STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2142

In re the Marriage of:
Nicole Marie Edwards, petitioner,
Appellant,

vs.

Christopher Michael Edwards,
Respondent.

Filed September 23, 2019
Reversed and remanded
Klaphake, Judge[*]

Dakota County District Court
File No. 19HA-FA-14-257

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

Kay Nord Hunt, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Klaphake, 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

KLAPHAKE, Judge

Appellant-mother Nicole Marie Edwards challenges the district court's award of additional parenting time to respondent-father Christopher Michael Edwards, arguing that the increase in parenting time constitutes a de facto custody modification and therefore Minn. Stat. § 518.18(d)(iv) (2018) applies to the motion. Because we agree that the increase in parenting time was a de facto custody modification, we reverse and remand.

D E C I S I O N

A district court has broad discretion when deciding parenting-time matters. *Hansen v. Todnem*, 908 N.W.2d 592, 596 (Minn. 2018). On appeal, our review 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 review the district court's factual findings for clear error. *Id.* at 599.

Mother argues that father's request to modify parenting time and the resulting order modifying parenting time amounted to a de facto modification of custody. Motions to modify custody and motions to modify parenting time are subject to different standards. When considering a motion to modify custody, the district court generally applies the "endangerment standard," set forth in Minn. Stat. § 518.18(d)(iv), whereas motions to modify parenting time under Minn. Stat. § 518.175, subd. 5(b) (2018), require only an analysis of the best interests of the child. *In re Custody of M.J.H.*, 913 N.W.2d 437, 440 (Minn. 2018). The determination of the applicable standard presents a question of law, which we review de novo. *Id.*

Mother and father were married in September 2006 and divorced in August 2014. The parties have one minor child, B.E., born in September 2009. At the time of dissolution, the parties agreed to a marital-termination agreement that awarded mother sole physical custody of the child subject to father's parenting time. Father was awarded parenting time every Thursday from 5:00 p.m. until Friday at 8:00 a.m., and every other weekend from Friday at 5:00 p.m. until Sunday at 5:00 p.m., for a total of four overnights every two-week period. In February 2018, father moved to modify the parenting-time schedule. Following a hearing, the district court granted the motion and ordered that father would continue to have parenting time every Thursday overnight and every other weekend and ordered that he would have additional parenting time on the Monday following mother's parenting-time weekend from Monday after school until Tuesday at 6:00 p.m.

The district court scheduled a review hearing for August 24, 2018. Prior to the hearing, father again moved to modify his parenting time. Following the review hearing, the district court granted the motion. The district court ordered that father would have parenting time every Monday and Tuesday overnight, that mother would have parenting time every Wednesday and Thursday overnight, and that the parties would alternate weekend parenting time from Friday after school to Monday morning school drop off. As a result, each parent received seven overnights per two-week period. Mother moved for amended findings, arguing that the order effectuated a de facto change in custody and therefore the district court should have applied the "endangerment standard" that applies to motions to modify custody under Minn. Stat. § 518.18(d)(iv). The district court denied

the motion after determining that the new parenting-time schedule did not result in a de facto change in custody.

Mother appeals the district court's determination that the new parenting-time schedule did not result in a de facto change in custody. Father argues that this issue was not properly preserved for appeal because mother did not raise it until her motion for amended findings. Generally, we will not review issues that were not presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). And an issue that was first raised in a motion for amended findings may be considered raised "too late." *Allen v. Cent. Motors, Inc.*, 283 N.W.2d 490, 492 (Minn. 1939). But here, the district court considered and ruled on the issue. And throughout the proceedings mother argued that a substantial increase in parenting time would significantly disrupt B.E.'s daily schedule because it would lead to more time commuting between the parties homes for school and extracurricular activities, which are relevant factors when considering if a motion to modify parenting time would result in a de facto custody modification. *See M.J.H.*, 913 N.W.2d at 443. Accordingly, the issue was presented to and addressed by the district court, and we may therefore review the issue.

In *M.J.H.*, the supreme court addressed the issue of when a motion to increase parenting time constitutes a de facto motion to modify custody. *Id.* at 440. The district court found that father's request was a de facto motion to modify physical custody and that it would change the child's primary residence, but this court reversed that determination on appeal. *Id.* at 439, 443. The supreme court granted review and reversed this court's

decision after determining that father's motion was a de facto motion to modify physical custody because his "proposed modification is substantial." *Id.* at 442.

The supreme court held that:

> [W]hen determining whether a motion to modify parenting time is a de facto motion to modify physical custody for purposes of deciding whether the endangerment standard applies, a court should consider the totality of the circumstances to determine whether the proposed modification is a substantial change that would modify the parties' custody arrangement. The factors considered may include the apportionment of parenting time, the child's age, the child's school schedule, and the distance between the parties' homes, but these factors are not exhaustive.

Id. at 443.

The parties' marital-termination agreement awarded father parenting time every Thursday overnight and every other weekend, for a total of four overnights every two-week period. The first order to modify parenting time awarded him one additional overnight, and the second order awarded him two additional overnights. As a result, following the district court's second order, father and mother had equal parenting time consisting of seven overnights per two-week period. Father argues that this court should only compare the increase between the two 2018 orders because mother did not appeal the first order and, therefore, it became the last permanent and final order setting parenting time. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). We disagree. The district court's order does not specify if the order is temporary or final, but the order scheduled a review hearing. Father moved to again modify parenting time prior to the review hearing, and the district court heard arguments on the motion at the review hearing. Accordingly, the district court

considered the second motion to modify parenting time as part of its scheduled review of the first order and again amended the parenting-time schedule. Because the district court scheduled a review hearing of the first order and considered the second motion as part of that review, the first order was not the last permanent and final order. We therefore compare the change between the parenting-time schedule established following the dissolution of marriage with the second order increasing father's parenting time.

The district court determined that, based on the totality of the circumstances, the increase in father's parenting time did not constitute a change in custody. The parties have joint legal custody, but mother was awarded sole physical custody. "Physical custody and residence" is defined as "the routine daily care and control and the residence of the child." Minn. Stat. § 518.003, subd. 3(c) (2018). Mother argues that the increase in parenting time functionally changed the physical custody of B.E. to joint physical custody. We agree. "Joint physical custody" is defined to mean "that the routine daily care and control and the residence of the child is structured between the parties." Minn. Stat. § 518.003, subd. 3(d) (2018). Following the district court's order, parenting time was divided equally between the parties. While an equal division of parenting time does not, per se, result in custody being treated as joint physical custody, it is a relevant factor to consider. *M.J.H.*, 913 N.W.2d at 443.

Moreover, as mother notes, the change resulted in father having significantly more parenting time during the school week than he was initially awarded following the dissolution of marriage. Under the initial parenting-time schedule, father only had overnights prior to a school day twice per two-week period; under the new schedule he has

five. This will have a substantial impact on mother's daily care and control of B.E. during the school week. *See Id.* at 442 (noting that a proposed change was substantial when it changed mother's "daily care and control of the child from nearly every school day to half of all school days"). Father lives thirty minutes away from B.E.'s school, and mother indicated that B.E. often goes back and forth between school and father's home at least twice when he has an after-school activity. Because the new schedule significantly restructured the parenting-time schedule during the school week, B.E. will have to spend significantly more time traveling between father's home and his school during the school week. Finally, we note that the district court's order addressing whether the proposed parenting-time schedule was a de facto custody modification incorrectly states that the new schedule only resulted in father being awarded a "single additional overnight." As discussed above, father was granted three additional overnights.

On this record, we conclude that the increase in father's parenting time was a de facto custody modification. Father was awarded substantially more parenting time, and the new schedule significantly impacted mother's "routine daily care and control" of the child, particularly during the school week. Because the motion was a de facto motion to modify custody, the "endangerment standard" set forth in Minn. Stat. § 518.18(d)(iv) applies to the motion. *Id.* at 441. We therefore reverse and remand for further proceedings.

Reversed and remanded.