STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1378

Joseph Theodore Appelhof, Jr., petitioner,
Respondent,

vs.

Bernadette M. Haack, n/k/a Bernadette Kaufman,
Appellant.

Filed March 30, 2010
Affirmed in part and reversed in part
Randall, Judge[*]

Le Sueur County District Court
File No. 40-F9-00-000822

Christopher E. Morris, Wornson, Goggins, Zard, Neisen, Morris & King, PC, New Prague, Minnesota (for respondent)

Jon G. Sarff, Sarff Law Office, Mankato, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Bjorkman, Judge; and Randall, Judge.

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

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

RANDALL, Judge

Appellant-mother Bernadette M. Haack challenges the district court order granting custody of child A.W.A. to respondent-father Joseph Appelhoff, arguing that: (1) the district court abused its discretion by granting respondent custody because the standard for modifying custody was not satisfied; (2) the district court erred by ordering appellant to retroactively reimburse respondent for medical expenses incurred for the child because respondent was prevented from seeking reimbursement in an earlier order; and (3) this case should be assigned to a new judge. We affirm in part and reverse in part.

FACTS

The facts of this case are undisputed. Appellant and respondent are the parents of minor child A.W.A., born December 15, 1995. Appellant and respondent were not married, and separated about a year after A.W.A.'s birth. Since the separation, appellant has had physical custody of A.W.A., but respondent has consistently exercised his parenting time. Respondent has previously moved the district court several times to redetermine physical custody, always resulting in appellant maintaining custody.

Most recently, respondent petitioned the district court to reconsider the custody arrangement after A.W.A. expressed her desire to live with her father to a therapist, her guardian ad litem, and the district court. In an order filed June 23, 2009, the district court granted respondent physical custody of A.W.A. Further, the court ordered appellant to pay respondent $1,267.56 for her share of medical expenses incurred for A.W.A.'s medical needs. Appellant appeals.

D E C I S I O N

I.

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).

When an appellant challenges a custody determination by disputing the district court's ultimate findings, and the district court's other findings are not challenged or are not clearly erroneous, the scope of appellate review is limited to the question of whether the district court abused its 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, and the district court must consider the factors listed in Minn. Stat. § 518.17, subd. 1. *Peterson v. Peterson*, 393 N.W.2d 503, 505 (Minn. App. 1986). Courts need not make specific findings for every factor if the findings as a whole show that the court has taken the relevant statutory factors into consideration. *Id.*

A court may modify a custody order if it finds (1) that a significant change has occurred in the circumstances of the child or the child's custodian; (2) that modification is necessary to serve the best interests of the child; (3) that the child's present environment endangers the child's physical or emotional health or impairs the child's

emotional development; and (4) that the advantages of the change in environment will outweigh the harm of change to the child. Minn. Stat. § 518.18(d) (2008).

The district court held an evidentiary hearing regarding whether the circumstances justified modifying the parties' custody arrangement for A.W.A., and found that they did. Appellant argues that the district court abused its discretion by modifying the child-custody arrangement. She claims the preference of a then 13-year-old child, alone, does not warrant a finding that the child's present environment endangers her well-being. We conclude that the evidence in the record supports the district court's conclusion that the modification is appropriate.

Change in Circumstances

First, the parties' circumstances since their separation have changed. *See* Minn. Stat. § 518.18(d) (providing that "a change . . . in the circumstances of the child or the parties" is necessary for the court to modify custody). A child's strong preference to change residence after a custody decree can constitute a change in circumstances. *Eckman v. Eckman*, 410 N.W.2d 385, 388 (Minn. App. 1987). Here, the district court found that the teenaged child's desire, expressed to her therapist, guardian ad litem, and to the court, to reside with her father was a substantial change in circumstances. The court noted A.W.A.'s particular maturity in making this decision. This finding is supported by the record and is not clearly erroneous.

Best Interests of the Child

Second, the district court found that modification of the custody arrangement was in A.W.A.'s best interests. *See* Minn. Stat. § 518.18(d) (providing that a finding that it is

in the child's best interests is necessary to modify custody). A child's reasonable preference is one of the statutory factors for the court to weigh in determining a child's best interests. Minn. Stat. § 518.17, subd. 1(a)(2) (2008). Here, the court stated that A.W.A.'s desire to live with her father was more than a "passing fancy"; it was a mature, fully considered choice. Furthermore, the court determined that respondent has been "the first of the two parents to make certain the child's expressed medical needs are examined and addressed, that her need for structure and independence is met, and that she is the primary object of his parental love" and that respondent fulfills his "parental obligations more so than does [appellant]." Thus, the court found that it is in A.W.A.'s best interests to reside with her father, who fulfills parental obligations most thoroughly, and with whom A.W.A. has expressed a strong desire to live. On this record, this finding is not clearly erroneous.

Danger to Physical or Emotional Health and Development

Third, the district court found that there was a danger of emotional harm if the custody arrangement was not changed. *See* Minn. Stat. § 518.18(d)(iv) (providing that a court may modify custody if its finds, among other things, that the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development); *see also 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). The district court determined, after interviews and testimony, that ignoring A.W.A.'s repeatedly expressed, mature desire to live with her father would adversely affect her mental and

emotional health and development. After interviewing A.W.A., the court found that she had a feeling of "really belonging and being appreciated as a member of a family unit" in her father's household, and that "maintaining the present custodial relationship will endanger and impair" her "mental health and emotional development."

Appellant contends that A.W.A.'s desire to live with her father is insufficient to prove endangerment. Appellant cites cases from this court that hold that a child's stated preference alone does not establish endangerment. *See, e.g.*, *In re Weber*, 653 N.W.2d 804, 811-12 (Minn. App. 2002). But in *Weber*, the district court found that a change in custody was not warranted, and the appellate court deferred to the lower court's credibility determinations and findings of fact. In contrast, here, when presented with the testimony and affidavits of the minor child, her therapists, and the guardian ad litem, the district court concluded that maintaining the existing custody arrangement would endanger A.W.A.'s emotional health and well being. Further, in *Weber*, the court found that a child's preference alone was insufficient to establish endangerment when the guardian ad litem reported that the child's expressed custody desires parroted his father's. 653 N.W.2d at 808, 811. In contrast, here, the district court found remarkable maturity in A.W.A.'s requests to live with her father that was not consistent with coaching. We defer to these district court findings and credibility determinations.

Where the child is a teenager, as here, Minnesota courts have heavily weighed the child's preference in determining emotional endangerment. A line of decisions from the early 20th century even allowed teenagers to remain with the nonparents with whom they resided, noting the impracticality of ordering a teenager to live where she does not want

to live and the damage to a child's psyche from having her preference overruled. *See, e.g., State ex rel. Feeley v. Williams*, 176 Minn. 193, 196, 222 N.W. 927, 928 (1929). In *Ross v. Ross*, this court placed particular emphasis on a teenager's preference, terming it "an overwhelming consideration." 477 N.W.2d 753, 756 (Minn. App. 1991). Here, like in *Ross*, the child's preference was the primary concern upon which the district court based its finding of endangerment. But it was not the only concern, as appellant claims. The district court was concerned with the child feeling like she belonged to a family unit, and feeling like she had meaningful communication in her father's household.

In *Eckman*, the district court had determined that a change in custody was warranted, and on appeal this court found the endangerment factor was met because of the child's strong preference to live with his mother, and his testimony that "he was often left alone and lonely [living with his father]." 410 N.W.2d at 389. Further, the court stated that "[f]orcing [the child] to stay in a more isolated environment when he prefers and needs more interaction shows actual emotional impairment." *Id.* Thus, this court concluded that the evidence supported the district court's finding of endangerment. *Id*. Similarly, here, A.W.A. expressed a strong preference to live with her father, and articulated that she received "more meaningful communication" and "a feeling of really belonging and being appreciated as a member of a family unit" in her father's household. Thus, here, like in *Eckman*, the district court did not clearly err by finding A.W.A.'s emotional health endangered because she expressed a strong, mature desire to live with her father, and because forcing her to stay in a household with less meaningful communication shows actual emotional impairment.

Balance of Harms

Fourth, the district court conducted a balancing of the harms and concluded that respondent should obtain custody. *See* Minn. Stat. § 518.18(d)(iv) (providing that a court may order modification of custody if it finds, among other things, that the harm likely to be caused is outweighed by advantages for the child). The district court found that any "possible harm is outweighed by the overall benefit, particularly because the child's relationship with her mother can be structured and maintained to allow mother to remain involved with the child in a positive and nurturing manner." The district court had the benefit of interviews with the child and testimony from others, and determined that the child's desire to live with her father was not a passing fancy, and that her feeling of really belonging in her father's household outweighed the possible harm of a change in custody.

Appellant again attempts to analogize this case to *Weber*, where this court affirmed a district court's denial of a change in custody, finding that cases that use a child's custodial preference as a significant factor when balancing harms usually involve continuing the present arrangement or returning to a previous long-term custodial arrangement. 653 N.W.2d at 811-12. But in that case, the district court found there was no showing that the minor child's desire to change the custody arrangement and live with a parent with whom he had never lived was in his best interests. *Id.* at 810, 812. The custody-seeking father's permissive parenting and manipulation would harm the child. *Id.* at 812. In contrast, here, the fact-finding, credibility-determining court concluded, based on A.W.A.'s strong, mature desire, that it was in her best interests to live with her

father, who was the better of the two parents at fulfilling his parental obligations and meeting A.W.A.'s needs.

We conclude that the district court satisfied Minn. Stat. §518.18(d). The court did not abuse its discretion by modifying custody and granting respondent physical custody of A.W.A.

II.

Appellant claims that the district court improperly ordered her to retroactively reimburse respondent $1,267.56 for medical expenses that he incurred for A.W.A.'s medical care, because earlier orders precluded the court from ordering appellant to reimburse respondent for medical expenses.

First, in a March 22, 2004 order, the child support magistrate provided that appellant, A.W.A.'s physical custodian, could recover unreimbursed medical expenses from respondent, but the magistrate provided no such reimbursement right or method for respondent to recover. In an order dated June 22, 2005, the magistrate provided that "except in an emergency [respondent] has no authority to incur expenses for the child who is in the sole physical custody of [appellant] as stated in the most recent support order which only allows [appellant] . . . to obtain reimbursement from [respondent]." The district court later included in a July 28, 2005 order affirming the magistrate's order, a provision verifying that only appellant has the right to seek reimbursement, because as the custodial parent in an acrimonious relationship with the noncustodial parent, only she can incur nonemergency medical expenses for the child. This issue was never raised on appeal from the magistrate's orders or the district court's July 2005 order.

Respondent asserts that he petitioned the court for a modification of the terms of these orders and it was granted. The terms of a child-support agreement (including medical support) may be modified upon a showing that the terms are unreasonable and unfair, based on a substantial change in circumstances of parental income, the child's needs, or the cost of living, among other things. Minn. Stat. § 518A.39, subd. 2 (2008). The district court did not undertake an analysis regarding modification of child-support orders under Minn. Stat. § 518A.39, subd. 2, and appellant had custody of A.W.A. at all times when respondent incurred the medical expenses. We reverse that portion of the district court's order. We do not reach the issue, however, of whether respondent can authorize medical care and request reimbursement for medical expenses incurred after the change in custody, because that issue was not raised to this court.

III.

Appellant argues that we should reassign this case to a different judge because the judge who presided over the case now works in a different county. Appellant contends that the case should stay in the current county for convenience, in case additional district court intervention is required. This claim, besides being premature because additional district court intervention is not required at this time, goes against the notion that district courts have broad discretion to schedule and assign cases. *See State v. Sanders*, 598 N.W.2d 650, 654 (Minn. 1999) (stating that the decision to grant a continuance is within the sound discretion of the district court). Appellant cites no authority and provides no legal analysis for this claim, resulting in a waiver of this argument. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135

(1971) (stating that issues based on mere assertion and unsupported by argument or authority are waived unless prejudicial error is obvious); *see also Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations unsupported by legal analysis or citation). Because appellant does not support this argument with analysis or citation, we conclude this argument is waived. Furthermore, reassigning this case to a new judge is premature.

Affirmed in part and reversed in part.