’s therapy records. Mental-health records are not accessible to the public, Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 1(f), and the district court designated B.L.F.’s therapy records as confidential. Although we have carefully examined all of these records, we specifically refrain from including details from them in this opinion.

between herself and B.L.F. And while one exchange could support an inference that father left B.L.F. unattended at nearly 11:00 p.m., it indicates no more than a “single incident of borderline . . . neglect,” which is not endangerment. See *Geibe v. Geibe*, 571 N.W.2d 774, 779 (Minn. App. 1997). The district court did not abuse its discretion by determining that mother failed to establish a prima facie case that father is endangering B.L.F.

Father’s alcohol use. Mother alleges that father is “frequently drunk.” The district court observed that mother made similar allegations in the past and “certainly has the right to again express her concern,” but concluded she did not make a prima facie showing that father’s alcohol use endangers B.L.F. Mother again relies on hearsay from B.L.F.’s therapist, and levels generalized accusations that father is “gone drinking” during parenting time or that B.L.F. is “being parented by a drunk.” She alleges only one specific alcohol-related incident from personal knowledge. In August 2019, father did not arrive for weekend parenting time. When he called for his regular evening conversation with B.L.F., mother perceived him to be intoxicated. Father explained that he mistakenly believed mother was on vacation with B.L.F. that weekend and he came the next morning to bring her camping with him. Even if father actually was intoxicated while on the phone, mother has not shown any reason to believe he has ever shown up for parenting time under the influence of alcohol or missed parenting time because of alcohol use.

In sum, the district court properly accepted as true mother’s allegations based on her personal knowledge but viewed those allegations as a whole and in the context of her supporting documentation and father’s allegations. We discern no abuse of discretion in

the district court's determination that mother failed to make a prima facie showing of endangerment.

III. The district court did not abuse its discretion by denying mother's parenting-time motions.

A district court generally must modify parenting time if it will serve the child's best interests. Minn. Stat. § 518.175, subd. 5(b) (2020). But each parent is presumptively entitled to at least 25% parenting time. *Id.*, subd. 1(g) (2020). A district court has broad discretion in determining parenting-time issues, and we will not reverse absent an abuse of that discretion. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017).

Mother first argues that the district court abused its discretion by denying her motion to modify the regular parenting-time schedule because it failed to explain its reasoning. We disagree. Mother asked the district court to reduce father's parenting time from 55% to every other weekend, excluding overnights. As the district court observed, such a drastic reduction amounts to a restriction of parenting time. *See Dahl*, 765 N.W.2d at 123 (explaining that a "substantial" parenting-time reduction can be a "restriction"). A district court may not restrict parenting time without a showing of endangerment. Minn. Stat. § 518.175, subd. 5(c) (2020); *see also Boland*, 800 N.W.2d at 182 (recognizing that the same analysis applies to motions to restrict parenting time and motions to modify custody). As discussed above, the district court did not abuse its discretion by determining that mother failed to present a prima facie case that B.L.F. is endangered in father's care. Accordingly, it did not abuse its discretion by denying mother's motion to restrict father's parenting time.

Mother next contends that the district court abused its discretion by declining to modify the holiday schedule because it failed to address B.L.F.’s best interests. This argument is unavailing. Mother sought to limit B.L.F.’s holiday time with father to no more than a few hours on Father’s Day, Thanksgiving, and Christmas. She contrasted her assessment that father does “nothing to make the day feel special” and “frequently does not even buy [B.L.F.] gifts,” with the fact mother and her family “celebrate all holidays to the fullest.” In denying the motion, the district court reasoned that each parent is entitled to celebrate holidays in his or her own way. *See* Minn. Stat. § 518.17, subd. 1(b)(3) (2020) (providing that in assessing best interests, a court must recognize there are “many ways” parents can provide “love and guidance”). And it found that it is in B.L.F.’s best interests to have a relationship with each parent, which will require mother to respect father’s different parenting style, including his approach to celebrating holidays. *See id.*, subd. 1(b)(2) (2020) (requiring court to consider that a relationship with both parents is part of a child’s healthy growth and development). We see no abuse of discretion by the district court in rejecting mother’s request to eliminate nearly all of father’s holiday parenting time.

IV. The district court did not abuse its discretion by declining to appoint a GAL.

A district court has discretion to appoint a GAL to represent a child’s interests in a “proceeding[] for child custody.” Minn. Stat. § 518.165, subd. 1 (2020). If the court “has reason to believe” the child is a victim of abuse or neglect, it “shall” appoint a GAL. *Id.*, subd. 2 (2020); *Baum v. Baum*, 465 N.W.2d 598, 600 (Minn. App. 1991) (stating that appointment of a GAL is “mandatory” upon a sufficient showing of abuse or neglect), *review denied* (Minn. Apr. 18, 1991).

The district court declined to appoint a GAL under either provision because “[c]ustody and parenting time has already been decided” and mother failed to establish a prima facie case of endangerment. We see no abuse of discretion as the pertinent issues of custody and parenting time have been decided. And we discern no error in denying a mandatory GAL appointment when mother presented no basis for finding that B.L.F. is abused or neglected.

V. The district court did not abuse its discretion by enforcing the parties’ equal rights to make decisions regarding B.L.F.’s mental health.

“Procedural and evidentiary rulings are within the district court’s discretion” *Braith*, 632 N.W.2d at 721. Likewise, the district court has discretion to “enforce its orders” with any “proper decree of the court . . . by methods which are speedy, efficient, and sufficiently flexible to meet the problem at hand.” *Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986) (quotation omitted). We will not reverse absent an abuse of discretion. *Braith*, 632 N.W.2d at 721.

Where, as here, parents share legal custody, they have “equal rights and responsibilities” regarding the child’s care, including medical treatment. Minn. Stat. § 518.003, subd. 3(b) (2020). Joint legal custodians must make such decisions “cooperatively.” *Rosenfeld v. Rosenfeld*, 529 N.W.2d 724, 726 (Minn. App. 1995); see also *Novak v. Novak*, 446 N.W.2d 422, 423-24 (Minn. App. 1989) (noting that joint legal custodians have equal rights and responsibilities regarding their child’s schooling, and that courts decide disputed questions based on the child’s best interests).

The district court made three rulings regarding the parties' equal rights to provide for B.L.F.'s mental-health care: (1) it ordered an end to B.L.F.'s treatment with the therapist mother selected, (2) it excluded the therapist's letters from the record in the absence of a valid waiver of B.L.F.'s therapist-patient privilege, and (3) it limited future filings containing B.L.F.'s health information. Mother challenges all three rulings; we address each in turn.

First, mother argues that the district court abused its discretion by terminating B.L.F.'s therapy because it is against B.L.F.'s best interests to disrupt that therapeutic relationship. This argument is unavailing. Mother selected the therapist without consulting father—a substantial unilateral decision inconsistent with the parties' joint legal custody. *See Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996) (concluding psychologist's report after interviewing children was “arguably inconsistent with the provisions of the judgment and decree” granting the parties joint legal custody because it was “made without [mother's] knowledge or consent”). The district court did not merely discontinue that therapy but directed the parties to find a mutually agreeable therapist, thereby enforcing the parties' joint-custody arrangement while also providing for B.L.F.'s welfare. We see no abuse of discretion.

Second, mother contends the district court abused its discretion by excluding the therapist's letters because she has the right to waive B.L.F.'s privilege. We disagree. A treating psychologist “shall not,” without a client's consent, disclose in court “any information or opinion based thereon” that the psychologist acquired in treating the client. Minn. Stat. § 595.02, subd. 1(g) (2020). The therapist-patient privilege is designed “to

increase the effectiveness of treatment by creating an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.” *Expose v. Thad Wilderson & Assocs., P.A.*, 863 N.W.2d 95, 107 (Minn. App. 2015) (quotation omitted), *aff’d*, 889 N.W.2d 279 (Minn. 2016). The need for a confidential therapeutic relationship is no less important when the patient is a minor child, and perhaps even more so for a child torn between parents in conflict. While a parent has the right to access her child’s medical records, Minn. Stat. § 518.17, subds. 3(b), 3a (2020), mother identifies no authority for the proposition that the right of access entitles one joint legal custodian to unilaterally waive the child’s evidentiary privilege over the objections of the other parent.⁶ More importantly, a joint legal custodian may not make such a substantial decision regarding a child’s welfare unilaterally. See Minn. Stat. § 518.003, subd. 3(b); *Rosenfeld*, 529 N.W.2d at 726. The district court did not abuse its discretion by excluding the therapist’s letters absent, at a minimum, both parties’ agreement to waive confidentiality.⁷

Third, mother challenges the district court’s prohibition against “fil[ing] into the court record any health information or opinion that has been acquired in attending to [B.L.F.] in a professional capacity, including mental health information,” without the

⁶ Mother also suggests that B.L.F. waived her therapist-patient privilege because the therapist’s letters state that she was writing “by request of” B.L.F. Mother identifies no authority for the proposition that a minor child may waive her own therapist-patient privilege.

⁷ We observe that even with such an agreement, the district court retains authority to “waive” parental rights regarding a child’s medical records if necessary to safeguard the child’s welfare. Minn. Stat. § 518.17, subd. 3(c) (2020).

court's "express permission." She contends the proscription was an abuse of discretion because the district court did not provide any analysis or supporting authority. But as we discussed above, the court explained that such records are inadmissible unless both parties agree to the disclosure. And the court repeatedly expressed concern that mother incites conflict with father and places B.L.F. in the middle of it. The district court order does not preclude the parties from using appropriately accessed medical records; it merely imposes a procedural hurdle to ensure that any such use would be based on both parties' agreement, further the child's best interests, and protect the confidential status of the documents. *See* Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 1(f)(1). Accordingly, the proscription was not an abuse of discretion.

Affirmed.