STATE OF MINNESOTA
IN COURT OF APPEALS
A11-129

In re the Marriage of:
Tanya Lee Suess, petitioner,
Respondent,

vs.

Nathan Allen Suess,
Appellant.

Filed November 21, 2011
Affirmed
Schellhas, Judge

Stevens County District Court
File No. 75-FA-08-360

Theodora D. Economou, Theodora D. Economou P.A., Morris, Minnesota (for respondent)

Lynnae L.G. Lina, Fluegel, Anderson, McLaughlin & Brutlag Chtd., Morris, Minnesota (for appellant)

Geri Krueger, Glenwood, Minnesota (guardian ad litem)

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

In this custody and parenting-time dispute arising out of respondent-mother's motion to modify custody and parenting time, appellant-father argues that the district

court erred by (1) holding an evidentiary hearing without first determining that respondent-mother made a prima facie showing of changed circumstances, (2) concluding after an evidentiary hearing that a change in circumstances has occurred sufficient to justify a modification of custody and restriction of father's parenting time, (3) failing to make the findings necessary to support a restriction of father's parenting time, and (4) requiring father to undergo domestic-abuse and anger-management evaluations and follow the recommendations. We affirm.

FACTS

On March 18, 2009, based on the parties' stipulation, the district court issued a judgment dissolving the parties' marriage and granting the parties joint physical and legal custody of their two minor daughters, K.J.S. and L.M.S., then ages five and two. The judgment states:

> Pursuant to the parties' agreement under Minn. Stat. § 518.18(d)(i), the standard for modification of child custody herein shall be the best-interests standard found in Minn. Stat. § 518.17, to be applied to any future motion for change of physical and legal custody, rather than the standard that would otherwise apply[.]

During the year following entry of the dissolution judgment, the children reported to mother and their daycare provider, J.K., that father swore, yelled, and slapped them and fought with his parents and his girlfriend in their presence. Mother claims that one of the children called her three times from father's home to tell her that father was mean. Mother claims that she heard father in the background swearing at the children. She also claims that father swore at her when she picked up the children from his home.

On February 1, 2010, mother moved the district court for an order seeking, among other things, primary physical custody, supervised visitation for father, and an order requiring father to undergo domestic-abuse and anger-management evaluations and follow the recommendations. Mother supported her motion with her affidavit and an affidavit from J.K. chronicling the circumstances since the parties' marriage dissolution. Father moved for a change in the children's daycare provider—to terminate the daycare services of J.K.—and supported his motion with an affidavit in which he also responded to mother's allegations. Father admits that he argued with his parents in front of the children, but he denies hitting the children and swearing at them to the extent mother claims.

The district court granted mother's request for an evidentiary hearing on her motion, noting the parties' agreement to apply the best-interests standard in Minn. Stat. § 518.17 to custody modifications, and concluding that section 518.17 "does [not] require that there be any changes in circumstances since the date of the original judgment."

Before commencement of the evidentiary hearing, mother moved the district court for an ex parte order to restrict father's parenting time to two hours of supervised visitation per week on the bases that father argued with her and swore in front of the children, argued with his parents in front of the children, forced one child's head into a bowl of salsa, and threw a hand mirror at one of the children. On August 31, the court issued a temporary oral order, suspending father's parenting time until further order of the court. On September 2, the court conducted a hearing at which mother's counsel and the children's guardian ad litem (GAL) appeared by telephone and father's counsel

appeared in person. Father denied mother's allegations and requested that the court deny the ex parte motion. The court ordered that father have supervised visitation with the children for two, two-hour visits per week during the weekend of September 17–19 and one, two-hour visit during the week of September 20–23, to occur at Someplace Safe in Morris.

Subsequent to the district court's issuance of the order restricting father's visitation but before commencement of the evidentiary hearing, the GAL issued her written report. The GAL noted that

> each parent has participated in a form of alienation of the other parent whether purposely or by habit of communication developed during the marriage relationship. Both parents appear to need refresher courses on parenting skills and co-parenting skills; without a full parental capacity it appears both parties have the ability to parent but are occasionally side tracked from good parenting and co-parenting skills by events that they are unable to resolve jointly.
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> . . . .
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> . . . Both of these parents are being unreasonable by refusing to cooperate or respectfully communicate with the other. Joint parenting of these minor children is not possible unless there is a change in how these parents communicate, resolve problems and interact with one another. . . .
>
> The children indicate that they have been "swatted by Dad and yelled at by Dad and yelled at by Mom and given time outs by Mom" indicating a difference of discipline within each home. The children have been grilled by both parents as to activities and actions of the other parent . . . .
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> . . . .
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> . . . [I]t is apparent the children have a strong loving bond with each parent.

The GAL recommended in her report that both parties have a mental-health diagnostic assessment as it relates to parental capacity and follow all recommendations. She also recommended that both parents participate in a co-parenting class and follow all recommendations, that mother attend assertiveness classes, and that father attend anger-management classes. "If joint physical custody is not attainable due to inability of the parents to address the stated issues," the GAL recommended "[mother] being granted sole physical custody and both parents retaining joint legal custody with an every other weekend, one evening per week and alternating holiday parenting time schedule being granted to [father]."

The GAL did not have any information about the allegations underlying mother's ex parte motion before she issued her written report. At the evidentiary hearing, the GAL testified that she did not personally investigate mother's allegations about the salsa and mirror-throwing incidents because the matter had been referred to Stevens County Human Services for investigation and that the investigation had not been completed. Based on the circumstances, the GAL testified as follows:

> Based on safety and erring on the side of caution, it would be . . . my recommendation that we stay status quo at this time until we receive the notice from Family Services on the assessment and that we come to a final conclusion regarding the witnesses and testimony taken today and on the 8th, I believe, and should it come down that these were not substantiated allegations, that time would be given back to the parent that has had that time taken away.

The GAL testified that she would "peg" her recommendation onto what comes out of the county's investigation.[1] As to father's motion to change the children's daycare provider, the GAL did not support changing providers. She said: "Quite frankly, the only stable thing going for these children right now is the seven and a half years that they've been at their daycare."

On November 22, the district court granted mother's motion in its entirety and continued the restrictions on father's parenting time until further order of the court. Father sought permission to move for reconsideration and the court denied his request. This appeal follows.

D E C I S I O N

Prerequisite for Modification

In its order for the scheduling of an evidentiary hearing on mother's custody-modification motion, the district court cited the best-interest standard found in section 518.17 and noted the parties' agreement to apply that standard to any future motion for a change of physical and legal custody. As to the prerequisites for an evidentiary hearing on a motion for a change of custody, the district court stated that section 518.17

> lists no time requirements pursuant to which a motion for modification must comply. Nor does it require that there be any changes in circumstances since the date of the original judgment and decree. These are prerequisites to a motion for

[1] On October 4, 2010, Stevens County Human Services sent father a letter, informing him that "[t]he decision was made that a family case will be opened with Stevens County Human Services in order to help you and your family with the concerns centered around co-parenting. Specifically, there will be two plans developed with each parent. . . . I will be in touch by telephone to discuss this further in detail." No other information about the county's involvement with the parties is contained in the record before this court.

> modification that are required only by Minn. Stat. § 518.18; which the parties specifically agreed shall not apply to motions for modification in this case. As such, the arguments by [father] that the one year time requirement and the change in circumstances requirement enumerated in Minn. Stat. § 518.18 bar [mother's] motion for modification, carry no weight.

Father argues that the district court erred by concluding that the change-in-circumstances prerequisite for an evidentiary hearing enumerated in section 518.18 was not applicable to mother's motion. We agree.

Section 518.18(d) requires the district court to deny a motion for modification of custody unless the moving party can first allege a prima facie case for modification. *Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981). Section 518.18(d) provides that the 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) (2010). The statute directs the district court to "retain the custody arrangement" unless "the court finds that a change in the custody arrangement . . . is in the best interests of the child and the parties previously agreed, in a writing approved by a court, to apply the best interests standard." *Id.* (d)(i).

Here, the parties agreed to give effect to section 518.18(d)(i), and nothing in that section voids the requirement set out in *Nice-Petersen* that the moving party allege a prima facie case for modification in order to obtain an evidentiary hearing on the motion. In considering mother's request for an evidentiary hearing on her custody-modification motion, the district court overlooked the explicit language in the parties' dissolution

judgment that states that the custody-modification standard will be best interests "[p]ursuant to the parties' agreement under Minn. Stat. § 518.18(d)(i)." We therefore conclude that the district court erred in its determination that mother did not need to allege a prima facie case for modification—a change of circumstances and the children's best interests—as prerequisites for an evidentiary hearing on her custody-modification motion. *See Boland v. Murtha*, 800 N.W.2d 179, 183 (Minn. App. 2011) (setting forth the three-step *Nice-Petersen* analysis). To rule otherwise would require the district court to hold a hearing in cases in which the moving party failed to allege the existence of circumstances which, if true, would allow modification.

But this court can disregard the district court's error if the record shows that the court would have reached the same result had it applied the appropriate statutory standard. *See* Minn. R. Civ. P. 61; s*ee, e.g.*, *Grein v. Grein*, 364 N.W.2d 383, 386 (Minn. 1985) ("Based upon the evidence adduced at the hearing and all the files and records before the trial court, it is clear that the court made the three findings necessary to support a modification of the original custody order.").

To meet the changed-circumstances prerequisite for an evidentiary hearing, mother was required to allege "that there has occurred a significant change of circumstances from the time when the original . . . custody order was issued." *Nice-Petersen*, 310 N.W.2d at 472. Moreover, the change "cannot be a continuation of conditions existing prior to the order." *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997).

Father argues that mother failed to allege a prima facie case for modification because she did not allege a change in circumstances that was significant. We disagree. In her affidavit supporting her motion, mother stated that "circumstances have come to light in recent days that have caused me to conclude that the children are not in a safe and appropriate environment spending half their time with their father." Regarding these "recent" incidents, mother described occasions on which father swore at and argued in front of the children. And she also submitted an affidavit of J.K., the children's daycare provider, who stated that one of the children reported that father hit and slapped the children. Although J.K. stated that father treated the children roughly *before* entry of the original custody order, father's past rough treatment of the children does not diminish the significance or effect of the child's recent report that father hit and slapped the children. The children's reports of recent hitting and slapping were sufficient to overcome the changed-circumstances requirement.

We conclude that the district court would have been well within its discretion to consider such statements a sufficient allegation of changed circumstances. The district court's error in granting mother an evidentiary hearing on her custody-modification motion without explicitly determining that mother alleged a prima facie case for modification was harmless, and we therefore disregard it.

Sufficiency of Evidence for Custody Modification

Father argues that the evidence does not support the district court's finding that a change in circumstances occurred that warranted a custody modification. Appellate review of custody determinations is limited to determining whether the district court

"abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996). "Even though the trial court is given broad discretion in determining custody matters, it is important that the basis for the court's decision be set forth with a high degree of particularity." *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989).

In its order issued after the evidentiary hearing, the district court cited several instances of father yelling and swearing at the children, and one instance in which father threatened to throw one of the children out the window and told her that she would be pregnant by the age of 15. The court noted that one child reported to J.K. that father hit, slapped, and spanked the children regularly. J.K. and mother testified that one of the children told them that father threw a mirror at her, and J.K. testified that one of the children told her that father pushed her face into salsa. While father denied pushing the child's face into salsa and he said he tossed the mirror at the child without the intent to hurt her, the district court acts fully within its power in making credibility determinations, and we defer to those determinations. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008).

In its conclusions of law, the district court stated:

> It is clear from the affidavits, the evidence presented, and the testimony given that [father]'s anger issues have escalated dramatically since the time of the original divorce decree, that the level of physical and verbal abuse by [father] has increased, and that [father]'s ability to work together with important people in the children's lives has deteriorated since the time of the divorce decree. The Court finds that these are substantial changes in circumstances that warrant a best

> interests analysis to determine when the children's best interests would be best served.

Father argues that the district court's findings are unsupported by sufficient evidence to support a change in circumstances because the evidence does not reflect circumstances that are new. He also argues that no credible evidence presented at the hearing supported the allegations of physical and verbal abuse. The district court found father's argument unpersuasive, and so do we. The district court's findings are supported by record evidence and the findings support the district court's determination that a change in circumstances occurred. The district court therefore did not abuse its discretion in ordering a custody modification.

Parenting-Time Restrictions

Father challenges the district court's order for supervised parenting time, claiming that the court's findings are not particularized or supported by the record. Appellate courts review parenting-time modifications under an abuse of discretion standard. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). District courts must make findings that are supported by the record and particularized. *Silbaugh*, 543 N.W.2d at 641; *Durkin*, 442 N.W.2d at 151.

Minnesota law allows parenting time to be restricted if that time "is likely to endanger the child's physical or emotional health or impair the child's emotional development." Minn. Stat. § 518.175, subd. 1(a) (2010). Here, the district court's findings are both particularized and supported by the record.

Father also argues that the district court's findings and conclusions are contrary to the findings and recommendations of the GAL. The district court is the ultimate decisionmaker, and it may follow or decline any or all portions of the GAL's recommendations. *Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993), *review denied* (Minn. Jan. 28, 1994). The district court did not abuse its discretion by not adopting all of the GAL's recommendations.

Domestic-Abuse and Anger-Management Evaluations and Recommendations

Father argues that the district court failed to make particularized factual findings to support its order that he obtain domestic-abuse and anger-management evaluations and follow the recommendations. Appellate courts review the district court's decision for an abuse of discretion, and the district court is required to have an "adequate factual basis before it subjects family members to the potentially traumatic effects of . . . therapeutic counseling." *J.M.G. v. J.C.G.*, 431 N.W.2d 592, 595 (Minn. App. 1988).

Here, the district court stated in its order that

> [e]vidence was presented that detailed verbal and/or physical abuse by [father] against the children, against [mother], against [J.K.] and against other people invested in [father's] life. This evidence cannot be ignored and must be taken very seriously. It is clearly not in the best interests of the children to be in a home with a person who is both verbally and physically abusive toward them.

We conclude that the district court's findings are adequate to support its order that father obtain domestic-abuse and anger-management evaluations and follow the recommendations.

Affirmed.