**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-332, A09-842**

In re the Marriage of:
Dehna A. Klatt, f/k/a Dehna A. Sorenson,
n/k/a Dehna Ann Smith, petitioner,
Appellant,

vs.

Tim Lee Klatt,
Respondent.

**Filed May 4, 2010**
**Affirmed**
**Worke, Judge**

Olmsted County District Court
File No. 55-FX-04-002440

Brandon V. Lawhead, Lawhead Law Offices, Austin, Minnesota (for appellant)

Tim Lee Klatt, Byron, Minnesota (pro se respondent)

Jill I. Frieders, Timothy A. Woessner, O'Brien & Wolf, L.L.P., Rochester, Minnesota; and

Kimball G. Orwoll, Rochester, Minnesota (for respondent Guardian ad Litem)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

**WORKE**, Judge

On appeal in this child-custody dispute, appellant-mother argues that the district court (1) abused its discretion by ordering supervised parenting time; (2) abused its discretion by awarding respondent-father custody; (3) improperly denied her motion to compel financial discovery for child-support purposes and failed to make adequate income-related findings; (4) made rulings that prejudiced her; (5) abused its discretion by awarding attorney fees; and (6) improperly made the guardian ad litem a party. We affirm.

## FACTS

Appellant Dehna A. Klatt, n/k/a/ Dehna A. Smith, and respondent Tim Lee Klatt dissolved their marriage in 2005. Pursuant to the judgment and decree, the parties were granted joint legal and joint physical custody of their minor children, K.K. and A.K.

Following a trial on parenting time in November 2006, the district court issued an order determining a parenting-time schedule and other custody-related issues. Also in 2006, appellant remarried. Following the district court's order, numerous changes occurred in appellant's home. Appellant stopped taking the children to church; instead, the children attended extensive church services led by appellant's husband in the family home. Appellant removed K.K. from violin lessons and refused to let her practice playing violin with her close friend, stopped taking A.K. to gymnastics because she believed that it was bad for a child's body, interfered with respondent's efforts to seek medical exams for the children, withheld A.K. from respondent for a summer, and sought

home-schooling for A.K. In May 2007, then-fourteen-year-old K.K. ran away from appellant's home and has since been living with respondent.

In August 2007, respondent moved to modify custody, requesting sole legal and sole physical custody of both children. Following a hearing, the district court found that respondent made a prima facie showing of emotional endangerment to the children and ordered temporary sole legal and sole physical custody with respondent. Appellant was allowed reasonable parenting time. The court also appointed a guardian ad litem[1] (GAL) who began having daily contact with the family. Based on written submissions from the GAL, the court issued various orders, including an order requiring appellant not to discuss the family's situation with A.K., and requiring that K.K. not be forced to visit appellant.

In December 2007, the GAL issued a summary report. The GAL reported that appellant did not support K.K.'s relationship with respondent. K.K. felt isolated when with appellant, appellant told K.K. that respondent was "evil," and told K.K. about things that respondent had done to appellant. The GAL noted that K.K. and appellant did not have a good relationship. She reported that appellant told A.K. that respondent was abusive, threatened to kill her husband, was arrested for domestic abuse when appellant was pregnant with A.K., and was a liar. The GAL described A.K. as being happy and busy when she was with respondent. But indicated that A.K. did not tell appellant about

[1] We note that the record is void of any order regarding reimbursement for or contribution to guardian ad litem fees. *See* Minn. Stat. § 518.165, subd. 3(a) (2008) ("A guardian ad litem . . . may be appointed either as a volunteer or on a fee basis. If a guardian ad litem is appointed on a fee basis, the court shall enter an order for costs, fees, and disbursements in favor of the child's guardian ad litem.").

the enjoyable things she experienced with respondent because she did not want to anger appellant. The GAL also indicated that appellant does not call respondent by his name, and believes that the children should make their own decisions, including decisions about their medical and dental care.

The GAL indicated that she is not concerned about the conditions in respondent's home. She noted that respondent showed no indication that he would interfere with the children's relationship with appellant, provided the children with many opportunities, and lived a more traditional life than appellant, ensuring public-school and church attendance, and medical and dental care. The GAL recommended that respondent have legal and physical custody of the children and that appellant have unsupervised parenting time with A.K.

In January 2008, the court issued an order incorporating the GAL's recommendations. Shortly after, the GAL submitted a request to terminate appellant's unsupervised contact with A.K. The GAL reported that appellant did not comprehend the emotional damage she caused by encouraging A.K. to tell appellant only things that made appellant happy. The GAL noticed that A.K. would "fake-cry" during telephone conversations with appellant from respondent's home, but would be happy as soon as she hung up. The GAL observed A.K.'s behavior after she spent time with appellant to be withdrawn, sad, and rude to respondent. Based on the GAL's submissions, the court ordered that appellant have supervised parenting time with A.K.

In mid-2008, appellant filed several motions, including motions to modify custody and parenting time, remove the GAL, compel discovery of respondent's business and

financial records, and require respondent to obtain a psychological and/or psychosexual evaluation. The district court held a hearing and denied appellant's motions. The district court also addressed respondent's motion for child support and granted the motion. The court ordered appellant to pay $848 per month in child support. The district court also ordered appellant to pay $1,500 for conduct-based attorney fees.

In August 2008, the district court held an evidentiary hearing. The GAL testified that she would not change her recommendations as stated in her reports. Dr. Paul Fountain, a psychologist who saw appellant and A.K., also testified, but the district court found that his opinions and testimony were confusing, contradictory, and ultimately unhelpful. On December 16, 2008, the district court ordered a modification of custody, granting respondent sole legal and sole physical custody of the children. The court ordered that appellant have supervised parenting time with A.K.

In February 2009, the district court held a hearing on appellant's posthearing motions. On March 11, the district court denied appellant's motions and ordered appellant to pay $1,400 in conduct-based attorney fees. Because of appellant's request to remove the GAL, the district court also issued an order that the GAL is a party to the action. This appeal follows.

## D E C I S I O N

### *Parenting Time*

Appellant first argues that the district court abused its discretion in ordering supervised parenting time. District courts have broad discretion to resolve child-custody issues. *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989). This court determines

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). Findings of fact are reviewed for clear error. *Id.* This court defers to the district court's credibility determinations and does not reassess those determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

"It is well established that the ultimate question in all disputes over [parenting time] 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).

> [T]he court shall . . . 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 . . . 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.* Restricted parenting time will not be upheld "unless the [district] court makes particularized findings on the reasons for [the restriction] and

expressly finds that the children's best interests would be served." *Courey v. Courey*, 524 N.W.2d 469, 472 (Minn. App. 1994).

Appellant claims that the district court limited her to supervised parenting time because it found that there had been harm and a risk of future harm to A.K.'s emotional development but that the finding was defective without a supporting psychological opinion. Appellant also argues that the court clearly erred in finding that appellant interfered with respondent and A.K.'s relationship because she was actually protecting A.K. from respondent who is "mentally ill[] and has a history of violence."

The district court made thorough findings regarding the best-interest factors, considering the (1) children's preference, (2) primary caretaker, (3) relationship each parent has with the children, (4) interrelationships the children have with other people, (5) length of time in a stable environment, (6) adjustment to home, school, and community, (7) permanence of the existing or proposed custodial home, (8) mental and physical health, (9) cultural background, (10) each parent's capacity to give the children love, affection, and guidance, (11) affect of any abuse, (12) each parent's ability to encourage and permit contact with the other parent, (13) each parent's ability to cooperate in child rearing, (14) dispute-resolution ability, and (15) any detriment to the children from living solely with one parent.

The court found that K.K. ran away from appellant's home and has a strong preference to reside with respondent; A.K., however, was never consistent or clear in demonstrating a preference. Respondent has been the primary caretaker, and the court found that he would continue to provide for the children's needs and interests. The court

found that appellant does not have a close or healthy relationship with K.K. and that appellant's relationship with A.K. has not been healthy for A.K.'s emotional development. The court found that it was in the children's best interests not to be separated. The court also found that appellant attempted to remove the people who were important to the children from them. The court further found that the children lived only a short period of time in a stable environment with appellant, while respondent has consistently provided a safe, stable, and comfortable environment. The court found that appellant does not have insight into the children's needs, does not give appropriate affection and guidance without controlling them, changed their religion, and wanted to change the manner of their education. The court also determined that in appellant's home, the children are exposed to emotional abuse and negative comments about respondent. The court concluded that the "overwhelming evidence supports that [appellant] is not willing to encourage the child[ren]'s relationship with [respondent]."

The court's findings are supported by the record, much of which are based on the reports of the GAL, whom the district court found to be credible. Appellant fails to show how the district court clearly erred in its findings; thus, the district court did not abuse its discretion in its parenting-time decision.

***Custody***

Appellant next argues that the district court abused its discretion by not awarding her custody. 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). Our review of a custody determination "is limited to whether the [district] court abused its discretion by

making findings unsupported by the evidence or by improperly applying the law." *Pikula*, 374 N.W.2d at 710. We view "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).

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) (2008). Generally, the court shall maintain the previous 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).

The record supports the district court's conclusion that modification is necessary. The parties' circumstances have changed. The district court found that the parties are constantly in conflict, and concluded that appellant is unwilling to encourage the children's relationship with respondent. Appellant claims that the court clearly erred in finding that appellant caused the children to alienate their affections toward respondent because it focused solely on appellant's reactions to respondent's behavior. But the evidence does not show that appellant merely reacted to respondent. The record demonstrates that appellant refused to even call respondent by his name and is unwilling to co-parent. Appellant's overall hostility toward respondent makes joint custody harmful to the children's emotional health and development. *See Zander v. Zander*, 720

N.W.2d 360, 368 (Minn. App. 2006) ("When evidence shows that parties . . . are completely unable to communicate and cooperate, joint legal custody is not appropriate."), *review denied* (Minn. Nov. 14, 2006). Further, the district court found that the children are exposed to emotional abuse and negative comments about respondent when in appellant's care. The record supports the district court's finding that modification is in the best interests of the children because of the danger of emotional harm under the previous arrangement. *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.") (quotation and citation omitted). The record also supports the district court's finding that joint custody is not in the children's best interests; therefore, the district court did not abuse its discretion in granting respondent sole legal and physical custody.

***Child Support***

Appellant also argues that the district court abused its discretion in ordering child support, claiming that she was denied her right to notice, an opportunity to be heard, and discovery. Appellant asserts that respondent should have produced additional business and financial records in order for the court to establish child support. The district court denied appellant's motion because she failed to show a good-faith belief that such discovery would uncover material facts relevant to determining child support. *See generally Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982) (stating that when addressing whether to grant a continuance to allow additional discovery, the district court should

consider, among other things, whether the moving party has a good-faith belief that material facts will be discovered or is merely engaged in a "fishing expedition").

Appellant claims that the court is to consider both parents' incomes in determining support. But the district court did consider both parties' incomes. The court made findings on the parties' gross incomes and their parental income for determining child support (PICS) before ordering appellant to pay child support. Appellant fails to show how the district court abused its discretion in failing to compel additional discovery when it had adequate information already available to determine appellant's support obligation.

Appellant next argues that the district court failed to make adequate findings regarding its computation of respondent's income in calculating child support. Appellant claims that the district court erred when it failed to include respondent's business "as gross income, despite [respondent's] claim that he takes no salary for [this] business that has gross income of over $209,000." First, there is nothing in the record supporting appellant's claim regarding respondent's income. Further, the court made specific income-related findings regarding support. The court found the parties' gross annual and gross monthly incomes. The court found the parties' PICS, the combined PICS, the combined basic support obligation for two children, the parties' percentile share, and the parties' percentage of parenting time. Appellant fails to show what information the district court failed to include in its findings.

***Hearing Issues***

Appellant raises several hearing issues. Appellant argues that the district court erred when it failed to give her notice that the motion hearing was a permanent hearing

on child support rather than a temporary hearing. Appellant seems to argue that the district court held two hearings—one related to child support and one related to custody. Appellant then asserts that she was not prepared, as respondent was, to litigate the issue of child support on a permanent basis at the evidentiary hearing.

Appellant had just as much notice as respondent to prepare for the evidentiary hearing. The district court ordered child support after the July 14, 2008 motion hearing. The district court did not need to reconsider child support at the August trial because the court had already determined each parent's PICS; thus, if the district court had ordered that the parties retain the prior joint-custody arrangement, the court would have been fully equipped to reorder child support to accommodate a joint-custody decision. Because the district court permanently modified custody to coincide with the temporary order, there was no reason to modify the child-support order. Appellant fails to show any prejudicial irregularity in the district court proceedings.

Appellant also claims that the court erroneously denied her request for an independent psychological examination of respondent. But there is nothing in the record to show that respondent should be required to undergo an independent psychological examination. *See Peterson v. Peterson*, 408 N.W.2d 901, 904 (Minn. App. 1987) (stating 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).

Appellant next challenges several evidentiary rulings. 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.* at 46 (quotation omitted).

Appellant claims that she was prejudiced when the district court decided that respondent should receive child support before holding a trial on the issue of custody. Appellant asserts that the district court decided the child-support issue based on affidavits, effectively presuming the custody determination and precluding her from conducting cross-examination. This argument has been previously addressed above. Appellant fails to show any prejudice.

Appellant argues that she was prejudiced when the district court allowed respondent to ambush her with his trial tactics. Appellant challenges the admission of a tape-recording of Dr. Fountain. But the district court did not find Dr. Fountain's testimony helpful because it contained many contradictions. Appellant challenges two tape-recorded voice-messages that Dr. Fountain left on respondent's cellular phone. The messages indicated that respondent did not need to bring A.K. to an appointment because the "problem did not lie with [A.K.] or [respondent], that it lied elsewhere." Respondent offered the tape as rebuttal evidence to Dr. Fountain's testimony.

Appellant fails to show that the evidence was improper, and, more importantly, fails to show that she was prejudiced by the evidence. Appellant argues that the evidence was willfully concealed, but fails to show how the record proves this contention. Further, this one piece of evidence did not affect the district court's decision because the district court did not rely on Dr. Fountain's testimony.

Appellant also argues that the district court abused its discretion in precluding Dr. Rosemary Linderman from testifying. Appellant asserts that the district court denied the admission of evidence because it was "not timely disclosed." But that is not the reason that the district court did not admit the evidence. At an August 2008 hearing, appellant's attorney stated that he wanted to call Dr. Linderman as a witness to interpret Dr. Fountain's independent tests. The district court stated that it did not need another witness to testify regarding what Dr. Fountain reported because he could testify regarding that information. The district court denied appellant's request, ruling that Dr. Linderman's testimony would be repetitive and not helpful. The district court did not abuse its discretion in precluding this evidence because Dr. Fountain testified regarding his testing and additional testimony would have been cumulative. *See Braith v. Fischer*, 632 N.W.2d 716, 725 (Minn. App. 2001) (ruling that "[t]he district court did not abuse its broad discretion in excluding cumulative evidence"), *review denied* (Minn. Oct. 24, 2001).

Appellant next contends that the district court issued an order terminating unsupervised contact based on a letter from the GAL when the GAL should have filed a motion rather than send a letter. Minnesota law requires a GAL to conduct an

independent investigation to determine the situation of the family and the child. Minn. Stat. § 518.165, subd. 2a(1) (2008). This includes "present[ing] written reports on the child's best interests that include conclusions and recommendations and the facts upon which they are based." *Id.*, subd. 2a(5). The GAL was not required to file a motion. She was required to submit reports, as she did. Based on the GAL's written report, the district court issued an order discontinuing appellant's unsupervised parenting time. Therefore, the district court did not abuse its discretion in accepting the GAL's submissions.

Appellant also argues that respondent's exhibit and witness list were untimely. The court ordered that the parties file with the court witness and exhibit lists on or before August 7, 2008. Respondent filed his witness list and exhibit list on August 12, 2008. The submissions were late, but appellant presents no argument that she was prejudiced by the court accepting respondent's submissions that were five days past the deadline, which makes appellate review of this issue difficult. Because appellant presents no argument as to how she was prejudiced, the district court did not abuse its discretion by accepting respondent's submissions.

***Attorney Fees***

Appellant also argues that the district court abused its discretion in awarding respondent conduct-based attorney fees. "The standard of review for an appellate court examining an award of [conduct-based] attorney fees is whether the district court abused its discretion." *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). Conduct-based fees may be awarded against a party who "unreasonably contributes to the length or expense

of the proceeding" and are discretionary with the district court. Minn. Stat. § 518.14, subd. 1 (2008). Findings are "needed to permit meaningful appellate 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 its July 29, 2008 order, the court ordered appellant to pay $1,500 in conduct-based fees and costs. The court found that the amount was awarded to respondent for having to defend appellant's "frivolous motions." The court stated:

> Parenting time is a legitimate issue to be presented to the Court. Nonetheless, [appellant] has unreasonably contributed to the length and expense of this proceeding. Rather than filing motions to support parenting time modifications [appellant] chose to file numerous other motions, including motions to change custody, pending the full evidentiary hearing and based on claims not grounded in fact or in good faith. [Appellant] has repeatedly claimed that [K.K.] wants to see her despite the fact she herself has not contacted [K.K.] since September 14, 2007. She repeatedly argued that [respondent]'s deposition statement supports her motion when in fact the record does not.
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> [Appellant] submitted correspondence from a polygraphist . . . . [Regarding a test] administered to 'determine her truthfulness about her current family conflict.' [Appellant's] memoranda refer to the information as 'persuasive evidence,' but do not cite any authority for such a proposition that is contrary to Minnesota law.
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> [Appellant] failed to comply with this Court's order . . . directing her to meet with the [GAL] and Dr. Fountain. . . . Instead she chose to direct her attorney [] to move the Court to remove [the GAL]. But no good cause has been shown to support the motion.
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> On April 30, 2008, [appellant] filed a motion . . . based on claims unsupported by the facts.

In its March 11, 2009 order, the court ordered appellant to pay $1,400 in conduct-based fees and costs. The court found that

> there was nothing in [appellant's] motion for [respondent] and the GAL to respond to or prepare to defend against. [Appellant] failed to identify and explain the bases for her motion, and she did not make any new legal or factual arguments. Instead, [appellant]'s attorney cavalierly makes unfounded and repetitive allegations based on the same irrelevant documents and evidence that were offered before, during, and after the evidentiary hearing.

The district court made the required findings that appellant unreasonably contributed to the length and expense of the proceeding, and did not abuse its discretion in awarding conduct-based fees.

***Guardian ad Litem***

Finally, appellant argues that the district court should not have made the GAL a party because the GAL was "acting as an attorney for respondent." In a child-custody proceeding, which, like this one, does not involve the circumstances described in Minn. Stat. § 518.165, subd. 2 (2008), appointment of a GAL is permissive. Minn. Stat. § 518.165, subd. 1 (2008) "[A] [GAL] for the minor children may be designated a party to the proceedings in the order of appointment." *Cepek v. Cepek*, 684 N.W.2d 521, 524 (Minn. App. 2004). Whether to appoint a GAL is within the district court's discretion. *Sheeran v. Sheeran*, 401 N.W.2d 111, 116 (Minn. App. 1987).

The GAL is appointed to protect the interests of the minor child and speaks for the child. *Cepek*, 684 N.W.2d at 525. In this matter, because the court found that appellant was manipulative and that the youngest child was often afraid to be honest with

her mother for fear of making appellant upset, a GAL was needed to speak on behalf of the child. Appellant appears to be upset with the GAL's recommendations, but that does not mean that the GAL was ineffective. There is nothing in the record to suggest that the district court abused its discretion by ordering the GAL a party.

**Affirmed.**