STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0687

Andrew Joseph Christian, petitioner,
Respondent,

vs.

Jennifer Irene Busch,
Appellant.

Filed March 9, 2015
Affirmed
Hooten, Judge

Anoka County District Court
File No. 02-F6-05-001429

Kelly A. Staples, Law Office of Kelly A. Staples, West St. Paul, Minnesota (for respondent)

Rodney H. Jensen, Mark E. Mullen, Jensen, Mullen & McSweeney, P.L.L.P., Bloomington, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Schellhas, Judge; and Hooten, Judge.

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

HOOTEN, Judge

On appeal from the district court's decision to modify child custody, appellant-mother argues that the district court abused its discretion because its decision was unsupported by the record. We affirm.

FACTS

Appellant Jennifer Irene Busch and respondent Andrew Joseph Christian are the parents of a minor child, I.C., who was born in 2004. The parties signed a recognition of parentage shortly after I.C.'s birth. In March 2006, the parties stipulated to a judgment and decree that awarded joint legal custody to the parties, sole physical custody to Busch, and parenting time to Christian that would increase as I.C. became older.

In January 2009, Christian moved for modification of custody, alleging that Busch was interfering with the parenting-time plan and placing I.C. in physical and emotional danger. The district court found that Christian had not proven a prima facie case for modification, and appointed a parenting-time expeditor to handle any future disputes that might arise between the parties regarding parenting time.

After learning that Busch had denied parenting time to Christian on numerous occasions, the parenting-time expeditor changed the location of the parenting-time exchanges of I.C. and awarded compensatory parenting time to Christian. In 2012, Busch appealed these decisions to the district court, requesting that the district court overturn the determinations of the parenting-time expeditor and appoint a guardian ad litem. Christian responded by seeking to have Busch held in contempt for violating the original stipulated judgment and decree. The district court ultimately upheld the decisions of the parenting time expeditor and granted additional parenting time to Christian, while also prohibiting Busch from unilaterally canceling parenting time. At the request of Busch, the district court also appointed a guardian ad litem. Because of continuing problems with Busch canceling Christian's parenting time, the guardian ad

litem recommended that Busch undergo a psychological evaluation and that Christian's parenting time be substantially increased so that Christian would have the majority of parenting time. After the district court received this recommendation, the district court ordered a custody evaluation.

Christian moved for modification of physical and legal custody. In January 2013, Marcia Young, the court-appointed custody evaluator, recommended that Christian be awarded permanent sole legal and physical custody. In March 2013, the district court awarded Christian temporary sole legal and physical custody of I.C. and set parenting time for Busch. The district court then conducted an evidentiary hearing on the issue of custody modification, hearing testimony from the parties, two custody evaluators, the guardian ad litem, and I.C.'s recently hired tutor.

At the evidentiary hearing, Marcia Young testified that, based upon her evaluation of the statutory best-interest factors under Minn. Stat. § 518.17, subd. 1(a) (2014), it was her recommendation that Christian have sole physical and legal custody of I.C. She explained that, while I.C. appeared to have a good relationship with both parents, Busch had an "exceptionally hostile attitude" toward Christian and refused to communicate and co-parent with him. She believed this to be a "rare case" in which a young child was placed in the middle of parental conflict, and that Busch had "programmed [I.C.] to behave in a way and tell [Busch negative things] about [Christian] in order to please [Busch]." She found that this "parental alienation" was "emotionally harmful" and would prevent I.C. from ever having a good relationship with Christian. Young noted that of the 580 custody evaluations that she had done previously, this case "was not a

close call" and was "probably the strongest" alienation case that she had ever had. She also expressed some concerns about Christian, specifically regarding his substance abuse problems and his past relationship with a woman who had been convicted of misdemeanor child abuse. She testified that while Christian's potential alcohol use concerned her, there was no indication that he had ever used alcohol while parenting I.C.

The reports and testimony of the guardian ad litem echoed Young's opinions. The guardian recommended that Christian be awarded the majority of parenting time with I.C., as she believed that "[I.C.'s] current environment residing with Ms. Busch endangers [I.C.'s] emotional health as a result of the negative and confusing information that she receives from Ms. Busch regarding Mr. Christian." She also evaluated the statutory best-interest factors in reaching her recommendation, and ultimately believed that "whatever emotional costs [to I.C.] that may be caused by a change in parenting time . . . shall be out-weighed by the advantage of expanding Mr. Christian's parenting time and residing in an emotionally safe environment."

The district court also considered the report and testimony of Nancy Darcy, a custody evaluator hired by Busch after the district court granted temporary custody to Christian. The report was fairly critical of Christian, describing his "disdain" for Busch and how Christian would "seeth[e] with hostility" in describing the parties' history of conflict. The report also stated that Christian had "little appreciation" for I.C. However, the report also noted that Busch would "continually bad-mouth[] [Christian] in front of and to [I.C.] and to any and all professionals who worked with [I.C.] including doctors, teachers, and therapists." While her report commended Young for having done an

"excellent job of documenting the extent of [Busch's] interference with [Christian's] parenting time and relationship with [I.C.]," at the hearing Darcy stated that Young had "considerably underestimated" the harm to I.C. if Christian was granted custody. She later clarified that I.C. had not been harmed by the temporary custody switch and that she was testifying as to future harm. Darcy expressed some concerns as to the level of intimacy between Busch and I.C., although she considered their relationship to be mainly positive. On cross-examination, Darcy admitted that she would consider Busch a "bad role model for [I.C.]" if it was shown that Busch had consistently disobeyed instructions from courts, law enforcement, doctors, and similar authority figures.

The parties also testified, with each describing the relationship he or she had with I.C. and the history of conflict between the parties. I.C.'s tutor also testified as to her progress in helping I.C. with her math and reading skills.

The district court ultimately awarded sole physical and legal custody of I.C. to Christian and awarded parenting time to Busch. As support for its decision, the district court relied heavily on the testimony and reports of Young and the guardian ad litem, finding their testimony "very credible" and their reports to be "entitled to substantial weight." Looking at the modification requirements under Minn. Stat. § 518.18(d) (2014), the district court concluded that modification of custody would be in I.C.'s best interests and that all of the statutory requirements had been met. This appeal followed.

D E C I S I O N

Busch argues that the district court's findings and legal conclusions lack support in the evidentiary record. "A district court has broad discretion to provide for the custody of

children." *In re M.R.P.-C.*, 794 N.W.2d 373, 378 (Minn. App. 2011). Our review of a district court's 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." *Id.* (quotation omitted). We defer to the district court's credibility determinations and will not set aside findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01. In order for a finding to be clearly erroneous, it must be either "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Hemmingsen v. Hemmingsen*, 767 N.W.2d 711, 716 (Minn. App. 2009) (quotation omitted), *review granted* (Minn. Sept. 29, 2009) *and appeal dismissed* (Feb. 1, 2010). "That the record might support findings other than those made by the trial court does not show that the court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

A party moving to modify a prior custody order may prevail if they establish: (1) a change in the circumstances of the child or custodian; (2) that a modification would serve the best interests of the child; (3) that the child's present environment endangers her physical or emotional health or emotional development; and (4) that the harm to the child likely to be caused by the change of environment is outweighed by the advantage of change. Minn. Stat. § 518.18(d)(iv); *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002). The district court concluded that Christian had proven all four of these elements in granting his custody modification motion. Busch argues that, on this record, there was insufficient support for the district court's findings as to each of these elements. We analyze Busch's arguments under each element in turn.

A. Change in circumstances

In order to modify custody, the district court must find that "since the *prior order* . . . a change has occurred in the circumstances of the child or the parties." Minn. Stat. § 518.18(d) (emphasis added). The change in circumstances "must be significant and must have occurred since the original custody order; it cannot be a continuation of conditions existing prior to the order." *Geibe v. Geibe*, 571 N.W.2d 774, 778 (Minn. App. 1997). The statute specifically includes "unwarranted denial of, or interference with, a duly established parenting time schedule" as facts upon which to base a custody modification. Minn. Stat. § 518.18(d).

Busch argues that the district court erred by considering the change of circumstances from the filing date of the original judgment and decree in March 2006, and should instead have considered the change in circumstances "from the date of the most recent order addressing modification," which she asserts is the March 30, 2009 order denying Christian's motion for custody modification. Busch cites *Kiesow v. Kiesow* in support of this proposition. 270 Minn. 374, 133 N.W.2d 652 (1965).

In *Kiesow*, the supreme court cited secondary authority providing that the most recent order addressing a motion for modification of a decree set the starting date for conduct considered in deciding whether a "substantial change in the circumstances of the parties" had occurred. *Id.* at 382, 133 N.W.2d at 659 (quotation omitted). But, *Kiesow* involved a motion for modification of spousal maintenance, an issue not before the district court here. *See id.* at 380–81, 133 N.W.2d at 658. And, *Kiesow* does *not* stand for the proposition that orders denying modification motions can be used as the starting

date for a change-in-circumstances analysis. *See Blomgren v. Blomgren*, 386 N.W.2d 378, 380 n.2, 380–81 (Minn. App. 1986) (holding that the district court erred by measuring a change in circumstances from the date of an order denying modification). Busch's argument is unpersuasive.

We have held that under section 518.18(d), "'prior order' is properly read as referring to either an original order granting custody or a subsequent order modifying custody, and it does not include orders that modify parenting time only and that do not modify custody." *Spanier v. Spanier*, 852 N.W.2d 284, 288 (Minn. App. 2014). In its March 2009 order, the district court denied Christian's modification motion and did *not* modify custody. The March 2009 order, which neither granted nor modified custody, is not a "prior order" under section 518.18(d). Thus, the district court did not err by considering the change in circumstances from the March 2006 judgment and decree, which is the most recent ruling awarding or modifying custody.

Moreover, the record supports the district court's finding that a substantial change in circumstances occurred regardless of whether March 2006 or March 2009 is the date used in measuring the change in circumstances. The district court determined that Busch's "continuous negative talk" and extensive interference with Christian's parenting time in 2011 and 2012, in which she refused him as many as 29 days of parenting time, caused Christian's relationship with I.C. to deteriorate and constituted a sufficient change in circumstances. This post-2009 conduct supports the district court's determination and would be sufficient even if the district court had looked only at the change in

circumstances after its March 2009 order. The district court did not clearly err by finding a sufficient change in circumstances between the parties to warrant custody modification.

B. Child's best interests

Busch argues that the district court's findings regarding the best-interest factors lack record support. In order to grant a custody modification, the district court must find that modification is "necessary to serve the best interests of the child." Minn. Stat. § 518.18(d). It must consider 13 factors in evaluating the best interests of the child. Minn. Stat. § 518.17, subd. 1(a). The district court "must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child," and in doing so "may not use one factor to the exclusion of all others." *Id.*

Citing extensively from testimony and reports in the record, the district court used 19 pages of its order to make detailed findings regarding the 13 statutory best-interest factors. The district court weighed each factor and provided extensive and thoughtful reasoning in support of its conclusions. The district court concluded that most of the factors weighed in favor of Christian gaining custody. It concluded that the primary-caretaker factor weighed in favor of Busch and the remaining factors were neutral or inapplicable. Busch challenges the findings of fact underlying four of the factors.

Factor (4): "[T]he intimacy of the relationship between each parent and the child"

The district court concluded that this factor favored Christian because he "genuinely loves and cares" for I.C., while Busch continually attempted to alienate I.C.

from Christian. The district court also found that Busch lacked appropriate boundaries in her relationship with I.C., leading to "intimate[] enmeshment" between the two. Busch argues that the record shows that she is not intimately enmeshed with I.C. and instead has a healthy, intimate bond with I.C. equal to the bond between I.C. and Christian. Her argument is unpersuasive.

As I.C.'s primary caregiver for much of her life, there is no doubt that a strong bond exists between Busch and I.C. However, the record shows that their relationship was, at times, unhealthy and harmful to I.C. The guardian ad litem illustrated their "intimate enmeshment" by testifying that Busch visited I.C.'s school nearly every day after the February 2013 custody change to eat lunch with her. Other witnesses testified that the nature of the relationship between I.C. and Busch served to damage I.C.'s relationship with Christian. Young testified as to how Busch's communication of her dislike of Christian to I.C. caused I.C. to be "afraid to be positive about him or maybe even admit that she loves him." Christian also testified to Busch's negativity toward him. The district court credited their testimony while discrediting Busch's contrary testimony, and we defer to the credibility determinations of the district court. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). The record supports the district court's determination.

Factor (6): "[T]he child's adjustment to home, school, and community"

The district court concluded that this factor strongly favored Christian because I.C. was better adjusted at school and with her peers after Christian was awarded custody, while Busch hindered I.C.'s independence and advancements at school. The district court specifically noted its concern with Busch's daily lunchtime visits to I.C., as the

guardian ad litem had found them to be "inappropriate and harmful to the minor child[,] and may have contributed to her poor school performance." The district court similarly noted Busch's disapproval of I.C.'s tutor, and how such disapproval influenced I.C. and undermined Christian's parenting.

Busch contends that the record does not support the district court's determination by pointing out facts in the record that she claims establishes that her school visits were not considered problematic, and that Christian had nothing to do with obtaining I.C.'s tutor. The record provides otherwise. The guardian ad litem testified that she clearly instructed Busch to stop visiting I.C. at lunchtime, and that Busch's testimony to the contrary was a lie. Christian testified that the tutor was hired at his direction by his mother. The record supports the district court's findings and its determination that this factor favored Christian.

Factor (7): "[T]he length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity"

The district court concluded that this factor favored Christian, as he appeared to offer I.C. a "stable and satisfactory home environment" with the care and support of his parents, whereas since the custody change, I.C. no longer uses her own bedroom at Busch's home and instead sleeps with Busch. Busch asserts that this finding is unsupported by the record and that I.C. would have a more stable and consistent environment with Busch because she has lived with Busch her entire life and attended the same nearby school through fourth grade.

But, stability is not determined solely by looking at which parent "provid[es] the most physical care," as courts can find that the parent who provides the "most emotional and intellectual care" is the best choice for stability. *Regenscheid v. Regenscheid*, 395 N.W.2d 375, 379 (Minn. App. 1986), *review denied* (Minn. Dec. 23, 1986). The district court focused on Christian's ability to provide I.C. better emotional stability at his home and better intellectual care by giving her a "fresh start" at a new school. The district court found that I.C. had been doing poorly at her old school and had not been sleeping in her own bedroom at Busch's house after the custody change. The district court gave more weight to the current and future care Christian could provide when judging stability. On this record, this finding is not so "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole" as to be clearly erroneous. *Hemmingsen*, 767 N.W.2d at 716 (quotation omitted).

Factor (9): "[T]he mental and physical health of all individuals involved"

The district court made its most extensive findings on this factor. It gave a long, detailed account of Christian's chemical dependency issues, his recent conviction of driving while intoxicated, and his prior relationship with a woman who had previously committed misdemeanor domestic assault against one of her children. The district court provided a similarly detailed accounting of Busch's mental and physical health. It also noted that, after temporarily losing primary custody, Busch continued to search for information about Christian and his friends on the Internet, constantly visited I.C.'s school at lunchtime, took photographs of the lunches Christian packed for I.C., and

contacted law enforcement in May 2013 with allegations that Christian was transporting I.C. without a booster seat in his car.[1]

The district court found, that while it was unclear whether Christian had a substance abuse problem, "at the very least [he has] exhibited a pattern [of] poor judgment after consuming alcohol." However, the district court ultimately determined that its concerns about Christian were "outweighed by the persistent, uninterrupted, and outrageous interference with [Christian's] parental rights by [Busch]." In light of Busch's repeated negativity toward Christian, the district court had "no confidence that [Busch] will change her behavior in response to court orders" or be a willing co-parent, and subsequently concluded that this factor overwhelmingly favored Christian.

Busch argues that these findings are unsupported by the record because there was no testimony showing how her mental health would impact her relationship with I.C, and contends that the district court gave too little weight to Christian's history of substance abuse. We do not agree. The district court thoroughly documented both Christian's and Busch's mental and physical health histories, and carefully weighed them in reaching its conclusion. The district court did not simply disregard the evidence provided about Christian's alcohol use; rather, its order required Christian to follow the recommendations of a chemical health assessment he underwent shortly before the hearing. That assessment indicated that Christian exhibited only a mild risk for alcohol

[1] I.C., who turned nine years old in May 2013, was well over the age requirements under the booster seat law. *See* Minn. Stat. § 169.685, subd. 5(b) (2012) (prohibiting driver from transporting child "under the age of eight" and shorter than 4'9" without a booster seat).

abuse, supporting the district court's determination that its concerns about Busch's behavior outweighed its concerns about Christian. Further, the district court credited the testimony of the guardian ad litem and Young, and to the extent that Busch's arguments seek to relitigate the credibility of these experts, we are bound by the district court's decision to credit their testimony. *See Sefkow*, 427 N.W.2d at 210. The record supports the district court's findings.

In sum, the district court provided a thorough, detailed consideration of the best-interest factors in its order, and its findings are supported by the record. On appeal, there is "scant, if any room for an appellate court to question the [district] court's balancing of best-interest considerations." *Vangsness*, 607 N.W.2d at 477. We will not disturb the carefully considered decisions of the district court here, as its best-interests analysis is supported by the record and its findings are not clearly erroneous.

C. Endangerment

Busch next argues that the district court erred by determining that I.C. was endangered if custody was not modified. Custody modification may be warranted if "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development." Minn. Stat. § 518.18(d)(iv). While the party seeking modification must show a "significant degree of danger," we have "consistently held that emotional abuse alone may constitute sufficient endangerment." *Geibe*, 571 N.W.2d at 778, 779 (quotation omitted). Significantly, "[a] custodial parent's efforts to undermine [a child's] relationship with the noncustodial parent may endanger the [child]." *Smith v. Smith*, 508 N.W.2d 222, 227 (Minn. App. 1993). "Repeated, concrete

efforts to prevent contact . . . could reasonably impact emotional health." *Geibe*, 571 N.W.2d at 780.

The district court found that Busch's "conduct in denying [Christian's] visitation and alienating the minor child from [Christian] has endangered the emotional health and development of [I.C.]" Elsewhere in its order, the district court detailed the numerous instances when Busch denied parenting time to Christian, how Busch consistently made negative comments about Christian and "encouraged [I.C.] to be fearful and distrustful" of him, and how Busch went "to great lengths to alienate the minor child" from Christian by telling I.C. that her last name is "Busch" and labeling I.C.'s clothes and belongings with the "Busch" name.

Busch asserts that these findings are clearly erroneous, as "[n]one of the experts in this case stated that [I.C.] was endangered [by] living with [Busch]." Busch mischaracterizes the record. Darcy, Young, and the guardian ad litem may not have used the word "endangerment," but these experts all attested to the emotional harm suffered by I.C. Young testified that it would be "emotionally harmful" for I.C. to grow up thinking that Christian was "a monster" and expressed concern that I.C. would "never have a good relationship with her father" if the prior custody arrangement had continued. Young further testified that she "could just see the incredible emotional turmoil" within I.C. and that this conflict and negative activity had "taken a very severe toll" on I.C. The guardian ad litem similarly testified that Busch's denial of parenting time to Christian was "emotionally harmful" to I.C. because it alienated her from her father. She believed that I.C. faced "emotional danger" and had behavioral issues due to Busch's conduct. Even

Darcy, Busch's own expert, wrote in her report that before Christian temporarily gained custody of I.C., "it . . . was apparent that active alienation was taking place that negatively affected [I.C.'s] health and wellbeing."

Busch also attempts to rebut the district court's findings by highlighting select references in the record purporting to show that Busch was not emotionally harming I.C. She points to the fact that Busch was never told by I.C.'s therapist that she should stop eating lunch with her at school every day, as well as Young's cross-examination testimony that her report did not indicate behavioral issues with I.C. But these isolated references do not change the fact that the custody experts in this case found that I.C. was being emotionally harmed by Busch's parental alienation of I.C. from her father and that the record was replete with evidence detailing such alienating conduct and its effect upon I.C. The district court did not err by determining that I.C. would be endangered if she remained in Busch's custody.

D. Harm of change versus advantage of change

Busch finally argues that the record shows that the harm caused to I.C. by the custody change outweighs its advantages. To support a custody modification, the district court must determine that "the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." Minn. Stat. § 518.18(d)(iv). The district court concluded that the advantages of a custody change outweighed its harms because I.C. had already temporarily been in Christian's custody since February 2013 and had "adjusted to her new environment" successfully. The district court further cited the fact that Christian had allowed I.C. to see Busch on a regular basis and was encouraging

of their relationship. The district court found that Christian was sufficiently attentive to the emotional and physical needs of I.C., and that awarding him sole custody was necessary in light of Busch's behavior and the parties' inability to successfully communicate.

Busch disputes these findings. She contends that credible evidence in the record demonstrates that I.C. had been harmed by the temporary custody change prior to the evidentiary hearing. The record shows otherwise. The district court heard testimony from Christian that I.C. was "improving daily" and "beginning to relax" while in his care. He testified that I.C. had learned how to ride her bike without training wheels and had improved her hygiene skills "from nearly non[-]existent to near independence" while she was in his custody. The guardian ad litem also observed I.C. at Christian's house in August 2013 and testified that I.C. appeared acclimated and comfortable there. Busch also asserts that I.C. has struggled at school since she was transferred to Christian's custody, but the record shows that I.C. has had difficulties in school since kindergarten and that Christian had begun to remedy this issue by hiring a tutor for I.C. In light of the record evidence, the district court did not err in determining that the advantages of a custody change for I.C. outweighed its harms.

Affirmed.