STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1420

In re the Marriage of:
Dana Lynn Bauer, petitioner,
Appellant,

vs.

Dustin Dylan Strong,
Respondent.

Filed February 24, 2014
Affirmed in part and reversed in part
Halbrooks, Judge

Dakota County District Court
File No. 19HA-FA-08-947

Shelly D. Rohr, Wolf, Rohr, Gemberling & Allen, P.A., St. Paul, Minnesota (for appellant)

John T. Burns, Jr., Burns Law Office, Burnsville, Minnesota (for respondent)

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

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

HALBROOKS, Judge

Appellant seeks review of a district court order granting respondent's motion to modify the primary residence of the parties' child and denying appellant's request for conduct-based attorney fees. Because the district court was required to adjudicate

respondent's motion pursuant to an endangerment standard, and endangerment was not asserted or demonstrated in this case, we reverse the district court's modification of the child's primary residence. We affirm the district court's decision denying appellant's request for conduct-based attorney fees.

FACTS

Appellant Dana Lynn Bauer and respondent Dustin Dylan Strong divorced in February 2009. Pursuant to a stipulated dissolution decree, the parties were awarded joint legal and joint physical custody of their minor child. The decree included an equal parenting-time schedule "[u]ntil [the child] begins Kindergarten" and identified Bauer's residence as the child's primary residence "for purposes of school registration and legal matters unless otherwise agreed to." At the time the decree was entered, both Bauer and Strong resided in Hastings. Bauer has since moved at least six times and currently resides in Woodbury.

In March 2013, Strong moved the district court to change the child's primary residence "for purposes of school registration and legal matters" to his residence. He argued that the requested modification was in the child's best interests because Bauer had moved so much and because the child's community and family connections were in Hastings.

Bauer responded, arguing that the district court could grant Strong's motion only upon a finding of endangerment, which Bauer contended does not exist, and requesting attorney fees and costs based on her contention that Strong's motion was groundless.

Applying a best-interests standard, the district court granted Strong's motion and designated his residence as the child's primary residence for the purposes of school registration and legal matters. The district court denied Bauer's motion for attorney fees and costs.

Bauer moved the district court for amended findings, a new trial, or a stay pending appeal, on the ground that the district court erred by failing to apply an endangerment standard to Strong's motion and by denying her request for attorney fees. The district court denied Bauer's motion. In its order, the district court noted that, if it had applied an endangerment standard, it would have denied Strong's motion for lack of a prima facie showing of endangerment. But the district court further noted that, even under an endangerment standard, Bauer was not entitled to conduct-based attorney fees. This appeal follows.

D E C I S I O N

I.

We review a district court's determination of a change of residence of a minor child for an abuse of discretion. *Dailey v. Chermak*, 709 N.W.2d 626, 629 (Minn. App. 2006), *review denied* (Minn. May 16, 2006). A district court abuses its discretion by making findings unsupported by the record or improperly applying the law. *Id.*

This appeal requires us to determine whether the district court erred by applying a best-interests standard to Strong's motion to modify the primary residence of the parties' minor child. A modification of a parenting plan or a parenting-time order that does not alter the child's primary residence is governed by a best-interests standard. Minn. Stat.

§ 518.175, subd. 5 (2012). But modification of a custody order or parenting-plan provision that specifies the child's primary residence is governed by Minn. Stat. § 518.18(d) (2012). Under section 518.18(d), a district court shall not modify a primary-residence provision of a custody order or a parenting plan unless (1) modification is in the best interests of the child and the parties previously agreed, in a writing approved by the district court, to apply a best-interests standard; (2) the parties agree to the modification; (3) the child has been integrated into the family of petitioner with the consent of the other party; (4) the child is endangered by his present environment; or (5) the primary custodial parent relocates to another state despite a district court order denying a request to relocate. Upon the facts before us, modification of the child's primary residence in this matter, pursuant to section 518.18(d), would be permissible only upon a finding of endangerment.

We agree with the district court's conclusion that the parties' dissolution decree does not constitute a parenting plan in the statutory sense. *See Rutz v. Rutz*, 644 N.W.2d 489, 492 (Minn. App. 2002) (revealing that "parenting plan" is a term of art and discussing certain requirements of Minn. Stat. § 518.1705 (2012), the parenting-plan statute); *see also In re Welfare of B.K.P.*, 662 N.W.2d 913, 916 (Minn. App. 2003) (noting that "parenting time" is a distinct concept from "parenting plan").

But in the absence of a parenting plan, the district court was required to enter an order for custody and parenting time upon the dissolution of the parties' marriage. *See* Minn. Stat. § 518.1705, subd. 3(e); *see also* Minn. Stat. § 518.17, subd. 3(a) (2012). A custody order must address the legal and physical custody, residence, and support of

minor children. Minn. Stat. § 518.17, subd. 3(a). The dissolution decree in this case, while not a parenting plan, meets the statutory definition of a custody order. Therefore, any modification to the order's designation of the child's primary residence is subject to Minn. Stat. § 518.18(d). Strong's motion should have been evaluated to determine whether the child is endangered as a result of having his primary residence with Bauer. Accordingly, the district court erred by applying a best-interests standard to Strong's motion.[1]

With respect to endangerment, the district court noted, "for purposes of any later appeal," that it would find that Strong failed to establish a prima facie showing of endangerment if it were to apply an endangerment standard. Strong neither challenges the district court's alternative determination nor asserts that the child is endangered as a result of having his primary residence with Bauer. We therefore reverse the district court order changing the primary residence of the parties' child from Bauer's to Strong's residence.

II.

The district court may award conduct-based attorney fees against a party who unreasonably contributes to the length or expense of a dissolution proceeding. Minn. Stat. § 518.14, subd. 1 (2012). A decision to award attorney fees lies "almost entirely" within the discretion of the district court and will not be reversed absent a clear abuse of

[1] The case upon which the district court relies, *Braith v. Fischer*, 632 N.W.2d 716 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001), in its application of a best-interests standard is inapplicable. *Braith* relates to a modification of visitation, not a child's primary residence. *See id.* at 721-22.

discretion. *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999).

Bauer argues that the district court abused its discretion by failing to make findings of fact relating to her request for attorney fees. This argument is unavailing. First, the two cases that Bauer cites in support of her argument that explicit findings are required respecting her request for attorney fees are distinguishable. Both cases involved the district court's decision to award attorney fees absent sufficient findings indicating whether and to what extent the award was based on conduct, need, or both. *See Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn. App. 2001); *Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001). Here, the district court denied any award of attorney fees.

Furthermore, the district court did make findings relevant to its decision to deny attorney fees. Bauer's request was premised on the theory that Strong's motion was groundless. The district court disagreed, noting that, even if it had applied an endangerment standard, it would have denied Bauer's request because Strong's motion was not brought in bad faith, did not unreasonably contribute to the length or expense of the proceeding, and was not frivolous. These findings support the district court's decision to deny Bauer's request for attorney fees.

Giving due deference to the district court's broad discretion to determine whether to award conduct-based attorney fees, and in light of the district court's findings in support of its decision, we affirm the order denying Bauer's motion for attorney fees.

Affirmed in part and reversed in part.