

*This opinion is nonprecedential except as provided by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
A21-1661**

In re the Marriage of:
Anthony Michael Bottolene, petitioner,
Respondent,

vs.

Beleyou Getachew Bottolene,
Appellant,

County of Wright,
Intervenor.

**Filed October 17, 2022
Affirmed
Frisch, Judge**

Wright County District Court
File No. 86-FA-15-2360

Mary E. Cincotta, Thronset Michenfelder, LLC, St. Michael, Minnesota (for respondent)

Ryan J. Briesse, Kristine J. Zajac, Zajac Law Firm, Minneapolis, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Ross, Judge; and Connolly,
Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant-mother argues that the district court abused its discretion in modifying
child custody by (1) considering a prior finding of domestic abuse from a separate

proceeding, (2) determining that mother's physical contact with the child constituted endangerment, and (3) failing to make reasonable accommodations for mother during the evidentiary hearing as a pro se litigant. Because the district court did not abuse its discretion in the consideration of evidence and did not clearly err in its findings of fact, we affirm.

FACTS

In June 2011, appellant-mother Beleyou Getachew Bottolene and respondent-father Anthony Michael Bottolene were married. Their child, M.G.B. (the child), was born later that year. In 2016, the parties divorced, and the dissolution court awarded mother joint legal custody and sole physical custody of the child subject to father's parenting time. The dissolution court later amended the decree in part but did not change the custody order.

OFP Proceeding

In December 2018, the OFP court issued an ex parte order for protection (OFP) based on father's allegations of domestic abuse of the child by mother. In January 2019, the parties agreed to continue the OFP matter, reinstate the prior parenting-time arrangement, and not use physical discipline against the child. Mother agreed to attend a parenting class or individual therapy that would address age-appropriate discipline. In April 2019, the parties again agreed to continue the OFP matter to give mother time to attend suitable programming or therapy.

On September 3, 2019, the OFP court held a hearing on the OFP. Mother did not appear at that hearing and did not contact the OFP court. At the hearing, the OFP court received testimony from the court-appointed guardian ad litem about mother's attendance

and progress in therapy and an attempt to contact mother about the hearing. The OFP court also received testimony from father that mother pulled the child's arm and hit him because the child had not completed his homework. Father testified that mother had dragged the child to the bathroom by his shirt to wash his face, and the child asked to be let go. The OFP court received as evidence a police report along with a photo of the child's arm depicting a bruise mark attributable to mother's physical contact with the child.

After the hearing, the OFP court determined that mother committed domestic abuse (the 2019 domestic-abuse finding) and issued an OFP, effective through December 13, 2020. Father and the child have been living together full-time since the issuance of the OFP.

Motion to Modify Custody

Before the expiration of the OFP, father separately filed a motion to modify child custody. Mother also moved to regain custody of the child.

On August 27, 2021, the modification court held a remote evidentiary hearing on the parties' cross-motions to modify custody. Although mother was initially represented by counsel, mother's counsel withdrew from representation before the modification court conducted the evidentiary hearing. During the hearing, the modification court received testimony about the child and the parties' relationship with the child from father's co-worker, stepmother, and father. The modification court also received testimony from mother and father about the child, their respective relationships with the child, their relationship with each other, and the circumstances surrounding the issuance of the OFP.

The modification court thereafter issued an order finding that mother's physical contact with the child constituted endangerment and modified custody, awarding father sole physical custody of the child subject to mother's parenting time.

Mother appeals.

DECISION

Mother argues that the modification court abused its discretion in issuing the custody modification order by (1) considering the 2019 domestic-abuse finding by the OFP court, (2) determining mother's physical contact with the child constituted endangerment, and (3) failing to make reasonable accommodations during the evidentiary hearing for mother as a pro se litigant. We address each argument in turn.

I. The modification court did not abuse its discretion by considering the 2019 domestic-abuse finding.

Mother first argues that the modification court abused its discretion by considering the 2019 domestic-abuse finding by the OFP court when determining whether to modify custody. Mother asserts that the modification court effectively applied the doctrine of collateral estoppel to prevent mother from challenging the 2019 domestic-abuse finding and that application of collateral estoppel was improper because she was not present at the hearing that resulted in that finding. We disagree.

As a threshold matter, mother did not object to the consideration of the 2019 domestic-abuse finding during the custody-modification evidentiary hearing, thereby forfeiting her new objection on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988);

see Lewis-Miller v. Ross, 710 N.W.2d 565, 570 (Minn. 2006) (applying *Thiele* in a custody dispute).

Even so, the record does not show that the modification court considered or applied the doctrine of collateral estoppel in the modification proceeding. Collateral estoppel prevents a party from relitigating an identical issue litigated in a previous action. *State Farm Mut. Auto. Ins. Co. v. Lennartson*, 872 N.W.2d 524, 534 (Minn. 2015). Here, the modification court did not prevent mother from litigating the issue of whether domestic abuse occurred. Instead, the modification court received the 2019 domestic-abuse finding as evidence of domestic abuse and also received testimony regarding the underlying allegations and findings of fact. In so doing, the modification court permitted mother to question father about physical contact by mother against the child. Ultimately, the modification court discredited mother's testimony regarding the circumstances giving rise to the 2019 domestic-abuse finding. We therefore do not agree with the characterization that the modification court effectively applied the doctrine of collateral estoppel, and we see no abuse of discretion in the consideration of the 2019 domestic-abuse finding.¹

¹ Mother does not contest the relevance of a prior domestic-abuse finding in the custody-modification context. We observe that Minnesota law contemplates the consideration of such evidence by the district court in determining whether to modify a custody order. Minn. Stat. § 518.18(d) (2020) provides that a court cannot modify a custody order unless it finds, among other things, that (1) a change in circumstances has occurred and (2) modification is in the best interests of that child. The existence of domestic abuse is a specific factor for consideration in evaluating the best interests of the child. Minn. Stat. § 518.17, subd. 1(a)(4) (2020).

II. The modification court did not abuse its discretion by determining mother's physical contact constituted endangerment.

Mother next argues that the modification court abused its discretion in concluding that mother's physical contact with the child amounted to endangerment and instead argues that her physical contact was merely disciplinary. We disagree.

The circumstances constituting endangerment are “unusually imprecise,” but must amount to a “significant degree of danger.” *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008). Not all corporal punishment necessarily supports a determination of endangerment. *See, e.g., Johnson v. Smith*, 374 N.W.2d 317, 320-21 (Minn. App. 1985) (concluding the district court abused its discretion in determining that the child was endangered where, “[o]ther than this observation [that the child appeared ‘shook up’ after one incident], and the evidence of a bump, there is no evidence the child has been hurt, physically or emotionally”), *rev. denied* (Minn. Nov. 18, 1985); *cf.* Minn. Stat. § 609.06, subd. 1(6) (2020) (permitting the use of reasonable force without consent when lawfully used by a parent to correct a child). Ultimately, “the existence of endangerment must be determined on the particular facts of each case.” *Sharp v. Bilbro*, 614 N.W.2d 260, 263 (Minn. App. 2000) (quotations omitted), *rev. denied* (Minn. Sept. 26, 2000).

“Appellate review of custody modification and removal cases is limited to considering whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law.” *Goldman*, 748 N.W.2d at 284 (quotations omitted). We review the modification court's findings of fact for clear error. *Id.* “Findings of fact are clearly erroneous where an appellate court is left with the

definite and firm conviction that a mistake has been made.” *Id.* (quotation omitted). We defer to the modification court’s determinations of witness credibility. *Id.* (citing Minn. R. Civ. P. 52.01; *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)).

The modification court made several findings of fact regarding mother’s physical contact to reach a conclusion of endangerment. The modification court found that mother pinched the child, pulled the child by the collar, and pulled the child by his ears. The modification court found that these physical contacts left a noticeable imprint on the child. The modification court found that this physical contact necessitated the involvement of law enforcement. The modification court noted that mother admitted to using physical discipline on the child such as pinching or spanking and that mother did not believe that her actions harmed the child or otherwise recognize the harm to her child resulting from that physical contact. The modification court also determined that the 2019 domestic-abuse finding was based on evidentiary submissions and not mother’s absence from the hearing. The modification court credited father’s testimony and discredited mother’s testimony with respect to the events surrounding the 2019 domestic-abuse finding. The modification court found that mother’s physical contact adversely impacts the child’s safety, well-being, and developmental needs. The modification court concluded that these factual circumstances, taken together, “strongly favored” a modification to custody and that the child was endangered.

These findings and conclusions are supported by the record. Mother admitted to pinching the child. Father testified that mother pinched the child, choked the child by dragging him into the bathroom by his shirt collar, pulled on his ears, and that mother’s

physical contact with the child resulted in bruising. These factual findings—abuse of the child with noticeable, physical manifestations—are sufficient to constitute endangerment.

III. The modification court did not abuse its discretion by excluding mother’s inadmissible evidence.

Mother argues that the modification court abused its discretion by failing to provide reasonable accommodations for mother as a pro se litigant. In support of her contention, mother notes that the district court excluded her exhibits but allowed father to admit his exhibits, despite neither party’s compliance with deadlines in the notice of remote Zoom hearing. We disagree that the modification court treated the parties in an inequitable manner and see no abuse of discretion by the modification court in its evidentiary ruling.

We review evidentiary decisions for abuse of discretion. *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015). District courts have a duty to reasonably accommodate pro se litigants so long as such accommodations do not prejudice the opposing party. *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minn. App. 1987). Even so, “[a]lthough some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules.” *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001).

The modification court excluded as evidence several testimonial but unnotarized letters offered by mother because the documents were not authenticated and constituted hearsay, not because mother failed to comply with deadlines. Evidence must be authenticated or identified to be admissible. Minn. R. Evid. 901(a). Mother was unable to

authenticate the veracity of the letters because the documents were not notarized and the purported authors were not present at the hearing. And because the purported authors of the letters were not present in court and not subject to cross-examination, the statements set forth in the documents likely constituted hearsay, which is generally not admissible evidence. Minn. R. Evid. 801(c), 802. Because mother's proffered evidence was not admissible, the modification court did not abuse its discretion in its evidentiary ruling.

Affirmed.