STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1065

In the Marriage of:

Varvara Viktorovna Tishchenko, petitioner,
Appellant,

vs.

Joseph Monroe Cmiel,
Respondent,

Ramsey County,
Intervenor.

Filed April 28, 2025
Reversed and remanded
Johnson, Judge

Ramsey County District Court
File No. 62-FA-18-1139

Maury D. Beaulier, Melchert, Hubert, Sjodin, P.L.L.P., Waconia, Minnesota (for appellant)

Kyle R. Kroll, Abigail J. Sokolowski, Winthrop & Weinstine, P.A., Minneapolis, Minnesota; and

Seungwon Chung, Taft, Stettinius & Hollister, L.L.P., Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

The mother of a teenage child requested eight additional days of parenting time per year. The district court decreased the mother's parenting time. We conclude that the district court erred by not considering whether the modification of parenting time is a *de facto* change of custody, by not considering whether the modification is a restriction of the mother's parenting time, and by not considering the presumptive statutory minimum of 25 percent of parenting time. Therefore, we reverse and remand for further proceedings.

FACTS

Varvara Viktorovna Tishchenko and Joseph Monroe Cmiel were married in 2007. They have one joint minor child, who was born in 2009. Tishchenko petitioned for dissolution of the marriage in 2018.

At a pre-trial conference in July 2019, the parties agreed to share joint legal custody of the child, and the district court later issued an order to that effect. In February 2020, the district court filed its dissolution judgment and decree, awarding Tishchenko sole physical custody and awarding Cmiel parenting time on alternating weekends and two weekdays per week. The decree provided Tishchenko with 261 overnights (72 percent) and Cmiel with 104 overnights (28 percent) of parenting time per year.

In May 2023, when the child was 13 years old, Tishchenko filed a motion to change the child's residence to South Carolina, where she and her new husband were relocating. Tishchenko requested a parenting-time schedule based on an assumption that the child would attend school in South Carolina and would return to Minnesota during the summer

months and during school breaks. Cmiel opposed the motion. At a motion hearing in July 2023, Tishchenko informed the district court that she was "kind of in the process of relocating there already." She stated that, in addition to her new primary residence in South Carolina, she and her new husband own two homes in Minnesota that are used for short-term rentals and that she could stay in one of them whenever necessary to exercise parenting time in Minnesota. At the conclusion of the hearing, the district court orally denied Tishchenko's motion to change the child's residence to South Carolina.

In September 2023, the district court filed an order establishing a modified parenting schedule. The order provided that the child would reside with Cmiel during the school year, that the child would reside primarily with Tishchenko during the summer months, and that Tishchenko could exercise parenting time during other school breaks. The order also provided that Tishchenko "may arrange for visits to Minnesota for parenting time" with 30 days' notice and for periods of not more than ten days, so long as the child attended school and other activities during her visits.

Shortly after the issuance of the September 2023 order, Tishchenko submitted a letter requesting reconsideration. Tishchenko argued, among other things, that the district court had modified custody without an evidentiary hearing, and she also sought clarification about whether the district court's order allowed her to have parenting time during ten-day visits to Minnesota in addition to the parenting time specifically awarded. In October 2023, the district court filed an order clarifying that Tishchenko's right to additional parenting time in Minnesota is limited to the right to extend to ten days the parenting time that she was awarded during school breaks and to arrange for ten days of

parenting time during months with no school breaks, for a maximum of ten days per month during the school year. As clarified, the September 2023 order provided Tishchenko with as many as 142 overnights (39 percent) of parenting time per year, depending on the extent to which she arranged for additional parenting time in Minnesota. Tishchenko does not challenge the September 2023 order on appeal.

Meanwhile, Tishchenko also filed a motion to modify parenting time. She requested, among other things, a parenting-time schedule that would give her eight additional days per year. At a February 2024 motion hearing, Cmiel asked the district court to maintain the existing September 2023 parenting-time schedule but to alternate school breaks in light of Tishchenko's willingness to spend time in Minnesota and to eliminate the provision that allowed Tishchenko to spend up to ten days per month with the child in Minnesota.

In May 2024, the district court filed an order in which it established a new month-by-month parenting schedule, to begin immediately and to continue until the child's emancipation in August 2027. The district court identified specific ten-day periods for Tishchenko's parenting time during most (but not all) months in the 40-month period before the child's emancipation. As a result, the May 2024 order provides Tishchenko with 66 overnights (27 percent) of parenting time in the remaining portion of 2024, 70 overnights (19 percent) of parenting time in 2025, 106 overnights (29 percent) of parenting time in 2026, and 41 overnights (19 percent) of parenting time in 2027 before the child's emancipation in August 2027. Tishchenko appeals.

DECISION

I. *De Facto* Change of Custody

Tishchenko first argues that the district court erred on the ground that the modification of parenting time constitutes a *de facto* change of custody.

The term "parenting time" is defined by statute to mean "the time a parent spends with a child regardless of the custodial designation regarding the child." Minn. Stat. § 518.003, subd. 5 (2024). If a party moves to modify a parenting-time order, a district court may grant the motion "[i]f modification would serve the best interests of the child" and "if the modification would not change the child's primary residence." Minn. Stat. § 518.175, subd. 5(b) (2024); *see also Hansen v. Todnem*, 908 N.W.2d 592, 596-97 (Minn. 2018).

The term "physical custody and residence" is defined by statute to mean "the routine daily care and control and the residence of the child." Minn. Stat. § 518.003, subd. 3(c) (2024). If a party moves to modify custody, a district court may modify custody after finding that "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and 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) (2024). A party seeking to modify custody based on endangerment is entitled to an evidentiary hearing if the party makes a *prima facie* showing of endangerment. *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017).

The supreme court has recognized that a motion to modify parenting time may seek a change that is, in effect, a modification of custody. *Christensen v. Healey*, 913 N.W.2d

437, 440-43 (Minn. 2018); *Ayers v. Ayers*, 508 N.W.2d 515, 520 (Minn. 1993). A district court may not effectively modify custody, which ordinarily requires a finding of endangerment after an evidentiary hearing, based only on a showing of best interests. *Christensen*, 913 N.W.2d at 441; *Ayers*, 508 N.W.2d at 520. To determine whether a proposed modification of parenting time would be a *de facto* modification of custody, "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." *Christensen*, 913 N.W.2d at 443. "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.*

This court applies an abuse-of-discretion standard of review to a district court's determination as to whether a proposed modification of parenting time would be a *de facto* change of custody. *Bayer v. Bayer*, 979 N.W.2d 507, 512 (Minn. App. 2022). In this case, however, the district court did not expressly consider whether its modification of parenting time is a *de facto* change of custody and did not expressly consider the *Christensen* factors. Before *Christensen*, appellate courts typically would resolve such an argument by reviewing the record to determine whether the district court intended a modification of parenting time to be a change of custody. *See, e.g.*, *Ayers*, 508 N.W.2d at 518-20; *Suleski v. Rupe*, 855 N.W.2d 330, 334-36 (Minn. App. 2014). But after *Christensen*, it is necessary to engage in a multi-factor analysis, and it is appropriate for the district court, which is most familiar with the case, to do so in the first instance. *See Hahn v. Jungwirth*, No. A22-

1616, 2023 WL 4553453, *2-3 (Minn. App. July 11, 2023) (order op.) *see also* Minn. R. Civ. App. P. 136.01, subd. 1(c) (providing that order opinions are "not binding authority").

Thus, the district court erred by not considering whether the modification of parenting time reflected in the May 2024 order constitutes a *de facto* change of custody. Therefore, we remand the matter to the district court for a determination of that issue in the manner required by *Christensen*.

II. Restriction of Parenting Time

Tishchenko also argues that the district court erred on the ground that the modification of parenting time constitutes a restriction of her parenting time.

Tishchenko relies on a statute that provides:

> [T]he court may not *restrict* parenting time unless it finds that:
>
> (1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development; or
>
> (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time.

Minn. Stat. § 518.175, subd. 5(c) (2024) (emphasis added). Tishchenko contends that the district court erred by restricting her parenting time without making either of the findings required by section 518.175, subdivision 5(c).

"There is no statutory definition of what constitutes a 'restriction' of parenting time." *Suleski*, 855 N.W.2d at 336. A reduction in parenting time "is not necessarily a restriction of parenting time"; rather, a restriction may exist if "a change to parenting time is 'substantial.'" *Dahl v. Dahl*, 765 N.W.2d 118, 123-24 (Minn. App. 2009) (quotation

omitted). "Less substantial alterations" of parenting time are merely "modifications," not restrictions. *Lutzi v. Lutzi*, 485 N.W.2d 311, 315 (Minn. App. 1992). "To determine whether a reduction in parenting time constitutes a restriction or modification, the court should consider the reasons for the changes as well as the amount of the reduction." *Dahl*, 765 N.W.2d at 124.

We begin by considering the amount of the reduction in Tishchenko's parenting time. *See id.* In doing so, we compare the parenting time awarded in the challenged May 2024 order to the parenting time previously awarded in the September 2023 order, as clarified by the October 2023 order. *See id.* at 123 (referring to "last permanent and final order setting parenting time" as "baseline" for argument concerning alleged restriction of parenting time). In addition, we quantify the amount of parenting time based on the number of overnights. *See Suleski*, 855 N.W.2d at 337.

The district court's September 2023 order provided Tishchenko as many as 142 days (39 percent) of parenting-time overnights per year. The district court's May 2024 order reduced Tishchenko's parenting time to 283 of the 1,213 overnights then remaining before the child's emancipation, which is equivalent to approximately 85 days (or 23 percent) per year. Thus, on an annual basis, Tishchenko's parenting time was reduced by 57 days, which is 40 percent of what she previously was awarded. The amount of the reduction in Tishchenko's parenting time appears to be substantial. *Compare Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002) (concluding that reduction by one-half was substantial); *Clark v. Clark*, 346 N.W.2d 383, 385-86 (Minn. App. 1984) (concluding that reduction from 14 weeks to five and one-half weeks (*i.e.*, 61 percent) was restriction), *rev.*

denied (Minn. June 12, 1984), *with Suleski*, 855 N.W.2d at 337 (concluding that reduction from 273 overnights to 245 overnights (*i.e.*, 10 percent) was not substantial); *Danielson v. Danielson*, 393 N.W.2d 405, 406-08 (Minn. App. 1986) (concluding that reduction from every other weekend to six weeks per year (*i.e.*, 52 to 42 overnights, or 19 percent) was not substantial).

We continue by inquiring into the reasons for the reduction. *See Dahl*, 765 N.W.2d at 124. The district court did not state any reasons. We are unable to discern any reasons because neither party sought the form or amount of the reduction that the district court ordered. Tishchenko requested eight additional days per year. Cmiel asked the district court to maintain the basic structure of the September 2023 order but to reduce Tishchenko's parenting time on holidays and to limit the length of her visits to Minnesota during school breaks. The district court's order states simply, "Attached as Exhibit 1 is the parenting time schedule the Court finds in the best interest of the minor child from May 1 to, 2024, until his emancipation."

Thus, the district court erred by not determining whether the reduction of Tishchenko's parenting time is a restriction. Therefore, we remand the matter to the district court for reconsideration. On remand, the district court shall determine whether the May 2024 order restricted Tischenko's parenting time and, if so, either make the findings required by statute for a restriction, *see* Minn. Stat. § 518.175, subd. 5(c), or further modify parenting time so that there is no restriction.

III. Minimum Amount of Parenting Time

Tishchenko last argues that the district court erred by awarding her parenting time in an amount that is less than the presumptive statutory minimum of 25 percent.

Tishchenko relies on a statute that creates "a rebuttable presumption that a child must receive a minimum of at least 25 percent of the parenting time with each parent." Minn. Stat. § 518.175, subd. 1(g) (2024). For these purposes, the percentage of parenting time is determined by "the number of overnights that a child spends with a parent." *Id.*

Cmiel initially argues that Tishchenko did not preserve this argument because she did not present it to the district court. Our caselaw provides that a district court must "demonstrate an awareness and application of the 25% presumption *when the issue is appropriately raised* and the court awards less than 25% parenting time." *Hagen v. Schirmers*, 783 N.W.2d 212, 217 (Minn. App. 2010) (emphasis added). Tishchenko points out that neither party "raised" the issue because neither party requested a restriction in Tishchenko's parenting time. We agree that, given the parties' respective arguments, Tishchenko was not on notice that the district court might reduce her parenting time to less than 25 percent. Thus, the argument is not forfeited. *See Dahl*, 765 N.W.2d at 120-21, 124 (considering argument where appellant requested minimum amount of 25 percent and district court awarded only 5 percent).

The parties present conflicting arguments as to whether Tishchenko's parenting time under the May 2024 order is more or less than 25 percent. Tishchenko contends that the district court awarded her less than 25 percent; Cmiel contends that the May 2024 order gives Tishchenko 26 percent. As stated above, the court's own calculations indicate that

the amount of Tishchenko's parenting time from May 2024 to the child's emancipation in August 2027 is 283 of 1,213 overnights, which is less than the 25-percent presumptive statutory minimum. In *Hagen*, this court stated that "the record does not indicate the district court considered the 25% presumption" and that "[t]he failure to consider the issue is error." 783 N.W.2d at 218. The same is true in this case.

Thus, the district court erred by not expressly considering the 25-percent presumptive statutory minimum. Therefore, we remand the matter to the district court for reconsideration. On remand, the district court shall either expressly consider the 25-percent presumptive statutory minimum or further modify parenting time so that Tishchenko's allocation of parenting time is not less than 25 percent.

Reversed and remanded.