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**STATE OF MINNESOTA
COURT OF APPEALS
A11-1985**

In re the Matter of:
Justin Bernard Graff, petitioner,
Appellant,

vs.

Heather Marie Fitzgerald,
Respondent.

**Filed July 16, 2012
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-FA-08-5222

Lori Michael, Apple Valley, Minnesota (for appellant)

Sandra Connealy Zick, Tuzinski & Zick, L.L.C., Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Muehlberg, Judge.*

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the district court's custody decision, arguing that the district court abused its discretion by (1) denying his motion to remove the assigned judge,

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

(2) limiting his cross-examination of the custody evaluator, and (3) awarding respondent sole physical and legal custody of the parties' minor child. We affirm.

FACTS

Appellant-father Justin Graff and respondent-mother Heather Fitzgerald are the parents of B.G., born August 2006. Father and mother were never married, but father signed a recognition of parentage. Both parties have used illegal drugs, and B.G. was born with cocaine in her system. Child-protection services monitored mother's drug use, and she remained sober for approximately 14 months after B.G.'s birth, during which time she and B.G. lived with father. Mother relapsed in late 2007.

In August 2008, father petitioned to obtain physical and legal custody of B.G. The district court awarded father temporary sole legal and physical custody, with the possibility of parenting time for mother if she entered chemical-dependency treatment. Mother entered treatment at Minnesota Teen Challenge in November.

In August 2009, based on mother's progress in treatment and the recommendation of a guardian ad litem (GAL), the district court ordered temporary joint legal custody and temporary physical custody to father, with parenting time for mother at Teen Challenge. Mother successfully completed treatment in December and subsequently returned to Teen Challenge to work in the ministry program.

In March 2010, mother moved to accelerate the review hearing scheduled for early May, alleging that father was restricting her access to B.G. The new judge assigned to the matter reappointed the GAL to address parenting time. After considering the GAL's report that the parties cannot agree on certain parenting issues, the district court awarded

mother temporary sole legal custody and father temporary sole physical custody, with parenting time for mother.

On December 6, father moved for permanent sole legal and physical custody of B.G. The district court ordered a full custody evaluation. Also in December, father filed a motion seeking to remove the judge, alleging that the judge is biased because the parties attended high school with the judge's daughters and the judge was appointed by former Governor Tim Pawlenty, who, according to father, supports Teen Challenge. The district court denied the motion.

After an August 2011 trial, the district court awarded mother sole physical and legal custody of B.G., with parenting time for father. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by denying father's removal motion.

To remove a judge who has presided at a motion or other proceeding, a party must make "an affirmative showing of prejudice on the part of the judge or judicial officer." Minn. R. Civ. P. 63.03. This showing incorporates the requirement of rule 63.02 that "[n]o judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror." Minn. R. Civ. P. 63.02. But "a judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which themselves may be unfair or which simply indicate dissatisfaction with the possible outcome of the litigation." *Carlson v. Carlson*, 390 N.W.2d 780, 785 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Aug.

20, 1986). We review denial of a motion to disqualify a judge based on bias for an abuse of discretion. *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002).¹

Father argues that the district court abused its discretion by denying the removal motion because (1) the judge's daughters attended high school with father and mother, and (2) the judge was appointed by a former governor, who "is a big supporter of Teen Challenge and their beliefs and morals." We are not persuaded. Father provides no evidence of an actual connection between the parties and the judge's daughters and fails to articulate how any such connection impaired the judge's ability to be impartial. And father's second basis for removal is even more tenuous. Not only does father fail to provide evidence of any connection between the former governor and the Teen Challenge program, but it would be untenable to require a judge to remove herself from a case because the governor who appointed the judge may hold views favorable or unfavorable to a party who appears before the court.

Father further asserts that the judge's actual bias is apparent because the custody decision is a "drastic turnaround" from the temporary order that awarded father sole physical and legal custody. We disagree. Father's argument mischaracterizes the effect of temporary custody orders. "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 (2010). And the fact that the district court's

¹ Mother argues that this court lacks jurisdiction to consider this issue because father failed to appeal the order denying his removal motion within 60 days after she served him with notice of the district court's denial order. *See* Minn. R. Civ. App. P. 104.01, subd. 1. The district court's order denying removal is not an appealable order. *See* Minn. R. Civ. App. P. 103.03 (listing appealable orders).

custody decision does not favor father does not, in itself, indicate bias. *See Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986) (adverse rulings are not sufficient to demonstrate bias for the purpose of removing a judge). On this record, we conclude that the district court did not abuse its discretion by denying father’s motion to remove the assigned judge.

II. The district court did not abuse its discretion by limiting father’s cross-examination of the custody evaluator.

A district court is responsible for case management, including the mode and order of interrogating witnesses and presenting evidence. Minn. R. Evid. 611; *McIntosh v. Davis*, 441 N.W.2d 115, 119 (Minn. 1989). The district court may place limits on evidence to avoid “undue delay, waste of time, or needless presentation of cumulative evidence.” Minn. R. Evid. 403. We will not reverse a district court’s procedural and evidentiary decisions absent an abuse of discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001).

Father contends that he was unable to effectively challenge the “potential for bias” reflected in the custody evaluator’s report because the district court limited his cross-examination of the evaluator. We disagree. Review of the custody evaluator’s testimony reveals that father had ample opportunity to probe the issue of bias, including whether the custody evaluator had prior contact with mother and the extent of the custody evaluator’s contacts with Teen Challenge. The district court actively interceded during father’s examination of the custody evaluator, asking counsel to move on from questions that had been asked and answered and inquiring directly of the witness to clarify certain points.

But the district court did the same during mother's examination of the custody evaluator, and during other witnesses' testimony, as well. We conclude that the district court's efforts to keep the trial moving and to understand the testimony of the eight witnesses does not constitute abuse of discretion.

III. The district court did not abuse its discretion by awarding mother sole physical and legal custody.

“Appellate review of custody determinations 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 district court's findings must be sustained unless they are clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We view the record in the light most favorable to the district court's findings and will reverse only if we are “left with the definite and firm conviction that a mistake has been made.” *Dailey v. Chermak*, 709 N.W.2d 626, 629 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. May 16, 2006). “That the record might support findings other than those made by the [district] court does not show that the court's findings are defective.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

The guiding principle in all custody determinations is the best interests of the child. Minn. Stat. § 518.17, subd. 3(a)(3) (2010); *Durkin v. Hinich*, 442 N.W.2d 148, 152 (Minn. 1989). In making a best-interests determination, the district court must make detailed findings considering all relevant factors, including 13 statutorily enumerated factors. Minn. Stat. § 518.17, subd. 1(a) (2010) (listing factors that must be considered).

Father argues that the district court's custody decision is flawed because the court (1) relied excessively on the custody evaluator's report, (2) made findings that conflict with previous GAL recommendations or findings in the temporary-custody orders, and (3) failed to make independent findings sufficient to address the required statutory factors. We address each argument in turn.

First, whether to accept the opinions of a court-appointed custody evaluator is a matter within the district court's discretion. *See Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991) (stating that a district court is not bound by expert recommendations and may reject the recommendations if it makes detailed findings that demonstrate full consideration of the factors addressed in the custody study). Accordingly, we will not second-guess the district court's determination that the custody evaluator was credible. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that "[d]eference must be given to the opportunity of the [district] court to assess the credibility of the witnesses").

Second, previous recommendations and temporary orders may inform the district court's view of the history of the case but do not preclude contrary findings based on credible testimony. Minn. Stat. § 518.131, subd. 9 (stating that temporary order does not "prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding"). This custody proceeding took place over three years, during which mother's circumstances changed considerably. The district court did not abuse its discretion by independently determining B.G.'s best interests based on the evidence presented at trial.

Third, the district court did not merely adopt the custody evaluator's findings and recommendations. Rather, the court considered and made independent findings on all 13 statutory factors, identifying the record evidence it relied on in determining B.G.'s best interests and making express credibility findings. The findings indicate that the district court considered both father and mother committed, loving parents, who are capable of caring for B.G.² But it is undisputed that the parties are unable to cooperate in raising B.G. and cannot compromise on critical points, such as religion and education, which makes joint custody untenable. Accordingly, the determinative issue before the district court was which parent would best support the other parent's active participation in B.G.'s life. *See* Minn. Stat. § 518.17, subd. 1(a)(13) (requiring consideration of "disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child").

Substantial record evidence supports the district court's finding that mother is more likely to permit and encourage frequent and continuing contact between father and B.G. than father is with respect to mother. The record is rife with evidence of animosity toward mother from not only father and father's fiancé, but also mother's mother and stepfather, who share a triplex with father. This animosity is reflected in father's interference with mother's parenting time and his open expressions of hostility toward mother in front of B.G., which, according to the custody evaluator, may negatively impact B.G.'s view of mother and B.G.'s own self-esteem. By contrast, mother

² Father emphasizes mother's history of chemical dependency, but the record amply supports the district court's finding that mother has acknowledged her chemical dependency, successfully undergone treatment, and remains sober.

expressed a desire to promote B.G.'s relationship with father, which the district court credited. The district court did not clearly err by finding that mother is better disposed than father to encourage contact with the noncustodial parent. On this record, we conclude that the district court did not abuse its discretion by awarding mother sole legal and physical custody.

Affirmed.