STATE OF MINNESOTA
IN COURT OF APPEALS
A10-761

In re the Marriage of:

Amy Lynn Brevik,
n/k/a Amy Lynn Ashbaugh, petitioner,

Respondent,

vs.

Scott Allan Brevik,
Appellant.

Filed April 12, 2011
Affirmed
Lansing, Judge

Clay County District Court
File Nos. 14-FA-07-3103, 14-FA-07-335

Amy Ashbaugh, Moorhead, Minnesota (pro se respondent)

Christopher Brevik, Anoka, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Connolly, Judge.

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

LANSING, Judge

The district court entered judgment following two years of interim orders in Scott Brevik and Amy Ashbaugh's marital-dissolution proceedings. On appeal from the judgment and a post-dissolution order, Brevik raises multiple issues relating to custody, property division, child support, and the district court's legal conclusions on jurisdiction. Because the district court had jurisdiction to decide the posttrial motions, the findings of fact are supported by the record, and the district court did not otherwise abuse its discretion or misapply the law, we affirm.

F A C T S

Amy Ashbaugh and Scott Brevik were married in 2003 and are the parents of TB, who was born in 2003, and MB, who was born in 2004. In June 2007 an argument over marital finances ended in a driving incident that provided a basis for criminal charges against Brevik. Ashbaugh began marital-dissolution proceedings in October 2007.

Following trial on the criminal charges, a jury found Brevik guilty of second-degree assault of Ashbaugh and the conviction was sustained on appeal. *State v. Brevik*, No. A08-0070, 2009 WL 817532, *1 (Minn. App. Mar. 31, 2009). The jury also found Brevik guilty of child endangerment in his conduct toward TB and that conviction was not appealed. *Id.* at *2. The district court sentenced Brevik to 365 days in jail for the child-endangerment conviction and issued a protection order that prohibited Brevik's contact with TB and MB until January 2008. Brevik was released from custody in April 2008.

In the August 2009 marital-dissolution judgment that followed eight days of trial, the district court applied the statutory best-interests factors to evaluate the custody issue and found that it was in the best interests of TB and MB for Ashbaugh to have sole legal and physical custody. The dissolution judgment also set Brevik's child support, divided the marital property, and resolved parenting time and other disputes that had aggregated through the course of the two-year proceeding.

Brevik moved for a new trial under Minnesota Rules of Civil Procedure 59.01 or amended findings and judgment under Minnesota Rules of Civil Procedure 52.02. Ashbaugh did not dispute the procedural correctness of the motion, but the district court, on its own initiative, raised an issue of subject-matter jurisdiction based on its interpretation of Minn. Stat. § 518.145, subd. 1 (2008), and rules 59.01 and 81.01.

After the district court granted their request to submit written memorandum on the jurisdiction issue, Brevik and Ashbaugh jointly submitted a copy of *Heisler v. Heisler*, 2001 WL 1464523 (Minn. App. 2001), an unpublished opinion of this court. *Heisler* held that a litigant in a marital-dissolution proceeding may move for a new trial or an amended judgment under Minn. Stat. § 518.145, subd. 2 (2000), but it is also "well established that parties to dissolution proceedings may make motions for new trial under rule 59.01." *Id.* at *3. The district court rejected the rationale of *Heisler*, but as a cautionary measure addressed Brevik's new-trial motion in addition to determining that it lacked subject-matter jurisdiction.

Brevik appeals from the marital-dissolution judgment and from the denial of his posttrial motion. He also disputes the lack of subject-matter jurisdiction.

D E C I S I O N

The five groups of issues that Brevik raises in this appeal relate to (1) jurisdiction, (2) evidentiary rulings, (3) custody and parenting time, (4) property division, and (5) child support. Ashbaugh, in a responsive brief, raised additional issues, which were dismissed in a special-term order for failure to file a notice of related appeal. *See* Minn. R. Civ. App. P. 103.02 (requiring notice of related appeal); *In re Marriage of Brevik v. Brevik*, No. A10-761 (Minn. App. Dec. 20, 2010) (order).

I

We first address the district court's determination that it lacked subject-matter jurisdiction to hear Brevik's new-trial motion brought under rule 59.01. Issues of subject-matter jurisdiction are reviewed de novo. *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002).

Although the district court considered and decided the issues raised in Brevik's new-trial motion, it concluded that Minn. Stat. § 518.145, subd. 1, and not Minn. R. Civ. P. 59.01, governs posttrial motions in marital-dissolution actions. Neither Ashbaugh nor Brevik raised a jurisdictional challenge, but the district court, concluding that new-trial procedures implicated subject-matter jurisdiction, raised the issue on its own initiative. We disagree with the district court's conclusion that the distinctions between the statutory marital-dissolution procedures and the civil-procedure rules raise issues of subject-matter jurisdiction.

The Minnesota Constitution extends a broad grant of subject-matter jurisdiction to the district court, providing that "[t]he district court has original jurisdiction in all civil and criminal cases." Minn. Const. art. VI, § 3; *State ex rel. Koalska v. Swenson*, 241 Minn. 278, 282, 62 N.W.2d 842, 844 (1954). Once proceedings are initiated in the district court and it has jurisdiction, "in the absence of a clear intention to the contrary, . . . ordinary rules of civil procedure apply unless clearly inconsistent with [a] statute." *In re Thunderbird Motel Corp. v. Cnty. of Hennepin*, 289 Minn. 239, 241-42, 183 N.W.2d 569, 571 (1971). Absent a clear constitutional or legislative provision that divests the court of jurisdiction, noncompliance with a statute or rule, even if written in mandatory language, does "not divest the district court of subject matter jurisdiction." *In re Civil Commitment of Giem*, 742 N.W.2d 422, 430 (Minn. 2007).

Neither Minn. Stat. § 518.145 nor rules 59.01 or 81.01 state that noncompliance divests the district court of its adjudicatory power over new-trial motions. Thus, the claim-processing rules that the district court analyzes do not raise an issue of subject-matter jurisdiction that requires the district court on its own initiative to question its power to proceed. Because subject-matter jurisdiction is not implicated and neither party raised a procedural objection, we direct our review to the district court's findings and conclusions that respond to Brevik's new-trial motion. *See Giem*, 742 N.W.2d at 430-33 (applying waiver principles to claim-processing rules that do not involve subject-matter jurisdiction).

II

It is our long-standing rule that issues involving trial procedure and evidentiary rulings are subject to appellate review only if there has been a new-trial motion that assigns these rulings as error. *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986). If an issue is properly preserved, we review it under a standard of broad discretion and will sustain the ruling unless the district court exercised its discretion arbitrarily, capriciously, or contrary to law. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). To warrant a new trial, the complaining party must also show that any error was prejudicial. *Id*. at 46.

Brevik claims that the district court abused its discretion by (1) admitting hearsay evidence of TB's and MB's statements, (2) admitting a police officer's statements from a separate court proceeding, (3) admitting hearsay testimony of statements made by Brevik's sister, (4) admitting Ashbaugh's testimony on future income and Brevik's attempts to find a job, (5) limiting testimony from Brevik's father about Brevik's attempts to find a job, (6) admitting testimony about Brevik's parents' income; and (7) failing to consider his motions in limine. Brevik's first three claims of error were not properly preserved in his motion for a new trial, therefore, we will not address those claims on appeal.

The fourth claim relates to Ashbaugh's testimony on her future income and Brevik's job search. We reject Brevik's claim that Ashbaugh's testimony was speculative and without proper foundation. Her testimony was based on exhibit 1, a letter from her employer, which stated that after August 2009 Ashbaugh would not be

employed at her previous level of pay. We also reject Brevik's claim of insufficient foundation for Ashbaugh's testimony about Brevik's job search. Brevik neither provides references to the record nor provides legal analysis to support his claim. Unsupported claims will not be considered on appeal unless prejudicial error is obvious, and we perceive no prejudicial error. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971).

The fifth and sixth claims of evidentiary error relate to the district court's limitation of testimony from Brevik's father about Brevik's attempts to find a job and its admission of testimony about Brevik's parents' income. Brevik's father stated that he did not know the details of Brevik's job search or offers, and we therefore reject Brevik's challenge to the district court's determination on lack of foundation. The testimony relating to Brevik's parents' income was not erroneously admitted because it was relevant to determining whether Brevik could care for TB and MB by living with his parents without a consistent source of income.

The final claim is essentially a challenge to trial procedure. Brevik claims that the district court abused its discretion by failing to consider his motions in limine. The district court did consider the motions, but determined that it would be "fully" and "better capable of resolving" the specific evidentiary issues during the course of the trial, when the context for the rulings would be less speculative. Because the proceeding was a court trial that did not require shielding a jury from inadmissible evidence, we fail to see any prejudicial abuse of discretion, and Brevik has provided no authority to the contrary.

Because Brevik has failed to demonstrate that any of the evidentiary or procedural rulings were an abuse of discretion, we affirm the district court's denial of the new-trial motion.

III

The marital-dissolution judgment placed sole legal and physical custody of the couple's two children with Ashbaugh and established the parenting-time schedule. Brevik challenges the district court's custody determination and a parenting-time modification.

A district court has broad discretion in custody decisions. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Appellate review on custody issues is limited to whether the district court "abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). The controlling principle in a child-custody determination is the child's best interests. *Id*. at 711. A child's best interests are determined by weighing thirteen statutory factors. *See* Minn. Stat. § 518.17, subd. 1(a) (2008) (listing factors). If a person seeking custody has been convicted of assault against a family or household member, that person has the burden to prove by clear and convincing evidence that custody or parenting time is in the best interests of the children. Minn. Stat. § 518.179, subds. 1(3), 2(3) (2008).

Brevik raises four challenges to the custody determination. He first contends that the district court abused its discretion by relying on a guardian ad litem's recommendation because she erroneously believed that Brevik's assault conviction

precluded him from receiving custody. We agree that the law changes the burden of proof, but does not preclude custody. But the district court did not rely solely on the guardian's recommendation in deciding the custody issue. The district court's analysis is carefully set forth in its extensive findings on each of the thirteen best-interests factors listed in Minn. Stat. § 518.17, subd. 1(a). Furthermore, the guardian's recommendation was also based on her consideration of the thirteen statutory factors.

Second, Brevik contends that the district court's determination improperly relied on a temporary custody order in violation of Minn. Stat. § 518.131, subd. 9(a) (2008), which provides that "[a] temporary order . . . [s]hall not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding." Minn. Stat. § 518.131, subd. 9(a) (2008). Although the district court took into account the seriousness of Brevik's criminal charges and the stability provided to the children when they lived in Ashbaugh's home during Brevik's incarceration, the district court was relying on the reasons for the temporary custody order, not the order itself. This does not constitute improper use of a temporary order.

Third, Brevik raises questions about Ashbaugh's mental health because two of her evaluation questionnaires indicated possible invalid results. We reject Brevik's claims that the district court improperly failed to consider Ashbaugh's questionnaire results. The record provides no evidence that Ashbaugh has psychological or behavioral problems.

The fourth challenge to the best-interests factors is intertwined with Brevik's new-trial motion and directed to Ashbaugh's failure to advise him that one of the children has

"been placed on an inhaler, nebulizer and prescription medication." The district court found that Brevik's claim of new evidence "is only further evidence of the extreme dysfunction and anger between [Ashbaugh and Brevik]" and that the new evidence "would not have changed its decision regarding the custody of the minor children." Because the district court took the evidence into account and reasonably concluded that it would not change its custody determination, Brevik has demonstrated no prejudice and no abuse of discretion. *See Dostal v. Curran*, 679 N.W.2d 192, 194 (Minn. App. 2004) (stating that decision on new-trial motion is reviewed for abuse of discretion), *review denied* (Minn. July 20, 2004).

Brevik's challenge to the parenting-time schedule is aimed at the district court's attempt to balance parenting time to avoid scheduling conflicts and to alleviate Ashbaugh's and Brevik's concerns that neither parent should have the children for three weeks or weekends in a row. Because the modification achieves the purposes that Brevik and Ashbaugh both requested and it is in the best interests of the children to balance parenting time and diminish conflict, we see no abuse of discretion. *See Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009) (recognizing district court's broad discretion in determining parenting time).

IV

Appellate review of the division of marital property is guided by principles that include according the district court broad discretion and deferring to the district court's factual findings. *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 852 (Minn. 2003). We do not impose a standard of exactness on the district court's valuation of assets: "it is only

necessary that the value arrived at lies within a reasonable range of figures." *Johnson v. Johnson*, 277 N.W.2d 208, 211 (Minn. 1979).

Brevik challenges the district court's valuation of the marital home. At trial, the district court received expert evidence of conflicting appraisals. Ashbaugh's expert estimated that the property was worth approximately $86,000. Brevik's expert estimated that the property was worth approximately $97,500. After consideration, the district court determined that the home's value was $94,750. This amount is within the range of the expert testimony and is not an abuse of discretion. Furthermore, Brevik's argument relies on a claim that the district court incorrectly valued the mortgage, but no evidence supports that claim.

Brevik raises two issues that involve responsibility for debt. The first involves Ashbaugh's student-loan debt. The district court found Brevik liable for a portion of Ashbaugh's student-loan debt. Ashbaugh testified that the student loan was partially used for the children's daycare expenses, and the district court relied on Ashbaugh's testimony. We defer to the fact-finder's assessment of witness credibility. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). The district court's conclusion that a portion of Ashbaugh's student-loan debt was a joint marital debt is supported by Ashbaugh's testimony and is not contrary to the evidence in the record.

The second payment issue involves a financial obligation for the fees payable to Rainbow Bridge for supervising Brevik's visitation with TB and MB. The district court issued a temporary order in February 2008 that required Ashbaugh and Brevik to share equally the costs of using Rainbow Bridge services. In a later temporary order, the

district court ordered Ashbaugh to reimburse Brevik $465.50 for her share of Rainbow Bridge fees that were reflected on Brevik's bill from Rainbow. Following Brevik's motion for immediate reimbursement and Ashbaugh's countermotion to modify the order, the district court vacated the provision that required Ashbaugh to pay half of Brevik's invoice. The district court based its modification on Ashbaugh's affidavit and documentation submitted by Rainbow Bridge. The district court determined that the amounts on Brevik's invoice were attributable only to Brevik's share of the costs. The documentation established that Rainbow Bridge waives the fees for victims of domestic violence, and Ashbaugh's share of the payments were not part of Brevik's invoice. Brevik contends that the district court did not have the authority to modify the temporary order.

Temporary orders in dissolution proceedings "shall continue in full force and effect until the earlier of its amendment or vacation, dismissal of the main action or entry of a final decree of dissolution or legal separation." Minn. Stat. § 518.131, subd. 5 (2008). The district court may modify or revoke a temporary order "before the final disposition of the proceeding upon the same grounds and subject to the same requirements as the initial granting of the order." *Id.* at subd. 9(b) (2008). "Temporary orders shall be made solely on the basis of affidavits and argument of counsel except upon demand by either party in a motion or responsive motion." *Id*. at subd. 8 (2008).

The district court's October 2008 temporary order modifying the Rainbow Bridge payment obligation was before the final disposition of the proceedings and properly

based on Ashbaugh's motion and affidavit requesting an order modifying the district court's previous orders, and is neither erroneous nor an abuse of discretion.

V

A district court must base child support on "potential income" if a parent is "voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income." Minn. Stat. § 518A.32, subd. 1 (2008). Potential income may be determined in three different ways, one of which is relevant to this appeal: "the amount of income a parent could earn working full time at 150[%] of the higher of the federal or state minimum wage." *Id.*, subd. 2 (2008). When a district court imputes income, it exercises broad discretion, and we review that imputation only for an abuse of that discretion. *See Butt v. Schmidt*, 747 N.W.2d 566, 574-77 (Minn. 2008) (reviewing challenge to district court's failure to impute income under abuse-of-discretion standard).

The district court found that Brevik failed to provide any information of his premarital income, has a poor work history, has low motivation to obtain employment, was not credible when he testified that he had looked for more than one hundred jobs, has not engaged in any outreach to obtain a job, lives at his parents' house and relies on them for his room and board, and is a physically healthy man with normal intelligence, capable of obtaining full-time employment. These findings are not clearly erroneous and support the district court's conclusion that Brevik is voluntarily underemployed or employed on a less than full-time basis. Therefore, the district court did not abuse its discretion by imputing income to Brevik at 150% of the federal minimum wage.

Brevik claims that the district court's calculation of Ashbaugh's income was clear error because its finding that her income would be reduced was solely based on conjecture. The district court's finding and calculations were not based on conjecture, they were based on exhibit 1—a letter from Ashbaugh's employer indicating that she would not be employed as a full-time teacher the next year. Because the evidence in the record supports the district court's finding and calculations, it did not err in concluding that Ashbaugh would have a reduced income.

Brevik also claims that the district court should have included in its calculation of Ashbaugh's income the amount she earns at her summer job with Concordia Language Villages. The district court, however, found that no testimony established that this was a permanent job and that Ashbaugh only took the position to earn extra money and pay household bills. The district court's findings are supported by Ashbaugh's testimony and are not clearly erroneous.

Brevik's final challenge to the child-support determination is that the district court miscalculated the amount of parenting time he had for the year constituting July 13, 2008 through July 13, 2009. We review a district court's child-support determination for abuse of discretion. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). A conclusion is clearly erroneous if it is against logic and the facts on record. *Rutten*, 347 N.W.2d at 50.

The district court determined that Brevik had parenting time for 163 of the 365 days from July 13, 2008 through July 13, 2009. This amounts to 44.6%. Brevik argues that the district court failed to consider that Ashbaugh sometimes denied Brevik his parenting time. No evidence indicates that the district court failed to consider any days

throughout the year that should have been attributable to Brevik's parenting time. Thus, Brevik has failed to demonstrate that the district court's finding is clearly erroneous.

Affirmed.