STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1473

In re the Marriage of: Isaac John Carey, petitioner,
Respondent,

vs.

Shea Antoinette Carey,
Appellant.

Filed July 28, 2009
Affirmed
Connolly, Judge

St. Louis County District Court
File No. 69-F0-02-600406

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Considered and decided by Johnson, Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant-mother challenges the district court's order that her parenting time with her minor child be supervised, arguing that such an order is an impermissible punishment

for her contempt of court. She also challenges the district court's order that mother pay 75% of respondent-father's attorney fees. We affirm.

FACTS

This appeal arises from a long-standing marital-dissolution dispute and the accompanying litigation over parenting time between appellant-mother Shea Antoinette Carey and respondent-father Isaac John Carey. The parties have a contentious history regarding mother's parenting time, which has, at varying times, been both supervised and unsupervised.

Relevant to this appeal, mother and father reached a stipulated parenting-time agreement, which was subsequently endorsed by the district court in an April 2, 2008 order (the parenting-time order). Pursuant to this order, mother was to have gradually increasing levels of unsupervised parenting time with the parties' then six-year-old minor child as mother successfully completed certain predetermined benchmarks. The day the parenting-time order was issued, mother violated it by taking the child to a park rather than directly to mother's home as was required by the parenting-time order. On April 21, 2008, mother again violated the parenting-time order by failing to answer her phone as required by the parenting-time order when father called to speak with the child, and by failing to return father's call within five minutes, which was also required by the parenting-time order. On April 30, mother "behaved extremely inappropriately" towards the child, telling the child that she must choose between her mother and her stepmother, or mother would "find herself a new [child]." The district court acknowledged that this incident did not directly violate any court orders, but found that the child was "deeply

upset" by the incident. The district court found that supervised parenting time was necessary to ensure that mother would be able to control her temper around the child.

The district court found mother in contempt of court for her violations of the parenting-time order. The district court ordered that mother's parenting time with the child should be supervised. The district court also ordered mother to pay 75% of the attorney fees incurred by father in bringing his motion to enforce the parenting-time order, finding that father had been required to bring the motion in order to ask the district court to enforce that order. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by finding mother in contempt for violating its previous order or ordering that mother's parenting time with the child be supervised.

A. Contempt finding

In finding that mother was in contempt of court, the district court found that mother had committed two separate violations of the parenting-time order in less than three weeks since the order was issued, the first violation occurring on the very day the order was issued. Appellant does not challenge these findings.

In reviewing a district court's decision whether to hold a party in contempt, the factual findings are subject to reversal only if they are clearly erroneous, while the district court's decision to invoke its contempt powers is subject to reversal only for an abuse of discretion. *Mower County Human Servs. ex. rel. Swancutt v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996). In reviewing a contempt order, appellate courts consider whether the

order "was arbitrary and unreasonable or whether it finds support in the record." *Gustafson v. Gustafson*, 414 N.W.2d 235, 237 (Minn. App. 1987) (quotation omitted).

Mother does not challenge the district court's conclusion that she was in contempt of the parenting-time order, but instead alleges that the district court improperly restricted her parenting time to only supervised visits as a consequence for her contempt. Mother argues that because she was able to demonstrate her compliance with the parenting-time order after the violations, it was an abuse of discretion to punish her for being in contempt. Mother also argues that Minnesota law limits the consequences that may be imposed upon a finding of contempt.[1]

"Although criminal contempt sanctions are imposed as a punishment, civil contempt sanctions are imposed to induce future compliance with a court's order favoring the opposing party." *Estate of Stollmeyer v. May*, 580 N.W.2d 58, 60 (Minn. App. 1998) (citing *Minnesota State Bar Ass'n v. Divorce Assistance Ass'n, Inc.*, 311 Minn. 276, 285, 248 N.W.2d 733, 741 (1976)). "The court's function in civil contempt cases 'is to make the rights of one individual as against another meaningful. When the duty is performed, the concern of the court is satisfied.'" *Id.* (quoting *Hopp v. Hopp*, 279 Minn. 170, 174, 156 N.W.2d 212, 216 (1968)).

It is unclear from the district court's order that mother received any sanction directly related to the contempt finding. In its order, the district court discussed both of mother's violations of the parenting-time order, as well as the April 30 incident where

[1] Mother cites Minn. Stat. § 588.02 (2008), describing the power of the district court to punish contemnors, and the limitations upon that power.

mother behaved "extremely inappropriately" toward the child, which the district court said "show[ed] that the only way to ensure that [mother] will control her temper around [the child] is by having her parenting time supervised." The district court acknowledged that mother's actions on April 30 "did not directly violate any of [the district court's] orders." While the district court directly correlated the necessity for supervised parenting time to the April 30 incident, it did not make any such statements with regard to the two violations of the parenting-time order. It appears from the district court's order that the two violations of the parenting-time order constituted the basis for the contempt finding, but that the April 30 incident was the basis for the finding that supervised parenting time was necessary. The district court's order, consistent with the discretion afforded it by *Swancutt* to not invoke its power to punish contempt, does not specify a consequence for the contempt finding. Thus, mother's argument that the supervised parenting time was ordered as punishment for her contempt of the parenting-time order is not supported by the district court's order. This record does not show that the district court abused its discretion by finding mother in contempt. Nor does it show that mother's supervised parenting time is a consequence for contempt.

B. Order for supervised parenting time

Mother argues that the district court failed to make required specific findings to support its determination that supervised parenting time was required, and therefore, abused its discretion.

The district court has broad discretion in deciding parenting-time questions based on the best interests of the child and will not be reversed absent an abuse of discretion.

Olson v. Olson, 534 N.W.2d 547, 550 (Minn. 1995); *Matson v. Matson*, 638 N.W.2d 462, 465 (Minn. App. 2002); *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). A district court's findings of fact, on which a parenting-time decision is based, will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978). "It is well established that the ultimate question in all disputes over visitation is what is in the best interest of the child." *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984).

> In all proceedings for dissolution or legal separation, . . . the court shall, upon the request of either parent, grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child.
>
> If the court finds, after a hearing, that parenting time with a parent is likely to endanger the child's physical or emotional health or impair the child's emotional development, the court shall restrict parenting time with that parent as to time, place, duration, or supervision and may deny parenting time entirely, as the circumstances warrant.

Minn. Stat. § 518.175, subd. 1(a) (2008). "If modification would serve the best interests of the child, the court shall modify the decision-making provisions of a parenting plan or an order granting or denying parenting time, if the modification would not change the child's primary residence." *Id.*, subd. 5 (2008). "[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." *Id.*

In discussing the April 30 incident, the district court found that mother had "behaved extremely inappropriately" by telling the child that if the child did not choose her mother over her stepmother, mother "would find herself a new [child]." The district court found that this behavior "deeply upset" the child, and that "the only way to ensure that [mother] will control her temper around [the child] is by having her parenting time supervised." The district court also noted "[t]he lengthy history of this case demonstrates that [mother], if allowed to stretch the limits of the rules set for her parenting time, will continue to do so until the entire Court order is meaningless."

Mother argues that these findings do not satisfy the statutory requirements the district court must meet before restricting her parenting time. Mother cites *Geibe v. Geibe*, 571 N.W.2d 774, 779 (Minn. App. 1997), arguing that a single incident of alleged borderline abuse or neglect is not sufficient endangerment to warrant modification of custody. *Geibe* is distinguishable from this case. *Geibe* involved a stepmother who was seeking a modification of the custody arrangement between her now-deceased husband and his former wife. *Id.* at 776. In *Geibe*, the stepmother had been denied a hearing on her motion for custody modification after the district court determined that the stepmother failed to state a prima facie case of endangerment. *Id.* at 777. This court held that the teenager's accusations of endangerment and abuse were "extremely non-specific" and that under the circumstances of that case, the district court did not abuse its discretion by giving the incident little weight. *Id.* at 779. *Geibe* does not address parenting-time issues.

"An order restricting visitation will not be upheld unless the trial court makes particularized findings on the reasons for restricted visitation and expressly finds that the children's best interests would be served." *Courey v. Courey*, 524 N.W.2d 469, 472 (Minn. App. 1994). Here the district court made particularized findings on the reasons for the restricted parenting time. The district court did not use the phrase "child's best interests" in determining that supervised parenting time was required, but it reasoned that mother's actions deeply upset the child and that supervised visitation was the only way that mother could be made to control her temper around the child. The district court's findings related to the April 30 incident are adequate to support a restriction of mother's parenting time. *Cf. Warwick v. Warwick*, 438 N.W.2d 673, 677-78 (Minn. App. 1989) (holding that, although the district court did not make an express finding of bad faith when appellant-father reduced his income, the district court's other finding that father was current in all his other obligations while failing to pay any child support, which the district court characterized as "egregious," "outrageous," and "contempt of court," was "effectively a finding of bad faith").

II. The district court did not abuse its discretion by awarding father attorney fees.

Mother argues that the district court abused its discretion by ordering that she pay 75% of father's attorney fees incurred as a result of his bringing the underlying motion because the district court failed to make a finding that she had the ability to pay the fees or that she unreasonably contributed to the length or expense of the proceeding.

> [T]he court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:
>
> (1) that the fees are necessary for the good faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
>
> (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
>
> (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.
>
> Nothing in this section or section 518A.735 precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.

Minn. Stat. § 518.14, subd. 1 (2008). Conduct-based fee awards "are discretionary with the district court." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007); *see Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007) (same). "The standards for making need-based and conduct-based fee awards are different. Therefore, fee awards made under this provision must indicate to what extent the award was based on need or conduct or both[.]" *Geske v. Marcolina*, 624 N.W.2d 813, 816-17 (Minn. App. 2001) (citation omitted) (addressing 1990 amendments to Minn. Stat. § 518.14, as well as recovery of attorney fees under Minn. Stat. § 518.14, subd. 1, in both district court and appellate court).

Mother argues that the only finding the district court made with regard to attorney fees was that father did not have the ability to pay them. This is not accurate. The district court also found that father was "required to bring this motion to ask this Court to

enforce the April 2, 2008 stipulated [parenting-time] order." In ordering the award of attorney fees to father, the district court also made findings related to two separate violations by mother of the parenting-time order.

The district court's order does not indicate that it intended to order an award of need-based attorney fees. While the district court discussed father's inability to pay his attorney every time he comes to court in response to mother's violations of court orders, the district court's focus was on the fact that mother's violations of court orders necessitate the appearances. The district court did not find that father was unable to pay his attorney fees related to this particular motion, but rather found that mother's actions necessitated further litigation and fees that father could not afford.

Mother argues that there were no findings that mother's conduct during the litigation unreasonably contributed to the length or expense of the proceeding. Mother's argument is not supported by the record. The district court noted two specific violations of the parenting-time order that required father to bring his motion to enforce that order and led the district court to find mother in contempt. Mother provides no explanation how her conduct in those violations was outside the litigation process or how it did not unreasonably contribute to the length or expense of the proceedings.

The district court ordered mother to pay father's attorney fees based on mother's conduct. Such an award is supported by the record and was not an abuse of the district court's discretion.

Affirmed.