STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0911

In re the Marriage of: Kjell Bjorn Peterson, petitioner,
Respondent,

vs.

Rosslyn Jean Kendrick,
Appellant.

Filed February 6, 2023
Affirmed
Connolly, Judge

St. Louis County District Court
File No. 69DU-FA-09-1103

Cheryl M. Prince, Hanft, Fride, P.A., et al., Duluth, Minnesota (for respondent)

Kristen C. Bullock, Bullock Law, PLLC, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant-mother challenges the district court's order modifying custody, arguing that the district court abused its discretion in awarding respondent-father sole legal and sole physical custody of the parties' child, in failing to appoint a guardian ad litem (GAL), in declining to interview the child, and in excluding as irrelevant the evidence of respondent's

2011 psychological evaluation. Because we see no abuse of discretion in the district court's determinations, we affirm.

FACTS

In 2007, a son, T., now 15, was born to appellant Rosslyn Kendrick and respondent Kjell Peterson, then husband and wife. In November 2009, a petition for dissolution of the parties' marriage was filed and a GAL was appointed for T. In August 2011, the GAL recommended that appellant have sole physical custody of T. The May 2012 dissolution judgment awarded joint legal custody of T. to each party and sole physical custody to appellant, subject to reasonable and liberal parenting time for respondent. Appellant and T. remained in the parties' home.

Between 2012 and 2019, appellant made unilateral decisions as to T.'s schooling and medical care, informing respondent of decisions after she had made them. In May 2019, respondent moved for a change in parenting time that would give T., then 12, alternate weeks with each parent. At the hearing on respondent's motion, the parties agreed to submit supplemental affidavits. The district court noted that this was the parties' fifth appearance on custody and parenting-time issues and suggested that, given appellant's unwillingness to co-parent, cooperate with respondent, or put T.'s needs above her own, respondent consider requesting a change in custody in his affidavit, which respondent did.

The district court's July 2019 order: (1) found that appellant had interfered with respondent's relationship with T. and acted in ways contrary to T.'s best interest; (2) found that it was in T.'s best interest for respondent to have temporary sole legal custody and temporary sole physical custody, with appellant having weekly and alternate weekend

parenting time; (3) reserved child support; and (4) stated that an evidentiary hearing and pretrial hearing would be scheduled within the next three months.

Following that hearing, the district court issued an order in March 2020, awarding respondent permanent sole legal and sole physical custody of T., with appellant having weekly and alternate weekend parenting time.

Appellant challenges the March 2020 order, arguing primarily that the custody award was an abuse of the district court's discretion and that the district court erred in not appointing a GAL for T. and abused its discretion in declining to interview T. and in excluding evidence of respondent's 2011 psychological evaluation.[1]

DECISION

1. The Custody Determination

"Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). The law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000).

A district court may modify a custody order if it finds

[1] Oral argument in this matter, originally scheduled for March 2021, was postponed until December 2022, when appellant's attorney had recovered from injuries sustained in a car accident. The parties declined to submit further briefing for this appeal. T., who was not quite 13 when the order being appealed was issued, will be nearly 16 when this appeal is decided.

> upon the basis of facts, including unwarranted denial of, or interference with, a duly established parenting time schedule, that have arisen since the prior order or that were unknown to the court 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. In applying these standards the court shall retain the custody arrangement or the parenting plan provision specifying the child's primary residence that was established by the prior order unless
>
> . . . .
>
> (iv) the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child . . .

Minn. Stat. § 518.18(d) (2022).

The district court found that:

> a. the circumstances of [T.] and [the parties] have changed significantly, namely that [appellant] is unable to work with [respondent], denigrates [him] to [T.], interferes with the [respondent/T.] relationship, does not promote [T.'s] emotional well-being by supporting him receiving treatment, and has made it clear she cannot place [T.'s] needs above her own, all to [T.'s] detriment;
>
> b. the modification outlined in this Order serves [T.'s] best interests;
>
> c. the prior custody and parenting schedule endangers [T.'s] physical health, emotional health, and his emotional development; and
>
> d. the benefits of the change outlined in this Order outweigh its detriments with respect to [T.].

Some of the district court's findings relevant to this statute concerned appellant's credibility: she had falsified a passport application for T. by signing respondent's name when he refused to agree to the application; her testimony sometimes contradicted

statements in her affidavits; and she was "willing to say whatever she believe[d] would benefit her most."

The district court also found that appellant believes "that only she knows best" and that this belief prevents her from acting in T.'s best interest, including refusing to attend parent-teacher conferences, even remotely, if respondent is present (notwithstanding the school's policy not to hold separate conferences for each parent); contradicting professionals' statements that T., who was diagnosed with anxiety, depression, and tics, would benefit from therapy; making T. reluctant to engage in therapy and resistant to it; stating that she was not interested in collaborating with respondent on T.'s therapy; claiming that a therapist had said T. did not need therapy when the therapist had written that T.'s needs were best met with monthly appointments; and attempting to cancel T.'s appointments that respondent had made.

One incident in particular was mentioned in both the district court's July 2019 and March 2020 orders. The district court stated:

> The Wolf Ridge incident really defines the crux of the issue: the inability of [appellant] to see the effect that her decisions have on [T. T's] classmates were going to attend a three-day school outing at Wolf Ridge which is an annual event for the 5th grade class at his school, and [respondent] was going to chaperone. The three days included a day that was [appellant's] day under the then-existing parenting time schedule. [Appellant's] written response to [respondent] regarding [T.] attending was, "You can either compensate me for the Monday overnight or I'll come with a police officer to Wolf Ridge and take [T.] home to bring him back the next day." [Appellant] claimed at the motion hearing following this incident that [T.] did not want to go [to Wolf Ridge] for three days. However, that explanation is not credible given the clear directive that if [appellant] were compensated for the day, she

> would approve him going for all three days. Rather than allowing him to attend this important event to him in its entirety, [appellant] held firm to her position and did not permit him to attend the first day and night of the three-day event. At the evidentiary hearing, she came up with a different explanation, stating that "we" were too tired that day. Notably, this was not a decision she made that day; her emails on the topic indicate this was an ongoing issue for several weeks prior to the first day of the event. [Appellant] had no good reason to prevent [T.] from attending, as is evident from her change of stories, and continues to be unable to see that her actions were unreasonable and overly dramatic, aimed at securing her own needs over everyone else's, including her child's. The threat to arrive with police officers and have [T.] removed in front of his peers is even more concerning.

The record supports the district court's findings. At the first hearing, appellant complained, "I'm expected by [respondent] to give in to everything that he requests from me, yet I never get any cooperation back from him. And it's very --" The district court interrupted to say, "This is about your son." Appellant continued, "It's very frustrating," and the district court repeated, "This is about your son." She continued, "I always bend over backwards to give [respondent] what he needs as a parent for his parenting time." The district court then asked, "So you viewed [the Wolf Ridge trip] as something [respondent] wanted and, therefore, you were denying it?" and pointed out that what appellant had just said was "not at all what you say in your email [about the Wolf Ridge trip.]"

It was also reported at the hearing that, although appellant claimed to have involved respondent on T.'s Individual Education Plan (IEP), she actually simply told him about it and the changes that would be made; she refused to attend conferences and IEP meetings, in person or by phone, with teachers and meetings if respondent attended them; and she

unilaterally changed the time of conferences they were both scheduled to attend. The record supports the district court's finding that

> [appellant] asserts that legal custody should be joint, yet it is apparent from all of the evidence that these parties are completely unable to communicate with each other and that they cannot make decisions together. Appellant testified that she cannot trust [respondent], that he is manipulative, that he has an agenda, that he has lied and that he is an instigator. This alone would make it impossible for the parties to make decisions together, but the Court has also seen evidence of [appellant's] inability to work with [respondent. Appellant] refused to attend school conferences with [respondent] or IEP meetings if [respondent] will be there.

The district court also made findings on the best-interest factors enumerated in Minn. Stat. § 518.17 (2022). As to the first factor, the child's physical, emotional, cultural, spiritual and other needs, and the effect of the custody change on his needs and development, the district court found that T. was then 12 (he is now almost 16), that appellant's "pervasive denigration" of respondent was extremely damaging to T., "as [were] her actions in placing her own needs and desire to control things" above T.'s needs. Finally, the district court noted "it is clear . . . that [respondent] will ensure that the child's needs are met. The Court finds that [appellant] has demonstrated that she is not able to do so." Again, the record supports this finding. It is undisputed that, since respondent was given custody, T.'s tics have disappeared and he is doing significantly better in school. One teacher reported that "[T.] is quick to ask questions and engage with adults in the classroom when things aren't making sense or when he has opinions on a particular subject. This is a vast improvement within [T.'s] academic career, where he previously presented himself as quiet and unorganized most of the time."

As to the second factor, the child's special medical, mental health, or educational needs, the district court noted that T. has an IEP but that, because appellant will not attend meetings with teachers and staff if respondent attends them, "not everyone who needs to support the child educationally receives the same message."

As to the third factor, the child's reasonable preference if he is of sufficient ability, age, and maturity to express a preference, the district court said T. was not of sufficient age to do so and observed that appellant's frequent requests that the district court meet with T. have been denied because "[t]he court does not believe it is appropriate to place a child of [T.'s] age in this position and is always reluctant to do so" and that appellant has "used her influence over the child to deter his cooperation in getting therapy for his diagnoses," so "the court would be gravely concerned about the influence placed on him by [appellant] if he were to testify."

As to the fourth factor, domestic abuse, the district court found it was not an issue in this case.

As to the fifth factor, physical, mental, or chemical health issue of a parent, the district court noted that appellant "called into question the chemical health of [respondent's] wife" and that respondent "testified credibly that he is not concerned about [her] drinking," that appellant implied respondent should have called his wife to testify but did not subpoena respondent's wife herself, and that, in any event, the district court was "convinced that [respondent] will ensure that [T.] is not placed in an unsafe situation."

As to the sixth factor, the history and nature of each parent's care for the child, the district court noted that both parties have been very engaged but have often disagreed about how best to care for him.

As to the seventh factor, each parent's willingness and ability to provide ongoing care, meet the child's needs, maintain consistency, and follow through with parenting time, the district court observed that, while respondent is a consistent and stable parent for T., appellant has placed her needs above T.'s on several occasions and "believes she knows best on all things, even above professionals, and is unwilling to listen to [respondent] or professionals if their opinion differs from hers."

As to the eighth factor, the effect on the child of changes to home, school, and community, the district court noted that T.'s self-confidence and school performance have both improved since being in respondent's custody, according to his teachers.

As to the ninth factor, the effect of a custody change on the child's relationships with others, the district court noted that T. will continue to have "the benefit of significant time with each parent and household."

As to the tenth factor, the effect on the child of maximizing or limiting time with either parent, the district court found that T.'s best interests are served by limiting his time with appellant to one week night and alternate weekends because of the district court's "serious concerns about [appellant's] ability to parent [T.] in a manner that supports [his] needs" in light of her views on therapy and her denigration of respondent and failure to support T.'s relationship with him.

As to the eleventh factor, the disposition of each parent to support the child's relationship with the other parent, the district court found that respondent will support T.'s relationship with appellant but that appellant will support T.'s relationship with respondent "only when it suits her" and disparages respondent and undermines the father/son relationship.

As to the twelfth factor, each parent's willingness and ability to cooperate in rearing the child, sharing information, minimizing the child's exposure to conflict, and utilizing methods for resolving disputes about the child, the district court found:

> The parties are unable to cooperate in the rearing of the child, primarily because [appellant] will not work with or even listen to [respondent.] Frankly, [appellant's] disdain for [respondent] is palpable. [Appellant] has shown that she will not agree with necessary proposals if proposed by [respondent], whether it be therapy for the child or the child attending a 3 day school function. She has, in written communications to respondent, called him an idiot and sworn at him. The parties cannot agree on medical issues, counseling issues, activities or educational needs of [T.]. [T]he court finds that [respondent] has demonstrated that he makes sound decisions about the child's best interests and ensures the child is well cared for physically, emotionally and scholastically.

Thus, of the twelve factors, the district court found the fourth is irrelevant, the fifth, sixth, and ninth are neutral, and the other eight favor custody with respondent.

The record supports the district court's findings. There was no abuse of discretion in awarding custody to respondent.

2. Appointment of a GAL

A GAL was appointed while the parties' divorce proceedings were pending. She recommended custody of T., who was then about three, with appellant, who had been his

primary caregiver during the pre-school years because respondent's job at that time required travel.

Appellant contends that the district court abused its discretion by not appointing a GAL again in 2019 because respondent alleged that T. was subject to emotional abuse and physical neglect and, in the alternative, that it was an abuse of discretion for the district court not to make a permissive appointment of a GAL. The district court told the parties that, if they wished to obtain and pay for a neutral third party to serve as a GAL, they were welcome to do so, but that the district court did not have funds for such permissive appointments: "[O]ur guardian [ad litem] program is not in a position . . . to do that kind of evaluation."[2]

Appellant had asked the court "to get a [GAL] involved *if* the Court is considering giving any weight to the statements [respondent] says [T.] made in [respondent's] affidavit." Thus, the reason appellant wanted a GAL was not to protect or benefit T. but to refute respondent's statements. The district court did not abuse its discretion in concluding that it had no obligation to appoint a GAL. *See Baum v. Baum*, 465 N.W.2d 598, 600 (Minn. App. 1991) (concluding that district court was not required to appoint a GAL when the party seeking appointment presented insufficient evidence of domestic abuse or neglect), *rev. denied* (Minn. Apr. 18, 1991); Minn. Stat. § 518.165, subd. 2 (2022)

[2] Appellant makes the conflicting arguments that, because T. was not endangered, there was no basis to modify custody, and that, because T. was endangered, the appointment of a GAL was mandatory.

(providing that a GAL must be appointed if the district court has reason to believe that the minor child is a victim of domestic child abuse or neglect).

3. Interview and Preference of T.

Appellant argues that the district court abused its discretion by declining her request to interview T. in chambers and by failing to give sufficient weight to what she claimed was T.'s custody preference. A district court has discretion to decide whether to interview a child about a custody preference. *Knott v. Knott*, 418 N.W.2d 505, 509 (Minn. App. 1988). A district court also has discretion to decide on which custody arrangement is in the child's best interests. *Pikula*, 374 N.W.2d at 710.

The district court explained in its findings its concern that, if T. were to testify as to his custody preference, appellant would attempt to influence his testimony. Respondent said he thought T. would say he wanted equal-time custody, but that T.'s preference should not be dispositive, and that respondent could not parent him adequately if he spent half his time with appellant. Moreover, T.'s therapist indicated that T. was uncomfortable about expressing a preference, and the district court agreed that being asked to express a preference would be very stressful for a child of T.'s age. The district court did not abuse its discretion in declining to interview T. or make his preference dispositive.

4. Respondent's 2011 Psychological Evaluation and the Psychologist Involved

A district court's decisions on matters arising during the course of trial are given considerable deference. *Alpha Real Estate v. Delta Dental Plan*, 664 N.W.2d 303, 310 (Minn. 2003).

During the trial, the parties' attorneys conducted lengthy debates on the admissibility of respondent's pre-divorce 2011 psychological evaluation. After listening to them, the district court declined to admit the evaluation as evidence or to let the psychologist who did the evaluation testify in order to provide foundation for it. The district court pointed out that the burden of proof in a custody-modification proceeding was to show a significant change of circumstances since the last order and a pre-divorce evaluation could not be relevant to that change. Appellant argues that she was prejudiced by this decision because she could have shown that respondent "failed to participate in therapy" and "lacked insight into how his behaviors contributed to the parties' acrimonious co-parenting relationship." However, at trial appellant made the district court aware that respondent had not followed the recommendation of the 2011 evaluation. Again, appellant focuses on the alleged defects of respondent and does not explain the relevance of a pre-divorce psychological evaluation to the modification of T.'s custody more than ten years later. The district court did not abuse its discretion in declining to admit the evaluation or to permit the psychologist who did the evaluation ten years earlier to testify.

Affirmed.