

*This opinion is nonprecedential except as provided by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
A20-0713**

In re the Marriage of:
Richard Otto, petitioner,
Appellant,

vs.

Janyce Otto,
Respondent.

**Filed March 29, 2021
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge**

Olmsted County District Court
File No. 55-FA-14-5012

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Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Bryan,
Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges (1) the denial of his motion to hold respondent in contempt for failing to comply with a parenting-time order, and (2) conditions that impermissibly restrict his parenting time. Because we conclude the district court acted within its discretion by

denying the contempt motion, but abused its discretion by imposing conditions that effectively suspended father's parenting time indefinitely without an evidentiary hearing, we affirm in part, reverse in part, and remand.

FACTS

Appellant Richard Otto (father) and respondent Janyce Otto, n/k/a Janyce McHale (mother) were married in 2002. In March 2017, the parties dissolved their marriage by a stipulated judgment that awarded the parties joint legal custody of their children—A.O. (born 2002) and R.O. (born 2005)—and awarded sole physical custody to mother. The dissolution judgment also provided that father would have parenting time as determined by a parenting consultant the parties selected. The consultant issued her last parenting-time order in March 2019,¹ which provided that the parties would alternate specified holidays and school breaks between “odd” and “even” years, and that father would have regular parenting time every Wednesday and overnight parenting time on the first and third weekend of each month.

In addition to making parenting-time decisions, the consultant determined that therapy was in R.O.'s best interests. Accordingly, the consultant appointed a therapist, set a schedule for the parties to transport R.O. to and from therapy, and made R.O.'s therapy sessions a “Safe Haven” free from interference by either parent. In mid-October, the therapist invited the parties to attend one of R.O.'s sessions to discuss her reluctance to attend parenting time with father. The parties relate differing accounts of what took place

¹ The consultant's contract terminated on April 1, 2019.

at the session, but both agree that the session ended with R.O. crying and upset. Father has not had parenting time with R.O. since approximately October 18, 2019, except for brief conversations through car windows and one attempt at a father-daughter therapy session the following month.

In January 2020, father moved the district court to issue an order holding mother in contempt for failing to ensure he received parenting time with R.O., and awarding compensatory parenting time. Mother opposed the motion, and moved the court to order the parties to cooperate with R.O.'s therapy, and to appoint a new parenting consultant.

The district court decided the motions without holding an evidentiary hearing. Its March 2020 order found that father has not had parenting time since October 18, 2019, and that R.O.'s opinions—as expressed through her therapist—regarding parenting time are entitled to consideration. The district court denied father's contempt motion, concluding that father's reduced parenting time stems from R.O.'s decisions, rather than mother's conduct. The district court ordered father to “arrange for and attend individual counseling,” and conditioned the resumption of his parenting time on cooperating with therapy recommendations and eventually attending joint counseling sessions with R.O. The district court reserved “the final decision on parenting time,” pending receipt of recommendations from the therapists. Father appeals.

DECISION

Father argues that the district court abused its discretion by not holding mother in contempt and by imposing conditions on his parenting time, effectively suspending it indefinitely without conducting an evidentiary hearing. We address each argument in turn.

I. The district court did not abuse its discretion by declining to hold mother in civil contempt.

District courts have the authority to enforce parenting-time orders by holding a party in civil contempt. *Erickson v. Erickson*, 385 N.W.2d 301, 304 (Minn. 1986); see Minn. Stat. §§ 518.175, subd. 6(h) (stating “unwarranted denial of or interference with duly established parenting time may constitute contempt of court”), 588.01, subd. 3(3) (stating district courts are empowered to find a party in contempt for “disobedience of any lawful judgment, order, or process of the court”) (2020). But “[c]ontempt is an extraordinary remedy that must be exercised with caution.” *Burgardt v. Burgardt*, 474 N.W.2d 235, 236 (Minn. App. 1991). We review a district court’s contempt decision for an abuse of discretion, but review underlying factual findings for clear error. *Mower Cty. Human Servs. ex rel. Swancutt v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996); see *Gustafson v. Gustafson*, 414 N.W.2d 235, 237 (Minn. App. 1987) (stating contempt decisions will be upheld if they find support in the record).

Father contends the district court abused its discretion because mother did not comply with the parenting-time order and did not demonstrate she was incapable of doing so. See *Meisner v. Meisner*, 20 N.W.2d 486, 487 (Minn. 1945) (stating the burden is on the purported contemnor to demonstrate an inability to comply with the violated order). We disagree. The district court found that father’s lack of parenting time was due to R.O.’s “opinions and fears” about spending time with him. The record supports this finding. Communications from R.O.’s therapist to both parents reflect that R.O.’s “continued rejection of parenting time” following the mid-October incident “has been [R.O.’s]

choice,” and stems largely from R.O.’s “history of relationship fears” with father. The therapist further stated that R.O. “has let [father] know that she is afraid of [father],” and that her decision “to not attend parenting time has been based on what she believes is safe for her well being.” These communications reasonably support a finding that R.O.’s fractured relationship with father—not any act or omission by mother—caused father’s parenting time to cease. Accordingly, the district court’s implicit finding that mother did not willfully refuse to comply with the parenting-time order is not clearly erroneous. On this record, we discern no abuse of discretion by the district court in denying father’s motion to find mother in civil contempt.

II. The district court abused its discretion by indefinitely suspending father’s parenting time without an evidentiary hearing.

We note at the outset that neither party asked the district court to modify custody of R.O. or the existing parenting-time order. And the district court’s order does not—on its face—purport to do so. But the order conditions father’s parenting time as follows:

4. Father shall arrange for and attend individual counseling Father shall ensure he engages a therapist who is willing to report to the Court regarding Father’s progress.
5. Father’s parenting time with [R.O.] is conditioned on the following:
 - a. Father must contact [R.O.]’s therapist . . . in a respectful manner that acknowledges her position as [R.O.]’s therapist, to learn of [R.O.]’s therapeutic progress. Father shall not make any threats, explicit or implicit, related to [R.O.]’s continued therapy
 - b. Father’s therapist may contact [R.O.]’s therapist. The therapists will then discuss each patient’s

progress in order to work toward joint therapy and/or therapeutic parenting time.

- c. Father's and [R.O.]’s therapists shall determine whether joint therapy is appropriate and should begin. When the therapists recommend joint therapy, Mother and Father shall agree on a date for a joint counseling session. Joint therapy shall **only** begin upon Father and [R.O.]’s therapists agreeing that joint therapy is appropriate given each of their counseling thus far.

. . . .

- 6. The Court shall make the final decision on parenting time, and will not ask the therapists to make decisions of that magnitude. The therapists are there to provide recommendations as to what is best for [R.O.]. They may first make those recommendations to the parents, and if they agree, they can voluntarily follow them. If the parents disagree, then the therapist shall make recommendations to the Court, including facts relied upon and the basis of the recommendations, so the Court may make the best decision possible based upon the child and parties’ progress and mental health prognoses.

The order does not schedule a review hearing or set a date by which the district court will make its final parenting-time decision. The parties agree, as do we, that the effect of these conditions is the indefinite suspension of father’s parenting time. We now consider whether this indefinite suspension exceeded the bounds of the district court’s discretion.

District courts have “broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion.” *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017) (quotation omitted). A district court may modify parenting time if it is in the child’s best interests, but may not restrict parenting time unless continued parenting time is “likely to endanger the child’s physical or emotional health or impair the

child’s emotional development.” Minn. Stat. § 518.175, subds. 5(b), (c)(1) (2020). Parenting time can be deemed restricted when a modification is “substantial.” *Suleski v. Rupe*, 855 N.W.2d 330, 336 (Minn. App. 2014). To determine whether a modification of parenting time is substantial—and therefore a restriction of parenting time—we consider “the reasons for the change as well as the amount of the reduction” of time, specifically whether the reason for the reduction in parenting time goes to the parent’s care or ability to care for the child. *Id.* A district court may not substantially modify parenting time without conducting an evidentiary hearing. *Id.*

We initially note that the reason for the reduction in father’s parenting time is his fractured relationship with R.O., which goes to his care for R.O. Accordingly, the reason-for-the-reduction prong of the analysis weighs in favor of considering the reduction as a restriction. The record also persuades us that the district court’s reduction of father’s parenting time is substantial. In addressing this prong, we must first identify the “baseline parenting-time schedule”—“the last permanent and final order setting parenting time”—and then we must determine whether the changes from that baseline schedule are “significant enough to constitute a restriction.” *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). Here, the baseline schedule is that established in the parenting consultant’s last-issued parenting-time order from March 2019. Under this order, father was entitled to parenting time every Wednesday and alternating holidays, and to overnights on the first and third weekend of each month and on select holidays. As a result of the district court’s order, father is essentially entitled to no parenting time unless and until (1) father begins therapy, (2) his therapist and R.O.’s therapist recommend joint therapy, and (3) mother

agrees to a date for a joint therapy session. In other words, father has gone from regularly scheduled parenting time with R.O. to, at best, joint therapy sessions with R.O. as determined by others. Absent a scheduled review hearing or a court-ordered timetable for establishing a new parenting-time order, father is left with only the hope of future parenting time. This amounts to an indefinite suspension of father's parenting time, and substantially modifies the last-issued parenting-time order.²

As noted above, a district court may not substantially modify parenting time without conducting an evidentiary hearing. *Suleski*, 855 N.W.2d at 336. The district court here abused its discretion by failing to conduct such a hearing. Accordingly, we remand to the district court to hold an evidentiary hearing during which the parties may present evidence regarding R.O.'s best interests and whether parenting time with father endangers R.O.'s health or development. *See id.*; *Dahl*, 765 N.W.2d at 124 (reversing and remanding for findings determining whether parenting time endangered the children); *see also Tarlan v. Sorensen*, 702 N.W.2d 915, 925 (Minn. App. 2005) (stating "courts should err on the side of requiring an evidentiary hearing when a child's health or emotional well-being are at stake").

² We note that the parties also contested whether the "rebuttable presumption that a parent is entitled to receive a minimum of 25 percent of the parenting time" for a child should apply here. Minn. Stat. § 518.175, subd. 1(g) (2020). But this rebuttable presumption only applies "[i]n the absence of other evidence." *Id.* Because the record does not establish that father was entitled to more than "25 percent of the parenting time" under the March 2019 parenting-time schedule, we need not consider whether the district court erred by failing to apply the statutory presumption.

In sum, we affirm the district court's denial of father's motion to hold mother in contempt. But we reverse the district court's parenting-time order and remand for an evidentiary hearing consistent with Minn. Stat. § 518.175, subd. 5(c).

Affirmed in part, reversed in part, and remanded.