

*This opinion is nonprecedential except as provided by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
A21-0913**

In re the Marriage of:
Jason Robert Carter, petitioner,
Respondent,

vs.

Michelle Lee Winter-Carter,
Appellant.

**Filed July 5, 2022
Affirmed
Bjorkman, Judge**

Clay County District Court
File No. 14-FA-18-3273

Jason W. McLean, Parvey, Larson, and McLean, PLLC, West Fargo, North Dakota (for respondent)

Michelle Winter, Dilworth, Minnesota (pro se appellant)

Considered and decided by Worke, Presiding Judge; Bjorkman, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges the district court's order deciding the parties' competing contempt and enforcement motions regarding their parenting plan. She argues that the district court (1) erred by denying her motion to enforce the parenting plan by awarding

her joint physical custody and equal parenting time, (2) erred by modifying the phone-contact provisions of the parenting plan, (3) erred by ordering the parties to engage a new family therapist, (4) abused its discretion by deciding her enforcement motion solely on affidavits, and (5) erred by holding her in contempt of court for failing to transfer the children's phone lines to respondent. We affirm.

FACTS

Appellant-mother Michelle Winter (f/k/a Michelle Winter-Carter) and respondent-father Jason Carter were married in 1999. They have three children, born in 2002, 2004, and 2009. The district court dissolved the parties' marriage on August 18, 2020. Later that month, the parties agreed to a parenting plan under Minn. Stat. § 518.1705 (2020) "for the benefit of their children." The district court amended the dissolution judgment to incorporate the parenting plan.

The Parenting Plan

Under the parenting plan, the parties share legal custody but father has sole physical custody, subject to mother's parenting time 5 days out of 14. As physical custodian, father is "responsible for paying for and maintaining the children's existing and new phone lines." Each party has limited phone contact with the children during the other's parenting time.

The parenting plan requires the parties to choose a "mutual family therapist" or, if they are unable to agree, to use one of two designated service providers. Each party must separately attend therapy with the children. The broad therapy goals are "to improve communication between the parents, communication between the parents and the children, and to move toward a more equal sharing of time between the parents." The plan requires

the therapist to set “micro-goals” to aid the family’s progress. And the therapist must “provide an update to the Court and the parties about these micro-goals” within the first two months. Thereafter, the therapist must provide updates at least every two months that “discuss the progress or lack of progress being made on the goals and micro-goals.”

The parenting plan contemplates increasing mother’s parenting time in two phases—first from 5 to 6 days out of 14, then to equal parenting time with the possibility of joint physical custody—based on progress in therapy. Advancement to the next phase is conditioned on “the therapist see[ing] progress meeting the stated goals and micro-goals, refraining from negative behaviors, progress in that the parties are not interfering with the other parent’s parenting time, except as specified in this parenting plan [to permit attendance at therapy], and progress in adjusting to parallel parenting.” Regarding physical custody, the parenting plan directs the therapist to submit a written recommendation to the district court “when he/she believes that it is beneficial to the children for both parties to have joint physical custody.” But the parenting plan also provides that mother’s parenting time may be restricted if she “talk[s] about this matter with the children, us[es] them as detectives, bad-mouth[s] [father], or otherwise disparage[es] him, or his parenting.”

Family Therapy

In September 2020, the parties selected Kristin Sharbono as the family’s therapist. Later that month, Sharbono provided a report to the district court that generally outlined the services she would provide and set initial goals. She included preliminary observations, including that “[b]ased on current information received it is difficult to understand why

custody is not 50/50.” But she acknowledged that she had not, at that point, reviewed the parenting plan or any other court records.

Sharbono provided a one-paragraph update in late November 2020. She noted a “mutual” family goal of 50/50 physical custody, her concern that the existing custody arrangement was detrimental, and her suggestion that “custody be returned to 50/50 with the expectation of ongoing counseling to repair relationships.”

Sharbono provided another update in late January 2021. She detailed the goals she had identified for each week of counseling up to that point. She also expressed concern that both parties continue to engage in “parental alienation” and expose the children to “toxic environments where they are expected to favor one parent over the other.” She identified the ongoing conflict around unequal custody and parenting time as a central point of conflict and again recommended 50/50 physical custody.

Following that update, father stopped taking the children to therapy with Sharbono. Mother continued to do so.

The Parties’ Motions

On February 19, 2021, mother moved the district court to hold father in contempt for refusing to support family therapy with Sharbono. She also asked the district court to enforce the parenting plan and order joint physical custody and equal parenting time, asserting that she complied with the requirements for those changes.

Father responded with his own motion. He asked the district court to deny mother’s motion because (1) the parenting plan permits him to select one of the designated providers for family therapy instead of Sharbono, and (2) mother has not satisfied the requirements

for increasing her parenting time because she continues to interfere with his parenting time and engages in other negative behaviors. He also asked the court to hold mother in contempt for failing to transfer the children's phone lines to him. And he moved to enforce the provision in the parenting plan permitting restriction of mother's parenting time by (1) making the custody and parenting-time provisions permanent, and (2) limiting mother's phone contact with the children.

The district court conducted an evidentiary hearing on the contempt motions, receiving testimony from the parties and Sharbono. The court decided the enforcement and modification motions based on the parties' affidavits and arguments. In a written order, the district court (1) denied mother's motion to enforce the parenting plan, (2) denied father's motion to make the custody and parenting-time provisions permanent, (3) granted father's motion to limit mother's phone contact, (4) held mother in contempt for failing to transfer the phone lines, (5) held father in contempt for not allowing the children to continue therapy with Sharbono, and (6) ordered the parties to engage a new therapist to work with the entire family. Mother appeals.

DECISION

Mother asserts various legal and factual challenges to the district court's rulings. Interpretation of an unambiguous parenting plan is a question of law, which we review de novo. *See Ertl v. Ertl*, 871 N.W.2d 410, 414 (Minn. App. 2015) (citing *Starr v. Starr*, 251 N.W.2d 341, 342 (1977)). But we review a district court's factual findings for clear error and defer to the district court's credibility determinations. *Thornton v. Bosquez*, 933 N.W.2d 781, 790 (Minn. 2019); *see* Minn. R. Civ P. 52.01 (providing that clear-error

review applies regardless of whether findings are “based on oral or documentary evidence”).

I. The district court did not err by denying mother’s motion to enforce the parties’ parenting plan to increase her parenting time.

Mother challenges both the district court’s legal conclusion as to what the parenting plan requires with respect to increasing parenting time and the court’s determination that mother did not satisfy the plan’s requirements. Her challenge is unavailing in both respects.

Mother argues that the parenting plan “gave ruling on custody to the counselor,” and all she needed to do to receive equal parenting time and joint physical custody was obtain Sharbono’s recommendation to that effect. This argument is not persuasive. The parenting plan requires Sharbono to provide guidance to the parties and the district court—in the form of “updates”—and if warranted, to make a recommendation to the district court regarding joint physical custody. And mother may only have increased parenting time if there has been

progress meeting the stated goals [of improved communication within the family] and micro-goals, refraining from negative behaviors, progress in that the parties are not interfering with the other parent’s parenting time, except as specified in this parenting plan [to permit attendance at counseling], and progress in adjusting to parallel parenting.

Accordingly, the district court did not err by requiring evidence of such progress before granting mother's motion.¹

Mother also claims error in the district court's finding that her behavior toward father has not improved, asserting, for example, that there is no "proof" she has made negative comments to the children about father. We disagree. Father's affidavit is replete with examples of mother disparaging and calling father names in front of the children, telling them they do not have to follow his directions, interfering with his parenting time, and manipulating the children to spend time with her on father's scheduled days. Indeed, mother does not deny engaging in these behaviors so much as she contends father behaves similarly. Accordingly, we conclude the district court did not clearly err by finding that mother has not improved her behavior as required to increase her parenting time.

II. The district court did not err by modifying the phone-contact provisions of the parenting plan.

Mother challenges the district court's decision to prohibit text messages and emails between her and the children and reduction of their phone time by half.² She does not

¹ Mother asserts that continuing unequal parenting time and physical custody is not in the children's best interests or fair to her. But the district court was not evaluating custody and parenting time in the first instance. It was interpreting and applying the parties' own agreement, as incorporated into the amended dissolution judgment, which requires that she demonstrate improved behavior before equalizing her parenting time and custody. Mother may dislike this requirement, but it is the agreement she made—with the benefit of counsel.

² The district court reduced mother's phone time with the children from two unsupervised 30-minute calls per week to one 15-minute call, subject to father's supervision "at his discretion." It also eliminated the provision for "reasonable" text messages and emails, instead prohibiting text messages and email contacts.

support her challenge with legal authority or identify any flaw in the district court's reasoning or factual findings. On this record, we discern no error.

The district court found that “[o]ne of the main issues in this case has been, and continues to be, Mother’s phone contact with the children.” And it explained that mother “has an inability to allow the children to have free and unrestricted time with their Father,” and “monopolizes their time with their Father by calling, video chatting and texting them for lengthy periods of time.” Those findings have ample support in father’s affidavit, which details phone calls between mother and the children averaging 55 minutes per day, mother “constantly” texting and emailing the children, his inability to reach the children while they are in mother’s care, and his observation that at least one of the children has returned to his care with his number blocked. On this record, we conclude the district court did not err by limiting mother’s phone contact with the children.

III. The district court did not err by ordering the parties to engage a new family therapist.

Mother contends that the district court erred by requiring the parties to engage a new family therapist because she lacks the financial resources to “add[] another counselor.” We are not persuaded.

The district court ordered the parties to retain a new therapist “who shall have the ability to consult with and obtain information from the parties’ and the children’s therapists, to repair the family relationships and provide updates and recommendations consistent with” the parenting plan. The court reasoned this was necessary because Sharbono, despite developing a rapport with the children, failed to perform this function.

Instead, she focused on her disagreement with the stipulated custody and parenting-time provisions of the parenting plan and largely declined to set the detailed goals and provide updates the parenting plan requires. The district court did not err by ordering the parties to engage a therapist who would honor the parenting plan.³

IV. The district court did not abuse its discretion by deciding mother's enforcement motion on affidavits.

Mother claims error in the district court's decision of her enforcement motion without permitting the parties or the two older children to testify regarding the factual basis for the motion. We review the decision whether to hold an evidentiary hearing on a motion for an abuse of discretion. *Le v. Holter*, 838 N.W.2d 797, 800 (Minn. App. 2013), *rev. denied* (Minn. Dec. 31, 2013).

The presumptive procedure in family matters is that all motions, except for contempt motions, "shall be submitted on affidavits, exhibits, documents subpoenaed to the hearing, memoranda, and arguments of counsel." Minn. R. Gen. Prac. 303.03(d)(1). Parties may request oral testimony, but they must do so by the time they file the motion for which the testimony would be taken. *Id.* (d)(2), (5).

Here, both parties filed contempt motions, so the district court scheduled an evidentiary hearing. But because the parties filed other motions, the district court stated at the beginning of the hearing that it would only take testimony on the contempt motions and

³ We observe that mother retains the option to discontinue the children's therapy with Sharbono. Nothing in the district court's order mandates that she continue that therapy; it merely recognizes the potential value of that therapeutic relationship and requires father to "support and allow" the children to continue the relationship.

would decide the other motions based on the affidavits. Mother and father, both represented by counsel, agreed to that procedure. Given the parties' assent and the plain language of rule 303.03, we conclude the district court did not abuse its discretion by not receiving testimony on mother's enforcement motion.

V. The district court did not err by holding mother in contempt for failing to transfer the children's phone lines to father.

Finally, mother challenges the district court's contempt finding, contending that "there is nothing to transfer." This contention is unavailing.

The parenting plan provides that, "[a]s the parent with primary custody, [father] shall be responsible for paying for and maintaining the children's existing and new phone lines." Father sought a contempt order because mother did not transfer the children's phone lines to him. Mother acknowledged that she had not done so but asserts that the parenting plan does not obligate her to transfer the phone lines; it simply requires father to pay for the phone plan. She also testified that only the eldest child, who is an adult, has a working phone.

The district court treated the question of whether the children have phones as separate from whether mother must transfer their phone lines to father. And the court agreed that "[a]lthough the [parenting plan] did not explicitly state that Mother must transfer the children's phone lines to Father that is a reasonable interpretation of the [parenting plan], especially in light of the Court's prior order requiring Mother to transfer

the phones to Father.”⁴ Accordingly, it held mother in constructive contempt. Because it remains undisputed that mother has not transferred the phone lines to father, and the district court did not condition her obligation to do so on the children having phones, she has not demonstrated any error in the district court’s contempt holding.⁵

Affirmed.

⁴ A January 29, 2020 order provided: “The children’s cell phone accounts shall be transferred back to [father’s] family account” and mother “shall sign all documents necessary to change the accounts over.”

⁵ Mother also asserts a claim of judicial bias, pointing to Minn. Code Jud. Conduct Canon 2.2, which requires that judges “perform all duties of judicial office fairly and impartially.” This claim is unavailing for two reasons. First, mother forfeited it by failing to raise it to the district court. *See Gummow v. Gummow*, 375 N.W.2d 30, 34 (Minn. App. 1985); *see also* Minn. R. Civ. P. 63.03 (permitting judicial removal at any time upon “an affirmative showing that the judge . . . is disqualified under the Code of Judicial Conduct”). Second, mother claims bias solely based on credibility findings and rulings in father’s favor, which are insufficient bases for imputing bias to a judge. *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227, 236-37 (Minn. App. 2005).