This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0593

In the Matter of:
Joseph Daryll Rued on behalf of minor child, petitioner,
Appellant,

vs.

Catrina Marie Rued, et al.,
Respondents.

Filed January 30, 2023
Affirmed; motion granted
Wheelock, Judge

Scott County District Court
File No. 70-FA-21-13336

James J. Vedder, Justin S. Boschwitz, Moss & Barnett, Minneapolis, Minnesota (for appellant)

Beth Barbosa, Gilbert Alden Barbosa PLLC, Burnsville, Minnesota (for respondents)

Considered and decided by Smith, Tracy M., Presiding Judge; Worke, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant-father appeals from the district court's order vacating an ex parte order for protection (OFP) on behalf of his and respondent-mother's joint child, arguing that the district court erred by (1) failing to appoint a guardian ad litem (GAL) for the child and (2) vacating the OFP and dismissing the matter. We affirm. We also grant

appellant-father's motion to strike the portions of respondent-mother's brief referring to documents outside the appellate record.

FACTS

These facts are taken from the testimony and evidence presented to the district court in the instant OFP matter. Joseph Daryl Rued (father) and Catrina Marie Rued (mother) were married in 2014 and share a joint child, W.O.R., born in 2014. Mother has two nonjoint children from a previous marriage, M.A.R. and K.A.R.

Mother filed a petition for dissolution of marriage in Hennepin County in 2016. The district court (dissolution court) filed a partial judgment and decree in April 2019 that resolved some of the issues of the dissolution and dissolved the parties' marriage.

Throughout the dissolution litigation, father and father's parents made numerous allegations that members of mother's family—including mother, mother's nonjoint children, mother's ex-husband, and mother's parents—were physically and sexually abusing W.O.R. Hennepin County Child Protection and the Eden Prairie Police Department opened four separate investigations into the allegations of abuse in August 2016, September 2017, June 2018, and September 2018. Each of the investigations was closed because workers determined the allegations were unfounded.

In addition to the allegations of abuse, father also alleged throughout the dissolution litigation that W.O.R. is allergic to dairy products and gluten. In December 2019, the dissolution court appointed a special master in the dissolution matter to address whether W.O.R. is allergic to either dairy products or gluten. W.O.R.'s preliminary allergy-test results indicated that W.O.R. was allergic to cats, dogs, and peanuts but was not allergic to

dust mites, molds, milk, or eggs. A final food-challenge allergy test never occurred because the physician conducting W.O.R.'s allergy tests resigned as a result of father's manipulative behavior, and the special master resigned due to the physician's resignation.

The dissolution court issued an amended custody-and-parenting-time order in October 2020 granting mother sole legal and sole physical custody and awarding mother child support.[1] The dissolution court's amended order included 325 findings of fact. The findings of fact discussed father's allegations of abuse in great detail. Notably, the dissolution court found that father had failed to prove that W.O.R. was physically or sexually abused and that father had created a source-monitoring[2] problem due to his repeated questioning of W.O.R. regarding abuse. The dissolution court also found that father was the only person who reported food-allergy symptoms in W.O.R.; neither mother nor the child's school reported that W.O.R. exhibited food-allergy symptoms despite feeding W.O.R. gluten and dairy.

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[1] The dissolution court amended its original custody-and-parenting-time order, issued in August 2020, for reasons not material to this appeal.

[2] The dissolution court relied on the definition of a "source-monitoring problem" to be a type of memory error where the source of the memory is incorrectly attributed to some specific recollected experience. The American Psychological Association defines "source monitoring" as "the process of determining the origins of one's memories, knowledge, or beliefs, such as whether an event was personally experienced, witnessed on television, or overheard." Am. Psych. Ass'n, *APA Dictionary of Psychology*, https://dictionary.apa.org/source-monitoring [https://perma.cc/K4VG-ZDH9]. We understand source-monitoring problems in the context of cases involving children to include the child's inability "to distinguish how they know something—i.e., whether they actually experienced an event or inaccurately believe that they experienced an event because others said that an event happened to them." *Rued v. Rued*, No. A21-0798, 2022 WL 2298992, at *2 n.2 (Minn. App. June 27, 2022), *rev. denied* (Minn. Sept. 28, 2022).

The dissolution court filed two additional orders in April and May 2021 in response to several posttrial motions from father and mother. Father appealed the October 2020, April 2021, and May 2021 orders. In a nonprecedential opinion, this court affirmed the dissolution court's grant of sole legal and sole physical custody to mother, its factual finding that W.O.R. had not been sexually abused by mother or her nonjoint children, and its factual finding that W.O.R. was not allergic to dairy or gluten. *Rued*, 2022 WL 2298992, at *9-12.

In October 2021, father petitioned the district court in Scott County for an emergency ex parte OFP on behalf of W.O.R. against mother and mother's son, K.A.R. The petition contained new allegations of physical and sexual abuse that W.O.R. had disclosed in writing. The allegations included that K.A.R. sexually abused W.O.R. by touching his penis and buttocks, that mother physically abused W.O.R. by clipping his toenails and inserting the cut-off toenails underneath his nails, that mother made W.O.R. sick by feeding him wheat and dairy products, and that mother allowed her ex-husband from a different marriage to hit W.O.R. on the shins. The district court granted an emergency ex parte OFP the same day that father filed the petition on the basis of the allegations contained therein, and, upon mother's request, it set a hearing to determine whether grounds existed upon which it should continue the OFP.

Father subsequently moved the OFP court to appoint a GAL for W.O.R. in the OFP proceedings. Mother's attorney filed an affidavit attaching the October 2020, April 2021, and May 2021 orders from the parties' dissolution file and requesting that the OFP court take judicial notice of the orders. Mother also filed a motion asking the OFP court to

dismiss the OFP, to deny father's motion to appoint a GAL, and to allow in camera testimony from the minor children.

The OFP court held a three-day evidentiary hearing in the OFP proceeding in November 2021. The OFP court took father's motion to appoint a GAL under advisement and granted mother's motion to allow in camera testimony from W.O.R. and mother's daughter, M.A.R. The OFP court declined to take formal judicial notice of the prior orders from the dissolution proceeding, but it considered the substance of the orders by agreement of the parties. The OFP court declined to receive W.O.R.'s written disclosures into evidence because it ruled that they were hearsay and not admissible under any hearsay exception and that W.O.R.'s in camera testimony would be more probative.

Father testified at the hearing, and he also called his parents and licensed psychologist Dr. Michael Shea to testify. Mother called Sergeant Jamie Pearson of the Shakopee Police Department and Scott County child-protection investigator Lesley Karnes to testify.

At the conclusion of the hearing, the OFP court vacated the ex parte OFP and dismissed the matter, finding that father presented insufficient evidence to support continuing the OFP. The OFP court filed its findings of fact on November 15, 2021.

Father appeals.

DECISION

I. The district court did not abuse its discretion when it did not appoint a guardian ad litem for W.O.R.

At the hearing on father's OFP petition, the district court stated that it would reserve ruling on father's motion to appoint a GAL and take that motion under advisement because the statute "require[d the court] to hear some evidence on that before deciding whether to appoint a guardian ad litem." Because it ultimately vacated the ex parte OFP and dismissed the matter on the basis that father presented insufficient evidence to support continuing the OFP, the district court did not rule on the GAL motion.

On appeal, father argues that the district court abused its discretion by failing to appoint a GAL for W.O.R. during the OFP proceeding. Father relies on Minn. Stat. § 518.165, subd. 2 (2022), which requires the appointment of a GAL in all proceedings for child custody, marriage dissolution, or legal separation in which custody or parenting time is an issue if the court has reason to believe that the minor child is a victim of domestic child abuse. Father argues that the district court had "reason to believe" W.O.R. had been abused because the district court initially granted father's motion for an emergency ex parte OFP. He contends that the ex parte OFP itself was a "sufficient basis for appointing a guardian ad litem."

When there exists "a threshold level of circumstantial evidence, or 'reason to believe' that [a child] may have been abused," appointment of a GAL is mandatory under Minn. Stat. § 518.165, subd. 2. *J.A.S. v. R.J.S.*, 524 N.W.2d 24, 27 (Minn. App. 1994). However, appointment of a GAL is not mandatory when allegations of abuse are general

or unsubstantiated. *See Anderson v. Archer*, 510 N.W.2d 1, 5 (Minn. App. 1993) (holding that appointment of a GAL was not mandatory because the respondent presented sufficient evidence to rebut appellant's unsubstantiated allegation of physical abuse); *Abbott v. Abbott*, 481 N.W.2d 864, 870 (Minn. App. 1992) (holding that appointment of a GAL was not mandatory because the children did not meet the definition of "victim of domestic abuse or neglect"); *Baum v. Baum*, 465 N.W.2d 598, 600 (Minn. App. 1991) (holding that appointment of a GAL was not mandatory because the appellant presented insufficient evidence of abuse or neglect), *rev. denied* (Minn. Apr. 18, 1991).

Father cites to *J.A.S.* and *J.E.P. v. J.C.P.*, 432 N.W.2d 483 (Minn. App. 1988), to support his position that a GAL appointment was mandatory here. In *J.A.S.*, the appellant-father's visitation with his joint child was suspended after the respondent-mother alleged that he sexually abused her nonjoint child. 524 N.W.2d at 26. We concluded that the district court abused its discretion in failing to appoint a GAL during the visitation proceedings. *Id.* at 27. The evidence that created a "reason to believe" that the child was abused included testimony describing the joint child's frightened reaction to visitation with appellant-father and the nonjoint child's allegations of abuse. *Id.*

In *J.E.P.*, we concluded that the district court erred in failing to appoint a GAL in a visitation dispute after a hearing on the appellant-mother's OFP against the father alleging sexual abuse of their children. 432 N.W.2d at 486. We concluded that appointment of a GAL was mandatory because the district court had reason to believe that abuse was occurring: an independent criminal investigation was underway at the time of the proceedings, appellant-mother and the children's therapist testified that the children had

described the sexual abuse, and the district court appointed an expert witness to investigate whether sexual abuse had occurred. *Id.* at 487.

In contrast to those in *J.A.S.* and *J.E.P.*, the hearing at issue in this case was a hearing to determine whether to continue the emergency ex parte OFP. The only evidence upon which the district court relied in granting the emergency ex parte OFP was father's unsubstantiated allegations of abuse in the ex parte OFP petition. Neither *J.A.S.* nor *J.E.P.* stands for the proposition that a district court's grant of an ex parte OFP, absent further evidence, constitutes "reason to believe" a child was abused. Thus, we conclude that father's allegations of abuse did not meet the "threshold level of circumstantial evidence" to give the district court reason to believe that W.O.R. was abused, and the district court did not err by not appointing a GAL in this case.

II. The district court did not abuse its discretion by vacating the OFP and dismissing the matter.

Next, father argues that the district court abused its discretion by vacating the ex parte OFP and dismissing the matter. He contends that the district court (1) made several findings of fact that were not supported by the record, (2) misapplied the law by not addressing the allegations that mother's ex-husband abused W.O.R., (3) did not properly consider expert testimony, and (4) incorrectly took issue with the amount of time that had passed between the alleged abuse and the grant of the emergency ex parte OFP.

Appellate courts review a district court's decision to grant an OFP for an abuse of discretion. *Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence,

misapplying the law, or delivering a decision that is against logic and the facts on record." *Bender v. Bernhard*, 971 N.W.2d 257, 262 (Minn. 2022) (quotation omitted); *see also Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009) ("A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." (quotation omitted)).

When reviewing a district court's decision to grant or deny an OFP, "[a]n appellate court will neither reconcile conflicting evidence nor decide issues of witness credibility." *Aljubailah v. James*, 903 N.W.2d 638, 643 (Minn. App. 2017) (quotation omitted). Rather, appellate courts "review the record in the light most favorable to the district court's findings" and "reverse those findings only if [the appellate court is] left with the definite and firm conviction that a mistake has been made." *Pechovnik*, 765 N.W.2d at 99 (quotation omitted).

A. The district court did not clearly err by making certain findings of fact.

Father challenges certain findings of fact the district court made. A district court's findings of fact are reviewed for clear error. Minn. R. Civ. P. 52.01; *see In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221-22 (Minn. 2021) (discussing, in detail, the clear-error standard for reviewing findings of fact and noting, among other things, that "an appellate court need not go into an extended discussion of the evidence to prove or demonstrate the correctness of the findings of the trial court"). Findings of fact "are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Kenney*, 963 N.W.2d at 221 (quotation

omitted). Under the clear-error standard, we may not reweigh the evidence, engage in fact-finding, or reconcile conflicting evidence. *Id.* at 221-22.

Father contends that the record does not support the district court's findings of fact regarding (1) the alleged sexual abuse of W.O.R., (2) W.O.R.'s alleged allergies to dairy products and gluten, and (3) mother's alleged treatment of W.O.R.'s toenails. Father bases his argument in part on his assertion that the district court mischaracterized W.O.R.'s in camera testimony. Contrary to father's argument, the district court's findings are consistent with W.O.R.'s in camera testimony and other evidence in the record. Father disagrees with the credibility determinations the district court made regarding W.O.R. and other witnesses,[3] but we will not decide issues of witness credibility. *Aljubailah*, 903 N.W.2d at 643.

Specifically, the district court found that W.O.R. was "not a reliable reporter when it comes to the allegations of domestic abuse" because W.O.R. is "suggestible" and believes what the adults in his life have told him about the alleged abuse. It also found that W.O.R.'s description of the behavior and his demeanor while testifying about the alleged abuse did not support a finding of abuse. The district court found that W.O.R.'s in camera testimony "cast considerable doubt on whether he is truly allergic to the things he mentioned" and that no medical evidence was presented at the hearing that W.O.R. is

[3] The district court also formed its credibility assessment "against the backdrop of Mr. and Ms. Rued's long-running battles in Hennepin County District Court," in which the district court made findings that father and his parents had created a source-monitoring problem by questioning W.O.R. about abuse and positively reinforcing W.O.R. for making disclosures. We defer to the district court's credibility determinations.

actually allergic to dairy products or gluten. As to W.O.R.'s toenails, the district court explained that it did not find father's and his parents' testimony credible because they testified that W.O.R. had chipped and red toenails, but father did not submit photographic evidence of this despite submitting photos of other alleged injuries.

Here, we have reviewed the record and conclude that the district court's findings of fact are not clearly erroneous.

B. The district court did not misapply the law by not addressing the allegations that mother's ex-husband abused W.O.R.

Father next argues that the district court abused its discretion by failing to find that mother's ex-husband, T.R., committed domestic abuse against W.O.R. The district court determined that these allegations were irrelevant to the OFP proceeding; father contends that the district court misapplied the law because T.R.'s alleged abuse fits the definition of domestic abuse under Minn. Stat. § 518B.01, subd. 2(a) (2022), and was relevant to the OFP because it occurred while W.O.R. was in mother's care.

W.O.R. testified that T.R. had hit him on the shins. W.O.R. did not testify that either mother or K.A.R., the subjects of the OFP, hit him. Father and his parents testified that they frequently saw "patterned" or unusual bruising on W.O.R. in 2021. Father submitted two exhibits in support of this allegation, which were photographs of W.O.R.'s back and legs. The district court could see no bruising, only a small red mark on W.O.R.'s back, in exhibit 1. The district court did see bruises and other marks on W.O.R.'s legs in exhibit 2, but the parties disputed the cause of these bruises.

Based on M.A.R.'s testimony, the district court found that contact between T.R. and W.O.R. had ceased, and therefore, any alleged abuse T.R. inflicted would not support an OFP against mother and K.A.R. Father does not address how the continuation of an OFP against mother and K.A.R. is an appropriate remedy for T.R.'s alleged domestic abuse. We discern no abuse of the district court's discretion here.

C. The district court properly considered the expert testimony.

Father argues that the district court abused its discretion by failing to consider the expert testimony of Dr. Michael Shea and by misinterpreting the testimony of the child-protection investigator, Lesley Karnes.

Father bases his argument that the district court failed to consider the expert testimony on the fact that the district court does not reference Dr. Shea's testimony in its findings of fact. Dr. Shea is a licensed psychologist who has worked extensively with child-abuse cases in his career. He is also a mandatory reporter with whom father shared W.O.R.'s written disclosures. In preparation for his testimony, Dr. Shea reviewed documents from the Hennepin County dissolution proceedings in addition to W.O.R.'s writings and spoke with father and his parents. Dr. Shea's testimony indicated that he believed W.O.R. had been abused based on his review of W.O.R.'s written disclosures and that he believed W.O.R. was in need of protection from mother and K.A.R. Dr. Shea did not interview W.O.R. about the alleged abuse.

Father cites to *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985), to support his argument that the district court must explain its reasons for disagreeing with an expert's conclusions. However, the court in *Pikula* stated that "[t]he [district] court is not . . . bound

to adhere to . . . expert testimony if it believes it is outweighed by other evidence," and it held that the evidence was adequate to support the findings the district court made regarding the fitness of the custodial parent even though it was "not apparent" why the district court did not consider the expert testimony. *Id.* *Pikula* undermines, rather than supports, father's argument because it indicates that the district court was not required to address and explain its reasons for rejecting Dr. Shea's testimony in its findings of fact.

Father also cites to *Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993), *rev. denied* (Minn. Jan. 28, 1994); however, *Rogge* is inapposite here. The expert testimony at issue in *Rogge* involved the evaluation of statutory best-interests factors by a custody evaluator and other professionals appointed by the court for a custody evaluation in a custody-modification proceeding. 509 N.W.2d at 164-65. Here, Dr. Shea was not evaluating statutory best-interests factors for custody modification, nor was he appointed by the court for a neutral evaluation. He was retained by father. He is not W.O.R.'s therapist and did not speak to W.O.R. directly about the written disclosures. We thus conclude that the district court did not abuse its discretion because it was not required to explain its assessment and weighing of Dr. Shea's testimony.

Father also argues that the district court misinterpreted Investigator Karnes's testimony. Father does not cite to any controlling legal authority to support his argument. Father focuses on an exercise Karnes completed with W.O.R. in which he placed his father in a "house of good things" and his mother in a "house of worries." Father argues that this testimony would support a finding that W.O.R. felt unsafe in mother's care and that the district court abused its discretion by making a contrary finding.

Father ignores that Karnes also testified that the "house of worries" does not necessarily indicate that W.O.R. was being hurt or experiencing sexual abuse. Thus, when we view the record "in the light most favorable to the district court's findings," it supports the district court's interpretation of Karnes's testimony. *Pechovnik*, 765 N.W.2d at 99 (quotation omitted).

D. The district court did not base its decision on the amount of time that had passed between the alleged abuse and the grant of the emergency ex parte OFP.

Finally, father argues that the district court abused its discretion by "taking issue with the timing of the alleged harm that was the basis for seeking an OFP for W.O.R." Father cites nonprecedential authority supporting his argument that the time that elapsed between the alleged abuse, the report of that abuse, and the adjudication of an OFP is not dispositive as to whether the district court should grant the OFP.

Father misconstrues the district court's order; it does not appear that the district court actually took issue with the timing of the alleged abuse. The findings of fact note that W.O.R.'s testimony described the instances of alleged abuse occurring in kindergarten, between six months to a year before father initiated the OFP proceeding in Scott County. The district court did not indicate that it gave significant weight to this elapsed time; instead, it stated that its decision "rested almost entirely on its observation and assessment of the credibility of the witnesses who testified."

In sum, there is sufficient evidence in the record to support the district court's findings of fact and its decision to vacate the ex parte OFP. Therefore, we conclude that

the district court did not abuse its discretion when it vacated the ex parte OFP and dismissed the matter.

III. Father's motion to strike portions of mother's brief is granted.

The appellate record consists of "documents filed in the trial court, the exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). "The court will strike documents included in a party's brief that are not part of the appellate record." *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd* 504 N.W.2d 758 (Minn. 1993).

We have reviewed father's motion and agree that mother's brief refers to documents outside the appellate record. We therefore grant father's motion to strike these portions of mother's brief.

Affirmed; motion granted.