

*This opinion is nonprecedential except as provided by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
A20-0986**

Trung Thien Do,
Respondent,

vs.

Kim Lang Thi Nguyen,
Appellant.

**Filed April 26, 2021
Affirmed in part, reversed in part, and remanded
Hooten, Judge**

Hennepin County District Court
File No. 27-FA-14-4505

John DeWalt, Melissa Chawla, DeWalt, Chawla + Saksena, LLC, Minneapolis, Minnesota
(for respondent)

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

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this parenting dispute, appellant mother argues that the district court (a) failed to make adequate findings of fact to support its denial of her motion to remove the child's residence from Minnesota, (b) failed to make adequate findings of fact to support its modification of parenting time and made findings that are not supported by the record, (c)

should not have awarded retroactive child care support to respondent father, and (d) failed to make adequate findings of fact to support its award of conduct-based attorney fees to father. We affirm in part, reverse in part, and remand.

FACTS

Appellant Kim Lang Thi Nguyen (Nguyen) and respondent Trung Thien Do (Do) are the parents of a minor child born in June 2014. The parties never married and discontinued their relationship in July 2014.

Initial custody, parenting time, child support, and child care support orders

In October 2014, the district court issued a final custody and parenting time order, adopting the parties' agreement to award joint legal custody to both parties and sole physical custody to Nguyen, subject to Do's parenting time. In March 2015, the district court issued an order awarding Nguyen child support and child care support while reserving the issue of medical care support. After the parties provided additional information regarding their healthcare expenses, the district court issued an amended child support order, which ordered Do to pay medical care support on behalf of the child.

Do's motion to modify parenting time

In April 2017, Do filed a motion for modification of his parenting time, retroactive modification of his child care support obligation with regular verification of costs incurred by Nguyen, and conduct-based attorney fees. Nguyen responsively moved for a denial of Do's motion in its entirety, modification of Do's child support obligation, modification of Do's parenting time according to a different schedule than that requested by Do, and conduct-based attorney fees. In August 2017, the district court issued an order regarding

parenting time and child support that (1) expanded Do's parenting time, but not to the extent he requested; (2) ordered Nguyen to pay her nannies in traceable methods and to provide Do with verification of her child care expenses every six months; (3) modified Do's basic support, medical support, and prospective child care support obligations; (4) retroactively modified Do's child care support obligation; and (5) denied conduct-based attorney fees to both parties.

Nguyen's first motion to relocate

In January 2018, Nguyen married J.N. Shortly after, J.N. moved to Texas and became a Texas resident. Nguyen and J.N. are the parents of one joint child born in March 2018, and according to Nguyen, they have another child on the way. In December 2018, Nguyen filed a motion to relocate the residence of the parties' minor child from Minnesota to Texas and modify Do's parenting time. Do filed a responsive motion requesting a denial of Nguyen's motion. After a motion hearing in January 2019, the district court issued an order in April 2019 denying Nguyen's first motion to relocate. Nguyen did not appeal from the denial.

Nguyen's second motion to relocate

In November 2019, Nguyen filed a second motion to relocate the residence of the minor child to Texas and modify Do's parenting time. Do filed a responsive motion seeking a denial of Nguyen's motion, along with conduct-based attorney fees and costs. During a motion hearing on November 19, 2019, Do moved for modification of his parenting time schedule, retroactive modification of his child care support obligation, and modification of his basic child support obligation. In February 2020, the district court

issued an order denying Nguyen's second motion to relocate, and granting Do's motion to modify his parenting time, retroactively modify his child care support obligation, and modify his basic child support obligation. The district court also awarded conduct-based attorney fees to Do. However, the district court left the record open for further written submissions regarding the amount of retroactive child care support awarded to Do.

Nguyen's first appeal

In April 2020, Nguyen filed a notice of appeal with this court. Less than a week later, we issued an order questioning our jurisdiction because the district court had not yet issued a final order on the issue of child care support. Later that month, Nguyen filed a notice of voluntary dismissal, and we issued an order dismissing the case pending the district court's final resolution of the child care overpayment issue.

Final order on child care support

In May 2020, the district court issued an order awarding Do \$10,640 in retroactive child care support.

Nguyen's second appeal

In June 2020, the district court issued an order awarding Do additional conduct-based attorney fees. In July 2020, Nguyen filed a second notice of appeal with this court. Later that month, we issued an order questioning our jurisdiction over Nguyen's appeal of the June 2020 attorney fee award. In August 2020, Nguyen filed a notice of voluntary dismissal. Two days later, we issued an order dismissing the June 2020 attorney fee portion of her appeal.

DECISION

I. The district court abused its discretion in denying Nguyen’s motion to relocate the minor child’s residence.

The district court has broad discretion in ruling on a motion to relocate the residence of children. *See Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). Motions to remove a child to another state are governed by Minn. Stat. § 518.175, subd. 3 (2020). Under that statute, a parent who has physical custody of a child subject to a parenting time order may not remove the child to another state except upon a court order or with the consent of the noncustodial parent. Minn. Stat. § 518.175, subd. 3(a). If the move is an attempt to defeat parenting time, the district court shall not permit the move. *Id.* In determining whether to permit a parent to change her child’s residence to another state when the other parent opposes the move, the district court must base its decision on the best interests of the child. Minn. Stat. § 518.175, subd. 3(b). The factors a district court must assess when addressing a child’s best interests include—but are not limited to—eight statutory factors. Minn. Stat. § 518.175, subd. 3(b)(1)-(8). The parent seeking to remove a child from Minnesota bears the burden of proving that the move is in the child’s best interests, unless the moving party has been a victim of domestic abuse by the other parent. *Id.*, subd. 3(c).

The district court denied Nguyen’s November 2019 motion to relocate under the doctrine of res judicata, finding that Nguyen presented “nearly the same arguments and evidence that she presented for her [December 2018] motion to relocate.” The district court

explained that “to the extent that [Nguyen] present[ed] any new evidence, it [was] simply more detailed evidence of the same type she presented before.”

Nguyen argues that the district court abused its discretion by denying her November 2019 motion to relocate the minor child’s residence to Texas under the doctrine of res judicata, without addressing the eight factors set forth by Minn. Stat. § 518.175, subd. 3(b), in light of new facts she presented in support of her November 2019 motion. We agree.

“[T]he availability and application of res judicata and collateral estoppel in family law matters is limited.” *Maschoff v. Leiding*, 696 N.W.2d 834, 838 (Minn. App. 2005). The legislature has given the district courts continuing jurisdiction over family law proceedings by allowing modifications to orders, and “parties may always move for such modifications based on changed circumstances.” *Loo v. Loo*, 520 N.W.2d 740, 743 (Minn. 1994). When a motion to relocate is filed following a denied motion to relocate, the threshold question should be whether any purported changes in circumstances since the denied motion were significant enough to require the district court to look beyond the decision denying relocation and consider the cumulative changes. *Cf. Phillips v. Phillips*, 472 N.W.2d 677, 680 (Minn. App. 1991) (explaining that when “a modification is sought following a denied motion for modification” of child support, “the first question is whether the change since the denied motion has been significant enough that it might, because of its incremental effect, require the trial court to examine the cumulative changes”).

Although Nguyen’s November 2019 motion to relocate was nearly identical to her December 2018 motion, Nguyen presented evidence that was not “simply more detailed evidence of the same type she presented before” in two affidavits supporting her November

2019 motion. Specifically, Nguyen identified multiple significant circumstances that had changed since she filed her December 2018 motion, including that (1) she and the minor child had developed increasingly-severe medical problems related to living in Minnesota's cold climate; (2) she had been placed on a medical leave of absence without pay in September 2019 due to her allergies and resulting depression; (3) she was approved for short-term disability benefits in November 2019; (4) her husband had recently purchased a second home in Texas; and (5) her brother, who is the minor child's uncle, had relocated to Texas earlier in 2019. These changes in circumstances were significant enough to require the district court to look beyond its order denying relocation and consider the cumulative changes since the denied motion by assessing the eight statutory factors in Minn. Stat. § 518.175, subd. 3(b).

The relocation statute states that the district court "shall" consider the best-interest factors when considering a request to relocate. Minn. Stat. § 518.175, subd. 3(b). And, it is well settled that the word "shall" is mandatory. Minn. Stat. § 645.44, subd. 16 (2020). Here, in denying Nguyen's November 2019 motion to relocate, the district court failed to consider the best interest factors set forth in section 518.175, subdivision 3(b), as of the time of her second request to relocate, stating only the following:

. . . [Nguyen] is motivated by a desire to be with her husband in another state, and it appears that [she] is going to relocate despite how this Court rules on the present motion. This is evidenced by the fact that [Nguyen] and her husband have purchased two homes in Texas and has already relocated her non-joint child to Texas. In addition, there is even evidence that [Nguyen]'s past actions were motivated to thwart the minor child's relationship with [Do], which even further supports the Court's previous finding that [Do]'s role in the

child's life would be greatly diminished if [Nguyen] relocated the minor child.

By failing to address the statutory best-interest factors in light of the new changed circumstances Nguyen presented in her affidavits supporting her November 2019 motion, the district court abused its discretion in denying the motion.

II. The district court did not abuse its discretion by modifying parenting time.

“It is well established that the ultimate question in all disputes over [parenting time] is what is in the best interest[s] of the child.” *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984). While each parent is presumptively entitled to at least 25% parenting time, Minn. Stat. § 518.175, subd. 1(g) (2020), Minnesota law also supplies 12 factors that the district court must consider and evaluate in determining issues of custody and parenting time in light of the best interests of the child. Minn. Stat. § 518.17, subd. 1(a) (2020). A district court has broad discretion in determining parenting-time issues, and we will not reverse the district court absent an abuse of that discretion. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017). A district court abuses its discretion if it misapplies the law or relies on findings of fact unsupported by the record. *Id.*

In its February 2020 order, the district court increased Do's parenting time from approximately 52 overnights per year to approximately 156 overnights per year. Nguyen argues that the “district court abused its discretion by modifying the parenting time schedule without making adequate findings that the change [was] in the best interests of the child” and by making findings that were not supported by the record. Specifically,

Nguyen argues that because Do’s November 2019 affidavit did not explicitly address the 12 best interest factors under Minn. Stat. § 518.17, subd. 1(a), the district court had “virtually no evidence from either party on the relevant modification best-interest factors” to support its modification of Do’s parenting time in its February 2020 order. We disagree.

In its February 2020 order, the district court analyzed each of the 12 factors under Minn. Stat. § 518.17, subd. 1(a), and made detailed findings for each factor. As part of its analysis of the seventh factor, the district court stated that:

[Do] is employed full-time at Dakota County and earns a steady income. He is willing and able to support the child financially to meet [the child’s] various needs. [Do] is also committed to providing the child with a structured but stimulating home environment. [Do] has a separate room for the child in his new home, has access to various toys and educational aids, and is in the habit of regularly exposing the child to Vietnamese language and culture.

After considering all 12 statutory factors under Minn. Stat. § 518.17, subd. 1(a), the district court found it to be “in the child’s best interest to modify the parties’ parenting time to include [Do’s] additional overnights.” The district court noted that it was “persuaded that the new schedule [would] enable the child to become more accustomed to [Do], and this growing familiarity and comfort with both parents—not just one—[would] lead to more stabilization of the child’s emotional state during exchanges and transitions between [Nguyen]’s and [Do]’s households.” The district court further noted “that the new schedule also provides [Nguyen] with significant parenting time and thus avoids significant disruptions to her routine and relationship with the child.”

The district court's findings are supported by the evidence in the record, including Do's affidavit filed on November 5, 2019. In that affidavit, Do states that he had "been an active and devoted father," who "regularly and consistently exercised [his] parenting time." He also mentioned that he had "purchased a new home in Rosemount, in which [the] minor child has [the child]'s own bedroom." Do further stated, "Our minor child loves to come to our home and spend time at our new home in Rosemount. Our minor child has a very strong bond with me. I bring [the child] to church, we do many outdoor activities, we listen to music, I expose [the child] to both the English and Vietnamese language and culture, we play with Legos, and we play in the snow and yard, for some just examples."

Because the district court addressed each of the 12 best interest factors under Minn. Stat. § 518.17, subd. 1(a), in its February 2020 order, and because its findings on this issue are supported by evidence in the record, we conclude that the district court did not abuse its discretion by increasing Do's parenting time.

III. The district court did not abuse its discretion by awarding retroactive child care support to Do.

We review child support orders for an abuse of discretion. *See Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008). We will uphold a district court's determination of child support unless it is "against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

"Unless otherwise agreed to by the parties and approved by the court, the court must order that work-related or education-related child care costs of joint children be divided between the obligor and obligee based on their proportionate share of the parties'

combined monthly [percentage of income for child support].” Minn. Stat. § 518A.40, subd. 1 (2020). When addressing child care support obligations, “[t]he court must require . . . documentation of child care expenses from the obligee and the public authority, if applicable.” Minn. Stat. § 518A.40, subd. 3(a) (2020). The district court may retroactively correct a child care support order, based on actual child care expenses incurred, for a period before the date of service of a motion to modify support. *Jones v. Jarvinen*, 814 N.W.2d 45, 47 (Minn. App. 2012).

In its August 21, 2017 order the district noted:

. . . the lack of transparency and open communication between the parties regarding the issue of child care costs is troubling and likely to cause further issues and litigation in the future. The Court therefore finds it appropriate to require Mother to: (1) pay her nannies or child care establishments in traceable methods (e.g., personal checks, credit or debit card payments, money orders or cashier’s checks made out to an identifiable individual who is not Mother); and (2) provide Father with verifications of her child care costs every six months (e.g., copies of Mother’s previously filed tax returns, 1099 forms issued by Mother, monthly bank statements).

In its February 2020 order, the district court found that Nguyen had “failed to pay her nannies in a traceable method” and that there was “still no evidence to persuade the [district] [c]ourt that [Nguyen] had the exorbitant child care costs of \$1,600 per month that she alleged.” The district court also found that there was “persuasive evidence creating the very strong inference that [Nguyen] never had [child care] costs and does not have these costs now.” Thus, the district court found it appropriate “to modify the child support retroactively to remove child care costs from the equation” and “to adjust child care support

retroactively to October 1, [2018], when [Nguyen] stopped working[,], as there would be no reason for her to incur employment-related child care costs” after that date.

Nguyen first argues that the “district court abused its discretion by requiring [her] to reimburse [Do] for his contribution to work-related [child care] costs that appellant paid and [for which appellant] provided evidence of payment.” Specifically, Nguyen contends that she “did pay her nannies in a traceable way, through personal check, which was explicitly permitted in the [district] court’s August 21, 2017 order.” She also asserts that she “provided verification” of her child care payments from October 2018 through September 2019, “along with a screen shot of [her] checking account activity report.” Nguyen argues that the screen shot is a form of verification “consistent with a bank statement,” a verification form explicitly allowed by the district court’s August 2017 order.

But the record does not support Nguyen’s argument. Although she provided copies of filled-out, signed checks to the district court, the copies do not show whether those checks were ever cashed. And although Nguyen provided a screen shot to the district court, it is unclear whether the screen shot is in fact a report of her checking account activity. The district court explicitly listed three acceptable forms of verification in its August 2017 order: previously filed tax returns, 1099 forms issued by Nguyen, and monthly bank statements. Nguyen failed to provide any such documents, even though she had more than two years to do so.

Nguyen also contends that the district court erred in determining that she stopped working on October 1, 2018, arguing that she was “the owner and sole employee of a nail salon” operating as Glam Nails “[f]rom 2013 to the date of the [motion] hearing” on

November 19, 2019. She asserts that her “only hope at earning an income in Minnesota was to try to save her nail salon, which required her to be on site, and required a nanny to care for” the minor child. To support her argument, Nguyen points to two pieces of evidence in the record: (1) an affidavit submitted by Nguyen’s accountant in November 2019 stating that Glam Nails had a year-to-date “net operating loss of over \$4,000” in 2019; and (2) Nguyen’s affidavit submitted in November 2019 stating that because she works “several hours a week at [her] nail salon,” a “nanny provides after-school daycare” for the minor child.

However, the record also contains contradictory evidence. Do submitted an affidavit in November 2019 stating that Nguyen took a leave of absence from her employment at Hennepin County beginning on October 1, 2018. In her own December 2018 motion, Nguyen stated that she was currently “on a leave of absence from her work due to a severe aggravation of her medical condition due to cold weather.” Nguyen also submitted affidavits with attached exhibits indicating that she requested a medical leave of absence from Hennepin County beginning on October 1, 2018, and that she was also approved for disability benefits on November 9, 2019. In determining that Nguyen stopped working on October 1, 2018, the district court implicitly discredited Nguyen’s testimony that she had continued to work at Glam Nails after October 1, 2018, and credited the evidence suggesting that her medical condition was so severe that she was unable to work. “We neither reconcile conflicting evidence nor decide issues of witness credibility, which are exclusively the province of the factfinder.” *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004). Assessment of credibility was the prerogative of the district court, and

Nguyen has not shown that the district court clearly erred in finding that she stopped working on October 1, 2018.

Because Nguyen failed to provide verifications of her child care costs every six months in compliance with the district court's August 2017 order, and because the record supports the district court's finding that Nguyen quit working on October 1, 2018, the district court did not abuse its discretion by awarding retroactive child care support to father.

IV. The district court abused its discretion by awarding conduct-based attorney fees to Do.

Nguyen argues that the district court abused its discretion by awarding \$5,407 in conduct-based attorney fees to Do in its February 2020 order. A district court is not precluded from imposing conduct-based attorney fees “against a party who unreasonably contributes to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1 (2020). Conduct-based attorney fees may be “based on the impact a party’s behavior has had on the costs of the litigation regardless of the relative financial resources of the parties.” *Dabrowski v. Dabrowski*, 477 N.W.2d 761, 766 (Minn. App. 1991).); see *Gales v. Gales*, 553 N.W.2d 416, 423 (Minn. 1996) (citing this aspect of *Dabrowski*). “While bad faith could unnecessarily increase the length or expense of a proceeding, it is *not* required for an award of conduct-based attorney fees.” *Geske v. Marcolina*, 624 N.W.2d 813, 818–19 (Minn. App. 2001). The requesting party bears the burden of establishing that the other party’s conduct unreasonably contributed to the length or expense of the proceeding, *id.* at 818, and an attorney fee award must also be supported by specific findings. *Richards v.*

Richards, 472 N.W.2d 162, 166 (Minn. App. 1991). We review an award of conduct-based attorney fees for an abuse of discretion. *Brotsky v. Brotsky*, 733 N.W.2d 471, 476 (Minn. App. 2007).

Throughout the proceedings, Do argued that he was entitled to conduct-based attorney fees because he had “incurred substantial fees and costs to simply expand [his] parenting time appropriately, modify childcare and support, and to defend against [Nguyen’s] same exact motion that the [district] court ruled on less than seven months ago.” At the November 2019 hearing, Do’s trial counsel addressed Nguyen’s two motions to relocate:

We’re here literally back on a motion not even out of the same year. And that’s why, I also, Your Honor, requested attorney fees because I truly think [Nguyen]’s going to keep doing this until my client can’t afford to defend against it. Nothing has changed in regards to [Nguyen]’s willingness to expand [Do]’s parenting time [Do] asked to expand one extra overnight; [Nguyen] said no.

In its February 2020 order, the district court observed that Nguyen had “unreasonably contributed to the length and expense of this case,” indicating that “[Nguyen] ha[d] opposed every attempt by [Do] to increase his parenting time and ha[d] continued to make objections to increased parenting time by raising the same complaints about his parenting.” The district court also noted that Nguyen “refuse[d] to acknowledge the changes in [Do]’s living circumstances that enable him to provide a good home for the child,” and “refuse[d] to acknowledge [Do] as a co-equal parent to the child.” The district court continued on to state that, “[m]ost importantly, [Nguyen] brought a second motion to relocate just seven months after the Court denied her first motion to relocate.”

The district court concluded that an award of conduct-based attorney fees was appropriate, in large part because the length of proceedings had been unnecessarily extended by Nguyen's second motion to relocate. For the same reasons that we determined in Section 1 of this opinion that the district court abused its discretion in denying Nguyen's second motion to relocate, we must necessarily also determine that the district court's finding that Nguyen unreasonably contributed to the length and expense of this case by filing the second motion to relocate is clearly erroneous. Because we conclude that the district court's attorney fee award was based "most importantly" on a clearly erroneous finding, the district court abused its discretion by awarding conduct-based attorney fees to Do.

In sum, we affirm the district court's order modifying parenting time and its order awarding retroactive child care support to Do. We reverse its award of conduct-based attorney fees to Do. Given the absence of clear best-interest findings, however, we cannot effectively review the district court's decision to deny Nguyen's motion to relocate the minor child's residence. We therefore reverse and remand the issue for the district court to reopen the record and consider the best-interest factors in light of the cumulative changed circumstances in the record supporting Nguyen's second motion to relocate.

Affirmed in part, reversed in part, and remanded.