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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A12-0213

A12-0644

In re the Marriage of:
Sarah Peterson, petitioner,
Respondent,

vs.

Adam Thomas Peterson,
Appellant.

Filed March 25, 2013
Affirmed in part, reversed in part, and remanded
Chutich, Judge
Concurring in part, dissenting in part, Ross, Judge

Stearns County District Court
File Nos. 73-FA-10-6837;
73-FA-10-6375

Marc G. Kurzman, Kurzman Grant Law Office, Minneapolis, Minnesota (for respondent)

Adam Thomas Peterson, Melrose, Minnesota (pro se appellant)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Appellant Adam Peterson (Peterson) contends that the district court made numerous errors in its dissolution orders involving him and his ex-wife, Sarah Peterson.

In particular, he argues that the district court erred in its (1) custody determination and award of parenting time; (2) failure to include the guardian ad litem as a party; (3) division of property; (4) computation of the parties' gross income; (5) child-support order; (6) spousal-maintenance order; and (7) award of need-based attorney's fees.

Because we conclude the district court properly exercised its broad discretion in determining custody and parenting time, declining to follow the recommendations of the guardian ad litem, and dividing property, we affirm those rulings. But because the district court erred in computing the gross income of the parties, we reverse and remand the financial determinations concerning income, child support, spousal maintenance, and attorney's fees.

FACTS

Married in Eagan in August 1997, the Petersons are the parents of three minor children. After nearly thirteen years of marriage, Sarah Peterson petitioned for dissolution in September 2010. Trial occurred on two separate days in the summer of 2011; testimony concerning child custody and parenting time occurred in July, while property and financial issues were tried in mid-August.

In its August 18, 2011, order on custody and parenting time, the district court awarded the Petersons joint legal custody of their three children and granted Sarah Peterson "primary" physical custody subject to reasonable visitation by Peterson. Peterson immediately moved for amended findings of fact and a new trial. He claimed that Sarah Peterson had not requested the relief of primary physical custody in her petition for dissolution; the district court misapplied the best interests of the child

standard; new evidence had emerged of a relationship of Sarah Peterson's that jeopardized the safety of the children; and that the district court's factual findings varied from evidence presented at trial. He also requested a custody evaluation. By order dated December 5, 2011, the district court denied the request for a new trial but issued amended findings of fact.

In its November 2011 order on financial and property issues, the district court awarded Sarah Peterson the marital home, the family van, a lawnmower, \$1,000 from the sale of a tow truck, and 50% of the couple's share of CLJ Estates, LLC and ATS Auto, Inc. Peterson was awarded the boat and motor, a computer, half the value of the equity in the marital home, and his share of CLJ and ATS.

The district court determined that Peterson has imputed gross income/benefits of approximately \$46,194 per year and Sarah Peterson has an actual gross income of approximately \$2,784 per year. Upon this determination, the court ordered Peterson to make temporary spousal-maintenance payments of \$900 a month for four years and child support payments of \$850 a month, to be adjusted as each child emancipates. The district court finally ordered that Sarah Peterson receive an additional \$12,500 in need-based attorney's fees. This appeal followed.

D E C I S I O N

I. Award of Physical Custody

In reviewing Peterson's various challenges, we are cognizant that the district court has broad discretion in determining issues in marital dissolution proceedings. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We review custody determinations only to

determine 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).

A. Litigation of Physical Custody by Consent

Peterson first contends that the district court erred by granting sole physical custody to Sarah Peterson when her petition did not request such relief and she never amended her petition. While Sarah Peterson’s dissolution petition seeks “joint legal and joint physical custody to the parties, with 50/50 parenting time,” the district court found that the parties litigated Sarah Peterson’s plea for sole physical custody by consent. We agree.

Minnesota Rule of Civil Procedure 15.02 governs amendment of pleadings by implied consent:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of a trial of these issues.

The district court has discretion in applying this rule and appellate courts review these decisions only for an abuse of discretion. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 474 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). Litigation by consent is implied where the issues sought to be raised are reasonably apparent and “the intent to try [those] issues is clearly indicated by the failure

to object or otherwise.” *Hopper v. Rech*, 375 N.W.2d 538, 542 (Minn. App. 1985) (quotation omitted), *review denied* (Minn. Dec. 30, 1985). A “[m]ere reference” to the relief sought at trial is not enough, however, to be considered litigation of the issue; rather, “[a] party must have notice of a claim against her and an opportunity to oppose it.” *Hofer v. Hofer*, 386 N.W.2d 391, 393 (Minn. App. 1986).

Applying these principles here, we conclude that the district court acted within its discretion in finding that Peterson impliedly consented to litigate the issue of physical custody at trial. As the district court noted, the pre-trial positions of each of the parties on legal and physical custody changed multiple times. At trial, Sarah Peterson testified that she desired sole physical custody and wanted Peterson to have visitation on certain weekends and possibly once a week. In addition, she previously told the guardian ad litem that she sought sole physical custody. Instead of objecting to this testimony as seeking relief outside the scope of the pleadings or seeking a continuance, Peterson’s counsel cross-examined Sarah Peterson on this issue. Moreover, as the district court aptly noted, if as Peterson asserts, both parents sought joint legal and physical custody with equal parenting time, a trial on custody and parenting time issues need not have occurred.

Here, where Peterson was put on notice of Sarah Peterson’s desire for sole physical custody by her unambiguous testimony on direct examination, and he addressed her request through cross-examination, the record supports the trial court’s finding that the parties implicitly consented to litigate the issue of joint physical custody. The district court therefore did not abuse its discretion by finding that the actions of the Petersons at

trial were more than the “mere reference” to joint legal custody that was found to be inadequate to imply consent in *Hofer*.

B. Application of the Best-Interests-of-the-Child Standard in Determining Physical Custody

Peterson next challenges the district court’s award of sole physical custody to Sarah Peterson, asserting that the district court misapplied the best-interests-of-the-child standard. The children’s best interests is the controlling principle in a child-custody determination. *Pikula*, 374 N.W.2d at 711 (Minn. 1985).

The best interests of a child are determined by weighing 13 statutory factors. Minn. Stat. § 518.17, subd. 1(a) (2010). In addition, if any one parent proposes joint custody, the court must consider four additional factors. These factors include: (1) the parents’ ability to cooperate; (2) the parents’ willingness to use reasonable methods to resolve disputes; (3) the detriment to the children if sole custody is granted; and (4) whether domestic abuse has occurred between the parents. *Id.*, subd. 2 (2010).

Our review of a child-custody determination is limited. 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). And if evidence supports the district court’s decision, no abuse of discretion occurs. *Doren v. Doren*, 431 N.W.2d 558, 561 (Minn. App. 1988). Although the record may support findings other than those made by the district court, this possibility does not demonstrate that the court’s findings are defective. *Vangsness*, 607 N.W.2d at 474. And

we view the record in the light most favorable to the district court's determination and defer to the district court's assessment of credibility. *Id.* at 472.

The Statutory Best-Interests-of-the-Child Factors

Peterson alleges that the district court abused its discretion by making dozens of “omissions, errors of fact and factual conclusions” in determining the best interests of the children. He argues that every statutory best-interest factor favors joint physical custody or weighs against Sarah Peterson having sole physical custody.

In its amended order and findings, the district court specifically considered each statutory factor of the “best interests of the child” standard. *See* Minn. Stat. § 518.17 subd. 1(a). Because sufficient evidence supports the district court's detailed findings that several best-interest factors favor granting Sarah Peterson sole physical custody and because the court's findings are not clearly erroneous, we may affirm the district court without separately answering each of Peterson's numerous allegations. *See Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951) (stating that an appellate court need not discuss and review evidence in detail to demonstrate that it supports the trial court's findings, but must instead consider all evidence and determine that it reasonably supports the findings).

In its amended findings, the district court found that, while most of the statutory factors were neutral, several factors weighed in favor of awarding Sarah Peterson sole custody. These included being the past primary caretaker; the time the children have lived in a stable environment; and the need to maintain continuity and permanence of the existing or proposed custodial home.

Peterson contends that the district court erred by weighing the factor of “past primary caretaker” in favor of sole physical custody by Sarah Peterson. Minn. Stat. § 518.17, subd. 1. “The primary caretaker is the person who provides the child with daily nurturance, care and support.” *Custody of Child of Williams v. Carlson*, 701 N.W.2d 274 (Minn. App. 2005) (quotation omitted); *see also Pikula*, 374 N.W.2d at 711–14.

Peterson testified about his high level of involvement with his children, but the district court found that the evidence showed otherwise. The district court found that Sarah Peterson was the primary caretaker because she stayed at home with the Petersons’ three children, home-schooled the children, and took them to activities. This finding is well supported by the record.

Peterson also contends that the district court erred by inserting its personal views and interpretations regarding religion and cell-phone usage when weighing the factor of interaction and interrelationship of the children with a parent or parents, siblings and others. *See* Minn. Stat. § 518.17, subd. 1(a)(5). Testimony at trial was introduced by both parties about Peterson’s religious views and about whether and how those religious beliefs affected the children and his behavior toward Sarah Peterson. While the parties testified about religious beliefs at trial, the thrust of the testimony and the focus of the trial court’s analysis were on the *behavior* of the parties toward each other and the children, no matter the motivation.

Sarah Peterson testified about the various ways in which Peterson exerted control over her during the marriage based in part upon his religious belief that the Bible requires wives to obey their husbands, her concern that it was not good for the children to see him

treating her that way, and her concern that the boys were exhibiting behavior adopting a similar attitude of male superiority toward her and their sister. For his part, when asked by his counsel on direct examination about the teachings of his church regarding “a man’s role and a [woman’s] role,” Peterson said that it’s “a learning process, learning how to get along and communicate.” He acknowledged that the Bible “verse is there, kind of like a 51/49 percent type of deal is how they use the verse.” When asked a follow-up question by his counsel if he is “the boss” at home, he stated, “No. I’m usually trying to figure out how to do what she wants and I can’t do it and it really goes against my belief system to do what she wants.”

In its original decision, the district court noted Sarah Peterson’s concerns about gender inequality affecting the children under this best interest factor. In its amended findings and order, however, the district court explained that these findings were “merely a summary of the parties’ testimony” and that it made no finding that Peterson’s “religion or his parenting decisions related to cell-phone usage are ‘right’ or ‘wrong’ decisions.” Tellingly, the district court ultimately found that the Peterson children have “generally good interaction with both parents” and noted that “[t]his factor weighs in favor of joint legal custody.”¹ Given this ruling in Peterson’s favor, we conclude that the district court

¹ Citing examples of Peterson precluding his wife from accepting more photography commitments and forcing her to attend church, the court found in its discussion in this section that Peterson was unwilling to compromise during the marriage. The district court concluded, however, that this evidence about Peterson’s controlling behavior showed that the parties struggled to cooperate in resolving disputes, which is a separate factor to be weighed when joint custody is sought.

did not improperly inject its personal views about cell phones or gender roles when weighing this factor.

Moreover, we do not believe that the district court's two brief, personal comments during trial, concerning the Biblical passage about the husband's authority to make decisions in the home² and the other concerning cell-phone usage,³ were an abuse of

² The district court's comments concerning the Bible passage occurred in the following exchange during cross-examination of Sarah Peterson:

PETERSON'S COUNSEL: With regard to the—this church issue that you bring up and you believe it's going to be detrimental to [the children] as a result of what's being taught. Can you actually explain to me what is being taught.

SARAH PETERSON: Ah—that the husband is the leader and controller of the family and that the wife has to submit and the kids have to submit to what the father says.

PETERSON'S COUNSEL: Okay. And is that some kind of a doctrine or is that out of the Bible or where is the—where do you get that?

SARAH PETERSON: That's a doctrine out of the Bible.

PETERSON'S COUNSEL: Okay.

SARAH PETERSON: That [the] Baptist church believes.

PETERSON'S COUNSEL: Except that what you're—all you're saying is you're just restating what the Bible says; is that correct?

SARAH PETERSON: No, that's not correct.

THE COURT: I think the Bible does say that.

PETERSON'S COUNSEL: Yeah, it does say that. I can get it out.

THE COURT: Just for the record, when I got married they said husbands obey your wives.

PETERSON'S COUNSEL: I can get it out for you if you don't believe it.

THE COURT: Or wives obey your husbands.

SARAH PETERSON: Right.

(footnotes continued on next page)

SARAH PETERSON'S COUNSEL: If you were a judge you could have set that aside.

THE COURT: But I don't profess to read the Bible often enough to know where it is. And after I heard it once I dismissed it, so.

SARAH PETERSON'S COUNSEL: Well I, even though I may be the only Jew in the county, I will stipulate that the Bible does have that in it.

PETERSON'S COUNSEL: Yeah.

³ The comment concerning cell-phone usage also occurred during Sarah Peterson's cross-examination:

PETERSON'S COUNSEL: And when [Peterson] gave the cell phone to the children to use, right, was it your understanding that [it] was for all three children?

SARAH PETERSON: That's correct.

PETERSON'S COUNSEL: Okay. Is it appropriate for a young child to have a cell phone?

SARAH PETERSON: It depends, yes.

PETERSON'S COUNSEL: What does it depend on?

SARAH PETERSON: It depends on whether they need to contact their other parent or not or . . . friends . . . if they have friends that they can talk to.

THE COURT: You're dating yourself here, [counsel].

PETERSON'S COUNSEL: Well I'm not dating anybody.

THE COURT: My twelve year old has a cell phone.

PETERSON'S COUNSEL: Well, I'm not certain why they—does everyone . . . [the child's] age have a cell phone to your knowledge?

SARAH PETERSON: Not everyone.

PETERSON'S COUNSEL: So a lot of kids get by without having a cell phone; is that correct?

SARAH PETERSON: I don't know.

discretion requiring reversal. Notably, Peterson's trial counsel did not object to either of these sua sponte comments made by the district court⁴ and Peterson's pro se appellate brief did not quote them. Nor did Peterson or his counsel ask the district court to recuse itself after the comments were made. After carefully examining the entire record, the district court's rulings, and its factual findings concerning the parties' behavior, we conclude that the court's decision to award physical custody to Sarah Peterson was not based upon Peterson's religious views or his restriction of his daughter's cell-phone use.

The other factors cited by the court as weighing in Sarah Peterson's favor are well supported by the record. The court found that the children needed to have a stable home environment during the school year, and that the children have lived in the family home, occupied by Sarah Peterson, for their entire lives.

Factors When Joint Custody is Sought

In considering the four additional factors regarding joint custody, the district court found that three factors did not weigh in favor of joint custody. *See* Minn. Stat. § 518.17, subd. 2. Viewing the record in the light most favorable to the district court's ruling and deferring to its credibility determinations, as we must, we conclude that more than sufficient evidence supports its determination that joint physical custody was not appropriate.

⁴ In fact, the district court's comment that she thought the Bible contained the passage at issue was exactly the point that Peterson's counsel was trying to make upon cross-examination and led to a stipulation that Peterson's counsel apparently welcomed. The cell-phone comment seemed to be an attempt at humor by the district court, and, as noted above, the district court ultimately credited Peterson as generally having good interactions with his children.

Concerning the first factor, an ability to cooperate in raising the children, the court initially noted that the parents presented no evidence concerning their ability to cooperate. To the contrary, the court found that the evidence demonstrated that the parties were not advising each other of the children's activities, such as counseling or Bible camp. In addition, the court referenced the testimony about gender roles and Peterson's control over Sarah Peterson in the past as pertinent to whether they could cooperate in the future. The court thus found that this first factor weighed against joint custody.

The dissent castigates the district court's conclusions and marshals evidence from the record showing that the parties can cooperate. Yet, upon appellate review, we are not to substitute our evaluation of the evidence for that of the fact-finder, even though the record may support findings other than those made by the district court. *See Vangness*, 607 N.W.2d at 474. Viewing the evidence in the light most favorable to the district court's decision, ample evidence supports the district court's determination that the Petersons are unable to cooperate in the rearing of their children.⁵

The court next found that the methods of resolving disputes factor did not weigh in favor of joint custody because the parties presented no evidence as to how disputes would be resolved. *See* Minn. Stat. § 518.17, subd. 2(b). Moreover, testimony at trial cast doubt upon their ability to do so.

⁵ Some of that testimony includes Peterson's admissions that communication between the parents was presently an issue: "Sarah doesn't talk to me"; the children had missed swimming lessons because the parents found it hard to talk; that "church is a huge issue"; and his statements that Sarah Peterson did not communicate with him about the children's visits to doctors or counselors.

Finally, the district court found that the factor concerning whether domestic abuse occurred between the parents, did not weigh in favor of joint custody.⁶ *Id.*, subd. 2(d). Evidence at trial included testimony by Sarah Peterson of isolating and controlling behavior by Peterson throughout their marriage. For example, she testified that Peterson often prevented her from visiting friends and family in the cities; that he frequently cut off communications by turning off the phone and Internet or by taking away the car keys; and that he forbid her from scheduling more photographic commitments.

Sarah Peterson testified to a history of arguments with Peterson, including three that led her to call 911. She stated that, in the presence of the children, Peterson frequently chased her around their house yelling at her, and continued to yell at her through the door and pound on the door when she retreated to one of two rooms with doors that locked. She testified that she felt terrified when she was cornered by Peterson and that he had once removed a door from its frame to gain access to her in the room to which she had retreated.

Sarah Peterson's mother confirmed that she received calls from her daughter when her daughter was locked in a room, and that she heard Peterson yelling at her daughter. When asked if she feared for her daughter's safety, she replied, "Very much so."

Both parties testified to a physical altercation that occurred over the family computer. Peterson blocked Sarah Peterson's way as she tried to take the family's

⁶ Domestic abuse occurs when the following is committed against a family/household member: "(1) physical harm . . . (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats . . . or interference with an emergency call." Minn. Stat. § 518B.01, subd. 2(a) (2010).

computer from the home and wrestled the computer from her. Sarah Peterson testified that she feared for her immediate safety and called 911.

Peterson denied removing the door and stated that both parties yelled during arguments. The trial court, however, specifically found that Sarah Peterson appeared “honest, sincere and believable in her testimony,” and that these arguments had occurred in front of the children. The district court then stated: “These occurrences do not, in this Court’s opinion, rise to the level of domestic abuse; the Court recognizes that a jury could find differently. This history does not support an award of joint custody.”

We believe that the district court’s determination that this factor does not weigh in favor of joint custody is not an abuse of discretion. By using the punctuation and phrasing that it did when weighing whether domestic abuse as defined in Minn. Stat. § 518B.01, subd. 2(a)(2) occurred, the district court recognized that the evidence presented was sufficient to support the conclusion of a reasonable fact finder that statutory domestic abuse had indeed occurred. To be sure, the district court did not believe Peterson’s behavior rose to the level of domestic abuse defined by statute, but it apparently thought that the issue was very close or it would not have mentioned another fact-finder. Because the district court did not find statutory domestic abuse, it did not apply the required rebuttable presumption that joint physical custody was not in the best interests of the children. *See* Minn. Stat. § 518.17, subd. 2. But even though that statutory presumption did not come into play, the district court, when weighing the best interests of the children, is certainly entitled to consider this evidence of frequent domestic discord and the controlling and isolating behavior that Peterson displayed.

Accordingly, its determination that this domestic abuse factor should not weigh *in favor* of joint custody is not erroneous.

In sum, reviewing the district court's balancing of the best interests standard in the light most favorable to its determination, and in deferring to the trial court's credibility determinations, we conclude that the district court properly exercised its broad discretion in awarding Sarah Peterson sole physical custody with reasonable visitation for Peterson.⁷

II. Issues Concerning the Guardian Ad Litem

Peterson claims that the district court erred by failing to make the guardian ad litem a party to the action, and by declining to order a custody study or to adopt the guardian ad litem's custody recommendations.

Minnesota Rule of General Practice 108.01 states that the guardian ad litem shall be treated as a party. Here, the district court appointed a guardian ad litem and sought a recommendation from the guardian. The guardian ad litem testified at trial and was cross-examined by both parties. But the amount of weight to give the report of a guardian ad litem is within the discretion of the district court. *Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991). A district court may disregard a custody recommendation as long as it provides its own findings regarding the best interests of the child. *Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993), *review denied* (Minn. Jan. 28, 1994). As discussed above, the district court made detailed findings under each

⁷ Even assuming that the district court's weighing of the domestic-abuse factor was erroneous, its balancing of the other best-interests considerations still weighs in favor of its child-custody determination.

of the statutory best-interests factors and did not therefore abuse its discretion in declining to follow the guardian ad litem's recommendations.⁸

III. Determination and Division of Marital Property

Peterson challenges the district court's inclusion of certain items as marital property, specifically his interest in ATS Auto Inc. and CLJ Estates LLC; the family van; lawnmower; proceeds from the sale of a tow truck; boat; and computer. Upon a marriage dissolution, the district court "shall make a just and equitable division of the marital property." Minn. Stat. § 518.58, subd. 1 (2010). The district court is not required to make detailed findings regarding its division, but the findings must consider the statutory factors, give a rationale for the chosen division, and allow for appellate review. *Dick v. Dick*, 438 N.W.2d 435, 437 (Minn. App. 1989).

District courts have broad discretion over property divisions, and we will not reverse absent a clear abuse of discretion or misapplication of law. *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). A district court abuses its discretion if it divides property in manner "that is against logic and the facts on record." *Rutten*, 347 N.W.2d at 50.

Property acquired by either spouse during the marriage is presumptively marital, but a spouse may defeat this presumption by proving the property is nonmarital by a preponderance of the evidence. *Baker v. Baker*, 753 N.W.2d 644, 649 (Minn. 2008).

⁸ In addition, the district court explained its reasoning for disregarding the guardian's recommendation. It noted that the guardian did not specifically address the 13 factors set forth by statute or explain why it recommended joint custody. The district court also found it troubling that the guardian ad litem had no contact with the parties since fall 2010, around nine months before the guardian filed her report.

Nonmarital property includes property acquired before marriage, property acquired in exchange for nonmarital property, and appreciation in the value of nonmarital property. Minn. Stat. § 518.003, subd. 3b (2010). Nonmarital property loses its status if it is not kept separate from marital property. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). And if it is commingled with marital property, it must be “readily traceable.” *Id.* Whether property is marital or nonmarital is a question of law that we review de novo, but we defer to the district court’s underlying findings of fact unless they are a clear error. *Id.*

A. ATS Auto Parts, Inc.

Peterson asserts that the district court erred by treating his interest in ATS Auto Parts, Inc. (ATS) as marital property. He claims that he was not vested in ATS but instead owed \$220,000 to his father for his shares in ATS, and that his shares accordingly have no value.

But it is undisputed that ATS was created during the Petersons’ marriage. The district court found that Peterson works full time for the corporation and owns 1250 shares in the company while Peterson’s father, Thomas Peterson, owns the other 1251 shares. Corporate tax returns confirm that Thomas Peterson and his son each own 50% of the company. Although Peterson’s father testified that his son was not yet an owner of the business because he had yet to pay for his shares, no other evidence was presented supporting this account and the district court’s determination that Peterson’s 1,250 shares was marital shows that it found his testimony to be not credible. The district court

therefore did not err in finding that Peterson failed to prove by a preponderance of the evidence that his interest in ATS was nonmarital.

We need not address Peterson's claim that his shares in ATS have no value because the district court's order did not value the business. If Peterson is correct in his unlikely claim that his interest has no value, he will owe nothing extra to Sarah Peterson.

B. CLJ Estates, LLC

Peterson also disputes the district court's determination that CLJ Estates, LLC (CLJ) is marital property. CLJ is a holding company for ATS and owns the property for the ATS salvage yard as well as real property near Nisswa. The district court granted Peterson the parties' interest in CLJ but ordered Peterson to pay Sarah Peterson 50% of their equity in the corporation, an amount equaling \$18,235. Peterson argues that his interest in CLJ is also not fully vested because he has made no capital contributions toward his ownership interest and thus the property is nonmarital. He also asserts that the district court erred in relying on the K-1 schedule of his tax returns because these values do not account for his basis in the partnership or the debts to the corporation. Peterson argues his father is the only contributor and that Peterson has an actual value of zero or less in CLJ. But again the district court properly relied on evidence in the record to find this property to be marital and in valuing the property.

The tax returns of CLJ show that Peterson has a 50% interest in CLJ. CLJ was also formed during his marriage to Sarah Peterson. Although Thomas Peterson testified that his son had not yet purchased his interest, the district court found contradictory his statement that CLJ was created with his capital contribution as well as Peterson's "brains

and skill.” Peterson produced no written evidence demonstrating the terms of payment for the CLJ or his agreement with his father. As noted by the district court, the K-1 schedules on the 2009 and 2010 income tax returns suggest that Peterson’s capital account had respective values of \$32,011 and \$36,470, the average of which was considered as the equity in the company. Thus, Peterson again fails to meet his burden of proving the nonmarital character of his interest, and the district court’s determinations are supported by the record.

C. Van and Lawnmower

Peterson contends that the district court erred in awarding the family van and a lawnmower to Sarah Peterson. Our careful review of the record shows that the district court properly found that these items had been comingled during the marriage, thus making them marital assets. *See Wiegers v. Wiegers*, 467 N.W.2d 342, 344 (Minn. App. 1991) (holding that comingling of marital and nonmarital property can result in nonmarital property becoming marital if the nonmarital property is not readily traceable).

While Thomas Peterson testified that the van was in his name, Peterson provided no further evidence to trace the van to a nonmarital source. Moreover, the record shows that the van was used almost exclusively by Sarah Peterson to transport the children during the day. Similarly, the district court credited the testimony of Sarah Peterson that she received the lawnmower as a Mother’s Day gift from Peterson because she does the lawn care. On this record, the district court did not err in allocating the lawnmower and van as marital property and awarding them to Sarah Peterson.

D. Computer and Boat

Peterson also claims that the boat and computer that he was awarded by the district court were corporate property, and that the debts of the corporation should have been considered along with these items. But the district court found that the boat was “primarily, if not exclusively, used by [Peterson] for personal recreation” and not for business purposes and that the computer was located in Peterson’s home and used by all family members. These findings are supported by the record. We therefore conclude that the district court did not abuse its discretion in allocating these items as marital property.

E. Tow Truck Sale Proceeds

Peterson contests the allocation of proceeds from the sale of a tow truck owned by ATS during the dissolution proceedings as marital property. Minnesota law requires the district court to compensate a party when a spouse unilaterally sells marital property during the dissolution unless the sale was “in the usual course of business or for the necessities of life.” Minn. Stat. § 518.58, subd. 1(a) (2010). The burden of proof is on the party claiming that the spouse disposed of marital assets during the dissolution. *Id.*

Peterson gained his ATS interest during his marriage, and we have determined that his interest in ATS is marital property. The district court found that during the dissolution proceedings, ATS made a \$4000 profit from the sale of a tow truck that has not yet been accounted for in its books. Peterson argues that these proceeds are corporate funds and that the \$4000 profit from the sale was deposited and used to pay down corporate debt. But Peterson provided no evidence or documentation that this income

was put into the company. No record evidence indicates that this \$4000 profit has been accounted for.

Because the tow truck was sold for a \$4000 profit by ATS and because Peterson could not account for the proceeds from this sale, the district court did not err in finding that Peterson and his wife were entitled to 50% of the proceeds, with the other half going to Thomas Peterson. The district court thus properly awarded Sarah Peterson an additional \$1000 to be paid to her by Peterson.

IV. Gross Income Computations

Peterson next challenges the district court's gross income computations. The district court determined that Peterson's gross income was \$46,194 per year and that Sarah Peterson's gross income was \$2,784 per year. We will not reverse the district court's determination of income unless it is clearly erroneous. *Davis v. Davis*, 631 N.W.2d 822, 827 (Minn. App. 2001). The district court has broad discretion when imputing potential income, and we review for an abuse of discretion. *Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008).

A. Peterson's Gross Income.

In reaching the exact figure of \$46,194, the district court apparently added (1) Peterson's 2010 income from ATS of \$14,025; (2) the imputed value of the use of and insurance on his truck of \$3,600 a year; (3) the imputed value of his cellular telephone use of \$1,200 a year; (4) his 2010 tax refund of \$5,934 (5) his business income from his 2009 tax return 1040 Schedule C of \$10,635; and (6) his business income from his 2010 income tax return 1040 Schedule C of \$10,800. Peterson argues that the district court

erred in using his 1040 Schedule C business income in his 2009 *and* 2010 tax returns to calculate his gross income for one year. We agree.

Although we note the particular difficulty of computing Peterson's gross income due to the comingling of corporate and personal assets, unconventional corporate structure of ATS and CLJ, and inadequacy of financial documents provided at trial, the district court erroneously included Peterson's business income from two separate years. Even though the record is sparse, the evidence shows that the figures of \$10,635 from the 2009 tax returns of CLJ and Peterson and the \$10,800 from Peterson's 2010 tax return are independent payments in separate years, from the same source, and for the same purpose. The record reflects that this money was being paid by CLJ directly to satisfy the mortgage payments of the Peterson homestead in each year.

Peterson's income determination was calculated erroneously because of this inclusion of a figure from a previous year. Without further explanation, this figure cannot be properly included when determining Peterson's 2010 gross income. For this reason, we must reverse and remand for the district court to make specific findings regarding Peterson's income without the inclusion of the \$10,635 from his 2009 tax return. We further direct the district court to recalculate Peterson's spousal-maintenance and child-support obligations using its revised gross income determination.

Peterson alleges other errors in calculating his gross income, contending that his income will drop because he does not have his tools and lawn mower and because he can no longer claim his children as dependents on his taxes. These arguments are unpersuasive. The record contains no evidence that Peterson will be unable to earn

similar amounts of business income without the lawnmower or tools. Peterson also provided no better evidence of his future income than his prior tax returns.

Nor did the court err in imputing personal income to Peterson through his use of the company cell phone and vehicle. The evidence supports the finding that company cars and the company phone were used extensively for Peterson's own personal use and yet were not declared as income on his tax returns.

B. Sarah Peterson's Gross Income

Peterson next challenges the district court's computation of Sarah Peterson's gross income. He argues that the district court failed to account for her use of the van and for her self-employment as a photographer. The district court found that Sarah Peterson currently works 8 hours a week and earns \$7.25 an hour for earning of \$232 a month. The district court also found that she has the equivalent of a high school education, is only 35 years old, and has the ability to be a self-sufficient member of the workforce. But the court noted that she has been an "agreed-upon stay-at-home mother" and has been the primary educator of her children. It also considered that she has been out of the workforce for more than 12 years before taking her current job.

As an initial matter, the omission of the van in the calculation of income is appropriate. The van has been awarded to Sarah Peterson and its expenses will not be paid by ATS, thus not generating any continuing income. Sarah Peterson's photography income is a more complex question.

Sarah Peterson testified at trial that she is currently operating a photography business called Reflective Perspective Photography. She stated, and her tax returns

confirm, that she received about \$1,400 of income in 2009 from the company. The district court did not impute any income from this job and provided no explanation for its omission from its income calculations. The district court also did not make specific findings as to why Sarah Peterson will not be expected to increase her levels of employment after the dissolution. And although the district court has broad discretion when imputing potential income, it was an abuse of this discretion for the district court to fail to account for any income from Sarah Peterson's work as a photographer without explanation. We therefore reverse the district court's determination of Sarah Peterson's income and direct the district court on remand to specifically consider Sarah Peterson's photography business and ability to increase her level of employment after the dissolution.

V. Child Support

The district court ordered Peterson to pay \$850 a month in child support, to be adjusted as each minor child is emancipated. This amount represents a reduction from the Child Support Guidelines that held that Peterson's child-support obligation should be approximately \$1,040 a month. Minn. Stat. § 518A.34 (2010). Peterson argues that the district court erred by improperly calculating his gross income and by determining that Sarah Peterson's income was only \$232 a month despite her potential self-employment as a photographer and her ability to work at other employment.

We review child support orders for an abuse of discretion. *Rutten*, 347 N.W.2d at 50. A ruling "that is against logic and the facts on record" is an abuse of discretion. *Id.*

We will not reverse the district court's determination of income for the purposes of child support unless it is clearly erroneous. *Davis*, 631 N.W.2d at 827.

As previously discussed, the district court erred in basing Peterson's child-support commitment upon an income of \$46,194 per year; accordingly, the child-support amounts based on it are also erroneous. A more difficult question concerns the district court's determination of Sarah Peterson's income for child-support purposes.

Child support must be calculated on potential income only if the district court determines that the parent is "voluntarily unemployed, underemployed, or employed on a less than full-time basis." Minn. Stat. § 518A.32, subd. 1 (2010). But if a parent stays home to care for children, the court can consider several factors when deciding whether the parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis. *Id.* subd. 5 (2010). These factors include the parties' parenting arrangements before the child-support action, the stay at home parent's employment history, recency of employment, earnings, and job availability in the community, among others. *Id.*

As previously noted the district court found that Sarah Peterson works only 8 hours a week, but noted that she has the equivalent of a high school education, is only 35 years old, and has the ability to be a self-sufficient member of the workforce. But she has also been a stay-at-home mother and out of the workforce for 12 years before recently taking her part-time job. But the district court made no specific findings on the statutory factors set forth in section 518A.32. Even though the district court based Peterson's income primarily on his income in previous years, when computing Sarah Peterson's

income, it declined to include the approximately \$1,400 in gross income she had earned as a photographer in 2009. The district court did not address this omission.

We therefore reverse and remand the district court's child-support determination for the district court to make specific findings on the gross income of both parties and recalculate child-support levels accordingly.

VI. Spousal Maintenance

Peterson next maintains that the district court erred in ordering him to make spousal-maintenance payments of \$900 a month for four years. He contends that Sarah Peterson failed to meet her burden of proof demonstrating the need for maintenance.

The district court has broad discretion when determining spousal maintenance. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). Spousal maintenance may be awarded if the district court finds that the spouse seeking maintenance lacks the property to provide for that party's reasonable needs or is unable to provide adequate support through employment. Minn. Stat. § 518.552, subd. 1 (2010). If maintenance is required, the court must consider all relevant factors including the resources of the parties, the likelihood they will become self-supporting, the standard of living during the marriage, the duration of the marriage, the length of absence from employment, the opportunities lost by the party, the age and physical and emotional condition of the spouse seeking maintenance and the contribution of each party to the marital property and as a homemaker. *Id.* subd. 2 (2010). The district court weighs these factors and the particular facts and circumstances of the case to determine whether spousal maintenance is needed

and if so, at what amount and duration. *Kampf v. Kampf*, 732 N.W.2d 630, 633–34 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

In reaching its spousal-maintenance determination the district court considered many of these factors. The court specifically considered the age, education, income, health, and abilities of the parties. The court also noted that the parties failed to present specific evidence related to their standard of living and that Sarah Peterson did not submit evidence related to the loss of earnings, seniority, retirement benefits, and other opportunities forgone by being a stay-at-home mom.

But, as with the child support order, the district court based Peterson’s spousal maintenance on an income of \$46,194 per year. Because this amount was reached in error, the spousal maintenance amount based on it is also erroneous. Similar concerns exist for the determination of Sarah Peterson’s income because the district court specifically noted her photography business but only included in its income determination the \$232 a month that Sarah Peterson makes at her part-time job.

Because we are reversing and remanding for recalculation of Peterson’s and Sarah Peterson’s income, the district court on remand must also recalculate and modify Peterson’s spousal-maintenance obligations in accordance with this opinion.

VII. Need-Based Attorney’s Fees

Peterson finally challenges the district court’s award of \$12,500 in need-based attorney’s fees to Sarah Peterson, contending that she failed to meet her burden of proof. Minnesota law states that the court “shall” award attorney’s fees if it finds that “(a) the fees are necessary for a good-faith assertion of rights; (b) the payor has the ability to pay

the award; and (c) the recipient does not have the means to pay his or her own fees.” *Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn. App. 2001); *see* Minn. Stat. § 518.14 subd. 1 (2010). There is “neither a mandate nor discretion to award such fees without those findings and the evidence to sustain them.” *Mize v. Kendall*, 621 N.W.2d 804, 810 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001). In a dissolution case, the issue of attorney’s fees “rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion.” *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999).

Here, the district court made no explicit findings regarding the statutory requirements and instead summarily awarded the attorney’s fees at the end of its order. “Conclusory findings on the statutory factors do not adequately support a fee award.” *Geske*, 624 N.W.2d at 817. And when an order lacks findings on the statutory factors we must remand unless “review of the order reasonably implies that the district court considered the relevant factors.” *Id.* at 817 (quotation omitted).

While the district court’s order discussed the income and finances of the Petersons at length, it did not directly address any of the statutory factors. Additionally, we have already reversed and remanded its findings on gross income. We similarly reverse and remand the district court’s award of \$12,500 in attorney’s fees and direct the district court to make specific findings on the statutory factors using its revised levels of income for both parties.

In conclusion, we affirm the district court’s custody and parenting-time decisions, the decision to decline to accept the guardian ad litem’s custody recommendation, and the

division of marital property. But we reverse the district court's findings regarding Peterson's income, child support, spousal maintenance, and attorney's fees. We remand for recalculation of the incomes of Peterson and Sarah Peterson, Peterson's child-support responsibilities, and his spousal-maintenance obligations in accordance with this opinion. On remand, the district court may, in its discretion, reopen the record. We also remand for the district court to make specific findings on the statutory factors for a need-based attorney's fees award.

Affirmed in part, reversed in part, and remanded.

ROSS, Judge (concurring in part, dissenting in part)

I concur in part and dissent in part. I agree with the majority's decision to reverse the district court's financial order. But I disagree with the majority's decision to affirm the custody order.

The district court twice expressly found that the parties presented "no evidence" of crucial facts, and, based solely on those two findings, concluded that two out of the four joint-custody factors favor sole physical custody instead of joint physical custody. The record, however, proves that evidence was in fact presented, rendering both of the "no evidence" findings clearly erroneous and rendering the legal conclusions based on them abuses of discretion. This court is supposed to correct clear errors. But the majority seems to conclude that the gravity of the district court's discretion in custody matters precludes it from correcting these errors. I see nothing in the caselaw discussion of "discretion" that either permits the district court to decide statutory factors based on clearly erroneous findings or prohibits this court from reversing a custody award in that circumstance. The legal question is simply this: although the district court has broad discretion to weigh evidence, does it have discretion to declare the nonexistence of existing evidence and then avoid weighing it at all? The answer should be no.

Preceding these and other clear fact-finding errors are what appear to be abuses of discretion. The district court judge first interjected her own marital experience in the child-custody proceeding revealing her apparent disapproval of a religious marital-relations doctrine that one of the parties has adopted and that the other has made the focus of the parties' custody dispute. The judge next highlighted her experience with her own

child, revealing that she also disapproves of a parenting decision that is another key feature of the parties' custody fight. The party whose religious views and parenting views did not find favor with the district court was deprived by the court of joint physical custody and reassigned to only a margin of parenting time. And as it turns out, all of the errors—those the majority rightly corrects (as to finances) and those it does not (as to the children)—happen all to work only against that losing party. That party now reasonably complains to us about the appearance of bias. For these reasons, I respectfully but strongly disagree with the majority's decision to affirm the custody and parenting-time order.

I

The district court judge twice interjected her own personal experience in a manner that calls her objectivity into question. It is essential that a district court judge deciding family court matters is neutral in deed and in appearance. *See McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn. 1984) (“Judges, of course, should be sensitive to the appearance of impropriety and should take measures to assure that litigants have no cause to think their case is not being fairly judged.” (quotation omitted)). Adam has questioned the district court's impartiality. His challenge is well-founded.

Judge Says that She Rejected Church View on Gender Role in Her Own Marriage

The first problem with the district court's custody and parenting-time order is that the judge announced her own previous decision rejecting the religious doctrine that one of the parties made the focus of her claim for sole physical custody. The court's unusual interjection took place during the custody trial. Sarah Peterson was describing her

disagreement with the teaching of the parties' marital church: "[T]hat the husband is the leader and controller of the family and that the wife has to submit and the kids have to submit to what the father says. . . . That's doctrine out of the Bible . . . [t]hat [the Faith] Baptist [C]hurch believes." Adam Peterson's attorney asked Sarah to clarify, questioning, "[A]ll you're saying is you're just restating what the Bible says; is that correct?" Sarah disagreed, answering, "No, that's not correct." The district court judge then interrupted the exchange *sua sponte*, commenting about whether the teaching is in the Bible, offering, "I think the Bible does say that." That interjection by itself creates no great concern, but the judge's next announcement does. She followed, emphasizing that she personally rejected the teaching in *her own* marriage:

Just for the record, when I got married they said . . . wives obey your husbands. . . . But I don't profess to read the Bible often enough to know where it is. And after I heard it once, I dismissed it, so.

The district court's custody order described that exchange this way: "Although neither party cited the Bible, the Court assumes the parties were referring to Ephesians 5:21–33 and there was an oral stipulation as to this phrase being in the Bible, albeit subject to different interpretations."

I think a district court acts beyond its broad discretion in deciding child custody if the judge personally suggests her approval or disapproval of a religious doctrine that only one of the parties holds. Worse, here, the district court repeatedly refers to the doctrine when it awards sole custody to the party with whom the judge appeared to have doctrinally aligned herself. It may be that the judge intended humor. Even so, the open

disapproval of Adam's religious view invites his suspicion of judicial bias. Adam, appealing pro se, noticed, "[The] [t]rial Court condemns the Appellant's . . . religion, and errs by adding its own personal views and interpretations in regard to religion." He reasonably complains that the district court's treatment of his religion "creates an appearance of bias," and he seeks reversal, referring to what he calls the district court's "derogatory comments" about his religious view.

The majority seems to misunderstand Adam's concern about bias, stating, "In fact, the district court's comment that she thought the Bible contained the passage at issue was exactly the point that Peterson's counsel was trying to make upon cross-examination and led to a stipulation that Peterson's counsel apparently welcomed." The concern is not that the court announced that the passage is in the Bible. It is that, knowing that the doctrine had taken a lead role in the custody trial, the judge revealed her bias by volunteering that in her own marriage she had "dismissed" the doctrine.

It would be less troubling if the district court's consequent decisions were not so intertwined with the religious view. But the custody and parenting-time decisions mirror the judge's personal disapproval. The decisions favor Sarah, who no longer wanted the children to attend the parties' church of ten years and be influenced by the doctrine that the district court judge rejected. And they disfavor Adam, who, based on the doctrine, said he had attempted to apply a husband-to-wife authority ratio of "51/49%." That apportionment bothered the district court so much that it became an express basis for its custody and parenting-time decision against Adam. If the decision had been written by some different judge who awarded Adam sole physical custody after *agreeing* with his

religious view by announcing her own faith-based decision to follow the biblical directive to “obey your husband,” the appearance of bias would be obvious.

We cannot overlook revealed judicial bias simply because it reflects a popular view. Married couples may freely choose how to resolve their disagreements, distributing the decision-making authority on any basis—religious, humanistic, egalitarian, democratic, random, or otherwise—apparently fair or apparently unfair, popular or scorned. This right makes the judge’s personal preference irrelevant. And although the Constitution is not the basis of my dissent, I add that a person’s sincere attempt to adhere to the Bible, including a flawed attempt to follow unpopular marital passages, is in part a matter of faith, the free exercise of which is guarded by the First Amendment.

Judge Interjects Her Own Parenting Decision

The district court judge offered another personal experience, again opposing Adam on a matter somehow thought significant in the custody decisions. Adam had testified that, after Sarah left the marital home, he provided 12-year-old daughter E.P. a cellular telephone “for the kids all to use to contact their mother and me, not for use for her 24/7.” He testified that the phone originally had no restrictions but that after E.P. created a conflict by not allowing one of her brothers to use the phone, Adam began a discussion with Sarah “about the amount of time and if it should be unlimited, what her feelings were on the situation and what her thoughts were about - - if unlimited texting and 24/7 access was appropriate for a twelve year, going to be thirteen-year-old.” Adam reduced the phone’s service features so that it could make calls only to the parents and not send or receive text messages to others. Sarah’s attorney made an issue of this,

intimating that Adam's decisions to restrict the phone's features were wrong and had angered E.P. because she wanted to use the phone for calls and text messages to her friends.

The troubling interjection occurred after Adam's attorney countered, seeking to establish the reasonableness of Adam's decision to limit the phone's capability. He asked Sarah, "Is it appropriate for a young child to have a cell phone?" Sarah gave a qualified answer: "It depends on whether they need to contact the other parent or not or . . . if they have friends that they can talk to." At that point, the district court judge interrupted the exchange between Adam's attorney and Sarah, suggesting that Adam's parenting decision was old fashioned: "You're dating yourself here Mr. Lies."

Adam's attorney attempted to parry the judge's argument, "Well I'm not dating anybody."

The judge replied by pressing her argument further by contrasting her own parenting decision: "*My twelve-year old has a cell phone.*" (emphasis added).

So at the moment that Adam's somehow-controversial decision to limit his 12-year-old daughter's cell-phone use was being defended by his attorney, the judge first argued against the reasonableness of the decision and then highlighted her own apparent contrary permission to her 12-year-old child. The judge appears to have argued in favor of a party then testified to a personal experience in support. Both statements effectively announced that the judge, as a parent, personally disagreed with Adam's parenting decision to restrict E.P.'s cell phone.

Adam's attorney began to respond directly to the judge's argument but then stumbled back midsentence to cross-examine the judge indirectly through Sarah: "Well, I'm not certain why they - - [D]oes everyone . . . [E.P.]'s age have a cell phone to your knowledge?" Sarah answered, "Not everyone." The attorney finally made his point with a rhetorical question, "So a lot of kids get by without having a cell phone; is that correct?"

The majority underrates the apparent prejudice reflected in the district judge's interjection in two ways. First, it suggests that the judge was only joking: "The cell-phone comment seemed to be an attempt at humor by the district court." That is mere speculation, and humor makes the declaration that her own child uses a cell phone no less prejudicial.

Second, the majority wrongly suggests that the judge's view about the cell phone had no bearing on the custody and parenting-time order, saying, "the district court ultimately found that the Peterson children have 'generally good interaction with both parents and noted that '[t]his factor weighs in favor of joint legal custody.'" So the majority reasons, "Given this ruling in [Adam] Peterson's favor, we conclude that the district court did not improperly inject its personal views about cell phones . . . when weighing this factor." But the majority is mistaken about "this factor" favoring Adam. "The factor" the district court was addressing was the children's relationship with the parties. Discussing this factor, the district court found that "[t]he way in which [Adam] enacted his decisions have negatively impacted his relationship with [E.P.]." The only purported relationship-impacting decisions discussed at trial or mentioned in the custody orders are Adam's restrictions of E.P.'s cell phone, and the only evidence about "the

way” that Adam addressed the cell-phone controversy was his mild suggestion that “[w]e need to communicate” and “learn a little conflict resolution and some give and take.” These statements are evidence of compromise, not control.

Also, the district court indeed does say that “this factor weighs in favor of joint legal custody,” but it does not weigh the factor in favor of joint *physical* custody. It vaguely refers to the parties’ (that is, *both* parties) difficulty getting along and then deems the statutory factor to favor *sole* physical custody with Sarah. It is true that, responding to Adam’s post-decision claim of bias, the district court’s amended order says it offers “no finding” as to whether the decisions “related to cell-phone usage are ‘right’ or ‘wrong’ decisions.” But the caveat is empty, and the statement that “the factor” favors *joint* custody is illusory; the order declares that the factor “weighs in favor of primary physical custody” to Sarah.

I am sure the legislature never imagined that a parent’s restriction of his child’s use of a phone would be implicitly support a statutory factor denying that parent’s request for joint physical custody and sharply limiting his parenting time. But my primary concern is that the judge invited doubt about her objectivity by *sua sponte* interjecting her own family experience as a comparison on an issue that the parties and the court rightly or wrongly treated as relevant to the custody decision. Adam perceives bias and declares that “[the] [t]rial Court condemns the Appellant’s parenting style.” He seems right.

By announcing her own marital decision (about the contested biblical passage) and then her own parenting decision (about the contested cell-phone restriction), the judge implied that she had aligned herself with Sarah against Adam on the two most debated

issues in the parties' custody trial. It would have been better for Adam to have asked the judge to recuse herself once she revealed her personal experiences rather than raise the issue on appeal. *Cf. Carlson v. Carlson*, 390 N.W.2d 780, 785 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986) (addressing appellant's claim the district judge abused her discretion by failing to grant recusal motion). But it is not uncommon for us to entertain an appellant's claim of bias without such a motion. *See, e.g., Toomire v. Toomire*, A11-1509, 2012 WL 3792120 (Minn. App. Sept. 4, 2012); *Friend v. Friend*, No. A10-1789, 2011 WL 1833137 (Minn. App. May 16, 2011). And the district court's alleged biases do not come into focus until the custody orders, which expressly elevate Adam's religious views about marital roles and his decisions about the children's cell phone into principal justifications for denying joint physical custody. The statements and treatment of these issues are fairness-related errors. These errors alone would draw my dissent. But there are others.

II

The Fact Findings on Statutory Custody Factors are Unsupported by Evidence

The district court issued clearly erroneous findings of fact on which it ordered joint legal custody to the parties but sole physical custody to Sarah. When joint custody is sought, the district court must consider the parents' ability to cooperate, the methods for and willingness to resolve disputes, the detriment to the children if one parent has sole custody, and whether domestic violence has occurred. Minn. Stat. § 518.17, subd. 2 (2010). Of these four statutory best-interest factors bearing especially on joint custody, the district court concluded that one was neutral but that three favored sole custody with

Sarah. The court clearly erred to arrive at its findings on these factors. We give no deference to district court decisions that rest on clearly erroneous fact-findings, even in custody cases. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (stating that we uphold the district court’s findings of fact unless they are clearly erroneous). The findings are clearly erroneous if, on review, the record leaves one with “the definite and firm conviction that a mistake was made.” *Id.* at 474. Put another way, a district court abuses its discretion if its custody decision is not “supported by *defensible* findings that address relevant best-interests factors.” *Id.* at 477 (emphasis added).

First Factor: Ability to Cooperate

The district court erroneously concluded that the first joint-custody factor, the ability of the parents to cooperate in child-rearing decisions, “weighs against joint custody.” The district court expressly relied on only two findings to reach this conclusion: (1) “The parties presented no evidence relative to their ability to cooperate” in child rearing and (2) “the evidence demonstrated that the parties do not presently have the ability to cooperate,” citing two pieces of evidence to support this second finding. The record demonstrates that both findings are clearly erroneous.

The record flatly disproves the finding that the parties “presented *no evidence*” of their ability to cooperate. First, both parties testified of their intention and willingness to cooperate with each other. Second, the guardian ad litem testified that she observed the parties’ cooperating. She witnessed an encounter when E.P. was with her mother baking while she was scheduled to be with Adam. The guardian reported implicitly that the parties accommodated each other in that circumstance so that E.P. could stay longer with

her mother during scheduled time with her father. Adam reinforced this evidence when he testified that he would tell E.P., “If there’s a special situation to go spend some extra time with mom, that’s fine.” The guardian concluded that, from “what [she] observed,” Adam and Sarah “would be willing to work with each other” and that “both of them are capable of accommodating the wishes of the children.” Third, Adam testified that, before the parties separated, despite Sarah’s having enrolled the children in public school without informing him, he came to agree with the decision and supported the children in the school before and after the separation. Fourth, Adam also testified that, before the separation, both parents attended the children’s field trips as parent attendants, but that after the separation the parties cooperated by dividing the duty: “And then Sarah and I have split up field trips with the kids when the parents are allowed to go.” The district court’s first basis for finding the inability to cooperate—there having been “no evidence” of ability to cooperate—is simply wrong and therefore clearly erroneous.

The district court cited two facts supporting its second finding on this factor that “the evidence demonstrates that the parties do not presently have the ability to cooperate.” But the two facts cited do not logically support this conclusion. The district court first cited Sarah’s failure to inform Adam “of some of the children’s activities, such as counseling.” And it next cited Adam’s failure to inform Sarah “of some of the children’s activities, such as Bible camp on July 18, 2011, the day of trial.” That one divorcing parent failed to advise the other of some activities occurring while the children were in that parent’s care itself says nothing of the parent’s ability *to cooperate*. And the two incidents cited have little objective significance in context. According to the

testimony of both parties, the children continued to be involved in church activities while in Adam's care, just as they were before the separation. And Sarah acknowledged that the children enjoyed the church. That E.P. attended a customary children's church activity on a summer day during trial without Adam specifically informing Sarah of her attendance has no apparent bearing on Adam's ability to cooperate with Sarah. Likewise Sarah's failure to inform Adam of a counseling session during Sarah's parenting time says nothing of her inability to cooperate in parenting-time decisions.

The majority adds facts—facts that were hotly disputed by the parties and *not found* by the district court—to conclude that this joint-custody finding is actually supported. This is not the role of an appellate court. And this court nowhere addresses the elephant in the room: the district court found that this joint-custody factor favored sole custody expressly because “*no evidence*” was presented to support a contrary finding, while the record flatly and obviously refutes the “no evidence” finding. It cannot be that by stating that “no evidence” exists the district court was simply employing a shorthand euphemism to say that it thoroughly weighed the competing evidence and found more convincing the evidence of noncooperation between the parties; this is because in addition to declaring the nonexistence of the existing evidence, the district court also failed even to mention the various bits of supposedly nonexistent evidence that I just discussed. It instead misstates the fact and rests its legal conclusion on that misstatement. There is just no evidentiary weighing of evidence to which this court can defer. The district court's finding that the parties are unable to cooperate is clearly erroneous simply

because it rests on a false factual assertion of “no evidence.” The same must be said of the next factor.

Second Factor: Methods for Resolving Disputes

The district court also clearly erred in finding that the second factor weighs against joint custody. Once again, its sole, express basis is just wrong: It declared that “the parties presented *no evidence* as to how disputes would be resolved.” And again, this is simply not true. Although neither party was asked how they would resolve disputes, the parties did in fact present evidence both that they have resolved disputes and how they might resolve disputes in the future. First, for example, as noted, Adam testified that the parties had decided to split the children’s field trips equally, resolving the issue of which parent would attend the trips when both wanted to attend. Second, also as noted, the guardian testified implicitly that Adam had voluntarily compromised his right to parenting time while Sarah and E.P. were engaged in a project during his scheduled time. This similarly occurred without court involvement or conflict. Third, after the court appointed a guardian ad litem at Sarah’s request, Adam testified that he agreed with the guardian’s report and custody recommendations. That report recommended a formal process to resolve any parenting dispute, ultimately using a mediator or arbitrator if necessary. So while the district court declared this factor to favor sole physical custody expressly because “the parties presented *no evidence* as to how disputes would be resolved,” the record demonstrates that the finding is simply incorrect. The parties did present evidence as to how disputes have been and would be resolved. The finding that

there was “no evidence” of dispute resolution is clearly erroneous, and the majority fails to even mention, let alone correct, this obvious dispositive error.

Third Factor: Whether Domestic Abuse Occurred

The district court’s finding on the domestic-abuse joint-custody factor confuses the law. The legislature requires the district court to consider whether domestic abuse has occurred when addressing the appropriateness of joint custody. Minn. Stat. § 518.17, subd. 2(d). If domestic abuse has occurred between the parents, the district court must apply a rebuttable presumption that joint custody is not in the children’s best interests. *Id.*, subd. 2. So even if domestic abuse has occurred, the abuser still may be entitled to joint physical custody if circumstances overcome the presumption. The negative implication of the statute is that when the court finds that domestic abuse has *not* occurred, the factor should not tip against joint physical custody. The district court found no domestic abuse here but then refused to weigh the factor in favor of joint physical custody; it effectively weighed the factor in favor of sole custody.

The district court considered Sarah’s claim of domestic abuse and rejected it. The parties gave disputed testimony about a single incident in the 14-year marriage in which any disagreement even arguably had a physical component. The couple had argued over a computer and Adam physically wrested it from Sarah’s hands. The court found that this was not domestic abuse. It also found that Sarah left some arguments by entering a different room and closing the door but that Adam would continue arguing through the closed door. This also is not domestic abuse. The district court found that the parties’ argument history “do[es] not, in [the] Court’s opinion, rise to the level of domestic

abuse.” Given the finding that domestic abuse did not occur, the statute suggests that this factor either weighs against sole custody or at least is neutral on the question. The district court concluded, instead, that this “history does not support an award of joint custody.” This conclusion constitutes an abuse of discretion.

The majority justifies the treatment of this factor against joint custody by opining that “the district court recognized that the evidence presented was sufficient to support the conclusion of a reasonable fact finder that statutory domestic abuse had indeed occurred.” The majority affords too little to the fact that the district court considered all the occurrences of alleged abuse (including the quarrel over the computer) and then expressly found that the “occurrences do not, in [the] Court’s opinion, rise to the level of domestic abuse.” That the district court speculated that some jury—that is, some fact finder *other than* the district court—“could find differently” about the computer incident, is no basis to fail to give this factor its full effect. The statute directs the district court to make the finding as to whether domestic abuse occurred, not as to whether some other fact finder might reach some other conclusion. The majority adds that even if the district court wrongly weighed this factor (and it clearly did), “its balancing of the other best-interests considerations still weighs in favor of its child-custody determination.” The problem is, as noted, *both* of the other joint-custody factors discussed rely on the express finding of “*no evidence*” despite the clear *evidence* that contradicts the finding.

Incidentally, although no party has challenged the finding, I point out that the record leaves no doubt that the district court had ample factual ground to find, as it did on this factor, that domestic abuse never occurred. The undisputed facts reveal that soon

after the separation Sarah came to the house where Adam continued to live; she entered the house unannounced to the surprise of Adam and the children, who were there with Adam; she had not discussed either entering or removing property; Adam had used the computer for work; Sarah tried to take the computer from the house in front of the children; Adam stood in front of her and, like her, claimed to have the right to the computer, taking the computer from her hands; and she told police that Adam had not abused or attacked her. The testimony led the district court to the supported factual finding that the incident did not constitute domestic abuse. And given the obvious fact from the undisputed testimony that *Sarah* instigated this dispute and was no less responsible than Adam for its unnecessary occurrence in front of the children, the district court and the majority's applying it against Adam and in favor of sole custody with Sarah is befuddling.

Fourth Factor: Detriment to the Children if One Parent Has Sole Custody

The district court found that one of the four joint-custody factors weighs in favor of joint custody. The district court was required to decide whether assigning custody to only one parent would result in a detriment to the children. *Id.*, subd. 2(c). It found that this factor “supports an award of joint custody.” In other words, the district court implicitly found that awarding sole physical custody would be a detriment to the children. It then awarded sole physical custody anyway, presumably based on its findings on the other three factors. Given the importance and nature of this finding, if the findings on the other three factors are erroneous—and they are—the sole-custody decision reflects an abuse of discretion as a matter of law.

In sum, the four statutory joint-custody factors were mishandled. The district court found that two of them favored sole custody by erroneously finding that the parties had presented “no evidence” in areas in which the parties had, in fact, clearly presented significant evidence. The district court deemed that the finding of no domestic abuse “does not favor” joint custody, while doing so seems to contradict the statute. (At the very least, under no reading of the statute can a finding of “no abuse” be deemed to favor sole custody.) And the district court found that the factor that addresses harm to the children from a sole-custody award favors *joint* custody. The award of sole custody in this setting is the kind of error that we have a duty to correct. I am sure the district court judge faced a difficult trial and attempted to come to the right conclusion. But errors are errors.

III

Miscellaneous Additional Errors Need Correcting

I have stated the principal reasons why I feel we must reverse the physical custody and parenting-time order, but multiple and significant other errors exist.

Finding of General Unwillingness to Compromise

The district court’s discussion of the generalized best-interest factors includes a finding that Adam was “generally unwilling to compromise during the marriage, and [Sarah] was required to submit to his will.” Both the original and amended custody orders demonstrate that this finding was a driving force behind them. The problem with the finding is that it is both logically irrelevant and factually unsupported.

The finding is irrelevant. The issue bearing on custody is not how the parties got along “*during* the marriage”; the issue is whether they can resolve parenting issues now that the marriage is over. The finding therefore does not align with the relevant issue.

Two of the facts offered in support of the finding suffer from the same infirmity. The district court supports the finding by citing evidence that Sarah wanted to build a photography business and Adam “precluded” her. This was a matter of disagreement or noncompromise *during* the marriage. No evidence suggests that Adam attempted to inhibit Sarah’s business efforts after the marriage broke apart. The district court similarly supports the finding of Adam’s uncompromising nature with Adam’s “testimony regarding his belief that a marriage is a partnership with the husband hav[ing] 51% input and the wife hav[ing] 49%.” Again, Adam’s “*belief*” is out of bounds, and this finding loses sight of the relevant question. Whatever theological belief Adam has about how a “marriage . . . partnership” should distribute authority between “husband” and “wife,” the parties are no longer in a “husband” and “wife” “marriage partnership.” The biblical passage that Adam relies on for his belief about authority within marriage (a belief the district court judge rejected in her own marriage) expressly addresses only “wives” and “husbands,” not men and women outside of a marriage, and no finding (or evidence in the record) suggests that Adam carried his theology to unmarried men and women. Adam’s view about gender roles within marriage is just as irrelevant to the custody question as is the district court’s focus on his supposedly uncompromising nature “*during* the marriage.” It is true that refusal to compromise during marriage might, in some cases, suggest co-parenting problems can be expected after the marriage. But here, again, the

only evidence of the relevant period suggests that Adam has been compromising, not uncompromising, in post-separation parenting issues.

In addition to the finding being irrelevant, it is not supported by the evidence expressly cited in support. While Sarah described Adam as making all the family decisions during the marriage, Adam testified without contest that it was Sarah who had chosen the parties' church, which the parties then attended for ten years. And Sarah testified that, during the marriage, she unilaterally and secretly enrolled the children in public school despite believing that Adam would oppose the decision. This belies the suggestion that Sarah made no important decisions during the marriage. And Adam testified without contest that he accepted and supported Sarah's unilateral school decision despite his original opposition to it. The majority does not address Sarah's unilateral school decision or Adam's compromising response, and the incident belies the majority's characterization of the "controlling and isolating behavior that Peterson displayed" during the marriage. The incident additionally renders objectively unfounded the district court's finding that Adam was uncompromising during the marriage.

The district court also supports the finding by citing the fact that Adam received counseling "from his pastor suggesting [that Adam] should force [Sarah] to attend church." This fact obviously does not support the finding that Adam refused to compromise because it impugns only the parties' *pastor*, not *Adam*. Despite the majority's statement that the district court supposedly cited examples "of [Adam] Peterson . . . forcing [Sarah] to attend church," the district court cited no such thing, and certainly no finding (or evidence) indicates that Adam ever forced Sarah to go anywhere.

I point out the fact-finding deficiencies about Adam's alleged dominance "during the marriage" only to highlight again that Adam has a reasoned basis for his claim of judicial bias. That he is condemned as uncompromising in the face of repeated examples of compromise and is held accountable for the statements and actions of others does seem to further support the claim. But my primary legal concern here is that the finding is irrelevant: the evidence establishes no link between the power-based relational strife "*during* the marriage" and the critical custody question of parenting cooperation *after* the marriage.

Stability of Children's Church Community Disregarded

Another concern is that the district court's analysis weighed "stability" in favor of sole custody with Sarah without regard to the children's most discussed and valued non-family community—their church. Despite overwhelming evidence and findings recognizing that the children have always attended and continue to be actively involved in the marital church where they grew up, the district court never assesses how the children's need for stability is impacted by the disruption in their church-related activities if Sarah has sole physical custody. The evidence was that Adam continues to take the children to church activities during his parenting time but that Sarah stopped taking them during her parenting time. The record suggests that these include evening, midweek activities. The district court's custody order does not mention this, nor does it assess its importance or make findings related to it. The consistent evidence indicates that the children have been positively and happily involved in their church community and that their involvement is important to them. I think the district court abused its discretion by

failing to address how the disruption of their participation in that community bears on their need for stability—a need that the district court described as “imperative.”

Rejection of Guardian’s Custody and Parenting-Time Recommendation

The district court rejected the guardian ad litem’s recommendation of joint custody and a 50-50 division of parenting time based on a clearly erroneous finding. It said, “The Guardian recommended maintaining the temporary agreement [with 50/50 parenting-time division] reached by the parties in June 2011 *simply because the parties reached that agreement.*” This finding is false. The record establishes that the guardian did not recommend joint custody and 50-50 parenting time “simply because the parties reached that agreement.” The guardian testified expressly recommending the equal division “*in accordance with*” the agreement, not *because of* the agreement. Instead, answering the question, “[W]hy did you recommend the current schedule?” the guardian summarized, “Because I believe that both parents are capable of doing a 50/50 parenting time. Both parents love their children.” She made the recommendation in the context of a report in which she had informed the court that she had observed the parties cooperating and avoiding potential parenting-time conflicts. And she also testified that she made the recommendation with the children’s best interests in mind. It is not clear how the district court overlooked the guardian’s expressly stated reasons for her recommendation and substituted a different reason; but it did, and the finding is therefore clearly erroneous.

Treatment of Adam Peterson’s Request for an Evaluator

After the district court issued its order in favor of sole physical custody over the recommendation of the guardian ad litem, Adam asked the district court to appoint a

custody evaluator. He offered to pay for the evaluator's services and to agree beforehand to be bound by the evaluator's recommendation. The district court denied the request. I think that the district court's discretion as to whether to appoint a custody evaluator is so broad that we should almost never reverse a denial of a request for one.

But this is an extraordinary case. Here, the district court judge made statements calling the court's neutrality into question and rejected the recommendation of the sole professional enlisted to provide a neutral recommendation. Sarah had asked the court to appoint a guardian ad litem while Adam's attorney had urged the court, "[W]e would request instead of appointing a guardian ad litem you appoint a custody evaluator." Adam's attorney explained that "[a] custody evaluator has the ability to go into a more in-depth investigation and make a recommendation to you." But the district court appointed a guardian. When the guardian submitted her report and testified in favor of joint physical custody and equal parenting time, the district court rejected the guardian's recommendations. The parties first heard the judge's personal comments about the disputed parenting decisions and religious views, and then they read the findings of "no evidence" in areas where evidence clearly existed. Then it heard Adam's claims suggesting unfairness. In this context, I think the district court had a duty to be more sensitive to the request for a neutral and unbiased look at custody.

The district court's reasons for denying Adam's renewed request are not convincing. One reason is that Adam "did not suggest [that] a custody evaluator would examine different evidence than that put before the Court." But the district court had recognized that a neutral evaluator would benefit the process, presumably by providing

information that would differ from what the parties would offer. This is why the court appointed a guardian. Another reason for refusing the request appears to be waiver. The court states that it “appointed a guardian ad litem and required the parties to share the costs” and that “neither party objected to this arrangement at that time.” But because Adam had requested a custody evaluator “instead” of a guardian, he did not waive the right to request a custody evaluator by not objecting after the guardian’s appointment. The court’s order similarly states, “[Adam] did not renew his request for a Court-appointed evaluator until after trial.” Of course Adam did not renew his request for an evaluator until after trial; *before* trial, the guardian wrote a report that recommended joint physical custody and equal parenting time, and *during* trial, the guardian restated this recommendation and explained her reasoning. It was only *after* trial that the court revealed that it would reject the guardian’s recommendation, and the rejection could not have been predicted.

Given the appearance of bias from the judge’s trial comments and from the district court’s multiple and clear fact-finding errors—all of which only work against Adam and in favor of Sarah—I would at least remand the custody decision and urge, on remand, that the district court consider whether appointing a neutral evaluator would allay the reasonable concerns that Adam has expressed about the appearance of unfairness.

IV

The district court’s financial order fails to address some necessary issues and clearly errs in its fact finding on other issues. I therefore concur in the decision to reverse that order. The custody and parenting-time order is rife with other errors. I hope that this

is a singular aberration for this court, affirming a district court’s legal conclusion that was based expressly on its factual findings that the parties presented “no evidence” about statutorily mandated factors, where the record plainly shows that the parties presented considerable evidence. Some of the factual errors seem to arise from the treatment of marital-relations issues, not with parenting issues. Even if all the allegations against Adam were true—and we have no reason on this record or on the factually supported findings to believe that they are—the worst that can be said of him is that he was an argumentative and domineering husband who held to a socially unpopular religious view about marital gender roles. Or, as the majority casts him, as a “controlling and isolating” husband. But that caricature alone cannot justify the custody and parenting-time decisions. The record establishes that Adam was consistently a highly involved, dedicated, sincere, and loving father whose relationship with his children has served them very well. He has participated fully in their educational, spiritual, recreational, and social endeavors. The custody order effectively sends him to the periphery of their lives as a part-time father. The order has too many errors—obvious and dispositive errors—and it raises too many serious doubts about fairness for me to agree to affirm. We should reverse the district court’s surely well-intended but nonetheless error-heavy decision.