

*This opinion is nonprecedential except as provided by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
A22-0976**

In Re the Custody of: X. W. F.,

Anthony Dexter Wayne Francis, petitioner,
Respondent,

vs.

Denise Tonche,
Appellant.

**Filed March 27, 2023
Reversed and remanded
Smith, Tracy M., Judge
Dissenting, Worke, Judge**

Steele County District Court
File No. 74-FA-14-1515

Anthony Dexter Wayne Francis, Owatonna, Minnesota (pro se respondent)

William K. Davies, Lanners & Olson, P.A., Roseville, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Smith, Tracy M., Judge; and
Cochran, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant-mother Denise Tonche challenges the district court's order granting respondent-father Anthony Dexter Wayne Francis's motion to modify the physical custody of the parties' minor child from joint physical custody to his sole physical custody. Mother

argues that the district court erred by (1) granting the custody-modification motion without conducting an evidentiary hearing and (2) not making adequate findings regarding child's best interests.¹ We conclude that mother did not waive an evidentiary hearing and that the district court therefore erred when it granted father's motion without it. Accordingly, we reverse and remand. Because we are remanding the matter for reconsideration of father's motion, we need not reach mother's second argument.

FACTS

Mother and father are the parents of one child, X.W.F., who was born in November 2013. Mother and father were never married.

In July 2014, while mother, father, and child were living together, father petitioned the district court to establish custody and parenting time. The district court awarded joint physical and joint legal custody to mother and father, with 50 percent of child's time with each parent. Soon after, the parties separated. Conflicts related to parenting time were frequent between 2015 and 2020, as reflected in both parties' motions to the district court alleging troubling behavior by the other parent, the parties' use of alternative dispute resolution, the appointment of a guardian ad litem, and the involvement of a parenting-time expeditor to resolve parenting-time disputes. In November 2021, father filed a motion to modify parenting time and physical custody of child. Father argued that awarding him sole physical custody would be in the best interests of child because child's "mental, emotional, and physical well-being [were] at risk." He cited the following:

¹ Father represents himself in this appeal.

[Mother] is refusing to co-parent, causing emotional trauma talking badly about father to [child]. Changing schools and telling [father] afterwards. Removing [father's] home [from] bus route w[ith]out telling [father]. Telling [child that mother is] going to get a gun because dad is a bad person. [Mother's] consistent unilateral decisions.

Mother filed a responsive motion to modify parenting time and physical custody, also seeking sole physical custody. Mother stated that father “does not believe that [child] needs therapy, has also denie[d] letting [child] have a case worker so he can get some services that he needs, does not let him be involved in extracurricular activities that he would like to do.” In response, father filed a supplemental affidavit with additional exhibits, contesting statements made in mother’s responsive motion and affidavit.

The district court issued a “Notice of Remote Zoom Hearing” scheduled for January 26, 2022. The parties, each representing themselves, appeared at the January 26 hearing. No testimony was taken at the hearing.

On April 14, the district court entered an order modifying custody. The order states that the matter came before the district court on January 26 on father’s motion to modify physical custody and parenting time. The order describes the basis for father’s motion and makes findings related to child’s mental health and best interests. It concludes that father’s motion, affidavit, and “properly admitted exhibits” establish the elements required for modification of custody in this case. The order further concludes that mother’s responsive motion and affidavit “failed to establish a prima facie case for modification.” After stating that “[t]he parties here waived an evidentiary hearing,” the order awards sole physical custody of child to father, subject to mother’s reasonable parenting time. The order also

outlines mother's parenting-time schedule, directs the parties to use the parenting-time expediter, and requires the parties to share information about child's therapy sessions.

Mother retained counsel and, pursuant to Minnesota Rule of General Practice 115.11, requested permission from the district court to move the district court for reconsideration and to require the district court to schedule the matter for an evidentiary hearing. The district court issued a notice of judicial determination denying mother's request for reconsideration and stating, "The parties agreed the January 26 hearing was the evidentiary hearing, and the court did receive evidence."

Mother appeals.

DECISION

Mother argues that the district court erred by modifying custody without conducting an evidentiary hearing. She denies having waived an evidentiary hearing and denies that an evidentiary hearing took place. Father asserts that mother waived the right to an evidentiary hearing and that, in any event, the district court treated the proceeding as an evidentiary hearing.

When considering a motion to modify custody, the district court employs a two-step process. First, the district court must determine whether the movant has alleged a prima facie case for modification by alleging facts that, if true, would provide sufficient grounds for modification. *Woolsey v. Woolsey*, 975 N.W.2d 502, 507 (Minn. 2022). "Specifically, the movant must make a prima facie showing that: (1) the circumstances of the child or the parties have changed; (2) modification would serve the child's best interests; and (3) one of the five specific additional grounds for modification as set out in [section] 518.18(d)(i)-

(v) exists.” *Id.* In this case, the specific additional ground asserted was that the child’s present environment endangers the child’s health and the benefit of a change of environment outweighs the harm likely to be caused by the change. *See* Minn. Stat. § 518.18(d)(iv) (2022). A district court has discretion in deciding whether a moving party has made a prima facie showing for modifying custody. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007).

Second, if the party moving for custody modification makes a prima facie showing, “the district court must hold an evidentiary hearing on the motion, during which the parties may present evidence on each factor.” *Woolsey*, 975 N.W.2d at 508 (citing *Crowley v. Meyer*, 897 N.W.2d 288, 293-94 (Minn. 2017)). Both the parent requesting modification of custody and the other parent are entitled to such an evidentiary hearing. *Lutzi v. Lutzi*, 485 N.W.2d 311, 316 (Minn. App. 1992). An evidentiary hearing in this context includes the opportunity to cross-examine witnesses. *Auge v. Auge*, 334 N.W.2d 393, 396 (Minn. 1983); *see also Hummel v. Hummel*, 304 N.W.2d 19, 20 (Minn. 1981).

A party may waive the right to an evidentiary hearing. *See McKinnon v. McKinnon*, 352 N.W.2d 530, 531 (Minn. App. 1984). “Waiver requires the intentional, or voluntary, relinquishment of a known right.” *Adam v. Adam*, 358 N.W.2d 487, 489 (Minn. App. 1984). Although waiver may be found by implication, it will not be inferred “simply from participation in the deficient procedure.” *Id.* When, as here, the facts are not in dispute, the question of waiver may be reviewed de novo, as a matter of law. *See In re Est. of Sangren*, 504 N.W.2d 786, 790 (Minn. App. 1993) (observing that a question of waiver of a known right is decided as a matter of law when the facts are not in dispute), *rev. denied* (Minn.

Oct. 28, 1993); *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 304 (Minn. 1990) (same).

Mother was entitled to an evidentiary hearing.

Although the district court never explicitly addressed in the January 26 hearing or elsewhere whether father had made a prima facie showing for custody modification, it implicitly concluded that he had done so in its order modifying custody. Mother does not challenge the conclusion that father alleged a prima facie case; she challenges only the failure to hold an evidentiary hearing. Based on the caselaw described above, when the district court determined that father had alleged a prima facie case, mother was clearly entitled to an evidentiary hearing unless she waived it. *See McKinnon*, 352 N.W.2d at 531.

An evidentiary hearing did not take place and was not waived by mother.

Father argues that “[t]he matter was treated as an evidentiary hearing” because the district court took evidence in the form of exhibits and heard from the parties, presumably at the January 26 hearing. He also contends that mother waived her right to an evidentiary hearing. We disagree with both assertions.

First, the January 26 hearing was not an evidentiary hearing. In its order modifying custody, the district court stated that the parties waived the evidentiary hearing. But in the district court’s subsequent notice of judicial determination, it stated that mother and father “agreed” that the January 26 proceeding “was the evidentiary hearing, and the court did receive evidence.” Although the district court did receive evidence in the form of affidavits

and exhibits,² it did not receive evidence in the form of testimony with the opportunity for cross-examination, a defining feature of the evidentiary hearing in the custody context. *See Hummel*, 304 N.W.2d at 20.

Second, the record does not clearly establish that mother waived her right to an evidentiary hearing or agreed that the January 26 hearing was such a hearing. Caselaw requires district courts to exercise caution when addressing the existence of a waiver of the right to an evidentiary hearing in custody disputes:

Where rights as vital as the right to a hearing in which a record can be made that may be reviewed on appeal and the right to cross-examine witnesses, upon whose statements a finding of fitness to have custody of minor children is to be based, are to be waived, it should be done by written stipulation; or it should clearly be made to appear from the record. Otherwise we cannot assume that all parties have agreed to it with a full understanding of its implications. In the absence of such showing, we must conclude that the right has not been waived.

Thompson v. Thompson, 55 N.W.2d 329, 333 (Minn. 1952).

Both parties represented themselves at the January 26 hearing. The district court engaged in the following exchange with father:

THE COURT: [Father], can you clarify for me whether you are asking the Court to make a decision based on the pleadings, or if you were asking for an evidentiary hearing? Otherwise, people look at that evidentiary hearing as a trial, basically, where there is testimony and cross-examination.

[FATHER]: I am asking the Court to make a decision based off the exhibits and affidavits currently submitted without an evidentiary hearing.

² It is clear from the record that the district court considered father's affidavits and 16 exhibits, but it is unclear what evidence from mother the district court ultimately considered.

THE COURT: All right. Very well. And then [father] is there any argument that you want to make concerning the law or do you wish to rest on your pleadings.

[FATHER]: I believe that my pleadings are full and correct, so I don't think I will have anything to add to that. I do have one question: Were any exhibits submitted by the other party?

At this point, the district court turned to the question of mother's exhibits and whether their submission was timely. After some discussion on that topic, the district court engaged in the following exchange with mother:

THE COURT: Okay, so I'm just asking you about the timeliness piece and you have addressed that.

[MOTHER]: Okay.

THE COURT: Now, if you wish to make a larger legal argument about his motion and your motion you may do so. You don't have to repeat anything that you have in your pleadings because I already reviewed those. So is there anything additional you wish to argue [mother]?

[MOTHER]: No. Like I said, I just thought I was doing everything I was supposed to be doing without a lawyer and trying to do my best on this.

THE COURT: All right. I will take this matter under advisement and issue a written decision.

Although, in context, the district court understood mother to have been waiving her right to an evidentiary hearing, with the benefit of the transcript on appeal, we conclude that the record does not clearly establish a knowing waiver. *See id.* Father was informed what an evidentiary hearing meant, and he explicitly waived his right to it. He was then asked if he wished to make any arguments "concerning the law," and he declined. Mother,

in contrast, was not asked whether she waived an evidentiary hearing. She was questioned about the timeliness of her exhibits and was then asked whether she wished to “make a larger legal argument” about the parties’ motions. Like father, mother declined to make a legal argument, but, unlike father, she did not explicitly waive the right to an evidentiary hearing. While this record might allow an inference that mother implicitly waived her right to an evidentiary hearing, the mere possibility of that inference is insufficient to allow us to affirm the district court’s determination that a waiver actually occurred. The record does not clearly establish that mother both understood and waived her right to an evidentiary hearing. Therefore, the record does not satisfy *Thompson*. That mother did not object to the district court deciding the motions based on affidavits and exhibits does not change this conclusion because participation in a deficient proceeding is not enough to support a waiver. *See Adam*, 358 N.W.2d at 489 (holding that, though “neither party objected to submission of the issue on the basis of opposing affidavits and arguments of counsel, this did not constitute a waiver of the right to an evidentiary hearing” in a change-of-custody dispute).

While father alleged a *prima facie* case to modify custody, mother did not waive her right to an evidentiary hearing on father’s motion. Therefore, we reverse and remand for the district court either to receive explicit waiver from both parties or to hold an evidentiary hearing.³ The district court, in its discretion, may reopen the record. To minimize the

³ Although we do not reach mother’s argument that the district court abused its discretion by modifying custody of child without making adequate findings related to child’s best interests, we observe that a district court addressing a motion to modify custody “shall not modify a prior custody order . . . unless it finds,” among other things, “that the modification

disruptive impact of more proceedings on child, we direct that the physical custody of child remain with father until the custody question is resolved. *See Hummel*, 304 N.W.2d at 21.

Reversed and remanded.

is necessary to serve the best interests of the child.” Minn. Stat. § 518.18(d) (2022); *see* Minn. Stat. § 518.17, subd. 1(a)(1)-(12) (2022) (listing best-interests factors a district court “must . . . evaluate” when “determining issues of custody and parenting time”). Therefore, on remand, after either obtaining an explicit waiver or holding an evidentiary hearing, the district court should make sufficient findings of fact addressing child’s best interests both to justify whatever result it may reach on the remanded motion to modify custody and to allow appellate review of that result. *See Rosenfeld v. Rosenfeld*, 249 N.W.2d 168, 171 (Minn. 1976) (noting, in the context of an initial custody award, that findings of fact should show that the district court considered the relevant factors, allow appellate review of its decision, and assure the parties that the district court fairly reached its decision); *see Hesse v. Hesse*, 778 N.W.2d 98, 104 (Minn. App. 2009) (citing this aspect of *Rosenfeld* in a child-support dispute).

WORKE, Judge (dissenting)

I respectfully dissent. As the majority correctly states, mother was entitled to an evidentiary hearing unless she *waived* it. *See McKinnon v. McKinnon*, 352 N.W.2d 530, 531 (Minn. App. 1984). I conclude that this record unambiguously shows that mother implicitly waived her right to an evidentiary hearing. Remand to the district court for an evidentiary hearing is not necessary based on the facts presented.

Crucial to identifying whether mother implicitly waived her right to an evidentiary hearing is an understanding of the relevant court history of the parties. Beginning in 2014, the parties, as pro se litigants, agreed to joint legal and joint physical custody of the child. Thereafter on nearly a yearly basis, the parties have routinely and continuously resorted to court resolution of their ongoing child-related disputes. Since the initial establishment of custody, the parties have been in court several times—repeatedly seeking the same relief—a change in custody. In support of their motions, the parties have routinely submitted documents and exhibits, and the district court has repeatedly resolved the parties’ various disputes based on those documents and exhibits without an evidentiary hearing.

In November 2021, father sought sole physical custody. In January 2022, mother responded with her own sole-physical-custody request. A hearing date was scheduled and then rescheduled due to the COVID-19 pandemic. The district court eventually held a remote hearing on January 26, 2022. At the hearing, the following colloquy took place:

THE COURT: All right. Very good. So this is a matter where [father] had filed a [m]otion for [c]hange of [c]ustody and some other relief. Mother did file a counter motion also for sole custody and to have the [c]ourt deny the request made by . . .

[f]ather. I have reviewed the pleadings and the exhibits that were submitted to the [c]ourt.

[Father], can you clarify for me whether you are asking the [c]ourt to make a decision based on the pleadings, or if you were asking for an evidentiary hearing? Otherwise, people look at that evidentiary hearing as a trial, basically, where there is testimony and cross-examination.

FATHER: I am asking the [c]ourt to make a decision based off the exhibits and affidavits currently submitted without an evidentiary hearing.

. . . .

THE COURT: Now, [mother] if you wish to make a larger legal argument about [father's] motion and your motion you may do so. You don't have to repeat anything that you have in your pleadings because I already reviewed those. So is there anything additional you wish to argue, [mother]?

MOTHER: No. Like I said, I just thought I was doing everything I was supposed to be doing without a lawyer and trying to do my best on this.

THE COURT: All right. I will take the matter under advisement and issue a written decision.

Although “[w]aiver requires the intentional, or voluntary, relinquishment of a known right,” it “may be found by implication.” *Adam v. Adam*, 358 N.W.2d 487, 489 (Minn. App. 1984). The majority relies on *Thompson v. Thompson*, 55 N.W.2d 329 (Minn. 1952), in stating that we must be cautious when reviewing waiver in custody disputes. I do not disagree. But *Thompson* states that waiver of an evidentiary hearing “should clearly be made to appear from the record” in order for the reviewing court to “assume that all parties have agreed to it with a full understanding of its implications.” 55 N.W.2d at 333.

Here, given the parties' multiple prior appearances in district court on their ongoing child-related disputes, I cannot say that mother did not have a "full understanding of its implications." Mother has been in court opposing father many times. She is familiar with the process. She appropriately responded to the district court questioning. The district court told mother that she could "make a larger legal argument" beyond that in her pleadings, and asked mother: "[I]s there anything additional you wish to argue?" Mother replied: "No." Immediately after, the district court stated that it would "take the matter under advisement." Mother did not request anything further of the court until an order deciding the outcome was issued on April 14, 2022.

In my opinion, the district court correctly construed mother's "No" in response to whether she had "anything additional . . . to argue" as an implicit waiver to an evidentiary hearing, especially when this exchange occurred shortly after father stated that he wanted to proceed without an evidentiary hearing. The district court followed the course of the dialogue and employed common sense in concluding that the matters had been submitted on the pleadings and exhibits. Considering the parties' history and the district court's familiarity with the matter, and mother's response to the district court within the entire context, I would affirm the decision of the district court based on the record.