This opinion is nonprecedential except as provided by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
A20-0865

In re the Marriage of:

Michelle Lee Roberts n/k/a Michelle Lee Freitas, petitioner,
Appellant,

vs.

Todd Mykle Roberts,
Respondent,

County of Lyon,
Intervenor.

Filed April 5, 2021
Affirmed
Smith, Tracy M., Judge

Lyon County District Court
File No. 42-FA-12-348

Michelle Lee Freitas, Cottonwood, Minnesota (pro se appellant)

Todd Mykle Roberts, Marshall, Minnesota (pro se respondent)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Michelle Lee Freitas appeals the district court's order granting respondent Todd Mykle Roberts's motion to modify custody of their two minor children. The district

court modified custody to give Roberts sole legal and sole physical custody of the children. Freitas asserts four errors: (1) the order infringes on her fundamental right to parent the children, (2) the district court violated her right to due process, (3) Roberts is statutorily barred from obtaining custody of the children, and (4) the district court abused its discretion in determining the best interests of the children. We affirm.

FACTS

Roberts and Freitas married in 1995. They have four children—two emancipated adults and the minor children at issue here, who were 13 and 11 years old at the time of the modification of custody. Freitas and Roberts's marriage was dissolved in 2012, and the judgment and decree (J&D) governing the dissolution provided for joint legal and joint physical custody of the children.

In 2014, two years after the J&D, Roberts moved to modify custody and parenting time. The district court denied modification of custody but granted modification of parenting time. As part of its order, the district court divided parenting time based on an alternating-week schedule, with one overnight visit allowed for the other parent during the off week.[1] Both parents failed to follow the order's terms, and the district court held both parents in constructive civil contempt of court.

In March 2019, Roberts was convicted of hiring or agreeing to hire a minor for prostitution in violation of Minn. Stat. § 609.324, subd. 1(b)(3) (2018). The minor involved

[1] The district court slightly modified the 2014 parenting time order in 2016. The modification changed the exchange day to Friday afternoon at the end of the school day and eliminated mid-week parenting time.

was not one of the parties' children. As part of his probationary sentence, Roberts is prohibited from having any contact with minor females without the approval of his supervising agent. This restriction includes the parties' minor children, both of whom are female. During Roberts's parenting time, and with the approval of his supervising agent, Roberts has been visiting the children in the evenings after work but not living in the same home with them.

Freitas moved to modify custody in July 2019, asking that the district court grant her sole legal and sole physical custody of the children because of Roberts's conviction. Roberts filed a responsive motion to modify custody, asking for sole legal and sole physical custody of the children based on Freitas's alleged abusive behavior towards the children. The district court scheduled an evidentiary hearing on the motions for November 2019.

In November 2019, before the evidentiary hearing, Freitas had an altercation with one of the children and struck the child across the face, causing bruising. Roberts requested—and the district court granted—an order for protection (OFP) on behalf of the children against Freitas. The OFP granted Roberts temporary physical custody of the children and limited Freitas's contact with the children pending the results of the motions to modify custody.

The OFP remained in effect until November 22, 2020. During this time, the children first resided with C.H., one of the couple's emancipated children, before moving in with their paternal grandparents, where they currently reside. Freitas and Roberts agree the children need consistent therapy, but neither has ensured that the children regularly attend therapy.

Following a continuance, the district court held an evidentiary hearing in February 2020 on the motions to modify custody. Both parties were self-represented. At the hearing, the district court heard testimony from Roberts and Freitas, C.H., the guardian ad litem (GAL) assigned to the case, Freitas's current husband, and two of Freitas's friends—a coworker and a friend from church. The district court also received the GAL's report recommending that it was in the children's best interests for Roberts to have sole legal and physical custody of the children given the need for stability and the parents' inability to work together for the benefit of the children.

The district court granted Roberts's motion, giving him sole legal and sole physical custody of the children. The district court evaluated the statutory best-interest factors, *see* Minn. Stat. § 518.17, subd. 1(a) (2020), and concluded that, while its "options in this case [were] limited and undesirable," it was the best option available under the circumstances and was in the best interests of the children.[2] As part of the order, the district court found that Freitas failed to rebut the presumption that joint legal and joint physical custody was not in the children's best interests because of the domestic-abuse incident that led to the OFP against her. *See* Minn. Stat. § 518.17, subd. 1(b)(9) (2020). The district court also found that Roberts rebutted the presumption that Freitas is entitled to at least 25% of

[2] The J&D stated that, in evaluating any proposed modification of custody and parenting time, "the court shall apply the best interests standard under Minnesota Statutes section 518.17." Minnesota Statutes section 518.18(d)(i) (2020) allows represented parties, with court approval, to agree that the best-interests standard will apply to any future custody-modification request, rather than the more stringent endangerment standard under Minn. Stat. § 518.18(d)(iv) (2020).

parenting time with the children. *See* Minn. Stat. § 518.175, subd, 1(g) (2020). In scheduling Freitas's parenting time, the district court created a parenting schedule for Freitas that includes three phases incrementally allowing Freitas more unsupervised time with the children.

Freitas appeals.[3]

DECISION

We do not presume that the district court has erred; the party asserting error, has the burden of showing it. *Horodenski v. Lyndale Green Townhome Ass'n, Inc.*, 804 N.W.2d 366, 372 (Minn. App. 2011) (citing *Midway Ctr. Assocs. v. Midway Ctr., Inc*., 237 N.W.2d 76, 78 (Minn. 1975)). Although Freitas is a pro se appellant, she "is still not relieved of the burden of, at least, adequately communicating to the court what it is [she] wants accomplished and by whom." *Carpenter v. Woodvale, Inc*., 400 N.W.2d 727, 729 (Minn. 1987) (citation omitted). Freitas's arguments are not entirely clear, but we discern four alleged errors, which we address in turn.

I. Freitas forfeited her argument that the modification infringes on her fundamental right to parent.

Freitas argues that the district court violated her fundamental right to parent the children when it granted Roberts sole legal and sole physical custody. In particular, she appears to argue that Minn. Stat. § 518.17, subd. 1(a), and Minn. Stat. § 518.18(d) are unconstitutional because they infringe on her right to parent the children.

[3] Roberts did not file a brief in this appeal, and we ordered that the appeal proceed under Minn. R. Civ. App. P. 142.03.

While Freitas is indeed correct that the right of a parent to make decisions for their child in the face of government interference is a fundamental right protected by the federal and Minnesota constitutions, *see Myer v. Nebraska*, 262 U.S. 390, 399-400, 43 S. Ct. 625, 626-27 (1923); *SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007), we do not address the merits of her argument for two reasons.

First, Freitas did not raise her constitutional argument before the district court and it is thus forfeited. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally only consider issues presented to, considered by, and decided by the district court); *In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address a constitutional issue raised for the first time on the appeal from a termination of parental rights). Freitas has not forfeited her fundamental right to parent her children, but she has forfeited her ability to argue that, in these proceedings, the district court deprived her of that right. *See Thiele*, 425 N.W.2d at 582 ("Nor may a party obtain review by raising the same general issue litigated below but under a different theory.").

Second, to the extent that Freitas asserts a facial challenge to the statutes, she did not properly inform the attorney general of her intent to challenge the constitutionality of the statutes. *See* Minn. R. Civ. App. P. 144 (requiring appellants inform the attorney general of constitutional challenges to statutes when the state is not a party to allow the state to intervene in the case); *Rutz v. Rutz*, 644 N.W.2d 489, 494 (Minn. App. 2002) (declining to address a facial constitutional challenge to several statutes because the mother did not notify the attorney general or raise the issue in the district court), *review denied* (Minn. July 16, 2002).

Freitas's first argument is therefore forfeited.

II. The district court did not violate Freitas's right to due process.

Freitas presents four arguments alleging violations of her due-process rights.

First, Freitas challenges the district court's grant of Roberts's request for a continuance of the evidentiary hearing on her motion to modify custody. "Whether to grant a continuance is a ruling within the trial court's discretion, which will not be reversed absent a showing of a clear abuse of that discretion." *In re Welfare of J.A.S.*, 488 N.W.2d 332, 335 (Minn. App. 1992) (citation omitted), *review denied* (Minn. Oct. 20, 1992).

The granting of the continuance was not an abuse of discretion. The district court had a duty to ensure fairness to Roberts as a pro se party by allowing him "reasonable accommodation" provided there was no prejudice to the adverse party. *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minn. App. 1987). Roberts requested the continuance 21 days before the original hearing date, explaining that one of the key witnesses was in treatment and could not be present on the scheduled date. Granting Roberts's request to permit him to call a supporting witness was not unreasonable. And, even though the witness did not end up testifying, Freitas does not explain how the delay prejudiced her.

Freitas cites *Amarreh v. Amarreh*, 918 N.W.2d 228 (Minn. App. 2018), as support for her argument that the district court erred. But *Amarreh* did not involve the continuance of an evidentiary hearing on a motion to modify custody—it involved the denial of an evidentiary hearing entirely. *Id.* at 230, 232-33. Because this is an appeal of the district court's order *after* an evidentiary hearing, *Amarreh* does not apply.

Second, Freitas argues that the district court erred by relying on the GAL's allegedly biased report. Freitas's argument centers on the facts that the GAL neither visited with Freitas in her home nor observed the children with Freitas, and that the GAL in the custody dispute was the same GAL assigned during the OFP proceeding. Based on these facts, Freitas argues that the GAL report is biased and "not aimed to protect the interests of the children." Freitas presents no legal authority for the proposition that the GAL's report must be disregarded as biased under these circumstances, *see Grigsby v. Grigsby*, 648 N.W.2d 716, 726 (Minn. App. 2002) (concluding that arguments submitted without legal authority are forfeited), and, in any event, we defer to a district court's credibility determinations, *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009). Here, it is clear that the district court believed the GAL's report to be credible, rather than biased.

Third, Freitas argues that the district court improperly admitted Roberts's exhibits. Freitas does not specify which exhibits the district court improperly admitted, rendering it impossible for us to review her claim. *Accord Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997) ("Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." (quotation omitted)). As a result, her evidentiary argument fails.

Finally, Freitas repeats multiple times that the children were "seized" from her without due process in violation of the Fourth Amendment to the federal constitution. Because Freitas presents this argument with no legal authority, it is forfeited. *See Grigsby*, 648 N.W.2d at 726.

III. Roberts is not statutorily barred from obtaining custody of the children.

Freitas next argues that several statutes preclude Roberts from obtaining full legal and physical custody of the children.

Freitas first cites Minn. Stat. § 631.52 (2020), arguing that it precludes Roberts from obtaining custody of the children because of his conviction. Section 631.52 requires the family court to remove a child from a parent's custody if the parent is convicted of certain crimes unless the court determines it is in the child's best interest to remain with the convicted parent. Minn. Stat. § 631.52, subd. 1(a)(1). But section 631.52 does not apply to this case. The statute applies only if the custodial parent is convicted of an enumerated crime under the statute. *Id.* The crime of which Roberts was convicted—hiring or agreeing to hire a minor for prostitution in violation of Minn. Stat. § 609.324, subd. 1(b)(3)—is not one of the enumerated crimes. *Id.*, subd. 2.

Freitas also cites Minn. Stat. § 244.057 (2020) and Minn. Stat. § 244.052 (2020), arguing that these statutes prevent Roberts from obtaining custody because, Freitas alleges, Roberts is required to register as a sex offender. But neither statute applies in this case. Section 244.057 relates to the requirement that an agency give a local child-protection agency notice if a sex offender is living with minor children. Because Roberts is not living with the children, this statute does not apply. Section 244.052 relates to pre-release procedures for imprisoned predatory offenders. Minn. Stat. § 244.052. Because Freitas did not establish that Roberts is a predatory offender, *see* Minn. Stat. § 244.052, subd. 1(5) (defining predatory offender), and because he is not imprisoned, this statute similarly does not apply. Thus, each of Freitas's statutory arguments fails.

IV. The district court did not abuse its discretion in balancing the best-interests factors.

Finally, Freitas challenges the district court's balancing of the best-interests factors under Minn. Stat. § 518.17. The district court has broad discretion to provide for the custody of the parties' children. *See Thornton v. Bosquez*, 933 N.W.2d 781, 790 (Minn. 2019) ("[A] district court needs great leeway in making a custody decision that serves a child's best interests, in light of each child's unique family circumstance."); *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). As a result, we review the district court's balancing of the children's best-interests factors for an abuse of discretion. *See Thornton*, 933 N.W.2d at 794 (citation omitted). "The [district] court abuses its discretion by making findings unsupported by the record or by improperly applying the law." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (quotation omitted).

Freitas challenges the district court's findings regarding nine of the best-interests factors. We address each in turn.

Child's Physical, Emotional, Cultural, Spiritual, and Other Needs

Freitas argues that Roberts's personal relationships and the "negativity of the family environment" caused by continued court proceedings led to the children's mental-health needs. She challenges the district court's finding that "[n]either parent has ensured that the children attend therapy regularly." This finding is supported by the record. The GAL report states that one of the children's therapy program ended "due to a lack of follow through by

the family" and that "their program is voluntary and cannot be forced if the family is not committed."[4]

Any Special Medical, Mental Health, or Educational Needs

Freitas argues that she can better provide the resources and environment to work through the children's mental-health challenges than can Roberts. While the district court does appear to fault Roberts specifically for his inability to insulate the children from his and Freitas's legal conflict, the district court does state that "[b]oth parents . . . are unable and unwilling to insulate the children from parental conflict" and that "[t]his failure on behalf of the parents has adversely affected the children's mental health and the parent/child relationship." This finding is supported by the GAL report. It states that "[b]oth parties appear more focused on their children's relationships with the other parent and 'catching' them in an act of contempt of court than they are on their own relationships with the children." The parties' focus on each other, the GAL concluded, comes at the expense of the children's mental-health needs.

The Preference of the Children

Freitas argues that the district court "over valu[ed] the children's expressed preferences from the Order of Protection hearing" to live with Roberts. But the district

[4] Freitas also argues that Roberts's pending domestic-abuse charges warrant reversal. However, both of Roberts's pending domestic abuse changes were filed on April 17, 2020—the same day that the district court granted him full legal and physical custody of the children—and are outside the district court record on appeal. *See* Minn. R. Civ. App. P. 110.01 (defining the record on appeal).

court expressly stated that it gave "little weight" to that preference because of Roberts's alienation of the children from Freitas. Freitas therefore has not shown error.

Whether Domestic Abuse Has Occurred

Freitas argues that Roberts's conviction for hiring or agreeing to hire a minor to engage in prostitution meets the statutory definition of domestic abuse and so the district court erred by only discussing the domestic abuse between her and one of the children. Freitas's argument misreads the statute. This factor requires the district court to assess "whether domestic abuse, *as defined in section 518B.01*, has occurred in the parents' or either parent's household or relationship." Minn. Stat. § 518.17, subd. 1(a)(4) (emphasis added). Section 518B.01 relates only to domestic abuse between members of "a family or household member" as defined by the statute. Minn. Stat. § 518B.01, subd. 2(a) (2020). Because Roberts's conviction involved a nonfamily member, it does not meet the statutory definition of domestic abuse and it was thus proper for the district court to disregard Roberts's conviction when evaluating this factor.

The Parents' Physical, Mental, or Chemical Health Issues

Freitas argues that the district court should have given Roberts's court-ordered sex offender treatment more weight in determining the children's best interests. The district court did note that Roberts "is required to complete sex offender treatment." But, because "there is scant if any room for this court to question a district court's balancing of the best-interests considerations," *In re Welfare of C.F.N.*, 923 N.W.2d 325, 334 (Minn. App. 2018) (quotation omitted), *review denied* (Minn. Mar. 19, 2019), Freitas's argument that we should rebalance this factor in favor of awarding her custody is unpersuasive.

The Willingness and Ability of Each Parent to Provide Ongoing Care

Freitas's argument for this best-interests factor also urges us to rebalance the best interests of the children. She argues that she was "highly involved" in the raising of the children and that she would provide a proper home, education, and therapy to the children if granted custody. The district court acknowledged that Freitas is well-intentioned but determined that she is nonetheless unable to provide for the children. In its order it found that "[b]oth parents are willing to provide ongoing care for the children and to meet their needs. Neither parent is particularly capable of providing that care." The district court based this finding in part on Freitas's inability to "comply with Court Orders regarding parenting time."

The district court's finding is supported by the record. The GAL report states that both parents "continue to subject the children to adult conflict" and, unless the parents recognize how they are "contributing to their children's deteriorating mental health and self-harm, the children will continue to be in an unhealthy living environment in both homes." Further, the record shows that, after Freitas willfully violated a 2016 order modifying parenting time, the district court held her in constructive contempt of court.

Effect of the Custody Arrangement on the Parents' Relationship with the Children

Freitas's argument on this factor primarily challenges the OFP. While the OFP does limit Freitas's parenting time with the children, the merits of the OFP are not before us in this appeal. Freitas does argue that the district court should have used the language in the OFP stating that, if the district court's custody order conflicted with the OFP, the custody

order supersedes the OFP. But that OFP language did not require the district court to reach a different result regarding custody. Again, we will not rebalance the best-interest factors leading to the district court's custody decision. *See C.F.N.*, 923 N.W.2d at 334.

Ability to Foster the Children's Relationship with the Other Parent

Here, too, Freitas asks us to rebalance the best-interests factors. *See id.* She states that Roberts has done nothing to encourage her relationship with the children. The district court's order essentially agrees with this statement, but it also finds that Freitas actively discouraged the children's relationship with Roberts. We discern no abuse of discretion.

The Willingness to Cooperate in the Rearing of the Children

Finally, Freitas argues that Roberts's inability to inform her of the children's appointments, address changes, and other general updates about the children's lives supports granting her sole legal and physical custody. Freitas also argues that Roberts intentionally alienated her from the children and that that is a basis to grant her sole legal and physical custody.

In its order, the district court recognized both parties' inability to communicate with each other, stating that they "are entirely incapable of working together to resolve disputes regarding any major decisions regarding the children." This finding is supported by the record. Roberts admitted at the evidentiary hearing that he failed to inform Freitas of the children's change of address and did not communicate doctor or therapy appointments with Freitas. And the GAL report also states that Freitas said "it is not possible to co-parent with Mr. Roberts" while Roberts said that Freitas is "manipulative and controlling."

But Freitas argues that the finding regarding Roberts's inability to cooperate means that she must be granted custody. Freitas relies on two cases to support her argument. Neither is persuasive. In the first, *Lemcke v. Lemcke*, we stated that "a sustained course of conduct by one parent designed to diminish a child's relationship with the other parent is unacceptable and *may* be grounds for denying or modifying custody." 623 N.W.2d 916, 919 (Minn. App. 2001) (emphasis added), *review denied* (Minn. June 19, 2001). But we cautioned that parental alienation does not automatically preclude granting custody to the parent responsible for the alienation because "the paramount consideration in any custody decision is the best interests of the child." *Id.* at 920. We then affirmed the grant of custody to the parent allegedly responsible for the alienation. *Id.* at 922. Here, the district court engaged in a best-interests analysis and determined, like in *Lemcke*, that the parent allegedly responsible for the alienation should still be awarded custody of the children. *Id.*

The second case that Freitas cites is *Henrikson v. Henrikson*, 179 N.W.2d 284 (Minn. 1970). There, the supreme court affirmed the district court's order modifying custody based on "[mother's] course of conduct, mainly [her] interference with [father's] right of communication and visitation with his sons." *Id.* at 285. Freitas is correct that this case suggests that interference with visitation rights (or what are now called parenting time rights) and parental alienation can lead to a change in custody. But, in *Henrikson*, the supreme court affirmed the district court's modification-of-custody order as within the district court's discretion. *Id.* Here, Freitas is arguing that we should reverse the district court's order. We disagree that *Henrikson* compels the conclusion that the district court abused its discretion here.

In sum, the district court did not abuse its discretion by modifying custody to grant full legal and physical custody of the children to Roberts based on the best interests of the children.

Affirmed.