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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2052**

Russell William Mundle, petitioner,
Appellant,

vs.

Amber Lynn Hintz,
Respondent.

**Filed August 22, 2011
Affirmed in part and remanded
Peterson, Judge**

St. Louis County District Court
File No. 69DU-FA-08-774

Matthew K. Begeske, Begeske Law Offices, Duluth, Minnesota (for appellant)

Amber Lynn Hintz, Twentynine Palms, California (pro se respondent)

Considered and decided by Peterson, Presiding Judge; Schellhas, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

PETERSON, Judge

In this child-custody and parenting-time dispute, appellant father argues that the district court abused its discretion by (1) restricting his parenting time, (2) requiring him

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

to pay the transportation costs associated with visitation, and (3) denying his request for joint legal custody of the parties' child. We affirm in part and remand.

FACTS

Appellant-father Russell William Mundle and respondent-mother Amber Lynn Hintz are the parents of one minor child, D.W.G., born November 28, 2004. The parties were never married and never lived together. Father had very little contact with D.W.G. during the months after he was born. Beginning when D.W.G. was approximately one year old, father's grandmother provided child-care for D.W.G. while mother worked and attended school. Because father resided with his grandmother, he had more contact with D.W.G. during this time.

In August 2007, mother and D.W.G. moved to California with her husband, who is an active-duty member of the United States Marine Corps. Although mother told father that she was moving and provided him with her contact information, mother testified that father never made any attempt to contact D.W.G.

In July 2008, father initiated a paternity action seeking, among other things, an adjudication of parentage, joint legal custody, and an award of reasonable and liberal unsupervised parenting time with the minor child. Mother served an answer and counterpetition requesting that she be awarded sole legal and physical custody and that father be awarded parenting time as can be arranged by the parties. The parties agreed that mother should continue to have sole physical custody of D.W.G., but they could not reach an agreement regarding legal custody and parenting time.

Following a hearing, the district court found that D.W.G., who is now six years old, is integrated into a stable family environment with two half-siblings and does not know that appellant is his father. The district court granted mother sole legal and sole physical custody of D.W.G. and granted father supervised parenting time in mother's home community. After successfully completing 30 supervised visits, father may bring a motion seeking unsupervised parenting time in mother's home community, and after successfully completing 30 unsupervised visits, father may bring a motion seeking unsupervised parenting time outside mother's home community, including visits in Minnesota. The district court ordered father to "bear his own transportation costs to effectuate his visits." The district court also ordered mother to bear the costs of using a third-party to supervise visitation "if she insists on a third-party conducting the supervised visits in California." This appeal followed.

DECISION

I.

Minnesota law requires district courts to "grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child." Minn. Stat. § 518.175, subd. 1(a) (2010). The district court has broad discretion in deciding parenting time based on the best interests of the child and will not be reversed absent an abuse of discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). "A district court abuses [its] discretion [regarding parenting time] by making findings unsupported by the evidence or

improperly applying the law.” *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010) (citing *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985)).

Father contends that

by requiring him to exercise some 30 supervised and 30 unsupervised visits in the State of California prior to even being permitted to petition for parenting time in the State of Minnesota, [the district court] for all intents and purposes denied [his] parenting time ENTIRELY, directly contravening both Minnesota statutory and case law in the process.

Father argues that his “parental rights have been de facto terminated contrary to Minnesota law, common sense, and the evidence presented in this case” because “[t]he district court has essentially issued an order with which compliance is impossible.”

Father contends that the district court erred by restricting his parenting time without finding that parenting time is likely to endanger D.W.G.’s physical or emotional health or impair his emotional development. Minn. Stat. § 518.175, subd. 1(a), provides:

If the court finds, after a hearing, that parenting time with a parent is likely to endanger the child’s physical or emotional health or impair the child’s emotional development, the court shall restrict parenting time with that parent as to time, place, duration, or supervision and may deny parenting time entirely, as the circumstances warrant.

The district court did not use the word “endanger” in its findings, but it is apparent that the court required that visitation be supervised and in mother’s home community because unsupervised visitation in Minnesota would pose a threat to D.W.G.’s physical and emotional health. The district court found that because father has an issue with alcohol, it is necessary to ensure that father is sober during any contact with D.W.G. The

district court also found that “[a]t the present time, transporting [D.W.G.] to Minnesota from California for purposes of supervised Parenting Time, without having established a relationship between [D.W.G.] and [father], would be disruptive to [D.W.G.’s] schooling, athletic activities, his integration into his family, and would not be in [D.W.G.’s] best interests.” Although findings expressed in specific statutory terms would have been helpful, we will not reverse on this basis when the court’s order identifies the danger to D.W.G.’s physical and emotional health posed by transporting D.W.G. from California to Minnesota for unsupervised visitation with a man whom D.W.G. does not know is his father. *See Prahll v. Prahll*, 627 N.W.2d 698, 703 (Minn. App. 2001) (stating that “[w]e may treat statutory factors as addressed when they are implicit in the findings . . .”). The record supports the district court’s findings, and the district court did not abuse its discretion in ordering that father’s parenting time be supervised and in California at this time.

II.

Father contends that “[o]ther cases have determined that splitting transportation costs is appropriate especially where, as here, one party chose to relocate outside the state of Minnesota.” Citing *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. App. 2000), *review denied* (Minn. May 16, 2000), father claims that the district court abused its discretion in ordering him to pay the transportation costs associated with visitation. In *LaChapelle*, this court considered whether “the [district] court abused its discretion in requiring [the mother] to pay costs associated with transporting [the child] to Minnesota every other month for visitation” and concluded that the district court’s apportionment of the

visitation expense was within its discretion. 607 N.W.2d at 165. However, father offers no explanation how the apportionment of costs in *LaChapelle* demonstrates that the district court abused its discretion in this case.

Father seems to argue that the district court's order was an abuse of discretion in light of his income and the transportation costs. But father did not make this argument in the district court or present any evidence on these issues. Therefore, this issue is not properly before this court, and we decline to address it. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating appellate court will generally not consider matters not presented to and considered in district court).

III.

A district court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula*, 374 N.W.2d at 710.

Father contends that the district court misapplied the law when it determined that he had "not established, by a preponderance of the evidence, a basis to be a joint legal custodian of [D.W.G.] despite the statutory presumption in favor of such custody arrangements." Except when domestic abuse has occurred between the parents, "[t]he court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child." Minn. Stat. § 518.17, subd. 2 (2010). While joint legal custody is presumed to be in a child's best interest, it "should be granted

only where the parents can cooperatively deal with parenting decisions.” *Rosenfeld v. Rosenfeld*, 529 N.W.2d 724, 726 (Minn. App. 1995) (quotation omitted). “Where the evidence indicates that the parties lack the ability to cooperate and communicate, joint legal custody is not appropriate.” *Wopata v. Wopata*, 498 N.W.2d 478, 482 (Minn. App. 1993).

Father’s request for joint legal custody triggered the rebuttable presumption of joint legal custody. Minn. Stat. § 518.17, subd. 2. The district court’s order acknowledges this presumption, but it is not clear what the court meant when it used the phrase “despite the statutory presumption.” Consequently, we cannot determine whether the district court required father to establish by a preponderance of the evidence a basis to be a joint legal custodian of D.W.G., rather than determining whether the presumption was rebutted. Therefore, we remand so that the district court may expressly apply the rebuttable presumption and determine whether the presumption has been rebutted.

Father also argues that the district court abused its discretion in denying his request for joint legal custody because the record does not support the district court’s finding that “[t]he parties cannot amicably resolve issues regarding religion, schooling, medical care, and the like.” We have carefully reviewed the record and, while there is evidence that the parties’ communication has been limited and they have had problems cooperating, we find no support for the finding with respect to these issues. On remand, the district court must reevaluate its award of joint legal custody and its findings must be supported by the evidence.

Affirmed in part and remanded.