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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0863**

In re the Matter of: Brooks J. Waldron, petitioner,
Respondent,

vs.

Uneica Nicole Garrett,
Appellant.

**Filed March 15, 2021
Affirmed; motions denied
Bryan, Judge**

Hennepin County District Court
File No. 27-FA-16-1681

Brooks John Waldron, Minnetonka, Minnesota (pro se respondent)

Uneica Nicole Garrett, Jordan, Minnesota (pro se appellant)

Considered and decided by Bryan, Presiding Judge; Ross, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this custody and parenting time dispute, appellant argues that the district court erred in the following three respects: (1) it applied the wrong legal standard to her motion to modify parenting time; (2) it restricted her parenting time to under 25% without a showing of endangerment; and (3) it imposed an unconstitutional condition on her ability to make a motion to modify custody. We affirm the district court's parenting time decision because the district court applied the correct legal standard and because mother's argument

misstates the law. In addition, we conclude that the district court did not violate mother's constitutional rights because the district court did not dismiss mother's motion to modify custody, but instead considered it. Finally, we deny appellant's and respondent's motions to strike.

FACTS

Appellant Uneica Nicole Garrett (mother) and respondent Brooks John Waldron (father) were never married and have one child together. The initial custody and parenting time order from January 2017 (January 2017 order) awarded the parties joint legal and joint physical custody of the child and established an equal parenting time schedule. In 2018, mother and father had a series of escalating arguments, and mother made statements that she was intending to harm herself and the child. For instance, mother told father "I don't want to be alive anymore, but I don't want [child] to be with you, so I am going to kill us both . . . [y]ou can do a welfare check tomorrow, and you can find us both floating in the lake." After this phone call, father petitioned the court for an order for protection (OFP) against mother on behalf of himself and the child. Following an evidentiary hearing, the district court granted the OFP. The child exclusively resided with father after the OFP went into effect.

Father also moved to modify custody based on endangerment. The district court scheduled the motion for an evidentiary hearing. At the evidentiary hearing on January 24, 2019, mother failed to appear. The district court found her in default and proceeded to receive testimonial and documentary exhibits in her absence. On February 1, 2019, the district court issued its written order (the February 2019 order) based on the evidence

presented. The district court concluded that “[b]ased on [father’s] testimony, undisputed evidence in the record that [mother] threatened her own life and the life of the child while the child was in her care, and [mother’s] default status, . . . endangerment of the child has occurred.” The district court then considered the best interests factors, awarded father sole legal and sole physical custody, and restricted mother’s parenting time to one supervised session every other week for up to four hours. The district court noted that mother was to “complete psychological and psychiatric evaluations,” and provide the district court “with updated medical and psychological records, to verify the status of her mental health” prior to filing a motion for unsupervised parenting time. Mother did not appeal the February 2019 order.

In November 2019, mother moved the district court to modify custody based on her belief that father was interfering with her parenting time and based on her improved mental health. In support of her motion, mother provided a report from the supervised visitation facility showing parenting time visits that father had cancelled. Mother also submitted documents from her family physician and therapist to demonstrate she was mentally able to care for the child in an unsupervised setting. In an order dated December 16, 2019, (December 2019 order) the district court denied mother’s motion to modify custody without a formal evidentiary hearing. The district court also addressed mother’s mental health and the allegations of father’s denial of parenting time. The district court determined that mother had a “history of psychiatric hospitalizations and crisis interventions” and that the documents mother submitted—including mother’s own reports—failed to address her history of impulsive and dangerous behaviors. These documents also failed to reference

mother's extensive psychiatric history. The district court concluded that the medical opinions were "without legal or factual basis and demonstrate a disturbing level of bias." The district court granted mother's request for unsupervised parenting time and permitted an expansion of parenting time to one overnight every other week. The district court also prohibited mother from filing any additional modification motions until she provides "credible documentation and qualified psychiatric opinions" showing that she is adequately managing her mental health. The district court also stated that "[p]rior to filing a motion to increase parenting time, [mother] shall complete a full psychiatric evaluation and provide the evaluator with her complete psychiatric history and a copy of this Order." Mother did not appeal the December 2019 order.

In March 2020, mother again moved the district court to modify custody. Mother's written motion also included the following request regarding parenting time: "If a change of physical custody is ordered, then I ask the Court to change the parenting time schedule as set forth in my Affidavit." In mother's affidavit, she reiterated the conditional request: "If the court changes physical custody, the parenting time schedule should be changed." Mother's affidavit also alleged that father willfully denied mother's parenting time, that the child expressed a desire to see mother more often, and that mother had continued to receive mental health treatment. Father submitted a responsive motion and affidavit regarding mother's allegations. At a hearing on April 7, 2020, the district court heard arguments regarding the custody modification motion. In addition, the district court permitted mother to make an oral request for an equal parenting time schedule even though the district court had no written parenting time modification motion before it.

In an order dated May 11, 2020, (May 2020 order) the district court denied mother's custody modification motion, concluding that mother failed to make a prima facie case for modification. The district court also denied mother's parenting time request, concluding that the stated bases did not establish that an equal parenting time schedule was in the child's best interests:

The Court notes that [mother] did not file a formal motion to modify the current parenting time schedule. [Mother] argued that it is in the best interests of the child to revert to the 2-2-5-5 parenting time schedule incorporated in the January 30, 2017 Order. However, she provided no basis to support her argument that a modification of the current parenting time schedule is in the best interests of the child. [Mother] exercised supervised visits with the child at a supervision facility once every other week during the time period of September 4, 2018 until December 21, 2019. Following a hearing on December 3, 2019, [mother's] parenting time was modified to unsupervised overnight visits on alternating weekends from Saturday at 3:00 p.m. until Sunday at 1:00 p.m. [Mother's] proposed modification to an equal parenting time schedule would be a drastic change for the child, and the only basis she provided for the drastic change is that the child wishes to spend more time with her and she is psychologically equipped to parent the child. The Court finds that [mother] has not presented a change in circumstances which would warrant her requested modification to the parenting time schedule and she has not done a proper analysis to show that a modification of the current parenting time schedule is in the best interests of the child.

Mother appeals the May 2020 order.

DECISION

I. Legal Standard Applied to Mother's Parenting Time Modification Motion

Mother argues that the district court abused its discretion because the district court did not apply the best interests standard to her parenting time modification request. We

disagree. The district court applied the best interests standard when it denied mother's parenting time modification request.

As a threshold matter, we note that mother did not make a written motion for modification of parenting time. Instead, she filed a motion for modification of custody. The only written request regarding parenting time was made contingent on a change in custody. The motion states, "If a change of physical custody is ordered, then I ask the Court to change the parenting time schedule as set forth in my Affidavit." In addition, mother's affidavit reads, "If the court changes physical custody, the parenting time schedule should be changed." Mother used the forms provided by the Minnesota Judicial Branch corresponding to a motion for change of custody (Form CHC302) and to an affidavit in support of the motion to change custody (Form CHC303). We acknowledge that there is no form provided for a change in parenting time. It may be that mother intended to make a request to modify parenting time independent from her request to modify custody, but that is not what mother's motion and affidavit stated.

The district court denied mother's custody modification motion without an evidentiary hearing.¹ See Minn. Stat. 518.18 (2020); *Englund v. Englund*, 352 N.W.2d 800, 802 (Minn. App. 1984) ("If the affidavits accompanying the motion for modification do not allege sufficient facts to allow a court to reach the findings required by § 518.18, the trial court is required to deny the motion." (citing *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981))). Even though the district court had no parenting time

¹ Mother does not challenge the decision to deny her custody modification request without a hearing.

modification motion before it, once it denied mother's custody modification motion, it permitted mother to make an oral request to modify parenting time at the April 7, 2020 hearing on her motion to modify custody.

Mother has appealed the denial of this oral motion, arguing that the district court applied the custody modification standard instead of the best interests standard used for many types of parenting time modification motions. Mother does not contest any of the fact findings of the district court, argue that the district court ignored or improperly discounted the statements in her affidavit, or expressly challenge the district court's weighing of the applicable best interests factors. Although we review the decision to grant or deny parenting time modification motions for an abuse of discretion, *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017), determining what legal standard applies to a request to change parenting time is a question of law that we review de novo, *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009)).

Minnesota Statutes section 518.175 (2020) governs modification of a parenting time schedule. For parenting time modification motions that do not request a change in the child's primary residence, the statute provides that modification of parenting time is justified if the requested modification would "serve the best interests of the child." Minn. Stat. § 518.175, subd. 5(b). In addition, the best interests standard applies to modifications of parenting time that do not constitute a "restriction," *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002), including modifications that reduce one parent's parenting time to "an amount that is between 45.1 to 54.9 percent parenting time," Minn. Stat. § 518.175, subd. 5 (establishing that a reduction to an amount within this range is "not a restriction of

the other parent’s parenting time”). The party requesting to modify a parenting time order has the burden of establishing that the proposed modification is in the best interests of the child. *See Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978).

This standard differs from the requirements that apply to motions to modify custody, motions to modify a parenting plan, motions to change the primary residence of a child, and motions to restrict one parent’s parenting time. Those types of motions are subject to specific procedural limitations and they require proof of endangerment or integration, proof of a change in circumstances, and proof that the requested change serves the best interests of the child. Minn. Stat. § 518.18 (listing requirements and legal standard); *see also Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (applying Minn. Stat. § 518.18(d) in an endangerment context); *In re Welfare of B.K.P.*, 662 N.W.2d 913, 916 (Minn. App. 2003) (differentiating parenting time modification motions from parenting plan modification motions and concluding that “the time limitations of Minn. Stat. § 518.18 do not apply to modifications of parenting time, even if the parenting time schedule was originally part of a broader parenting plan”); *Matson*, 638 N.W.2d at 468 (restrictions of a parent’s parenting time are subject to the provisions of section 518.18).

Mother asked the district court to adopt an equal parenting time schedule, not a “restriction,” and mother is correct to argue that the best interests standard applies to mother’s motion. Minn. Stat. § 518.175, subd. 5; *Matson*, 638 N.W.2d at 468. We disagree with mother’s characterization of the district court order, however. Contrary to mother’s argument, the district court did not apply the custody modification standard. Instead, it expressly applied the best interests standard to mother’s oral parenting time modification

request. The district court first described the permanent parenting time schedule in place at the time of mother's motion: "Following a hearing on December 3, 2019, [mother's] parenting time was modified to unsupervised overnight visits on alternating weekends from Saturday at 3:00 p.m. until Sunday at 1:00 p.m." Mother's parenting time consisted of one overnight visit out of every fourteen days. The district court then compared this schedule to the equal parenting time schedule that mother requested, expressing concern regarding the degree of the requested change: "[Mother's] proposed modification to an equal parenting time schedule would be a drastic change for the child." The district court considered mother's stated basis for the request: "the only basis she provided for the drastic change is that the child wishes to spend more time with her and she is psychologically equipped to parent the child." The district court concluded the following:

The Court finds that [mother] has not presented a change in circumstances which would warrant her requested modification to the parenting time schedule and she has not done a proper analysis to show that a modification of the current parenting time schedule is in the best interests of the child.

Although the district court stated that mother did not establish a "change in circumstances," it also concluded separately that mother had "not done a proper analysis to show that a modification . . . is in the best interests of the child." Thus, we reject mother's assertion that the district court applied the wrong legal standard when it denied her request to modify parenting time.

To the extent that mother also impliedly argues that the district court abused its discretion when it weighed the best interests factors and denied her request, we disagree.

The basis for mother's requested parenting time change consisted only of mother's improved mental health and the child's statements that he wanted to see her more often. Mother's motion and affidavit contained no factual statements regarding the impact that requested change would have and lacked any analysis regarding the degree of the requested change. In the absence of mother's factual statements or explanations regarding any of the other enumerated best interests factors, the district court did not abuse its discretion when it concluded that mother's improved mental health and the child's statements did not justify the requested modification.

II. The Statutory Minimum Parenting Time Percentage

Mother argues that the district court erred as a matter of law by "restricting" her parenting time below the statutory minimum parenting time percentage without finding that she presents a danger to the children. We are not persuaded.

The legislature established a rebuttable presumption in favor of a minimum parenting time percentage: "In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive a minimum of 25 percent of the parenting time for the child." Minn. Stat. § 518.175, subd. 1(g). In addition, to impose a "restriction" on one party's parenting time, the district court must make a finding that "parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development" or that the parent whose parenting time is being restricted "has chronically and unreasonably failed to comply with court-ordered parenting time." *Id.*, subd 5(c). Mother's argument depends on the interpretation of these two statutory provisions, presenting a question of law that we review de novo. *Dahl*, 765 N.W.2d at 123.

Mother's argument does not convince us to reverse the district court. First, mother's argument conflates a "restriction" with an amount of parenting time falling below the statutory minimum. Contrary to mother's argument, these two statutory provisions are distinct from one another and a finding of endangerment is only required when a district court imposes a restriction: "Although a 'restriction' requires a finding of endangerment or noncompliance with court orders, parenting-time allocations that merely fall below the 25% presumption can be justified by reasons related to the child's best interests and considerations of what is feasible given the circumstances of the parties." *Hagen v. Schirmers*, 783 N.W.2d 212, 218 (Minn. App. 2010) (citation and footnote omitted). Father need not prove endangerment and the district court need not find endangerment in order to justify awarding mother less than 25% parenting time.

Second, the district court did not restrict or reduce mother's parenting time in the May 2020 order. After presiding over an evidentiary hearing in February 2019, the district court restricted mother's parenting time based on a finding of endangerment. In addition, in the February 2019 order, the district court made sufficient findings to award mother less than 25% parenting time. The district court later permitted an insubstantial expansion of mother's parenting time in the December 2019 order. When comparing the May 2020 order to the baseline permanent parenting time schedule previously established, we conclude that the district court did not restrict mother's parenting time when it denied her oral request for equal parenting time in its May 2020 order.

Third, we decline to interpret the statute as mother's argument necessitates: to require father to perpetually carry a burden to prove endangerment or to perpetually rebut

the statutory presumption in response to mother's motions to expand parenting time. To adopt such an interpretation would conflict with the caselaw requiring a moving party to establish the requirements of 518.18, result in continual litigation of factual disputes regarding endangerment, and mandate evidentiary hearings with competing endangerment presumptions and burdens of proof. In addition, mother's interpretation conflicts with the statutory language regarding applicability of the rebuttable presumption. The legislature provided that the rebuttable presumption applies only "[i]n the absence of other evidence." Minn. Stat. § 518.175, subd. 1(g). In this case, father also submitted a sworn affidavit regarding the factual assertions made by mother. Because the record in this case contains evidence, we cannot adopt mother's interpretation of the statute and conclude that the statutory presumption applied to her oral motion to modify custody. Based on these reasons, we discern no error in the district court's parenting time decision.

III. Constitutional Challenge to Conditions of the December 2019 Order

Mother challenges the district court's denial of her modification motions in the May 2020 order, arguing that the district court imposed an unconstitutional condition on her ability to bring such motions in the December 2019 order. Mother is correct that the district court's December 2019 order precluded her from filing modification motions unless she satisfied certain conditions. We disagree with mother's argument, however, for two related reasons. First, mother did not appeal the December 2019 order and cannot now challenge the conditions therein. *See Dieseth v. Calder Mfg. Co.*, 147 N.W.2d 100, 103 (Minn. 1966) (stating that "[e]ven though the decision of the trial court in the first order may have been wrong, if it is an appealable order it is still final after the time for appeal has expired.");

Dailey v. Chermak, 709 N.W.2d 626, 631 (Minn. App. 2006) (applying this aspect of *Dieseth* in family law appeal), *review denied* (Minn. May 16, 2006).

Second, the district court permitted mother to file her modification motions. It did not preclude them or strike the motions. Instead, the district court considered both motions, concluding that mother had satisfied the conditions of the December 2019 order. At the hearing, the district court stated the following: “We just said before filing another motion to increase parenting time, she must do that, and we see from what’s been filed that she’s done that which would allow her to bring the motion regarding parenting time.” Therefore, we conclude that mother’s constitutional rights were not violated.

IV. Motions to Strike

Mother and father filed motions before this court to strike portions of the other party’s brief and addendum. Father challenges a number of factual descriptions in mother’s brief. If an appellate court does not consider material that a party seeks to strike, the motion to strike is moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot when the court did not rely on challenged materials). Because we neither consider nor need to consider the portions of the briefs and addenda that are not properly included in the appellate record, we deny both motions as moot.

Affirmed; motions denied.