STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0558

In re the Marriage of:

Erin Renae McKissock n/k/a Erin Renae Kelly,
Appellant,

vs.

Brian Todd McKissock,
Respondent.

Filed March 13, 2023
Reversed and remanded
Gaïtas, Judge

Dakota County District Court
File No. 19WS-FA-20-459

Alan C. Eidsness, Sarah J. Hewitt, Henson & Efron, P.A., Minneapolis, Minnesota (for appellant)

Brian Todd McKissock, Cottage Grove, Minnesota (self-represented respondent)

Considered and decided by Segal, Chief Judge; Gaïtas, Judge; and Halbrooks, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant-mother Erin Renae McKissock n/k/a Erin Renae Kelly, who has sole physical custody of the children she shares with respondent-father Brian Todd McKissock, appeals the district court's order denying her "request to move to South Haven," arguing that the district court erred in restricting her ability to move within Minnesota when it ruled on her motions to modify parenting time and to change the children's school. Because we conclude that the district court abused its discretion by sua sponte imposing a geographic restriction and by failing to address mother's motions, we reverse and remand.

FACTS

Mother and father are the parents of three young children. They divorced in June 2020 by stipulated judgment. The stipulated judgment awarded mother and father joint legal custody of the children and awarded mother sole physical custody.

Under the stipulated judgment, the children are to reside with mother, and father has parenting time for one evening each week and every other weekend.[1] In the summer, each parent is entitled to two weeks of uninterrupted vacation with the children.

Following the divorce, mother continued to reside in the family home in Inver Grove Heights. In 2021, father remarried and moved to his wife's home in Cottage Grove, which is about 15 minutes from the Inver Grove Heights home. Mother also has a new partner.

[1] Mother and father agree that, in practice, father exercises more parenting time than specified by the judgment because mother travels for work.

Her partner lives in South Haven, which is approximately 90 minutes away from Inver Grove Heights.

In February 2022, mother moved to modify the judgment's parenting-time schedule and to change the children's school.[2] Mother's motion stated that she planned to move with the children to South Haven where she would reside with her partner, who has strong community ties there. The motion also noted mother's concerns about rising crime in her neighborhood in Inver Grove Heights. Mother's motion proposed a detailed plan for parenting time, which provided father with more parenting time and allowed the children to continue participating in their activities. Additionally, mother presented her research on schools in South Haven, which she alleged were as suitable, if not more suitable, for the children than the schools in Inver Grove Heights.

Father opposed mother's motion, asking the district court to "deny [mother]'s request to move with our children to South Haven." He alleged that the children have strong ties in Inver Grove Heights and that mother's move to South Haven would interfere with his relationship with the children.

The district court held a hearing on mother's motion. After hearing from both mother and father, the district court stated that, in divorce cases involving children, the parties must reside within half an hour of each other. The district court stated, "I prefer a bike ride away . . . . And now we're an hour and a half away."

Continuing, the district court stated:

[2] Mother also requested permission to take an international vacation with the children, but this issue is not before us on appeal.

> [Y]ou're trying to convince the Court that moving to Annandale is in the best interests of the kids. Whether it is or isn't, I'll have to decide.
>
> . . . [T]his hour-and a-half drive is not a good thing, no matter how we spin it, no matter how we talk about it. There's some discussion about, well, we can meet halfway in Maple Grove. Well that's a halfway drive for you, and it's a halfway drive for [father], but it's a full ride for the kids. Either way, they're in the car for a long time. And I don't like that fact, just so everybody knows.
>
> There's no magic to South Haven. People can sell and move and do whatever, but, you know, I need you guys within a half hour of each other. That's, frankly, where I'm coming from. Because I don't think a move to South Haven, it may be good for you and the school district may be good for you, but it's a complication for the relationship between father and the children. That's generally where I'm coming from.

Mother's attorney reminded the district court that mother is the sole physical custodian of the children, and therefore, mother can change the residence of the children without court permission. The attorney clarified that "this isn't a relocation motion, this isn't a request for permission to move, this is how do we change the parenting time schedule to adapt the reality of the move."

But the district court stated:

> So the relationship between the two adults is taking priority, and the kids are the ones doing all the jumping through the hoops. Statute or no statute, I don't like that fact. That's the reality of it.
>
> I mean, that's why the law's been changing about joint physical custody to take away this I can move if I choose to. Because we have selfish -- not that [mother] is selfish, but we've had selfish situations where people are moving to Hibbing, or Duluth or something like that, saying, "well, I can." Now whether the law tells me I have to eat it, I'll deal with that, but --

The district court acknowledged that mother could move because she has sole physical custody of the children. However, it suggested that it would be more suitable for mother to move closer than South Haven, to a community such as Edina or Mendota Heights.

The district court gave the parties an opportunity to discuss alternatives to mother's motion following the hearing. But the parties did not reach a resolution and the district court ultimately issued an order.

The order denied mother's "request to move to South Haven." It stated that mother's "request to move" was not in the children's best interests because the drive from South Haven was too long, and mother's relocation would remove the children from their current community where they have friends, family, and activities.

Mother appeals.

DECISION

Mother challenges the district court's order. She argues that the district court did not address her parenting-time and school change motions, but instead—and without applying the correct legal standard—imposed a geographic or "locale" restriction. Father responds that the district court did not impose a locale restriction, but merely denied mother's motion to change the children's school.

"Determination of the applicable statutory standard and the interpretation of statutes are questions of law that [appellate courts] review de novo." *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008) (citations omitted). But a district court has broad discretion in deciding matters of child custody and parenting time, and the appellate court will disturb such a decision only if the district court abused its discretion. *Id.* at 281-82. "A district

court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record." *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022) (quotation omitted).

As an initial matter, we determine that the district court decided an issue that was not before it. Mother and father agree on appeal that neither party moved the district court to decide whether mother could relocate to South Haven with the children. Although the district court was never asked to decide whether mother could move, it considered and ruled on what it identified as mother's "request to move." The district court's decision did not address mother's request for a school change, as father argues. Rather, the district court directly considered and decided that mother was not allowed to move. The district court found that "Mother's Significant Other is not working based on his ability to support himself through other financial resources available to him at this time" and suggested that the significant other would experience little hardship by leaving South Haven to join mother elsewhere. The district court found that "Mother is putting her relationship with her Significant Other first rather than the effect this would have on her children." The district court found that "Mother's move to South Haven" is not "within the children's best interests." And the district court's order states that "Mother's request to move to South Haven is respectfully DENIED." Because neither party moved the district court to rule on whether mother could change her residence to South Haven, the district court abused its discretion by considering and ruling on this issue.

Moreover, because mother has sole physical custody of the children, the district court abused its discretion by sua sponte restricting mother's ability to change the

children's residence within Minnesota. Although a state statute addresses a parent's ability to relocate to a different state, *see* Minn. Stat. § 518.175, subd. 3 (2022),[3] there is no statute that restricts a parent's freedom to relocate within the state. As the parent with unrestricted sole physical custody of the children, mother is entitled to change the children's residence within Minnesota without first obtaining the district court's permission. *See* Minn. Stat. § 518.003, subd. 3 (2022) (defining "physical custody and residence" as "the routine daily care and control and the residence of the child"); *see also Stang v. McGarvey*, No. A07-1938, 2008 WL 2496991, at *2-3 (Minn. App. June 24, 2008) (recognizing that, "absent joint physical custody or a provision in a parenting agreement or court order identifying a child's physical residence, the physical custodian has flexibility in determining his or her residence," and rejecting father's challenge to custodial mother's move to an in-state location 240 miles away from father's residence).[4]

We have observed that "there is no absolute prohibition under Minnesota law against awarding child *custody* on the condition of maintaining a specific geographic residence for the child, as long as that residence is shown clearly and genuinely to serve

[3] Minnesota Statutes section 518.175, subdivision 3, provides that "[t]he parent with whom the child resides shall not move the residence of the child *to another state* except upon order of the court or with the consent of the other parent, if the other parent has been given parenting time by decree." Minn. Stat. § 518.175, subd. 3 (emphasis added). A 1978 amendment to this statute added the clause "or more than 100 miles within this state." 1978 Minn. Laws ch. 772, § 41, at 1079. But the legislature removed that clause just one year later. *See* 1979 Minn. Laws ch. 259, § 19, at 566.

[4] While unpublished opinions are not binding, we cite *Stang* for its persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that "[n]onprecedential opinions . . . are not binding authority . . . [but] may be cited as persuasive authority").

the child's best interests." *Daily v. Chermak*, 709 N.W.2d 626, 630 (Minn. App. 2006) (emphasis added), *rev. denied* (Minn. May 16, 2006). Here, the issue of custody was addressed in the dissolution proceedings. In the stipulated judgment, mother and father were granted joint legal custody, and mother was granted sole physical custody of the children. There were no locale restrictions imposed in connection with custody. And neither party has moved for modification of the custody order. *See Goldman*, 748 N.W.2d at 283 (stating that locale restrictions are "custody arrangements" and part of a "custody order"); *see also Starren v. Starren*, No. A15-0141, 2015 WL 5825118, at *4-5 (Minn. App. Oct. 5, 2015) (stating that a post-decree "request to impose a locale restriction preventing the children from being moved [within the state of Minnesota] is properly interpreted as a motion to modify custody" and "would be analyzed under section 518.18(d)" (citing *Goldman*, 748 N.W.2d at 283 and *Schisel v. Schisel*, 762 N.W.2d 265, 269 (Minn. App. 2009))), *rev. denied* (Minn. Dec. 29, 2015).[5] Thus, the district court abused its discretion by sua sponte ordering such a restriction in deciding mother's motions to modify parenting time and to change the children's school.

Finally, the district court did not consider the motions that were before it. The district court did not address or rule on mother's motions for modification of parenting time and for a school change. Because the district court's imposition of a locale restriction in response to these motions was contrary to logic and the facts in the record, we conclude that the district court's ruling was an abuse of discretion.

[5] We cite *Starren*, an unpublished decision, for its persuasive value. *See* Minn.R. Civ. App. P. 136.01, subd. 1(c).

Accordingly, we reverse the district court's order denying mother's "request to move to South Haven." We remand to the district court to consider mother's motions for modification of parenting time and for a school change applying the legal standards corresponding to those motions. *See* Minn. Stat. § 518.175, subd. 5(b) (stating that a district court shall modify parenting time when modification "would serve the best interests of the child"); *Novak v. Novak*, 446 N.W.2d 422, 424-25 (Minn. App. 1989) (noting that choice of child's school is a question of legal custody and disagreements should be resolved by considering the best interests of the child), *rev. denied* (Minn. Dec. 1, 1989); *see also* Minn. Stat. § 518.17, subd. 1 (2022) (articulating best-interests factors). On remand, whether to reopen the record shall be discretionary with the district court, and nothing in this opinion shall be construed as an expression of this court's opinion regarding how to decide the remanded questions.

Reversed and remanded.