STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1663

In re the Marriage of:
Cory Michael Bayer, petitioner,
Respondent,

vs.

Alissa Lea Bayer, n/k/a Alissa Lea Peterson,
Appellant.

Filed September 6, 2022
Affirmed
Segal, Chief Judge
Concurring specially, Rodenberg, Judge[*]

Pope County District Court
File No. 61-FA-14-495

Michael P. Boulette, O. Joseph Balthazor, Jr., Taft Stettinius & Hollister, LLP, Minneapolis, Minnesota; and

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Kathleen M. Newman, DeWitt, LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and Rodenberg, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

We review for abuse of discretion a district court's determination that a proposed modification of parenting time constitutes a de facto change of custody. Under this standard, if the district court's findings of fact are supported by the evidence, appellate review is limited to assessing whether the district court misapplied the law, or the decision is against logic and the facts on record.

OPINION

SEGAL, Chief Judge

Appellant-mother challenges the district court's order denying her motion to enforce a neutral custody evaluator's parenting-time recommendations. She argues that the district court erred when it determined that the recommended changes would amount to a de facto modification of physical custody. We affirm.

FACTS

Appellant-mother Alissa Lea Bayer, now known as Alissa Lea Peterson, and respondent-father Cory Michael Bayer married in March 2002 and have four children together. The marriage was dissolved by a stipulated judgment and decree in January 2015. As provided in their stipulation, the parties were awarded joint legal and joint physical custody of the children. The plan provided for a 2-2-3 parenting-time schedule, meaning that each parent would have two weekdays every week and alternating three-day weekends with their children. This schedule was later changed to alternating weeks in order to reduce the number of exchanges.

Parenting issues arose, including father's concern that the children were becoming distant and withdrawn from him. Father alleged that the children's behavior was the result of parental alienation caused by mother. Mother alleged that father was emotionally and physically abusive toward the children. The parties, as relevant here, eventually entered into a stipulation for the appointment of a neutral evaluator. The district court approved the stipulation and incorporated it into an order issued in August 2020 (the stipulated order).

In the stipulated order, the neutral evaluator was tasked, among other things, with addressing what parenting-time schedule would be in the best interests of the children and recommending treatment or intervention for the parents and children. The stipulated order required the parties to "follow the recommendations and decisions made by [the neutral evaluator] with respect to parenting time, treatments, and/or interventions." It also expressly prohibited the neutral evaluator from making "decisions or recommendations regarding a change to legal or physical custody."

The neutral evaluator provided a written summary of her recommendations to the parties in June 2021. Among other things, she recommended that the parties share legal and physical custody of the children and that the parents and children participate in therapy. Additionally, she recommended a reduction in father's parenting time to "every other weekend, from after school on Friday until Tuesday morning" and, if there was no school, father's parenting time would start at 9:00 a.m. on Fridays.

Father objected to the recommendations and requested a comprehensive report of the neutral evaluator's findings. In her updated report, the neutral evaluator added a

recommendation that, "[e]ventually, Father should be able to schedule one on one time with one of the children, from after school until 7:30 p.m., during mother's extended parenting time," but provided that "Mother needs to agree to the time, prior to the visit."

Father continued to object to the change and mother then sought enforcement of the neutral evaluator's recommendations. In an order issued in November 2021, the district court granted enforcement of the neutral evaluator's therapy-related recommendations but denied enforcement of the parenting-time recommendations. The denial was based on the district court's determination that the neutral evaluator's parenting-time recommendations would result in a de facto modification of physical custody and that this exceeded the neutral evaluator's authority under the stipulated order. The district court noted in the order that mother had not filed a motion to modify custody and allowed that the denial was "without prejudice for Mother to bring a motion to modify custody as allowed by law." Mother appeals.

ISSUES

I. What standard of review applies to a district court's determination that an adjustment in parenting time results in a de facto modification of physical custody?

II. Did the district court abuse its discretion in determining that the proposed changes to the parenting-time schedule would constitute a de facto modification of physical custody?

ANALYSIS

This appeal requires us to review the district court's determination that the neutral evaluator's recommendations on parenting time constitute an improper de facto modification of physical custody. The order appointing the neutral evaluator granted the

evaluator the authority to make recommendations on parenting time, but it excluded "the authority to make decisions or recommendations regarding a change to legal or physical custody."

The requisite legal standard for modification of an existing parenting-time order differs materially from the standard required for modification of physical custody. When a parent moves to modify parenting time, the district court must grant the motion if the "modification would serve the best interests of the child" and "would not change the child's primary residence." Minn. Stat. § 518.175, subd. 5(b) (2020). Before a district court can grant a motion to modify physical custody, the district court must find (1) "that a change has occurred in the circumstances of the child or the parties," (2) "that the modification is necessary to serve the best interests of the child," and (3) that one of five bases listed in the statute has been established.[1] Minn. Stat. § 518.18(d) (2020).

The supreme court has repeatedly explained that whether a proposed change modifies parenting time or amounts to a de facto change in physical custody is to be determined by assessing the impact of the change, not its label. *See, e.g.*, *Ayers v. Ayers*, 508 N.W.2d 515, 520 (Minn. 1993) (concluding that mother's motion to modify parenting time was a request to modify physical custody because, although the proposed modification

[1] Of the five, the endangerment basis is the one applicable here. That basis requires the district court to find that "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and [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) (2020).

would "leav[e] intact the 'joint legal and joint physical' denomination of the arrangement," the modification would give the father "virtually no custody during the school year").

The supreme court addressed this issue most recently in *Christensen v. Healey*, where it considered whether a parent's motion to expand parenting time amounted to a de facto motion to change physical custody. 913 N.W.2d 437, 438-39 (Minn. 2018). In that case, mother had been awarded sole physical custody of the parties' joint child, subject to father's parenting time, which included every other weekend during the school year and alternating weeks in the summer. *Id.* Father's motion sought to increase his parenting time to every other week throughout the year, so that father's parenting time would be equal to mother's. *Id.* The district court denied the motion on the grounds that it was, in essence, a motion for a change of physical custody and father had not satisfied the requisite legal standard to justify a modification of physical custody. *Id.*

In *Christensen*, the supreme court held that a totality-of-the-circumstances test should be applied to evaluate "whether a motion to modify parenting time is a de facto motion to modify physical custody." *Id.* at 443. The court stated that the relevant factors to be "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.*

While the supreme court observed in *Christensen* that "merely increasing [father's] parenting time to 50 percent, without more, would not modify the award to [mother] of sole physical custody," the court noted that the district court's analysis included consideration of other factors, such as "the child's age, school, and the distance between

the parties' homes." *Id.* at 442-43 (quotation omitted). The supreme court held that "the district court's order contains sufficient findings" to support the district court's determination that father's "motion is a substantial change that would modify the parties' custody arrangement." *Id.* The supreme court concluded that father's motion thus constituted a de facto motion to modify physical custody, even though it was brought as a motion to modify parenting time. *Id.*

Before turning to an analysis of the district court's determination in this case, we must first identify the proper standard of review.

I.

The parties disagree on the applicable standard of review. Mother contends that this court should apply a de novo standard of review and that we should conduct an independent review of the *Christensen* factors. We note that mother cites *Dahl v. Dahl*, 765 N.W.2d 118 (Minn. App. 2009), to support her contention. *Dahl*, however, preceded *Christensen* and thus was decided without the benefit of the totality-of-the-circumstances test articulated in *Christensen*.[2]

Father frames the issue differently, arguing that this case involves a custody decision that is reviewed for abuse of discretion. He cites *Thornton v. Bosquez*, 933 N.W.2d 781, 794 (Minn. 2019); *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985); and *Rutten v.*

[2] Mother also maintains, correctly, that we apply a de novo standard of review when asked to interpret a stipulation or order. *See Wolf v. Oestreich*, 956 N.W.2d 248, 253 (Minn. App. 2021), *rev. denied* (Minn. May 18, 2021). But we are not being asked to do that here. Mother and father agree that the stipulated order permitted the neutral evaluator to recommend modifications to parenting time, but not physical custody.

Rutten, 347 N.W.2d 47, 50 (Minn. 1984), in support of that approach. We are not persuaded. Those cases arose in the context of appeals from initial custody determinations and not from determinations of whether a particular adjustment of parenting time amounts to a de facto modification of custody.

The supreme court made clear in *Christensen* that the question of whether the district court applied the correct legal standard—the standard for modification of parenting time or for modification of physical custody—is a question of law subject to de novo review. 913 N.W.2d at 440. The opinion did not, however, expressly articulate the standard for appellate review of the district court's application of the *Christensen* factors—in other words, the standard to apply to the district court's ultimate determination of whether a proposed change constitutes a de facto modification of physical custody. But our reading of *Christensen* convinces us that the supreme court applied an abuse-of-discretion standard.

In affirming the district court's conclusion in *Christensen* that the proposed change would constitute a de facto modification of physical custody, the supreme court did not engage in its own weighing of the relevant circumstances. Instead, the supreme court simply stated that the district court considered a variety of factors and that the district court's findings supported the district court's conclusion. *Id.* at 443. This analysis is consistent with an abuse-of-discretion standard of review. Under that standard, if the findings of fact are supported by the evidence, appellate review of the district court's application of the *Christensen* factors is limited to determining whether the district court "misappl[ied] the law, or deliver[ed] a decision that is against logic and the facts on

record." *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022) (quotation omitted); *see also Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022). Accordingly, we read *Christensen* as having applied an abuse-of-discretion standard when it reviewed the district court's ultimate determination of whether a proposed adjustment to parenting time constitutes a de facto change in physical custody.[3] And it is the standard we will apply here.

II.

With this standard in mind, we review the district court's determination that the parenting-time recommendations constitute a de facto modification of physical custody. Here, mother does not claim error in the district court's findings of fact. Mother argues, instead, that the district court misapplied the law by placing too much emphasis on the change in the apportionment of parenting time. Mother relies on caselaw, such as *Christensen*, that rejects rigid application of "a bright-line rule based solely on the time spent with the child." *Christensen*, 913 N.W.2d at 443 (noting that "[s]uch a mathematical rule conflicts with the governing principle that a district court has broad discretion in determining custody and parenting time matters").

In this case, the district court began its analysis with the significant reduction in father's parenting time that would result from the neutral evaluator's recommendations. The district court noted that the neutral evaluator's recommendations would reduce father's

[3] Regardless of whether *Christensen* requires the application of an abuse-of-discretion standard to appellate review of this issue, we are persuaded that it is the correct standard for the reasons so ably articulated in the concurrence.

parenting time from the 50/50 split that had been in place since the marriage dissolution in 2015, to "approximately 29/71 parenting time, with Friday to Tuesday every other weekend." But the district court's analysis did not end there. The district court went on to address other considerations.

For example, the district court commented that father currently "assists the children with school every other week, every day, and is involved in this important aspect of the children's lives," and that with the proposed change, he would "have almost no interaction with the children on school days." The district court also commented on the range in the children's ages from 11 to 17. The district court observed that the "younger children, in particular, may be more impacted by the significant change in parenting time" and that the proposed change in schedule would mean that mother would "have a substantially more important role with respect to [the younger children's] daily routine and care as they grow." *See id.* (noting that age and school schedule are relevant factors for consideration). The district court also considered two other factors identified in *Christensen*—which schools the children attended and the proximity of the parents' homes to each other—and concluded that neither would be impacted by the proposed schedule change.

The district court thus applied the totality-of-the-circumstances test articulated in *Christensen* and the district court's conclusion is neither against logic nor the facts on record.

Mother makes two additional arguments. First, mother claims that the district court's decision is inconsistent with the parties' stipulation that they would "follow the recommendations and decisions made by [the neutral evaluator] with respect to parenting

time." This argument, however, misses the mark. The issue is not whether the parties should be held to their stipulation, but whether the neutral evaluator's recommendations concerned only parenting time or veered into a modification of physical custody—an action prohibited by the stipulated order.

Second, mother argues that the district court failed to factor in the neutral evaluator's recommendation that "[e]ventually, Father should be able to schedule one on one time with one of the children, from after school until 7:30 p.m." and that the schedule change is thus not as dramatic as it might otherwise appear. We reject this argument because it essentially asks us to reweigh the evidence, which is inconsistent with an abuse-of-discretion standard of review. *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221-22 (Minn. 2021). We also note that mother's argument ignores the proviso in the recommendation that "[m]other needs to agree to the [after-school] time, prior to the visit." This, along with the fact that the recommendation employs qualifiers such as "[e]ventually" and "should be able to," signifies that having after-school time with the children would be no more than a future possibility for father.

On this record, we discern no abuse of discretion by the district court.[4]

DECISION

Because we discern no abuse of discretion by the district court in its determination that the recommendations of the neutral evaluator would constitute a de facto modification

[4] Finally, it bears noting that the district court provided in its order that the denial of mother's motion was without prejudice and that mother could "bring a motion to modify custody as allowed by law." Thus, mother can still seek a modification of physical custody if the statutory requirements for modification are satisfied.

of physical custody and, because the neutral evaluator was specifically prohibited from recommending a change to physical custody in the stipulated order appointing the evaluator, the district court did not err in denying mother's motion to enforce the neutral evaluator's parenting-time recommendations.

Affirmed.

RODENBERG, Judge (concurring specially)

While I concur with the majority, I am not convinced that *Christensen v. Healey*, 913 N.W.2d 437 (Minn. 2018), established the standard of review that the majority posits. Nevertheless, I agree that the standard of review the majority adopts is undoubtedly the proper standard of review to apply to a district court's determination that a particular adjustment to parenting time amounts to a de facto custody modification.

The Minnesota Supreme Court's analysis in *Christensen* arose in a similar but not identical context to this case. There, the parents had joint legal custody of a child, and the mother had physical custody with father having parenting time during the school year every other weekend and the parents having alternating weeks during the summer.[1] *Christensen*, 913 N.W.2d at 439. Father moved to increase his school-year parenting time to an alternating-week schedule, based on allegations that the child was not doing well in school, was arriving to school inadequately clothed, and "lacked stability" in mother's home. *Id.* The district court denied father's motion, concluding that the endangerment standard under Minn. Stat. § 518.18(d)(iv) (2016) applied because father's proposed modification would result in a modification of physical custody. This court reversed, reasoning that "an award of equal or nearly equal parenting time would not necessarily be an award of joint physical custody." *Id.* (quotation omitted). The supreme court granted review on the question of whether the endangerment standard "applies to a parent's motion to increase parenting time to 50 percent when prior orders grant sole physical custody and the child's primary

[1] The parties had several different parenting-time arrangements over time, but the every-other-weekend-with-father arrangement was in effect at the time of father's motion.

residence to the non-moving parent." *Id.* at 440. The supreme court reversed this court, holding that

> when 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.

Id. at 443. The supreme court—as had we—rejected the argument that every physical custodian must have a majority of the parenting time, *id.* at 442, and it identified a non-exhaustive list of factors properly to be employed in such a case, *id.* at 442-43.

As the majority correctly notes, the *Christensen* opinion did not "expressly articulate the standard for appellate review." There is language in the *Christensen* opinion suggesting that the supreme court may have employed a de novo standard of review. The supreme court stated: "Considering the child's age, school schedule, and the distance between the two parties' homes, *we conclude that [father's] proposed modification is substantial enough to change [mother's] routine daily care and control of the child*." *Id.* at 442 (emphasis added) (quotation omitted).

Here, the parties agree that the *Christensen* factors are applicable. The precise question for decision is whether we should review the district court's treatment of the *Christensen* factors for clear error and abuse of discretion or de novo. I do not read *Christensen* as having resolved that precise question.

Regardless of whether *Christensen* established the standard of review applicable here, the facts of this case highlight the superior position that district courts occupy to

consider and weigh the *Christensen* factors to determine whether a particular modification of a parenting-time arrangement amounts to a change in physical custody. The parties to this appeal have been acrimoniously disputing custody and parenting time for several years, and have attacked and parried concerning alleged marital infidelity, domestic abuse, and parental alienation in the process. They have made multiple unsuccessful attempts to employ evaluators and therapists (for both the parties and the children) in attempts to resolve the disputed issues. The children eventually wrote letters of protest to a parenting consultant concerning one proposal to resolve the ongoing custody and parenting-time issues. At one point, the children were whisked off to a rented home in Minneapolis and a resolution was proposed that included a drastic change to the parenting-time schedule, including that mother have no contact whatsoever with the children for 30 days. This case—and all of these issues—were repeatedly before the district court.

When mother moved the district court to adopt the neutral evaluator's recommendations in a court order, the district court was faced with a complex situation that required consideration of the parties' entire acrimonious history to determine whether the parenting-time recommendations amounted to a modification of the parties' physical custody arrangement.

I agree that applying the abuse-of-discretion standard to the district court's determination is at least consistent with *Christensen*, which did not expressly identify a standard of review. *See State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) ("The court of appeals is bound by supreme court precedent . . . ."). I emphasize that it is also consistent

with the underlying principle that appellate courts should practice restraint and avoid substituting their judgment for that of the better-positioned district court.

When making custody determinations in the first instance, for example, the district court must consider relevant statutory factors to evaluate the best interests of the child and "explain how each factor led to its conclusions and to the determination of custody and parenting time." Minn. Stat. § 518.17, subd. 1(a)-(b) (2020); *see also* Minn. Stat. § 518.003, subd. 3(f) (2020) (defining "custody determination" to include decisions concerning parenting time). On appeal, we review a district court's findings of fact on the best-interests factors for clear error, *Hansen v. Todnem*, 908 N.W.2d 592, 599 (Minn. 2018), and the court's balancing of those factors for an abuse of discretion, *Thornton v. Bosquez*, 933 N.W.2d 781, 794 (Minn. 2019). And we have recognized that there is "scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000).

Because the district court has broad discretion in making custody determinations, 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." *Goldman v. Greenwood*, 748 N.W.2d 279, 281-82 (Minn. 2008) (quotation omitted). The concept that the district court's findings on the statutory factors are reviewed for clear error while its ultimate conclusions are reviewed for an abuse of discretion is not limited to custody disputes; rather, it is an approach that is generally applied when a district court must consider and weigh various factors to arrive at a legally significant conclusion. *See In re Welfare of*

Child. of J.R.B., 805 N.W.2d 895, 900-01, 900 n.4 (Minn. App. 2011) (identifying numerous examples of this idea), *rev. denied* (Minn. Jan. 6, 2012).

Other examples abound. In determining whether the probative value of a prior conviction as impeachment evidence outweighs its prejudicial effect, a district court must consider and weigh the factors enumerated in *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978). Appellate courts review the district court's balancing of the *Jones* factors for abuse of discretion. *State v. Hill*, 801 N.W.2d 646, 651 (Minn. 2011); *see also State v. Hochstein*, 623 N.W.2d 617, 625 (Minn. App. 2001) (recognizing that the district court is in a "unique position" to assess and weigh the *Jones* factors and "must be accorded broad discretion"), *rev. granted* (Minn. Apr. 25, 2001) *and ord. granting rev. vacated* (Minn. July 24, 2001). In probation-revocation cases, while appellate courts review de novo whether the district court made the necessary findings on the *Austin* factors, the district court's ultimate determination to revoke probation is subject to an abuse-of-discretion standard of review. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005) (applying the factors established in *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980)). In extended-juvenile-jurisdiction cases, we review the district court's findings on the six statutory factors set forth in Minn. Stat. § 260B.125, subd. 4 (2020), for clear error and appellate courts review the district court's weighing of those factors for abuse of discretion. *See, e.g.*, *In re Welfare of J.H.*, 844 N.W.2d 28, 34-35 (Minn. 2014). We similarly review a district court's weighing of the eight factors set forth in the Uniform Child Custody Jurisdiction and Enforcement Act to determine the appropriate forum when dual jurisdiction exists for an abuse of discretion. *Levinson v. Levinson*, 389 N.W.2d 761, 762 (Minn. App. 1986); *see*

also Minn. Stat. § 518D.207(b) (2020) (articulating factors courts must consider in order to determine "whether it is appropriate for a court of another state to exercise jurisdiction"). And, when reviewing a district court's decision concerning the reinstatement and discharge of a forfeited bail bond, appellate courts review a district court's findings on the *Shetsky* factors for abuse of discretion. *State v. Askland*, 784 N.W.2d 60, 62 (Minn. 2010) (applying the factors established in *Shetsky v. Hennepin County (In re Shetsky)*, 60 N.W.2d 40, 46 (Minn. 1953)).

By analogy to the aforementioned situations where district courts are required to consider and weigh various factors to reach a decision, I am confident that, even if *Christensen* did not establish the standard of review that the majority posits, it is the proper standard of review for appellate courts to apply to a district court's determination concerning whether an adjustment to parenting time amounts to a de facto custody modification.

Christensen identified the factors that a district court should consider in determining whether a proposed alteration of parenting time amounts to a custody change. And application of those factors is a uniquely factual determination that must be resolved on a case-by-case basis. That is what district courts do, and we should not revisit that determination on a de novo basis. Appellate courts are poorly situated to conduct such an assessment on appeal. The majority adopts the proper standard of review for the reasons discussed.