

*This opinion is nonprecedential except as provided by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**

A23-1487

A23-1970

In re the Marriage of:

Beth Ostergaard Stillwell, petitioner,
Respondent,

vs.

Harry Alan Stillwell,
Appellant.

Filed August 19, 2024

Affirmed

Johnson, Judge

Hennepin County District Court
File No. 27-FA-12-8135

Victoria Brenner, Laura E. Kvasnicka, Taft Stettinius & Hollister, L.L.P., Minneapolis,
Minnesota (for respondent)

Matthew J. Gilbert, Patrick A. McDonald, Gilbert Alden Barbosa, P.L.L.C., Burnsville,
Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Halbrooks,
Judge.*

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

NONPRECEDENTIAL OPINION

JOHNSON, Judge

This appeal concerns the temporary suspension of a father's parenting time, the denial of his motion to modify custody, and an award of conduct-based attorney fees. We conclude that the district court did not err in any of the challenged rulings. Therefore, we affirm.

FACTS

Harry Alan Stillwell and Beth Ostergaard Stillwell were married in 2004. They have two joint minor children, a daughter and a son. Beth petitioned for dissolution of the marriage approximately 12 years ago, in October 2012. Since then, the parties have had numerous high-conflict disputes and have engaged in nearly continuous litigation.

In September 2014, the parties resolved the issues of custody and parenting time by a stipulation. The parties agreed they would share joint legal custody for religious and educational decisions, that Beth would have sole legal custody for the purposes of medical and dental decisions, and that no physical-custody designation would be made. The parties also agreed to a parenting-time schedule by which Harry would have the children for five overnights each two-week period, and they agreed to the appointment of a parenting-time consultant to resolve parenting-time disputes. The district court incorporated the parties' stipulation into an amended dissolution judgment and decree, which was entered in November 2014.

Between 2014 and 2017, the district court appointed two parenting-time consultants, both of whom eventually resigned. In March 2019, the district court appointed a special

master to provide a better mechanism for addressing and resolving the parties' disputes. *See* Minn. R. Civ. P. 53. The district court authorized the special master to, among other things, "expand or restrict either party's parenting time or to order supervised parenting time" and to "make recommendations . . . regarding a change of legal or physical custody."

In February 2020, the parties' 12-year-old daughter refused to see her father or to exchange more than a limited number of text messages with him. The special master consulted with the daughter's healthcare providers and issued an order (the sixth special-master order) stating that it was "not advisable" for the daughter to have unsupervised contact with Harry. The special master ordered Harry to not contact his daughter "directly or indirectly" and to follow recommendations made by the daughter's healthcare providers to facilitate contact that was "appropriate, constructive, and consistent with the goals of the family repair work." In August 2020, the special master filed a status report in which she documented the daughter's healthcare providers' concerns about the daughter's condition and the possibility of her having contact with her father.

In early April 2021, the daughter made a disclosure concerning an incident involving her father, which led to child-protection and criminal investigations. In mid-April 2021, the special master issued an order (the sixteenth special-master order) suspending Harry's parenting time with both children on a "temporary basis" and scheduling a review hearing for later that month. In late April 2021, the special master issued an order (the seventeenth special-master order) discussing the concerns of the parties' son's healthcare providers and child-protection workers that the son "may be subjected to extreme pressure or exposed to significant parental conflict if he is required to

transition between households prior to the resolution of” the child-protection and criminal investigations. The special master limited Harry’s parenting time with his son to two two-hour supervised sessions per week. After receiving the order, Harry sent the special master an e-mail message that began, “Screw this. I am not having ‘supervised’ visits with [my son], ever.” In early May 2021, the special master issued an order (the eighteenth special-master order) that extended the limitations on Harry’s parenting time until the criminal and child-protection investigations were completed and until Harry and the son had engaged in a family therapy session.

In mid-May, the son’s healthcare providers expressed concerns about his being returned to Harry’s care based on a belief that Harry was “subjecting [the son] to emotional pressure to adopt [Harry’s] perspective regarding the current situation” by “sharing negative or other inappropriate information” and that Harry had demonstrated an inability to regulate his emotions. Based on this information, the special master issued an order in late May (the nineteenth special-master order) that extended the limitations on Harry’s parenting time with the son until Harry completed three additional family therapy sessions and three dialectical-behavioral-therapy (DBT) sessions.

In June 2021, the state charged Harry with two crimes based on his daughter’s prior disclosure. One month later, the district court in Harry’s criminal case issued a domestic-abuse no-contact order (DANCO) that prohibited Harry from contacting either child. The conditions of his pre-trial release also prohibited him from having any contact with minors.

In December 2021, while Harry was prohibited from contacting his children, he moved to modify custody, seeking temporary sole legal and temporary sole physical

custody of both children. In a supporting affidavit, Harry asserted that Beth had “unilaterally removed” the children from school “for significant periods of time” and that Beth was alienating the children from him based on their daughter’s allegations.

In January 2022, the district court in Harry’s criminal case modified the conditions of pre-trial release to allow Harry to have contact with the parties’ son, to the extent allowed by the orders in this case. In July 2022, the special master filed an order (the twenty-first special-master order) providing that Harry’s parenting time would remain suspended until he completed a psychological evaluation and a four-week DBT program.

In October 2022, the district court conducted a hearing on the special master’s July 2022 order and on Harry’s motion to modify custody. In December 2022, the state dismissed the criminal charges against Harry based on concerns that it would not be in the daughter’s best interest to testify. In January 2023, the district court issued an order affirming the special master’s July 2022 order, denying Harry’s motion to modify custody, and awarding Beth conduct-based attorney fees. Harry filed a motion for amended findings, which the district court denied. Harry appeals.

DECISION

I. Parenting Time

Harry first argues that the district court erred by suspending his parenting time without making a finding that his exercise of parenting time is likely to endanger the children.

Harry bases his argument on a statute that provides:

[T]he court may not restrict parenting time unless it finds that:

(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) (2022). “There is no statutory definition of what constitutes a ‘restriction’ of parenting time.” *Suleski v. Rupe*, 855 N.W.2d 330, 336 (Minn. App. 2014). “To determine whether a reduction in parenting time constitutes a restriction or modification, the court should consider the reasons for the change as well as the amount of the reduction.” *Dahl v. Dahl*, 765 N.W.2d 118, 124 (Minn. App. 2009). A restriction may arise from either the reason for the change, the amount of the reduction, or both. *Suleski*, 855 N.W.2d at 336. But a reduction in parenting time, by itself, may be a restriction only if the amount of the reduction is “substantial.” *Dahl*, 765 N.W.2d at 123-24 (quotation omitted).

We assume without deciding that the special master's orders constitute a restriction. Harry's argument nonetheless fails on the ground that the special master and the district court issued multiple orders and made multiple statements that satisfy the statutory requirement of a finding of endangerment. For example, in a November 2020 order, the district court affirmed the special master's fifth and sixth orders, which had suspended Harry's parenting time with the parties' daughter, on the ground that her healthcare providers had determined that her health “would likely become endangered if she were to spend time with her Father.” Similarly, in April 2022, the district court affirmed the special master's nineteenth order, which had extended the limitations on Harry's parenting time,

on the ground that “Father’s argument that there has not been an endangerment finding [is] both inaccurate and unpersuasive.” In general, the special master and the district court continuously were reviewing and evaluating evidence of the potential harms that might occur if Harry were allowed to have less-restricted contact with the children. To the extent that the special master or district court did not make more explicit summary findings of endangerment, such a finding may be implied in the orders quoted above and numerous other orders. *See Dobrin v. Dobrin*, 569 N.W.2d 199, 201-02 (Minn. 1997); *Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001). Furthermore, the record contains abundant evidence of endangerment such that the district court’s findings of endangerment are not clearly erroneous. *See Cook v. Arimitsu*, 907 N.W.2d 233, 240 n.3 (Minn. App. 2018), *rev. denied* (Minn. Apr. 17, 2018).

Thus, the district court did not err by temporarily suspending Harry’s parenting time.

II. Motion to Modify Custody

Harry next argues that the district court erred by denying his motion to modify custody.

In general, the modification of a custody order is governed by section 518.18. *See Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022). Absent an agreement between the parties, a motion to modify custody typically is analyzed under subsection 518.18(d)(iv), which allows a district court to modify custody upon a finding that “the child’s present environment endangers the child’s physical or emotional health or impairs the child’s emotional development and the harm likely to be caused by a change of

environment is outweighed by the advantage of a change to the child.” Minn. Stat. § 518.18(d)(iv) (2022).

A party who moves to modify custody based on endangerment must make an initial factual showing by submitting an affidavit in support of the motion. *Boland v. Murtha*, 800 N.W.2d 179, 182-83 (Minn. App. 2011).

[T]he district court must first determine whether the party seeking to modify the custody arrangement has made a *prima facie* case by alleging facts that, if true, would provide sufficient grounds for modification. 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 Minn. Stat. §§ 518.18(d)(i)-(v) exists.

Woolsey, 975 N.W.2d at 507 (citations omitted); *see also Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). The moving party also must show that the change in circumstances is the cause of the child’s emotional or physical endangerment. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981).

If a district court denies a motion to modify custody without holding an evidentiary hearing, this court applies a *de novo* standard of review to the district court’s treatment of the parties’ affidavits, an abuse-of-discretion standard of review to the district court’s determination whether a *prima facie* case has been established, and a *de novo* standard of review to the district court’s decision to not hold an evidentiary hearing. *Boland*, 800 N.W.2d at 184-85.

In this case, the district court denied Harry’s motion to modify custody without an evidentiary hearing. The district court reasoned that Harry had “failed to make a *prima*

facie case for custody modification” because his allegations “do not rise to the level of endangerment,” as necessary to satisfy section 518.18(d)(iv) and the third requirement of a *prima facie* case. The district court also reasoned that Harry had not shown “that the change in custody he requests would be in the children’s best interests,” as necessary to satisfy the second requirement of a *prima facie* case. The district court further reasoned that Harry had not demonstrated a substantial change in circumstances, rather than “a continuation of ongoing circumstances,” as necessary to satisfy the first requirement of a *prima facie* case, because his allegations demonstrated only that there was “continued discord between the parties” and that “the children have ongoing issues with” him.

Harry contends that his affidavit alleged facts that, if true, would be sufficient for a modification. He asserts that his affidavit contained “a multitude of allegations” of physical and emotional abuse by Beth against their daughter. He relies on police reports in which the daughter made accusations against Beth that the daughter later recanted when she was questioned by police officers. Because the daughter’s accusations were recanted, the police reports do not show that the child’s “present environment endangers the child’s physical or emotional health or impairs the child’s emotional development.” *See* Minn. Stat. § 518.18(d)(iv). In any event, Harry does not challenge the district court’s determinations that he did not satisfy the first and second requirements of a *prima facie* case. In addition, Harry’s affidavit does not address the fact that, when Harry filed the affidavit, he was prohibited by orders in the criminal case from contacting his children. The district court commented that Harry’s motion was “misguided and impractical on its

face” because it was “unclear” how he could “exercise sole legal and sole physical custody over [the daughter] while there is an active DANCO in place.”

Thus, the district court did not err by denying Harry’s motion to modify custody without an evidentiary hearing.

III. Attorney Fees

Harry last argues that the district court erred by granting Beth’s motion for conduct-based attorney fees.

In a parenting-time or custody-modification proceeding, a district court may, in its discretion, award conduct-based attorney fees and costs against a party “who unreasonably contributes to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1 (2022); *see also Buckner v. Robichaud*, 992 N.W.2d 686, 689 (Minn. 2023); *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295-96 (Minn. App. 2007); *Geske v. Marcolina*, 624 N.W.2d 813, 818-19 (Minn. App. 2001). Whether to award conduct-based attorney fees generally depends on “the impact a party’s behavior has had on the costs of the litigation.” *Dabrowski v. Dabrowski*, 477 N.W.2d 761, 766 (Minn. App. 1991). This court applies an abuse-of-discretion standard of review to a district court’s award of conduct-based attorney fees. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999); *Rutten v. Rutten*, 347 N.W.2d 47, 51 (Minn. 1984); *Szarzynski*, 732 N.W.2d at 295.

In this case, the district court granted Beth’s motion for the following reasons:

Father has unnecessarily contributed to the length and expense of this proceeding such that an award of fees is warranted. During the current round of litigation, Father has filed a total of six (6) motions seeking affirmative relief from the court: a motion on October 21, 2021, an amended notice of

motion and motion on December 23, 2021, a motion on April 8, 2022, an amended motion on June 16, 2022, a motion on July 6, 2022, and a supplemental motion on September 12, 2022. Most of Father's motions are intended to bypass the decisions of the Special Master, even after the Court has denied Father's motions to remove the Special Master and repeatedly affirmed her decisions. Father has taken unreasonable positions during this proceeding, has alienated many of the professionals working with the family, and refused to take accountability for his part in the family dynamic. As one example of this, Father attempted to use the civil discovery process in this matter to circumvent the criminal discovery process, and the Court was forced to deny his request to compel discovery.

In a subsequent order, the district court determined the amount of conduct-based attorney fees and awarded Beth \$54,607.

Harry contends that he did not unreasonably contribute to the length or expense of the proceedings because he sought review of the special master's orders. Harry's arguments do not overcome the district court's reasons for granting the motion. We are mindful that the district court has first-hand knowledge of Harry's submissions and litigation tactics and has a superior perspective in determining whether he unreasonably contributed to the length or expense of the proceedings. Our review of the record confirms the district court's view that Harry made excessive filings and unnecessarily caused Beth to incur attorney fees.

Thus, the district court did not abuse its discretion by granting Beth's motion for conduct-based attorney fees and awarding her \$54,607.

Affirmed.