STATE OF MINNESOTA
IN COURT OF APPEALS
A07-286

Leyla Tarlan,
Respondent,

vs.

Alan Sorensen,
f/k/a Mourits Alan Sorensen,
Appellant.

Filed January 15, 2008
Affirmed in part, reversed in part, and remanded
Ross, Judge

Beltrami County District Court
File No. F9-98-935

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Considered and decided by Dietzen, Presiding Judge; Ross, Judge; and Harten, Judge.*

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Appellant Alan Sorensen and respondent Leyla Tarlan have three children together. Sorensen, who had primary physical custody and sole legal custody of the three

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

children, began regularly weighing their nine-year-old daughter and refused to allow Tarlan to pay for the older son's necessary orthodontic treatment. The district court granted Tarlan's motion for sole legal and physical custody and ordered Sorensen to undergo a psychological assessment.

Sorensen argues that the district court's factual findings of endangerment are unsupported by the record. He also argues that the district court abused its discretion by ordering him to undergo a psychological assessment without notice and a hearing. Because the district court's factual findings are supported by the record, we affirm its order modifying custody. But the district court's order that Sorensen comply with recommendations made after a future psychological assessment was improperly issued because Sorensen was given no opportunity to be heard. We therefore affirm in part, reverse in part, and remand.

FACTS

Alan Sorensen and Leyla Tarlan, formerly husband and wife, have three children. The older two are twins, a boy and a girl born in January 1995. They also have another son, born one year later. In 1999 Sorensen and Tarlan's marriage dissolved and the district court granted Sorensen legal and physical custody of all three children. But in 2004 Tarlan began to express concerns for the children's welfare. She asked the district court to allow her to obtain counseling services for the couple's daughter. The district court denied this motion, but we reversed and remanded for an evidentiary hearing. *Tarlan v. Sorensen*, 702 N.W.2d 915, 925 (Minn. App. 2005). Before the hearing, Tarlan moved the district court for custody of the children, arguing that they were endangered in Sorensen's care.

The district court made detailed findings of endangerment, of changed circumstances since Sorensen obtained custody, and concerning the best interests of the children. The court granted Tarlan's motion for endangerment-based custody modification and granted her sole legal and physical custody of the children.

The district court found that Sorensen had been weighing the girl daily, based on testimony that Sorensen subjected the child to a regimented weigh-in routine. Sorensen also had washed her hair in the shower while the nine-year-old was naked. The court also found that Sorensen endangered the older son by refusing to allow Tarlan to pay for necessary orthodontic work. The district court found that this son, twelve years old, also expressed a strong preference to live with Tarlan and that Sorensen declined to enroll him in accelerated programs at school, though he qualified. It found that Sorensen refused to follow the advice of anger management counselors, chemical use assessors, parenting classes, and other counselors. The court noted that Sorensen became visibly angry in open court. The district court sua sponte ordered Sorensen to undergo a "full psychological assessment" and to follow all of its recommendations before any of his parenting time is restored.

This appeal follows, with Sorensen challenging the bases for the custody modification and objecting to the requirement that he undergo a psychological assessment and follow all recommendations that it generates.

D E C I S I O N

I

Sorensen points to several alleged errors that he contends require us to reverse the district court's order modifying custody. Our level of deference to the district court leads us to a different conclusion.

We will reverse a district court's order modifying custody only if the district court abused its discretion. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996). A district court abuses its discretion when its fact-finding is clearly erroneous. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). A district court also abuses its discretion if it improperly applies the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). Because the district court's findings were not clearly erroneous and the court did not misapply the law, it did not abuse its discretion by granting Tarlan's motion to modify custody.

A district court may not modify custody unless it finds children are endangered. Minn. Stat. § 518.18(d) (2006). Four factors must be shown to justify an endangerment-based modification: (1) there has been a substantial change in circumstances; (2) a modification is in the best interests of the children; (3) the children are presently endangered, physically or emotionally; and (4) the balance of harms favors the custody change. *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). Sorensen disputes the district court's analysis of these factors.

Sorensen contests the district court's conclusion that circumstances have changed. But we have already determined that if Tarlan's accusations are true, there has been a change in circumstances. *See Tarlan v. Sorensen*, 702 N.W.2d at 923 ("Based on the

record before this court, we conclude that a substantial change in circumstances has occurred since the original custody award."). The district court credited Tarlan's accusations, so there has been a change in circumstances with respect to the daughter based on our prior determination. It also found that there has been a change in circumstances with respect to Sorensen's older son. It based this finding on concerns regarding his delayed orthodontic treatment and on his newly stated strong preference, at an age and level of maturity where his preference is now given weight, to reside in Bemidji with his mother. Although the younger son expressed no residential preference, the district court noted the presumption that siblings should be kept together. *See Rinker v. Rinker*, 358 N.W.2d 165, 168 (Minn. App. 1984) (noting split custody decisions "are viewed as unfortunate and are carefully scrutinized" (quotation omitted)); *see also Maxfield v. Maxfield*, 452 N.W.2d 219, 223 (Minn. 1990) ("Split custody is not favored.") The district court's finding of changed circumstances is not clearly erroneous.

Sorensen admits that the district court explicitly analyzed the best-interest factors. *See Rogge v. Rogge*, 509 N.W.2d 163, 165 (Minn. App. 1993) (noting that district courts are required to analyze explicitly specific statutory factors), *review denied* (Minn. Jan. 28, 1994); *see also* Minn. Stat. § 518.17 subd. 1(a) (2006) (listing factors). But he argues that the court's findings on some of those factors are cursory or unsupported by the record. A district court's findings of fact will not be disturbed unless they are clearly erroneous. *In re Child of Evenson*, 729 N.W.2d 632, 635 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). Sorensen challenges the court's characterization of the older son's statements to the district court judge as expressing strong preference to live with his mother. Sorensen argues that the statements should be characterized as a mere

preference to attend school where Tarlan lives, rather than a preference to live with her. Sorensen's characterization of the testimony is not implausible. But the district court was present when the representation was made, and we will defer to its judgment when assessing testimony. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Sorensen also challenges the district court's best-interests finding as it regards the greater number of extracurricular activities available while the children are in Tarlan's home, noting that Tarlan naturally has more opportunities to facilitate extracurricular activities because she has the children in the summer months while Sorensen has them during the comparatively busy school year. This court is not in a position to reweigh factually nuanced considerations that are largely based on anecdotal perception, and we rely on the district court's best-interests consideration. *See J.W. ex rel. D.W. v. C.M.*, 627 N.W.2d 687, 693–95 (Minn. App. 2001) (relying on the district court's findings on the best interest factors), *review denied* (Minn. Aug. 15, 2001); *see also Vangsness v. Vangsness*, 607 N.W.2d 468, 475 (Minn. App. 2000) (stating that the court of appeals cannot reweigh evidence presented to the trial court). Sorensen also maintains that references to his temper and his refusal to attend anger-management therapy are unsupported by the record. But the district court observed that Sorensen displayed at least one angry outburst in court. And the record suggests that Sorensen previously became furious with his daughter's physician for releasing her medical records to Tarlan. The doctor noted that Sorensen "close[d] our interpersonal space somewhat." The original guardian ad litem and Tarlan's psychologist both recommended anger-management treatment. The district court's best-interest findings were supported by the record, and they are therefore not clearly erroneous.

Because the district court believed Tarlan, its finding of endangerment also has been decided already by this court. We previously concluded that Sorensen's regular weighing of his daughter, if true as alleged by Tarlan, could place the daughter in a "significant degree of danger." *Tarlan v. Sorensen*, 702 N.W.2d at 923 (citation omitted). The district court's discussion of the daughter's endangerment also referred to Sorensen's inappropriate behavior, including an "adult" relationship with the children's babysitter resulting in a harassment order against Sorensen, washing the daughter's hair while she was nude, and weighing the daughter daily. The weighing and nude hair-washing have since stopped, but evidence in the record supports Tarlan's contention that they did not stop until Sorensen was cautioned by social services or the daughter's therapist. The record supports the district court's findings that Sorensen weighed his daughter regularly and washed her hair while she was nude.

The district court's endangerment findings also were based on Sorensen's refusal to allow Tarlan to pay for their older son's necessary orthodontic treatment. The district court found that the older son needs orthodontic work urgently or he will require oral surgery as an adult. The son told the court that Sorensen has been avoiding the issue, and he felt that Sorensen "is not in favor of having that done, I guess." We do not simply dismiss Sorensen's assertion that he was opposed only to the child's and Tarlan's preferred timing of the dental treatment. But we are not in a position to second guess the district court's finding that Sorensen's refusal to allow Tarlan to arrange and pay for this work endangered his physical and emotional health. We recognize that this is a close question, but on balance, we conclude that this finding is not clearly erroneous.

Sorensen ultimately argues that the district court erred by restricting his parenting time. We hold that after finding endangerment, the district court appropriately decided to restrict parenting time. *See* Minn. Stat. § 518.175, subd. 1(a) (2006) ("If the court finds . . . [endangerment] the court shall restrict parenting time.").

The balancing of harms may be implicit in the district court's consideration of the other factors. *See Eckman v. Eckman*, 410 N.W.2d 385, 389 (Minn. App. 1987) (upholding modification without explicit balancing). Here, the district court found that the balance favored modification. The court made this finding based on the record, the parties' testimony, and on the judge's interview of the children. The court found that the older son strongly favored living with Tarlan, and the other two children were indifferent. These findings were not clearly erroneous.

Because the district court's findings regarding the modification factors are not clearly erroneous we cannot say the district court's custody modification was an abuse of discretion. *See Putz*, 645 N.W.2d at 347 (noting a court abuses its discretion when its factual findings are clearly erroneous). We recognize that the support for the endangerment-based custody modification and restriction of parenting time was not overwhelming and that Sorensen's position is neither without merit nor unsupported by his strong desire to maintain the original custody arrangement. But our review is limited to deciding whether the district court abused its discretion and we conclude that it did not.

II

Sorensen also challenges the district court's order that he undergo a psychological assessment and comply with all of the assessment's recommendations. This relief was not requested by Tarlan and the district court ordered it sua sponte without giving

Sorensen notice and an opportunity to respond. Sorensen therefore could not introduce evidence or argument relevant to the order. The district court abused its discretion by ordering a psychological assessment when that issue had not been raised or argued. *See Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983) (requiring district court to base relief on issues either raised by pleadings or litigated with consent). We are also troubled by the breadth of the order for a psychological assessment, which was not limited to an assessment of presenting issues bearing on the parent-child relationship, and which requires Sorensen to obey all future, presently unknown and unknowable recommendations of the psychological assessment. We reverse the order for a psychological assessment and remand to allow the parties to be heard on the question of whether and to what extent a psychological assessment should be required and applied to determine Sorensen's parenting time. The district may, at its discretion, reopen the record if necessary to accomplish the purpose of the remand.

Affirmed in part, reversed in part, and remanded.