

*This opinion is nonprecedential except as provided by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
A22-1513**

In re the Marriage of:
Wendy Sue Walker, petitioner,
Respondent,

vs.

Neil Julian Elavsky,
Appellant.

**Filed September 25, 2023
Affirmed
Wheelock, Judge**

Hennepin County District Court
File No. 27-FA-10-2967

Wendy Sue Walker, Minneapolis, Minnesota (pro se respondent)

Emmalie Brudzinski, RWI Law, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Cochran, Judge; and Wheelock,
Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges the district court's order denying his motion for reunification therapy and reinstatement of parenting time with his child, arguing that the district court abused its discretion by denying the motion without an evidentiary hearing. We affirm.

FACTS

Appellant-father Neil Julian Elavsky and respondent-mother Wendy Sue Walker divorced in 2010. They agreed that mother would have sole legal and physical custody of their child, who was four years old at the time, subject to father's parenting time two evenings a week and every other weekend. Since then, the parties have engaged in extensive litigation related to parenting time.

In 2014, mother obtained an order for protection (OFP) against father on behalf of herself and the child after father threatened mother with his fist, slapped the child on the bottom and face, and pulled the child's hair. The OFP limited father's access to the child to supervised parenting time and required father to participate in parenting education. Father subsequently filed various motions seeking unsupervised parenting time, reduced supervision, and compensatory parenting time, all of which the district court denied.

In 2016, after father violated the OFP numerous times and failed to participate in the required parenting education, the district court extended the OFP for 50 years and suspended his parenting time. The following year, the district court ordered mother to enroll the child in individual therapy "to prepare for family therapy" with father; ordered father to complete a domestic-abuse program, a chemical-health assessment, and a parenting program; and provided that father may move to modify the OFP and reestablish contact with the child if he completed those requirements and provided a supportive letter from the parenting-program director.

In 2018, father demonstrated progress in the required programming, moved to hold mother in contempt for not enrolling the child in therapy, and asked the district court to

restore his parenting time. The district court declined to hold mother in contempt or restore parenting time but ordered Hennepin County Family Court Services to conduct a Brief Focused Assessment (BFA) “to determine whether reunification is appropriate.” The BFA evaluator opined that reunification was not in the child’s best interests and recommended against reunification until the child’s therapist determines that the child is ready. The district court recognized that father did “what was required of him in order to get on track to see the child again” but found reunification premature because the child was not ready. The district court explained that the child was afraid of father and experienced significant anxiety at the prospect of being around him because of father’s past behavior. The district court therefore ordered that father’s parenting time shall continue to be suspended and that the child’s therapist “shall determine when the child is ready to participate in reunification or restorative therapy.” Father again sought reunification in late 2019, and the district court again denied the request.

In June 2021, father filed another motion seeking reunification therapy and parenting time—the motion at issue in this appeal. Father did not request an evidentiary hearing in his motion or its supporting affidavit or by separate motion. The district court sought input from the child’s therapist so it could “knowledgeably weigh in on the reunification process and the child’s best interests.” After receiving no response from the therapist, the district court ordered an updated BFA; neither party objected.

The BFA evaluator met with the parties and the child, who was then nearly 16 years old, and reviewed the child’s mental-health records, including the child’s diagnosis of

posttraumatic stress disorder (PTSD).¹ In an April 2022 report, the BFA evaluator expressed concern that father did not show insight into the child’s “emotional wounds” and his role in causing them. She also noted that the child expressed a “reasonable, credible, and valid preference” not to have contact with father or work toward renewed contact and was so upset after talking to the evaluator about father that they² missed school the following day. The evaluator opined that “the potential harm of renewing contact between [father and the child] outweighs any perceived benefit.”

Father requested the release of the file on which the evaluator relied in preparing the BFA, acknowledging that it is not part of the record in this matter and includes documents generated after he filed his motion for reunification therapy and parenting time. When the district court asked why he wanted the file, he stated that he was not requesting a “full evidentiary hearing” but a “forum” to respond to the BFA. The district court granted the request for the file but cautioned that it did so to facilitate father’s review of the BFA, not for him to supplement the record, and it scheduled a hearing to address the BFA for June 1.

On May 24, father emailed the district court to request a continuance, stating that the BFA evaluator lied and that he was between attorneys. The district court denied the continuance, noting that the email was ex parte and the request untimely.

¹ The evaluator also reviewed father’s mental-health records and discussed concerns about his extensive psychiatric history and medication noncompliance. But the district court did not identify father’s mental health as a reason for denying his motion.

² The child identifies using they/them pronouns. We also refer to the child using they/them pronouns in this opinion.

At the June 1 hearing, mother requested that the district court follow the BFA recommendation and the district court asked father what he wanted the court to do. Father replied that the BFA should be disregarded because it contains “perjury,” the head of the Hennepin County Medical Center has a history of “human rights violations,” and the BFA misrepresents his mental-health history. He also said it is unreasonable for mother to choose the child’s healthcare providers, expressed doubt about the child’s PTSD diagnosis, and called the child’s mental-health treatment “mental rape” that has made the child a “martyr.” He disputed the validity of the OFP. He also asserted that reunification would help ensure that the child has support in college. And he reiterated his request for reunification therapy. The district court said it would issue a written order within 90 days.

Before the court issued its order, father sent three more ex parte emails to the district court restating his concerns about the BFA.

On August 26, the district court denied father’s motion, finding that the child continues to struggle with mental-health issues related to father’s treatment of them and opposes reunification and, therefore, that reunification therapy and parenting time with father would not serve the child’s best interests. The court also reiterated its admonition against ex parte communications.

Father appeals.³

³ Mother did not file a brief in this appeal, but we consider the appeal on the merits under Minn. R. Civ. App. P. 142.03.

DECISION

A district court “shall” modify parenting time if the modification will serve the child’s best interests and will not change the child’s primary residence. Minn. Stat. § 518.175, subd. 5(b) (2022). A district court has broad discretion in addressing matters of parenting time, including whether to order reunification therapy to assist in parenting time. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017). On appeal, we will not disturb a parenting-time decision “unless the district court abused its discretion by misapplying the law or by relying on findings of fact that are not supported by the record.” *Suleski v. Rupe*, 855 N.W.2d 330, 334 (Minn. App. 2014).

Father argues that the district court abused its discretion by denying his motion for reunification therapy and parenting time without an evidentiary hearing. He contends that he is entitled to an evidentiary hearing because (1) *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981), requires one; (2) the district court could not rely on the BFA without an evidentiary hearing to allow father to cross-examine the evaluator and the witnesses she interviewed in preparing the BFA; and (3) an evidentiary hearing is required for a district court to restrict parenting time. Father’s arguments are unavailing in all respects.

As a threshold matter, the Minnesota General Rules of Practice presume that family court motions (except contempt motions) will be submitted without an evidentiary hearing. Minn. R. Gen. P. 303.03(d)(1). If a party wants an evidentiary hearing, they must request it by motion when filing the initial motion. *Id.* (d)(2). A district court has discretion in

deciding whether to hold an evidentiary hearing. *Le v. Holter*, 838 N.W.2d 797, 800 (Minn. App. 2013), *rev. denied* (Minn. Dec. 31, 2013).

Father never requested an evidentiary hearing, either by motion as mandated by rule 303.03 or at any other time. And none of the arguments he advances on appeal persuade us that the district court abused its discretion by not holding an evidentiary hearing absent such a request.⁴

First, *Nice-Peterson* does not apply here. That case requires the district court to conduct an evidentiary hearing if a party moves to modify custody and the court, assuming the movant's allegations are true, determines that the movant established a prima facie case as to the statutory requirements for such a modification. *Nice-Peterson*, 310 N.W.2d at 472. This court has also applied the *Nice-Peterson* standard to require an evidentiary hearing on a motion to restrict parenting time. *Boland v. Murtha*, 800 N.W.2d 179, 182 (Minn. App. 2011). But father did not seek to modify custody or restrict parenting time. And he identifies no authority applying the *Nice-Peterson* standard, rather than the presumption against an evidentiary hearing in rule 303.03, to a motion for reunification therapy or to increase or grant parenting time. *Cf. Le*, 838 N.W.2d at 801-02 (holding *Nice-Peterson* standard inapplicable to motion to remove child from the state).

⁴ Indeed, it is not even clear that father's argument regarding an evidentiary hearing is properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts do not address questions not previously presented to and considered by the district court). In the interests of completeness, however, we will briefly address the point.

Second, father is not entitled to an evidentiary hearing to confront the BFA evaluator or the people she interviewed. He did not request an evidentiary hearing when the district court ordered the BFA or when the BFA was filed. He identifies no authority requiring a district court to hold an evidentiary hearing before relying on an advisory report to inform its parenting-time decisions.⁵ And to the extent he requested a “forum” to respond to the BFA, he received one: he had ample opportunity at the June 1 hearing to voice his concerns about the evaluator’s credibility, the reliability of the information on which the evaluation was based, and his doubts about the child’s diagnosis and care. Notably, though, he did not dispute the BFA evaluator’s report as to the child’s needs and preferences and does not now challenge the district court’s central finding in denying his motion—that the child continues to struggle with mental-health issues related to father’s treatment of them and opposes reunification.

Third, the district court did not restrict or otherwise change parenting time by denying father’s motion. A “restriction” is a “substantial reduction” of parenting time, *Suleski*, 855 N.W.2d at 337, and is permissible only in cases of endangerment or chronic and unreasonable noncompliance with court-ordered parenting time, Minn. Stat. § 518.175, subd. 5(c) (2022). As noted above, a court may not restrict a party’s parenting time without an evidentiary hearing. *Boland*, 800 N.W.2d at 182. But father’s parenting

⁵ Father cites *Gumphrey v. Gumphrey*, 115 N.W.2d 353, 357 (Minn. 1962), and *Stanford v. Stanford*, 123 N.W.2d 187, 191-92 (Minn. 1963), which call for a district court to conduct an evidentiary hearing to permit parties to challenge advisory reports before relying on those reports in making *custody* decisions. As with *Nice-Peterson*, those cases do not apply where, as here, the only decision at issue is a parenting-time decision.

time has been suspended by court order since 2016. By denying his motion, the district court merely preserved the status quo; it did not restrict or otherwise change father's parenting time.

Moreover, our careful review of the record confirms that the district court did not abuse its discretion by denying father's motion. The district court identified the correct standard applicable to father's parenting-time request—the best interests of the child. Minn. Stat. § 518.175, subd. 5(b). And it made factual findings pertinent to that standard. It found that father persists in ignoring the child's PTSD diagnosis, characterizes the child's mental-health care as “mentally raping” them, refuses to accept years of neutral reports (including the BFA) detailing why the child does not want to resume a relationship with him, and repeatedly misgenders the child. The district court summarized: “Given the updated BFA, and the totality of the circumstances and this family's history in Family Court, the Court finds that it would not be in the child's best interests to be required to participate in reunification therapy.” Based on these findings, the district court concluded that “[p]arenting time is not currently an appropriate goal between [father] and the child.” Because father identifies no error in any of these findings and the record amply supports them, the district court did not abuse its discretion by denying father's motion.

Affirmed.