

*This opinion is nonprecedential except as provided by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
A20-0848**

In re the Marriage of: Jaclyn Ann Stevens, petitioner,
Respondent,

vs.

Gordon Michael Stevens,
Appellant.

**Filed May 10, 2021
Affirmed in part and reversed in part
Slieter, Judge**

Stearns County District Court
File No. 73-FA-15-9212

Betsey Lund Ross, Lund Ross, P.A., St. Cloud, Minnesota (for respondent-mother)

Edward R. Shaw, Brainerd, Minnesota (for appellant-father)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this child-custody-modification dispute, appellant-father Gordon Stevens argues that the district court abused its discretion by awarding respondent-mother Jaclyn Stevens sole legal and sole physical custody of the child. The record supports the district court's factual finding of endangerment of emotional harm for purposes of modifying legal custody and we affirm that part of the decision. However, because those same facts do not

support the district court's factual finding of endangerment of emotional harm for purposes of modifying physical custody, we reverse that part of the decision.

FACTS

Father and mother's marriage was dissolved in 2017. Pursuant to the dissolution decree, the parties were awarded joint legal and joint physical custody of their minor child, L.S., with equal parenting time.

In 2018, father moved for sole legal custody based upon endangerment. The district court held a *Nice-Peterson*¹ hearing, concluded father alleged a *prima facie* showing for modification of legal custody, and scheduled an evidentiary hearing. The district court stated: "[A]n evidentiary hearing is necessary to determine whether the allegations made by the parties are true and whether it is in the Child's best interests to modify legal custody." In an order appointing a guardian *ad litem* (GAL), the district court checked three separate boxes directing the GAL to submit a report regarding "Permanent legal custody of the child(ren)," "Permanent physical custody of the child(ren)," and "Long-range parenting time." The GAL filed a report recommending that the court award mother sole legal and sole physical custody of L.S. Following receipt of the GAL report, mother moved for sole legal custody.

¹ *Nice-Peterson v. Nice-Peterson*, 310 N.W.2d 471, 472 (Minn. 1981) (stating that party seeking modification must "establish satisfactorily on a preliminary basis that there has occurred a significant change of circumstances" that endangers the child's physical or emotional health or development).

The district court held a five-day evidentiary hearing beginning in August 2019. The district court heard testimony from, among others, father, mother, the GAL, and L.S.’s therapist.

The district court, in a detailed 99-page order, awarded mother sole legal and sole physical custody of L.S. and modified parenting time to a “week-on/week-off” schedule. Father appeals.

DECISION

A district court has “broad discretion in determining custody matters.” *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008) (quotation omitted).

Appellate review of custody modification and removal cases is limited to considering whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. Appellate courts set aside a district court’s findings of fact only if clearly erroneous, giving deference to the district court’s opportunity to evaluate witness credibility. Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made.

Id. at 284 (quotations and citations omitted). “When determining whether findings are clearly erroneous, an appellate court views the record in the light most favorable to the [district] court’s findings.” *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002).

A district court may not modify a prior custody order unless it finds, upon facts developed after the prior order or facts that were unknown at the time of the prior order, 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.” Minn. Stat. § 518.18(d) (2020). In reviewing an endangerment-based custody-modification motion, the district

court must retain the prior custody arrangement unless: (1) the circumstances have changed; (2) a change in custody would serve the child’s best interests; (3) the child’s present environment endangers his physical health, emotional health, or emotional development; and (4) the benefits of the change outweigh its detriments with respect to the child. *Id.* Appellant solely contests element three—endangerment. Our court has held that the endangerment standard, though “imprecise,” requires “a showing of a significant degree of danger.” *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991); *see Goldman*, 748 N.W.2d at 285 (quoting these aspects of *Ross*).

“Legal custody” is defined as “the right to determine the child’s upbringing, including education, health care, and religious training.” Minn. Stat § 518.003, subd. 3(a) (2020). “Physical custody and residence” is defined as “the routine daily care and control and the residence” of the child. *Id.*, subd. 3(c).

It is important to note that neither party moved for modification of physical custody and that neither party challenged the district court’s *sua sponte* consideration of this question. Additionally, the district court’s *Nice-Peterson* order identified that there existed a *prima facie* basis to proceed to an evidentiary hearing solely on the issue of legal custody. The first reference to physical custody was noted by the judge’s checkmark in a form “Order Appointing Guardian ad Litem.” Finally, the written report of the guardian *ad litem* as referenced by the district court’s findings primarily focused on factors of legal custody.²

² The GAL also did not apply the best-interests factors of Minn. Stat. § 518.17, subd. 1 (2020) in reaching her recommendation and no custody investigation was performed pursuant to Minn. Stat. § 518.167 (2020).

Legal Custody

Addressing the endangerment factor related to legal custody, the district court determined from the record that:

- “[T]he parties have continuously experienced exceedingly high conflict and placed [L.S.] in the center of those disputes,” which included the “appropriate medical care for [L.S.] (i.e., ADHD medication, therapy, assessments, ear plugs) as well as extra-curricular activities (i.e., the frequency of Chinese tutoring, violin lessons, involvement in Cub Scouts and baseball)”;
- “[S]ome of [the parties’] disputes have occurred in front of [L.S.]”;
- “[T]he parties have had disputes over therapy appointments as well as the use of in-home therapy, with appointments being made and cancelled, in addition to disputes over [L.S.’s] use of ADHD medication”; and
- L.S.’s “present environment—specifically, that the parties presently share joint legal custody of him—endangers his emotional health and impairs this emotional development, as required by Minn. Stat. § 518.1 8(d).”

We have held that evidence of disagreements between parents which endanger a child’s emotional health is sufficient to modify legal custody. *See Andros v. Andros*, 396 N.W.2d 917, 922-23 (Minn. App. 1986) (stating that disputes “over the children’s religious upbringing endangers the children’s emotional well being by placing them in the middle of a ‘tug-of-war’”). We have also held that intense conflict between the parents that causes problems with a joint legal custody arrangement by placing the child in the middle of the conflict can constitute emotional endangerment. *Andersen v. Andersen*, 360 N.W.2d 644, 646 (Minn. App. 1985).

The district court's findings to modify legal custody based upon emotional endangerment are supported by the record. The district court made detailed findings of intense and ongoing disputes between the parents, and the potential risk to L.S. with joint legal custody. The district court found that L.S. had witnessed this conflict between his parents. The district court's thorough and well-detailed factual findings are supported by the record and are not clearly erroneous. The district court did not abuse its discretion by granting mother sole legal custody.

Physical Custody

The party requesting modification of physical custody must present evidence that the conduct of the other parent puts the child at a "degree of danger" that is "significant," and that the child suffers actual adverse effects from such conduct. *In re Weber*, 653 N.W.2d 804, 811 (Minn. App. 2002).

First, the district court's findings which lead to its conclusion to modify physical custody appear to derive from the same findings which support its legal-custody-modification conclusion. However, these findings address factors related to legal custody but not those of physical custody. Second, a careful review of the record, which is reflected in the district court's findings, does not support modifying joint physical custody. The following are examples of such findings:

- "As far as [L.S.'s] emotional needs, as noted by the Guardian ad Litem in her [] report, both parties show love and affection towards [L.S.], both parties praise [L.S.'s] abilities and want to support him to succeed";

- “Both [father] and [mother] are willing and able to provide care for [L.S.]”;
- “Both parents love and care for [L.S.] wholeheartedly and his physical, emotional, spiritual and other needs are being met at each parties’ homes. All involved agree that [L.S.] benefits from both parents being involved in his life and would be suited to an equal parenting time schedule. Both [father] and [mother] are highly involved in [L.S.’s] development and education”;
- “[L.S.] has a good relationship with [father] and [mother]. [Father], [mother], and the Guardian ad Litem all recommend that [L.S.] have an equal parenting time schedule”; and
- “[T]he Court finds that it is in [L.S.’s] best interests to modify the parenting time schedule so that the parties have parenting time on a week-on/week-off basis.”

The record does not reflect, and hence the district court made no findings, that continued joint physical custody would jeopardize L.S.’s physical or emotional well-being. This is in contrast to the findings and record which indicate that L.S. experiences emotional harm in a joint-legal-custody arrangement. Because the district court’s findings related to a modification of physical custody are not supported by the record, they are clearly erroneous and the district court abused its discretion by modifying physical custody.

Affirmed in part and reversed in part.