STATE OF MINNESOTA
IN COURT OF APPEALS
A09-977

In re the Marriage of: Yasmeen Khan, petitioner,
Respondent,

vs.

Azber Azher Ansar,
Appellant.

Filed November 24, 2009
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19-F3-05-014166

M. Sue Wilson, James T. Williamson, M. Sue Wilson Law Offices, P.A., Two Carlson Parkway, Suite 150, Minneapolis, MN 55447 (for respondent)

Azber Azher Ansar, P.O. Box 111097, St. Paul, MN 55111-1097 (pro se appellant)

Considered and decided by Shumaker, Presiding Judge; Worke, 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 challenges the district court's decision modifying legal custody of the parties' minor child, raising numerous objections to the evidentiary proceedings. Appellant also argues the district court erred in failing to order respondent to undergo a

psychological examination; in restricting the parties' access to the minor child's therapy notes; and in ordering appellant to pay conduct-based attorney fees. Because the record supports the district court's findings that the parties' increasing inability to cooperate and communicate with one another is a change in circumstances warranting modification, and the district court did not abuse its discretion in both restricting access to the minor child's therapy notes to protect the child's privacy and in awarding conduct-based attorney fees, we affirm.

FACTS

Appellant-father Azber Azher Ansar and respondent-mother Yasmeen Khan were married in 2000. The parties have one minor child, A.A., born in 2001. The parties were divorced by judgment and decree in 2006. Respondent and A.A. have resided in New Jersey since June 2008 while appellant continues to reside in Minnesota.

Pursuant to the judgment and decree, the parties stipulated to joint legal custody of A.A. and respondent was granted sole physical custody. The parties agreed to have Dr. Susan Phipps-Yonas serve as a parenting consultant and to assist in resolving parenting disputes.

On January 4, 2008, a hearing was held concerning respondent's petition for a harassment restraining order (HRO) based on the substance and frequency of appellant's e-mails during a week in December 2007, and appellant's request for, among other things, unsupervised parenting time. Appellant had e-mailed respondent 28 times that week,

> making the following threats or accusations: that Khan's brother forged his name on immigration documents and that Khan must meet with Ansar to discuss that issue; that Khan's brother embezzled money from Ansar and committed fraud and that Khan must meet with him to discuss that issue; that Khan engaged in insurance fraud; that Khan lied to police; that Khan lied about her unemployment; and that Khan fraudulently obtained her medical license in Iowa and Minnesota. Ansar became angry when Khan did not agree to discuss matters on the same day in person or on the telephone, and he threatened to report her to the Federal Fraud Hotline.

Khan v. Ansar, No. A08-477, 2008 WL 4133872, at *2 (Minn. App. Sept. 9, 2008). Appellant

> responded by filing two motions, asking for the following relief: granting him unsupervised access to A.A.; appointing a guardian ad litem; appointing a parenting time expeditor; discharging the current parenting consultant; ordering Khan not to move A.A. out of state; ordering Khan to place A.A. back in school; granting Ansar an evidentiary hearing on the issue of parenting time; granting Ansar interim parenting time; ordering Khan to hand over A.A.'s passport to a neutral third party; granting Ansar compensatory parenting time; granting an in camera interview of A.A.; appointing a vocational expert for Khan; and imposing sanctions against Khan's attorney for alleged unprofessional conduct.

Id. The district court granted the HRO, effective until January 4, 2009. In a subsequent order, the district court granted respondent sole legal and physical custody of A.A. until the HRO expired or was no longer in effect and awarded respondent $11,760.50 in attorney fees "in light of [appellant's] conduct and the [HRO]."

Appellant appealed the modification of his parenting time under the HRO; the modification of legal custody; and the award of attorney fees. *Id.* at *1. This court

affirmed the HRO's parenting-time restriction, but reversed and remanded the case on the issues of legal custody and attorney fees. *Id.* at *3, *5.

On remand, the district court held a two-day hearing regarding the issue of legal custody. The district court also had before it several motions brought by appellant: (1) requesting that joint legal custody be maintained and that respondent undergo a comprehensive psychological evaluation; (2) requesting a "taint hearing" concerning the interview methodology used by respondent during DVD-recorded questioning (the DVD) of A.A.; (3) requesting extended examination of expert witnesses Dr. Phipps-Yonas and Mindy Mitnick, Ed. M., M.A., as to their qualifications and whether their testimony would be more prejudicial than probative; (4) seeking to exclude Mitnick from testifying at the evidentiary hearing; (5) seeking to exclude any reference to domestic abuse and appellant's participation in a domestic abuse program as well as any references to appellant's medical licensure proceedings; and (6) again seeking to exclude the testimony of Mitnick.

The district court denied appellant's motion to exclude references to domestic abuse. The district court likewise denied appellant's motions to strike the expert testimony of Dr. Phipps-Yonas and Mitnick, while reminding appellant that he would be able to cross-examine them.

As for appellant's request for extended voir dire of Dr. Phipps-Yonas, the district court noted that appellant would be entitled to voir dire the experts on cross-examination. Appellant expressed that he was particularly concerned about Dr. Phipps-Yonas's

knowledge of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936. This request was allowed.

With respect to appellant's motion for a taint hearing, the issue was initially reserved until a party attempted to introduce the DVDs at issue into evidence, as respondent stated she did not intend to offer it and appellant said he "might." Appellant's purpose in requesting the "taint hearing" was to address what he alleged to be "tainted" questioning of A.A. by respondent. Finally, the district court stated it would consider appellant's motion to maintain the joint custody arrangement and did not specifically rule on appellant's request that respondent undergo a comprehensive psychological evaluation.

Dr. Phipps-Yonas testified that this has been a high conflict case. She also testified that she has had to make decisions for the parties because they were not able to agree about parenting time. When asked, based on her three years of working with the parties, if she believed they have the ability "to make decisions together regarding matters of education, religion, and medical and therapy matters," Dr. Phipps-Yonas responded that the parties have "had an awful lot of difficulty doing that. And I told [appellant] that I wasn't going to make a specific recommendation in this case regarding legal custody, but I certainly would say that they have a great deal of difficulty agreeing on much of anything."

Dr. Phipps-Yonas also testified that appellant "often doesn't understand the connections between how people respond and to what he's done." Additionally, she testified that, although she has not been aware of it in recent months, there has been

evidence of appellant using his son as a tool for hurting respondent. She also testified as to disputes the parties have had concerning A.A.'s enrollment in therapy; whether A.A. should have a passport and who should hold onto it; and appellant's persistent requests to be present at all of A.A.'s medical appointments. In the period of time that she has worked with the parties, Dr. Phipps-Yonas found appellant's behavior "unpredictable."

The issue of the DVD immediately arose again with appellant's cross-examination of Dr. Phipps-Yonas. The DVD contains two short exchanges between A.A. and respondent in which (1) A.A. states that he is angry because his mother has a boyfriend and she does not "like" [A.A.] anymore and that his father told him this, and (2) A.A. reports that his father told him that respondent wanted to have an abortion when she became pregnant. The district court did not conduct a "taint hearing," but allowed appellant extensive cross-examination on the DVD and the mode of questioning employed by respondent.

In addition to Dr. Phipps-Yonas, the district court heard testimony from several other professionals, including Mitnick, an expert on the effects of high conflict cases on children; Margaret "Peggy" Cottrell, respondent's parenting coach; Dr. Lucinda Cummings, A.A.'s former therapist; and Dr. John Cronin, who performed a psychological evaluation of appellant and also provided parenting coaching to appellant. The district court likewise heard from the parties.

Based on the testimony proffered and exhibits received, the district court made extensive findings of fact concerning the parties' tumultuous relationship and their persistent conflict in parenting A.A. The district court found that conflict between the

parties has escalated since their stipulation to joint legal custody of A.A.: "While the parties have been able to reach agreement on some matters, they have had ongoing conflicts regarding the parenting time schedule, the minor child's passport, the minor child's education, the child's medical care and his religious education." Addressing the e-mail correspondence which led to the HRO, the district court found that "[appellant's] behavior in sending these emails is relevant to an evaluation of legal custody because it highlights the tremendous pressure placed on [respondent] by [appellant's] conduct."

In weighing the testimony of Dr. Phipps-Yonas, the district court found that "[t]he parenting consultant has been highly involved in helping the parties resolve parenting time disputes and often has had to make decisions for the parties because no agreements could be reached." Recalling the testimony of A.A.'s therapist, the district court noted that A.A. "told [his therapist] he was upset about his parents' conflict" and it was her opinion that A.A. "was being harmed by [appellant's] hostility toward [respondent]." Further, while the child's therapist "does not believe that [appellant] poses a physical danger to [A.A.], she is concerned about [appellant] posing an emotional threat to the child."

Although acknowledging that the parties have been able to come to a consensus at times, the district court found that "it is clear from the record that [appellant] has an established pattern of escalating conflict, punctuated by periods of relative calm and stability." Drawing on the testimony of respondent's expert who opined that such a pattern "results in ongoing anxiety and disruption for the parent who is repeatedly faced with threats and intimidation," the district court found that "[i]t is harmful to [A.A.] for

his mother to be constantly placed in distress and anxiety as a result of her interaction with his father."

As for Dr. Cronin, appellant's expert, the district court found him to be less credible. Noting several deficiencies in Dr. Cronin's report and testimony, the district court concluded that, "[d]ue to these shortcomings, and [appellant's] apparent lack of candor during the evaluation, Dr. Cronin's report is not reliable and certainly does not demonstrate that the parties are able to co-parent effectively."

The district court found that

> Ms. Mitnick's conclusion that the record in this matter shows poor cooperation between the parties, even with the assistance of a parenting consultant, and ongoing, protracted litigation regarding harassment and issues of legal custody, is accurate. The parties' conflict has caused the minor child anxiety and emotional turmoil and has created an environment where decisions about the child cannot be made in a timely manner. [Respondent] has shown that the present arrangement of joint legal custody impairs the child's emotional health and development. There is no evidence on the record to suggest that there is any harm to the minor child if [respondent] were awarded sole legal custody. [Appellant's] suggestion that [respondent] is delusional and paranoid about his relationship with [A.A.] is unfounded. The Parenting Consultant found that although [respondent] has expressed a lot of fear about [appellant's] behavior, she has almost always acted in [A.A.'s] best interests. This Court agrees and finds her very credible.

The district court concluded that all of the modification factors set forth in Minn. Stat. § 518.18(d)(iv) (2008) and the additional joint custody factors enumerated in Minn. Stat. § 518.17, subd. 2(a)-(d) (2008) were satisfied, and "[a]ll support the conclusion that

it is in the child's best interests for [respondent] to have sole legal custody of the minor child."

Additionally, the district court ordered appellant to pay respondent $16,368 in conduct-based attorney fees: $11,760.50 pursuant to the previous order and $4,607.50 in connection with the evidentiary hearing. The district court found that appellant had not provided the court with any reason why he should not pay the "original" fees, and that appellant's actions at the evidentiary hearing in attempting to introduce "clearly inadmissible evidence"; filing unreasonable motions; his insistence upon calling A.A.'s therapist to testify; and the taking of extensive depositions have "caused [respondent] undue expense" and warranted additional fees.

Lastly, the district court ordered that neither party have access to A.A.'s therapy records without the other's consent or a court order, concluding the restriction was reasonable to protect A.A.'s privacy while citing Dr. Phipps-Yonas's recommendation that "the parties agree that the child's therapist would not share the therapy records and that the therapist not be called to testify in the parties' legal disputes" and noting that appellant has refused to adopt this recommendation. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in modifying the custody arrangement and granting respondent sole legal custody of A.A.

A district court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by

making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985).

Appellant raises numerous evidentiary challenges to the manner in which the district court conducted the evidentiary hearing on the issue of legal custody, including whether certain experts should have been allowed to testify; whether certain types of evidence should have been admitted; and whether the district court should have conducted an in camera interview of A.A. In general, "[t]he admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). Further, "[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id.* (quotation omitted). While attacking several of the district court's evidentiary rulings on appeal, the heart of appellant's argument is that he is unhappy with the district court's custody determination. Appellant does not argue that a different ruling on any one of these matters would have changed the ultimate result, but merely that evidence should have been "considered" by the court differently, e.g., allowed, refused, or weighed differently. Because the thrust of appellant's argument is that the district court abused its discretion in modifying legal custody of A.A., and because appellant does not assert that alternative rulings on any of these matters would have supported denying modification, we merely consider whether the district court's findings are supported by the record, reflecting the broad discretion accorded to district courts in custody determinations.

"When the appellant challenges a custody placement by disputing the [district] court's 'ultimate' findings, and other findings are accepted or adequately supported by the record, the scope of appellate review is limited to the question of whether the [district] court abused its exercise of discretion." *Holmberg v. Holmberg*, 529 N.W.2d 456, 458 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). "Custody determinations must be based on the best interests of the child. The court must consider the factors contained in Minn. Stat. § 518.17, subd. 1, and when joint custody is contemplated the court must consider the additional factors contained in Minn. Stat. § 518.17, subd. 2." *Peterson v. Peterson*, 393 N.W.2d 503, 505 (Minn. App. 1986). "The court need not make specific findings concerning each of these factors if the findings as a whole reflect that the trial court has taken the relevant statutory factors into consideration in reaching its decision." *Id.*

A district "court shall not modify a prior custody order . . . unless it finds, upon the basis of facts, . . . that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child." Minn. Stat. § 518.18(d). The court shall retain the previously ordered custody arrangement unless, among other things, "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." *Id.* (d)(iv).

An evidentiary hearing is required under section 518.18(d) "if the party seeking to modify a custody order makes a prima facie case for modification." *Goldman v.*

Greenwood, 748 N.W.2d 279, 284 (Minn. 2008). When joint legal custody is contemplated,

> the court shall consider the following relevant factors:
>
> (a) the ability of parents to cooperate in the rearing of their children;
>
> (b) methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods;
>
> (c) whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and
>
> (d) whether domestic abuse, as defined in section 518B.01, has occurred between the parents.

Minn. Stat. § 518.17, subd. 2. A joint custody arrangement may be modified when parents demonstrate intense anger toward one another; continue to battle over decisions concerning their minor child; and where their conflict creates an environment of instability for the minor child who is caught in the middle of the conflict. *See Andersen v. Andersen*, 360 N.W.2d 644, 646 (Minn. App. 1985).

On remand from this court, the district court held a two-day evidentiary hearing regarding whether the circumstances justified modifying the parties' joint legal custody of A.A. "When determining whether findings are clearly erroneous, the appellate court views the record in the light most favorable to the [district] court's findings." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

The evidence in the record supports the district court's conclusion that the modification is appropriate. First, the parties' circumstances since their divorce have changed. Minn. Stat. § 518.18(d). The parties have been generally unable to cooperate

concerning parenting of A.A. despite assistance from the parenting consultant, as previously agreed to, and the level of conflict between the parties continues to escalate with only temporary periods of peace and agreement. Second, the overall hostility between the parties makes A.A.'s present environment harmful to his emotional health and development by causing anxiety and turmoil to him directly and resulting in a situation where parenting decisions regarding his well-being cannot be made in a timely manner. *Id.* (d)(iv). Third, modification is in the best interests of A.A. because of the danger of emotional harm under the current arrangement. *Id.* (d); *see Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997) ("Endangerment requires a showing of a 'significant degree of danger,' but the danger may be purely to emotional development.") (citation omitted). As to the fourth factor, concerning the balancing of the harms, "Minnesota law rests on a presumption that stability of custody is in a child's best interests." *Id.* at 780. While the district court made no specific finding on the relative harms, this factor "may sometimes be implicit in other factors." *Id.* at 778. In finding that appellant's behavior has generally fostered the parties' conflict; that there is no harm if respondent is awarded sole custody of A.A.; and that the present situation endangers A.A.'s emotional well-being, the district court's findings reflect that the balance of harms falls in favor of respondent obtaining sole legal custody.

Moreover, the lack of cooperation between the parties is especially relevant when considering whether parents should have joint custody. The parties' ability to cooperate and resolve disputes constitute two of the four factors to be considered along with the best interests of the child when joint custody is sought. Minn. Stat. § 518.17, subd. 2.

"When evidence shows that parties to a dissolution are completely unable to communicate and cooperate, joint legal custody is not appropriate." *Zander v. Zander*, 720 N.W.2d 360, 368 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). The district court must also consider "whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing" and whether domestic abuse has occurred. Minn. Stat. § 518.17, subd. 2(c), (d). Finding that the parties are constantly in conflict over decisions concerning their son and continue to have poor cooperation, the district court held, however, that "[t]here is no evidence on the record to suggest that there is any harm to the minor child if [respondent] were awarded sole legal custody." The district court also noted that there have been incidents of domestic abuse committed by appellant.[1]

Appellant asserts that the district court abused its discretion in denying his motion to exclude evidence and references to domestic abuse as such evidence "can cause emotional bias and was highly prejudicial." The district court judge stated on the record that it was not an emotional matter for him and that such evidence was "highly relevant" to the issue of legal custody. Indeed, one of the best-interests factors considers the effects on the child of any purported abuse. Minn. Stat. § 518.17, subd. 1(12).

[1] It appears that the "domestic abuse" occurred prior to entry of the judgment and decree. The 2006 judgment and decree describes a pattern of false claims made by appellant against respondent, including an incident in 2005 in which appellant cut himself with a knife and then called 911, claiming respondent injured him, as well as accusations concerning respondent's care of A.A. An order for protection was issued on behalf of respondent in July 2005, but "was entered without a finding of domestic abuse based on [appellant's] stipulation." The judgment and decree did conclude that "[t]his is a case of domestic abuse."

Many professionals testified at the evidentiary hearing regarding legal custody. Appellant challenges the expertise of two of respondent's witnesses and asserts the district court deviated from the *Frye-Mack* standard for novel scientific evidence, but fails to identify what novel scientific evidence was presented to the district court. Whether a witness qualifies as an expert is generally within the district court's discretion. *In re Welfare of Children of J.B.*, 698 N.W.2d 160, 166 (Minn. App. 2005). Appellant likewise argues that the district court did not accord proper weight to his expert, Dr. Cronin. However, the district court concluded Dr. Cronin's report was unreliable because it lacked key details, which reflected appellant's lack of candor during the evaluation. "The weight to be given any testimony, including expert testimony, is ultimately the province of the fact-finder." *Id.* at 167.

Appellant makes much of the DVD produced by respondent, which respondent did not seek to introduce at the evidentiary hearing. Appellant sought to conduct a "taint hearing" and introduce testimony concerning the DVD to (1) discredit Dr. Phipps-Yonas and (2) elicit testimony from Dr. Phipps-Yonas to corroborate appellant's allegation that respondent had used leading and manipulative tactics in questioning the parties' son. Appellant cites numerous out-of-state authorities, but does not cite any Minnesota caselaw to support his request. Minnesota law does not recognize "taint hearings." *See In re Welfare of R.A., Jr.*, No. A07-1180, 2008 WL 2168636, at *3 (Minn. App. May 27, 2008) (holding district court did not abuse its discretion in denying motion for a "taint hearing" as "[n]o Minnesota law supports this argument" and "[a]bsent Minnesota precedent, the district court did not abuse its discretion in denying appellant's motion for

a hearing to determine if [child's] testimony would be tainted"), *review denied* (Minn. Aug. 5, 2008).

Moreover, contrary to appellant's assertion that the district court ignored his motion, the district court stated it would "leave the door open" until someone attempted to offer the DVD. The district court subsequently permitted appellant to ask Dr. Phipps-Yonas about the DVD and the nature of the discussion. Appellant himself states in his brief that he "extensively cross-examined [Dr. Phipps-Yonas] about her expertise and her ability to view 1 minute DVDs and suspend a father's parenting time with his son." The DVD was ultimately received into evidence by the district court. To the extent the district court relied on testimony concerning the DVD in its order, it was not an abuse of discretion to decline to hold an evidentiary hearing not recognized under Minnesota law on a topic for which appellant himself acknowledges he conducted extensive cross-examination.

Appellant also sought in camera review of A.A. by the district court concerning the DVD. "Conducting interviews of the children is also within the court's discretion." *Sheeran v. Sheeran*, 401 N.W.2d 111, 116 (Minn. App. 1987). The district court noted appellant's repeated requests to have A.A. interviewed by the district court and opined that "[t]his Court felt then, and continues to feel, that this is inappropriate."

In sum, the paramount concern in all child-custody proceedings is the best interests of the child. The district court weighed the evidence presented by the parties and evaluated the testimony of the many professionals who testified at the evidentiary hearing. The record soundly supports the district court's findings concerning a change in

circumstances based on the parties' increasing inability to cooperate and share legal custody since their divorce, and plainly reflects the high-level of conflict surrounding A.A. as a result. Joint legal custody is not in the child's best interests when his or her parents lack the ability to cooperate and communicate with one another. *Wopata v. Wopata*, 498 N.W.2d 478, 482 (Minn. App. 1993). The record likewise supports the district court's finding that the parties' conflict endangers A.A.'s emotional well-being. A child's best interests are certainly not served if his emotional well-being is in danger. *Tarlan v. Sorensen*, 702 N.W.2d 915, 924 (Minn. App. 2005).

"An abuse of discretion occurs when the district court resolves the matter in a manner that is 'against logic and the facts on [the] record.'" *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 474 (Minn. App. 2004) (*quoting Rutten*, 347 N.W.2d at 50). In determining whether modification of the prior custody arrangement was in A.A.'s best interests, the district court focused on the joint-custody factors—those factors most relevant to the dispute before it. *See* Minn. Stat. § 518.17, subd. 2 (listing factors to be considered when joint custody is sought). When making determinations regarding joint custody, the district court is to consider both the joint-custody factors under subdivision two and the best-interests factors under subdivision one. *Id.* Although the district court could have been clearer in enunciating the best-interests factors it used to reach its decision, we do not find that its decision to modify legal custody of A.A. was against logic or the record in this matter. *See Peterson*, 393 N.W.2d at 505 (holding specific findings on statutory factors not necessary so long as findings made reflect consideration of relevant factors as a whole). Viewing the evidence in the light most favorable to the

decision, we conclude the record supports the considerable findings made by the district court concerning the parties' inability to cooperate and communicate in light of joint-custody factors, and find that the district court did not abuse its discretion in modifying legal custody of A.A.

We believe the particular circumstances of this case justify the district court's substantial reliance on the joint-custody factors. *See Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (refusing to remand a custody ruling for lack of findings where the record made it clear that the result on remand would not change). *Cf. Rogge v. Rogge*, 509 N.W.2d 163, 165-66 (Minn. App. 1993) (holding remand was necessary when district court failed to make findings on certain relevant best-interests factors when such unconsidered factors may not favor modification that was granted), *review denied* (Minn. Jan. 28, 1994). After reviewing the files, record and 12 pages of findings and analysis produced by the district court in considering whether to maintain joint legal custody, and in light of the fact that appellant is not challenging respondent's sole physical custody of A.A., we believe the district court would expressly find that the best-interests factors also weigh in favor of respondent if this case were remanded. *Grein*, 364 N.W.2d at 387. We are mindful that "[i]t is thoroughly settled law that the parent's right to the care, custody, and control of his minor children is paramount to all other considerations, save the best interests of the child." *State ex rel. Larson v. Halverson*, 127 Minn. 387, 388-89, 149 N.W. 664, 665 (1914). However, remanding this case for additional findings would likely only deepen the parties' conflict with one another to the detriment of A.A. and further increase the expenses of litigation without a change in result.

II. The district court did not err in failing to order respondent to undergo a comprehensive psychological evaluation.

Appellant contends the district court erred in both failing to address his motion requesting that respondent be required to submit to a comprehensive psychological evaluation and to subsequently order respondent to complete such an evaluation. In contesting the district court's modification of legal custody, appellant asserts respondent is an irrational person with "paranoid delusions."

Appellant does not present any legal argument or authority supporting his request. This court declines to address allegations unsupported by legal analysis or citation. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994). Notably, appellant continues to argue for joint legal custody of A.A. and does not dispute respondent's sole physical custody of A.A., suggesting that he does not consider respondent unable or unfit to parent.

Further, in making child custody determinations, one of the factors utilized when considering the best interests of the child is the mental health of the parties involved. Minn. Stat. § 518.17, subd. 1(9). The district court stated that there was "no evidence on the record to suggest that there is any harm to the minor child if [respondent] were awarded sole legal custody. [Appellant's] suggestion that [respondent] is delusional and paranoid about his relationship with [A.A.] is unfounded." Through its findings, the court implicitly denied appellant's motion, noting respondent was "very credible" and that the parties' parenting consultant opined that "although [respondent] has expressed a lot of fear about [appellant's behavior], she has almost always acted in [A.A.'s] best

interests." The district court did not err in failing to order a comprehensive psychological evaluation of respondent. *See Peterson v. Peterson*, 408 N.W.2d 901, 904 (Minn. App. 1987) (finding nothing in the record to justify interfering with district court's decision not to recommend further psychiatric evaluation of a parent when "counselors making the custody study extensively reviewed and evaluated the issue and did not recommend further psychiatric evaluation"), *review denied* (Minn. Sept. 23, 1987).

III. The district court did not abuse its discretion in failing to find respondent has engaged in parental alienation.

Appellant asserts that respondent "intentionally and chronically" interfered with appellant's contact with his son. Appellant again refers to the DVD and also states "[t]his was elaborated in the Custody evaluation report." Appellant provides no legal authority on the subject of parental alienation.

Again, this court will not address allegations unsupported by legal analysis or citation. *Ganguli*, 512 N.W.2d at 919 n.1. Moreover, the custody evaluation report is of limited evidentiary value. The report was prepared in connection with the divorce proceedings and the evaluating psychologist passed away shortly before trial, removing the parties' opportunity for cross-examination concerning his findings. The judgment and decree specifically addressed the way the custody report would be handled:

> Dr. Terhune died just prior to the trial in this matter. [Appellant] requested a continuance to hire another custody evaluator and objected to the Court admitting Dr. Terhune's report. Regarding the issue of physical custody, Dr. Terhune's report recommendation played only a partial role in the Court reaching its decision. The Court heard nearly 3 full days of testimony on the issue which provided a substantial basis for the Court's findings.

Accordingly, appellant has failed to provide this court with a basis for determining whether the district court abused its discretion in failing to make a finding of parental alienation based on the limited consideration of the custody report.

IV. The district court did not abuse its discretion in granting respondent's motion that neither party be permitted access to A.A.'s therapy notes.

Appellant argues that he should be allowed access to the therapy notes generated by A.A.'s therapist, and that it would be in A.A.'s best interest for such access to be granted. Appellant summarily asserts that patients have a right to access their individual medical records and parents have the right to access the records of their children under HIPAA. Appellant provides no legal discussion or citation on parental access to the psychotherapy notes of a child.

Appellant does not present any authority to show that he was prejudiced by the court restricting access by *both* parties to the notes generated by A.A.'s therapist or that it would be in A.A.'s best interest to allow access to the notes. In fact, the district court found that appellant "has obtained all the minor child's therapy records despite having been involved in the therapy on an ongoing basis." Additionally, the district court noted that the parties' judgment and decree contained findings that appellant "was willing to use the parties' minor child to satisfy his need to prevail over [respondent] in this litigation and to make himself appear the better parent." The district court also stated that, despite the use of a parenting consultant and work with a parenting coach, appellant "continues to harass and intimidate [respondent] and to use the minor child in order to make himself appear to be a better parent."

Under Minnesota law, parents have the right to access the medical records of a minor child. Minn. Stat. § 518.17, subd. 3(b). However, a court may waive this right "if it finds it is necessary to protect the welfare of a party or child." *Id.* The district court specifically found that "[i]n order to protect the child's privacy, it is reasonable to require that the parties not be permitted access to the minor child's therapy records." Because appellant provides no legal discussion regarding HIPAA and because the district court found that such restriction was necessary to protect A.A.'s privacy, it was not an abuse of discretion under state law to grant respondent's motion and restrict the parties' access to the notes of their son's therapist.

V. The district court did not abuse its discretion in awarding respondent $16,380 in conduct-based attorney fees.

Appellant argues that the district court abused its discretion in ordering him to pay conduct-based attorney fees and that the district court did not make appropriate findings concerning his ability to pay. The $16,380 awarded to respondent consists of a re-imposition of the $11,760.50 ordered during the prior proceedings and an additional $4,607.50 for the evidentiary hearing.

"An award of conduct-based fees under Minn. Stat. § 518.14, subd. 1, may be made regardless of the recipient's need for fees and regardless of the payor's ability to contribute to a fee award." *Geske v. Marcolina,* 624 N.W.2d 813, 818 (Minn. App. 2001). Because the standards for need-based and conduct-based fee awards differ, the district court must indicate to what extent a fee award made under this provision was based on need or conduct or both. *Id.* at 816.

"Conduct-based fee awards may be awarded against a party who unreasonably contributes to the length or expense of the proceeding and are discretionary with the district court." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007); Minn. Stat. § 518.14, subd. 1 (2008). "Because conduct-based attorney fees under Minn. Stat. § 518.14, subd. 1, are to be based on behavior occurring during the litigation process, behavior occurring outside the litigation process is not a basis for a conduct-based fee award under that provision." *Geske*, 624 N.W.2d at 819. Findings are "needed to permit meaningful appellant review on the question whether attorney fees are appropriate because of a party's conduct." *Kronick v. Kronick*, 482 N.W.2d 533, 536 (Minn. App. 1992).

In setting forth the basis for the $4,607.50 award, the district court stated that appellant's "attempts to have clearly inadmissible evidence introduced at trial, his filing of four unreasonable motions as well as his insistence upon calling the minor child's therapists to testify, as well as the numerous extensive depositions he conducted, have caused [respondent] undue expense." Regarding the $11,760.50 award, the district court found that appellant "has not provided any reason why he should not pay these attorney's fees." This award was based on both the appellant's "conduct" leading up to the previous January 4 hearing and the HRO. Arguably, the HRO is not behavior that occurred during the litigation process, but rather stemmed from the parties' continuous hostility towards one another. However, it appears that both the request for unsupervised parenting time and the petition for the HRO were handled at the same hearing. The record reflects the district court's frustration with appellant's conduct at the HRO/parenting time

proceeding. While the district court only made broad "conduct" findings when it assessed the attorney fees initially, appellant subsequently had a chance to challenge the $11,760.50 award when the case was remanded back to the district court. He did not.

We conclude that the district court did not abuse its discretion in finding that appellant has unreasonably contributed to the expense of these proceedings and awarding a total of $16,380 in conduct-based attorney fees for appellant's behavior during the prior proceedings and at the evidentiary hearing. Further, because the attorney fees were conduct-based, the district court was not required to make findings concerning appellant's ability to pay. *Geske*, 624 N.W.2d at 818. Lastly, we decline to address appellant's arguments regarding any alleged deficiency with the HRO petition as a means of challenging the attorney fees; it appears that appellant is attempting to relitigate issues pertaining to the HRO. *Khan*, 2008 WL 4133872, at *3.

VI. The district court's comments do not amount to judicial misconduct.

Appellant argues that the district court "was not impartial, depicted emotional and cultural bias against the Appellant throughout the legal proceedings, made inappropriate biased comments about Appellant's culture, religion and heritage and inculcated those comments into the proceedings." Further, appellant argues the district court was biased towards him as a pro se party, showing favoritism to respondent's counsel. To support his contentions, appellant cites comments made concerning (1) Minnesota's appellate courts; (2) the district court's familiarity with the expertise of two of respondent's expert witnesses; (3) whether there was an exhibit with respondent in a bikini; and (4) an instance in which the district court judge had been reprimanded.

Appellant does not argue and the record shows no indication that appellant challenged these statements in court when they were made. Similarly, as respondent points out, the record shows no indication that appellant ever sought to remove the district court judge pursuant to Minn. R. Civ. P. 63.03. "On appeal, we consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Gummow v. Gummow*, 375 N.W.2d 30, 34 (Minn. App. 1985) (quotation omitted). Moreover, "[b]ecause the issue of judicial bias was not raised during trial, appellant's timeliness is questionable." *Id.* Similarly, as this issue was not raised with the district court, it is not properly before this court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Finally, even if appellant had raised questions of judicial bias and impartiality below, the record does not reflect that "an objective examination of the facts and circumstances would cause a reasonable examiner to question the judge's impartiality." *State v. Burrell*, 743 N.W.2d 596, 601 (Minn. 2008).

VII. Appellant's argument that his constitutional rights were violated when officers allegedly failed to give him his *Miranda* rights are not properly before this court.

In his reply brief, appellant asserts that his Fifth and Sixth Amendment rights were violated when he spoke with police in 2005 concerning the "knife incident"[2] because (1) he was not read his *Miranda* rights and (2) the officer continued to interrogate him despite his request for an attorney. First, issues not raised or argued in appellant's brief cannot be revived in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn.

[2] *See supra* note 1.

App. 1990), *review denied* (Minn. Sept. 28, 1990). Second, "[courts] do not decide constitutional questions except when necessary to do so in order to dispose of the case at bar." *State v. Hoyt*, 304 N.W.2d 884, 888 (Minn. 1981). Accordingly, appellant's constitutional claims are not properly before this court.

Affirmed.