

*This opinion is nonprecedential except as provided by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
A22-1705**

In re the Marriage of:
Jacquelyn Ann Costabilo, petitioner,
Respondent,

vs.

Frank Pat Costabilo Jr.,
Appellant.

**Filed September 11, 2023
Affirmed in part, reversed in part, and remanded
Reyes, Judge**

Washington County District Court
File No. 82-FA-13-6193

Jacquelyn Ann Hetchler, River Falls, Wisconsin (self-represented respondent)

Elizabeth M. Cadem, Erik F. Hansen, Patrick C. Burns, Burns & Hansen, P.A., Wayzata,
Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and John Smith,
Judge.*

NONPRECEDENTIAL OPINION

REYES, Judge

In this parenting-dispute case, appellant-father argues that the district court
(1) abused its discretion by denying his motion for reunification therapy; (2) improperly

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

modified his legal-custody rights; and (3) abused its discretion by denying his motion for contact with and information about the children. We affirm in part, reverse in part, and remand.¹

FACTS

Appellant Frank Pat Costabilo, Jr., (father) and respondent Jacquelyn Ann Hetchler (mother) have two common children: E.D.C. (daughter), born in 2005, currently age 18, and V.F.C. (son), born in 2007, currently age 15. By a judgment and decree dated August 18, 2015, the parties dissolved their marriage, and the district court awarded the parties joint legal and joint physical custody with an equal parenting-time schedule.

By the time of the dissolution, mother had moved to River Falls, Wisconsin, with both children, while father resided in Woodbury, Minnesota. The district court's decree ordered that mother move back to a location within five miles of Woodbury, Minnesota, or to zip codes 55082 or 55003 before the beginning of the 2016 school year. However, mother did not move back and continued to reside in River Falls. The parties' long history of acrimonious litigation ensued. In December 2016, the district court held mother in civil contempt and ordered her to pay a portion of father's attorney fees.

In May 2018, the district court denied mother's ex parte motion to suspend father's parenting time with daughter and scheduled a motion hearing regarding modification of parenting time and related issues. Father moved to (1) remove the children from mother

¹ Because respondent-mother did not file a brief, we decide the appeal on the merits of the case. *See* Minn. R. Civ. App. P. 142.03 (providing that when a respondent does not serve or file brief on appeal, the "case shall be determined on the merits").

and her husband T.H.'s home; (2) grant him compensatory parenting time; (3) modify custody of the children to award him sole physical custody; and (4) hold mother in constructive civil contempt of court for "flatly refus[ing] to honor [the divorce decree]" and denying his parenting time. In June 2018, mother filed a motion to modify parenting time and physical custody and for an order for the children to attend schools in River Falls, Wisconsin. The district court ordered the parties to attend family therapy and denied the parties' motions in July 2018 following a hearing and appointed A.H. as an ongoing parenting-time expeditor to determine any valid reasons supporting modification of parenting time or custody. A month later, the district court amended its therapy order to require the parties to attend an evaluation with Dr. Jane McNaught.

In November 2018, A.H. filed a report with the district court. A.H.'s report found that, although the parties were awarded equal parenting time, "both children have expressed their desire to stay with [mother] full time" and "do not want [father] at any of their sporting events, appointments, religion classes, afterschool activities or school in general." Despite the court-ordered parenting schedule, "both children refused to go with [father] and refused to spend any more time with [him]. The police were called and showed up at school when [daughter] refused to leave the school with [father]. The police did not enforce the court-ordered parenting time because [daughter] claimed to be afraid." A.H. recommended that father (1) should not attend children's extracurricular practices, meets, events, or tournaments unless invited by the children and (2) should not show up at the school or at the school grounds, except for parent events and teacher conferences, unless invited by the children.

In March 2019, father filed a new motion for parenting-time assistance, seeking an order (1) to address mother's "continued alienation and denial of [his] parenting time" and (2) for mother to provide information of children's medical insurance, health, and extracurricular activities. Mother in turn moved to modify parenting time and to allow the children to choose their own schools.

In June 2019, the district court ordered that (1) father shall have "supervised parenting time at FamilyWise parenting time center for one hour each week with each of the children until further recommendation of the children's therapists or until the children confirm that they are ready for unsupervised parenting time with father;" (2) the children may, at their initiation, have nightly telephone contact with father at 9:00 p.m.; (3) the parties' daughter, then age 14, was of sufficient age to choose the school she wished to attend; and (4) the parties' son, then age 12, was too young to be given the responsibility of school choice.

During supervised parenting time with father at FamilyWise, the children "exhibited physical and verbal signs of anxiety and were unable to enter or stay in the room with [father]." Father suggested that "[mother] leave the center and force the children to remain without option to leave." FamilyWise declined and closed his supervised parenting-time case on August 23, 2019.

In September 2019, father filed motions asking the district court to hold mother in constructive civil contempt of court and for parenting-time assistance, alleging that mother failed to comply with the supervised parenting-time order by instructing the children not to cooperate. Father also requested reunification therapy with a certain doctor.

In a February 28, 2020 order, the district court found no support for father's allegation that mother interfered with father's supervised parenting time and denied father's motion for contempt. At the time of this order, father was subject to a domestic abuse no contact order (DANCO) in another case, which allowed nightly calls with son provided son initiated the phone call. The district court therefore denied father's motion for reunification therapy as moot.

In January 2021, father filed an ex parte motion and a motion for contempt, asking, among other relief, that mother be found in civil contempt of court for failure to abide by the custody order, an order for protection based on allegations of endangerment and abuse by mother and T.H., and modification of the children's custody. The district court held an evidentiary hearing on January 22, 2021.

A court-appointed guardian ad litem (GAL) filed a report and testified at the hearing. The GAL interviewed the children and concluded that daughter was "very articulate in her statements" and "extremely uncomfortable with her [f]ather and how his actions impact her life." Daughter reported having a very good relationship with T.H. and denied the allegations of abuse by T.H. Daughter also expressed that she felt embarrassed for having to undergo questioning by law enforcement regarding the alleged abuse. As for son, the GAL described him as "an intelligent, outgoing child who wishes to attend River Falls schools, along with his sister." Son believed that father was "overly controlling" and often interfering in his activities. Son was upset that, despite the then-in-effect DANCO, father continued to make frequent unauthorized phone calls to him. The GAL testified that

neither of the children appeared to have been coached regarding their statements. The district court found the GAL's report and testimony credible.

The district court also received testimony from an investigator with the River Falls Police Department. The investigator testified that father had been contacting the department for several years regarding issues between the parties and at least monthly about allegations involving T.H. and daughter. In January 2021, the investigator interviewed daughter and found no merit to father's allegation of abuse, and the investigator closed the case.

A manager of the child-protection unit in Ellsworth, Wisconsin, testified that she had received six reports of alleged abuse from father between January 2020 and early 2021, but that none of the reports merited investigation. The district court found the manager's testimony to be credible. Finally, mother's sister also testified that she believed that both children were "100% safe" with mother and T.H. In an April 29, 2021 order, the district court denied father's motions and ordered that phone contact between the children and father "be at the discretion of the children."

In June 2022, father's DANCO from the other case was dismissed. That month, mother obtained a harassment restraining order (HRO) against father on behalf of the children. The district court dismissed the HRO in September 2022.

In July 2022, father moved for (1) reunification therapy; (2) facilitation of nightly calls with the children; (3) contact by mail; (4) disclosure of mother and the children's address; (5) an order directing mother to abide by the custody order; (6) access to medical and educational records; and (7) permission to attend the children's school and

extracurricular activities. After a hearing on father's motions, the district court denied each of father's requests in an October 5, 2022 order. This appeal follows.

DECISION

I. The district court did not abuse its discretion by denying father's motion for reunification therapy.

Father claims that the district court abused its discretion by denying his motion for reunification therapy and by doing so without a hearing to make findings on the best-interest factors under Minn. Stat. § 518.17, subd. 1(a) (2022). We are not persuaded.

A district court has broad discretion in deciding parenting-time questions and will not be reversed absent an abuse of that discretion. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017). A district court must modify parenting time if it would serve a child's best interests. Minn. Stat. § 518.175, subd. 5 (2022). It must also consider "a child's changing developmental needs" when deciding a motion to modify parenting time. Minn. Stat. § 518.175, subd. 5(b).

A district court may not *restrict* parenting time without first finding either (1) "parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development" or (2) "the parent has chronically and unreasonably failed to comply with court-ordered parenting time." Minn. Stat. § 518.175, subd. 5(c). "When determining whether a reduction constitutes a restriction, the court should consider the reasons for the change as well as the amount of the reduction." *Anderson v. Archer*, 510 N.W.2d 1, 4 (Minn. App. 1993) (citation omitted). "[A] reduction of total visitation time [] is not necessarily a restriction of visitation," but a restriction may occur when the

court makes a “substantial alteration of visitation rights.” *Id.* (quotations and citations omitted).

Here, the district court’s October 5, 2022 denial of father’s reunification-therapy request does not constitute a restriction or modification of his parenting time because it has not changed or reduced father’s parenting time since the April 29, 2021 order, which denied father’s request for reunification therapy and provided that all phone contact with the children shall be at the children’s discretion. As a result, the district court did not abuse its discretion by not holding another evidentiary hearing. *See* Minn. Stat. § 518.175, subd. 5(b) (providing that district court shall modify parenting time only when it serves child’s best interests).

Father relies on *Sheeley v. Sheeley*, in which this court concluded that the district court abused its discretion by denying a father’s motion for reunification therapy without an evidentiary hearing or making a finding under Minn. Stat. § 518.175, subd. 5(c). A16-1809, 2017 WL 3122339 (Minn. App. July 24, 2017). The father in *Sheeley* had not had parenting time since the child was four years old, and the child refused to attend scheduled parenting time. *Id.* at *3. Because the father in *Sheeley* had “no practical way to exercise his parenting time,” we concluded that the district court’s “denial of father’s motion for reunification therapy restricts father’s court-ordered parenting time with [child] in such a way that is tantamount to the elimination of father’s parenting time.” *Id.*

Sheeley is a nonprecedential opinion that is not binding authority. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c). In addition, *Sheeley* is distinguishable. Unlike the father in *Sheeley*, father here has other ways to exercise his parenting time with children, such as

phone contact at the children's discretion. The children in this case are also older than the four-year-old child in *Sheeley*. The district court found that both daughter and son "are now of sufficient age and maturity to have significant input into their environment and their relationship with [father]."

We conclude that the district court did not abuse its discretion by denying father's motion for reunification therapy and by not holding an evidentiary hearing.

II. The district court did not abuse its discretion by failing to enforce father's legal-custody rights.

Father asserts that the district court abused its discretion by failing to enforce his legal-custody rights and "essentially strip[ped] him of those rights, modifying legal custody." We are not convinced.

Father's July 12, 2022 motion requested the district court to order mother to comply with prior court orders. Because the prior custody order was still in effect, the district court denied the motion as duplicative and father's legal-custody rights remained in effect. We discern no abuse of discretion by the district court.

Moreover, father argues, for the first time on appeal, that the district court's alleged failure to enforce the prior custody order amounted to a "de facto modification" of legal custody. Because father did not present this argument to the district court, this issue is not properly before us, and we decline to address it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented [to] and considered by the trial court in deciding the matter before it.")

III. The district court abused its discretion by denying father's motion to receive information about the children.

Father argues that the district court abused its discretion by denying his motions for contact with and information about the children. We agree as to the information access.

A. Mail contact with children

Following the dismissal of the DANCO against father involving son, father requested to have mail contact with the children in addition to the telephone contacts at the children's discretion as provided in previous orders. The district court denied the motion without explanation.

As discussed in section I, father continues to have the right to have phone contact with the children at the children's discretion. Father does not argue that having mail contact with the children will serve the children's best interests. *See* Minn. Stat. § 518.175, subd. 5(b) ("If modification would serve the best interests of the child, the court shall modify the [parenting plan].") We conclude that the district court did not abuse its broad discretion by denying father's request to have mail contact with the children.

B. Access to information about the children

Father and mother have joint legal custody of children. As a result, both are entitled to "equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(b) (2022).

Father alleged that mother has denied him access to the children's medical and education records and that mother and the children changed their address without notifying

him. The district court did not make fact findings on these allegations. In response to father's motion to access various records related to the children, the district court denied it as redundant because father has joint legal custody of the children under the divorce decree and subsequent orders.

We reverse and remand to the district court to make the relevant findings on whether mother has obstructed father's access to the children's records and to fashion any appropriate remedy. In doing so, the district court has the discretion to reopen the record. Nothing in this opinion shall be construed as an expression of this court's opinion regarding whether the enforcement, in Wisconsin, of father's rights under custody rulings issued by a Minnesota court requires a proceeding in Wisconsin under Wisconsin's version of the Uniform Child Custody Jurisdiction and Enforcement Act. *See Wis. Stat. §§ 822.01-.47* (2022).

Affirmed in part, reversed in part, and remanded.