

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2010).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1626**

Richard A. Maras,
Respondent,

vs.

Patricia Lou Zinke,
Appellant.

**Filed June 20, 2011
Affirmed
Peterson, Judge**

Pope County District Court
File No. 61-F7-98-050173

Michael D. Schwartz, Michael D. Schwartz, P.A., Chanhassen, Minnesota (for respondent)

Theodora D. Economou, Glasrud & Economou, P.A., Morris, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Crippen, Judge.*

UNPUBLISHED OPINION

PETERSON, Judge

Appellant mother challenges the district court's denial of her custody-modification motion, arguing that the district court abused its discretion by failing to conclude that the

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

child's present environment in father's home constitutes emotional endangerment, due to father's intimidation and anger issues. Because the district court did not abuse its discretion by determining that mother failed to demonstrate a substantial change in circumstances sufficient to modify custody, we affirm.

FACTS

Appellant-mother Patricia Lou Zinke and respondent-father Richard A. Maras are the parents of A. M., who was born in July 1997 and is currently 13 years old. The parties never married; father was adjudicated the child's father in an uncontested paternity proceeding, and both parties sought custody. In 2000, after psychological evaluations of both parents, the district court ordered that father have sole legal and physical custody of the child, with the child spending alternate weeks with each parent.

In 2001, based on the parties' difficulty in resolving parenting-time issues, the district court made minor parenting-time modifications. In 2008, mother sought an order for protection on behalf of the child, based on father's alleged drinking and yelling in front of the child during domestic disputes in father's marriage at that time. After a hearing, the district court declined to modify parenting time but ordered that neither party consume alcohol and appointed a guardian ad litem (GAL) to represent the child's interest in those proceedings.

In April 2009, father moved the court for parenting-time modification, based on mother's move to Brandon, Minnesota. Mother responded by moving for sole physical custody of the child and the renewed appointment of a GAL. After learning of a recent family-vacation incident in which father was issued a domestic no-contact order, mother

amended her motion to seek sole legal custody and supervised parenting time for father. The district court denied the request to reappoint a GAL but ordered that both parties refrain from consuming alcohol and that the child receive counseling. The district court found that mother had established a prima facie case for custody modification under Minn. Stat. § 518.18 (2008) and scheduled an evidentiary hearing. In May 2010, father moved that mother be held in constructive civil contempt for withholding parenting time following an asserted March 2010 incident in which father allegedly masturbated under a blanket in front of the child.

At the evidentiary hearing, the child testified that she told an adult about the masturbation incident and that she did not want to return to father's home. She testified that after she reported that incident, her father called, acting somewhat angry, and asked what was going on. She also testified that, on other occasions, father screamed and yelled at her; that she once saw father hit his former wife; and that she was afraid that he might hit her also. She indicated that there is no land telephone line in father's house, which is located in a rural area, and that father took away her cell phone and has not returned it.

A Pope County child-protection worker testified that she interviewed the child about the alleged masturbation incident, but she was unable to interview father and ultimately treated the case as a family assessment. She testified that the child expressed fear that if she returned to father's home, she would be segregated in her room. The child-protection worker testified that mother called several times inquiring about the report.

A school social worker testified that the child told her about the report and was scared to go to father's home because of the yelling and screaming. She testified that she had a discussion with the child about the investigation, but the child was too embarrassed to tell her the subject matter. She testified that mother also called her about the report.

Mother testified that the school social worker had called her and advised her that the child was too scared to return to her father's, and the child-protection worker called mother later that day. Mother testified that when the child was at her home, the child received the call from father about the report. Mother testified that until the school social worker called, she did not know about the investigation, and that after that call, she decided to keep the child from father's home. She admitted that her driver's license was revoked for a time, based on a 2007 DWI conviction.

The GAL who had been appointed during the 2008-2009 domestic-abuse investigation testified that the child was very clear about how much she loved her mother, less so about her father, and she was protective of her mother and sometimes acted as a parent to her. The GAL testified that father did not hit the child and seemed as though he loved her, but the child had lived in an environment of fighting, drinking, and yelling related to domestic disputes. She testified that father had had two orders for protection that were sought and dismissed and a disorderly-conduct conviction arising out of a domestic dispute in Douglas County.

Father's former wife, to whom he was married from 2007 until 2009, testified that father was boisterous, loud, and yelled, to the point that the child was fearful of him. She

testified that she had been drinking during the 2009 vacation incident when father was issued a domestic no-contact order.

Father denied the masturbation incident and denied expressing anger or threats to the child. He testified that during two school years, he discovered in the child's end-of-year report card that she had been absent or tardy 25 or 27 times, and he had not been notified. He indicated that he believes the influence of both parents is extremely important and that he is trying to teach the child the value of education, hard work, and taking care of possessions. He believes that mother is not a positive influence and has taught the child to be untruthful. He testified that, two years earlier, mother indicated to him that she did not want the child for parenting time, and he later learned that mother had a DWI conviction. Father stated that an alcohol assessment showed that he had no problems with alcohol, that he has abided by an order not to drink in the child's presence, and that he voluntarily took an anger-management class. He testified that he took the child's cell phone away when he realized that she was texting a 60-year-old man.

The district court denied the motion to modify custody. The district court found that it had serious questions about whether the alleged masturbation incident occurred, that the child acknowledged that father has never physically harmed her or threatened to do so, and that mother agreed that she willfully failed to comply with court-ordered visitation. The court found that the previous domestic incidents between father and his former wife may have caused the child to be fearful but were not focused on the child, and the person involved was no longer in father's life. The court found that the fact that the child had expressed a preference to live with mother was not determinative,

particularly in light of the possibility that mother had been exerting undue influence on the child. The court found mother in constructive civil contempt for willfully withholding the child from father's custody following court orders. This appeal of the denial of custody modification follows.

D E C I S I O N

In reviewing a district court's decision on a motion to modify custody, this court examines "whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). This court defers to the district court's ability to evaluate witness credibility and will set aside findings of fact only if they are clearly erroneous. *Id.* at 284; *see also Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (emphasizing that appellate courts do not reassess credibility determinations). Findings of fact are clearly erroneous if this court "is left with the definite and firm conviction that a mistake has been made." *Goldman*, 748 N.W.2d at 284 (quotation omitted). The party seeking modification has the burden of proving circumstances that justify modification. *Id.* at 286.

To modify a custody order under Minnesota law, the district court must find, on the basis of facts that have arisen since the prior order or were unknown at the time of the prior order, that a change in circumstances of the child or the parties has occurred and modification is necessary to serve the child's best interests. Minn. Stat. § 518.18(d) (2010). A change in circumstances must be significant. *Roehrdanz v. Roehrdanz*, 438 N.W. 2d 687, 690 (Minn. App. 1989), *review denied* (Minn. June 21, 1989). One

ground for custody modification is 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). But modification is not warranted if the current custody order poses no danger to the child’s health or emotional development. *Sullivan v. Allen*, 419 N.W.2d 822, 825 (Minn. App. 1988).

Mother argues that the district court abused its discretion by failing to modify custody based on endangerment. While “[t]he concept of endangerment is unusually imprecise,” a party must show “a significant degree of danger” to satisfy the endangerment standard. *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. App. 1991) (quotation omitted); *see also Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997) (stating that danger may be to emotional development).

Mother’s motion to modify custody due to endangerment is based on father’s alleged inappropriate behavior during the March 2010 masturbation incident and her contention that the child was emotionally harmed by father’s yelling and screaming. But the district court found that the child’s testimony relating to the masturbation incident was vague and mother’s testimony was not credible, which presented “serious questions” as to whether the incident actually occurred or was made up to support custody modification. We defer to the district court’s credibility determinations. *Goldman*, 748 N.W.2d at 284. The district court also found that although the domestic incidents during father’s former marriage may have caused the child to be fearful, they were not focused

on the child, and father's former wife was no longer present in father's home. Based on the hearing testimony, these findings are not clearly erroneous.

Mother also argues that the district court improperly failed to take account of the child's expressed preference. Minnesota law accords "predominate importance [to] the choice of the older child" in considering custody determinations. *Ross*, 477 N.W.2d at 756. But the district court did not clearly err by finding that the 13-year-old child's expressed preference was not determinative, especially in light of mother's opportunity to exert influence on the child relating to that preference. *See Lundell v. Lundell*, 387 N.W.2d 654, 658 (Minn. App. 1986) (ruling that the district court did not abuse its discretion by refusing to give preclusive effect to a 12-year-old's preference).

Mother further argues that the district court erred by failing to make explicit findings on the child's best interests, as required by Minn. Stat. § 518.18(d). Initially, we note that "lack of endangerment is fatal to [an endangerment-based] motion to modify custody." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007); *see Niemi v. Schachtschneider*, 435 N.W.2d 117, 119 (Minn. App. 1994) (describing endangerment as a "threshold" for modifying custody). Thus, because we are affirming the district court's finding that mother failed to show endangerment, any error by the district court in not making findings of fact addressing the child's best interests can be ignored as harmless. *See Minn. R. Civ. P. 61* (requiring harmless error to be ignored). Further, we "may treat statutory factors as addressed when they are implicit in the findings" made by the district court. *Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001). Here, the same judge who previously considered the parties' parenting-time disputes made specific

findings supporting its conclusion that mother had failed to satisfy her burden to show how the current custodial environment endangered the child's physical or emotional health or impaired her emotional development. Because consideration of the child's best interests is implicit in those findings, the district court's failure to make specific best-interests findings does not require a remand.

Finally, mother argues that the district court improperly relied on a lack of evidence from the child's private counselor and ignored expert testimony from the school social worker and the former GAL. *See Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993) (concluding that district court must provide explicit reasons for rejecting expert's recommendation or make detailed findings examining the factors considered), *review denied* (Minn. Jan. 28, 1994). But because mother did not establish either the school social worker or the former GAL as an expert, they testified as lay witnesses, and the district court was not required to make specific findings relating to their testimony. And the district court did not abuse its discretion by stating, as one of several reasons for denying mother's motion, that the child's private counselor did not provide evidence, when either party could have requested a subpoena for that counselor's testimony and neither did so.

Father argues that he should be granted bad-faith attorney fees on appeal because mother is using subsidized legal services and forcing him to incur attorney fees in defending the appeal. Attorney fees on appeal must be sought by motion. *See Minn. R. Civ. App. P. 139.06*, subd. 1 (stating that "[a] party seeking attorney fees on appeal shall submit such a request by motion under Rule 127"); *see also Minn. R. Civ. App. P. 127*

(stating that “an application for an order or other relief shall be made by serving and filing a written motion for the order or relief”). Because father made no separate motion, we decline to grant the relief he requests.

Affirmed.