STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1648

Caroline M. Rice, petitioner,
Appellant,

vs.

Brent R. Rice,
Respondent.

Filed January 22, 2008
Affirmed
Peterson, Judge

Hennepin County District Court
File No. DC 292 618

Brian M. Olsen, Tower Center Mall, P.O. Box 988, Cokato, MN 55321 (for appellant)

Cory D. Gilmer, 700 Lumber Exchange Building, 10 South Fifth Street, Minneapolis, MN 55402 (for respondent)

Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Wright, Judge.

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

PETERSON, Judge

In this marital dissolution, appellant wife argues that the district court abused its discretion by (1) awarding respondent husband sole physical custody of three of the parties' children, (2) denying her motion for a continuance and (3) awarding her

insufficient attorney fees. Appellant also argues that this court should vacate the property award made in the dissolution judgment. We affirm.

FACTS

Appellant-wife Caroline M. Rice is trained as a registered nurse, but during most of the parties' 16-year marriage, she was a stay-at-home mother for the parties' five children, whose ages now range from nine to seventeen years. Respondent-husband Brent R. Rice is a stockbroker, and during the marriage, he earned nearly all of the family's substantial income. In spite of husband's substantial income, the parties accumulated a significant amount of debt during the marriage as a result of their comfortable lifestyle and expenses associated with mold damage to their home.

In 2004, wife petitioned for a marital dissolution. The district court granted the dissolution on December 28, 2004, and reserved several issues (including custody) for trial on December 6-7, 2005. In a March 2006 order issued after the December 2005 trial, the district court (1) granted wife sole legal and sole physical custody of the parties' two oldest children, (2) granted husband sole physical custody of the parties' three youngest children, (3) granted the parties joint legal custody of the three youngest children, and (4) reserved the issue of spousal maintenance. This appeal followed.

D E C I S I O N

I.

Wife argues that it was "clearly erroneous to fail to award physical custody of the five minor children to [her] when she was clearly the primary parent and caregiver" and that it was "clearly erroneous to split the children without considering their

interrelationships with one another." "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 v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). This court will sustain a district court's findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01. This court views the record in the light most favorable to the district court's findings of fact. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Id.* When there is conflicting evidence, we defer to the district court's determinations of credibility. Minn. R. Civ. P. 52.01; *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

"In determining custody, the court shall consider the best interests of each child." Minn. Stat. § 518.17, subd. 3(a)(3) (2006). "'The best interests of the child' means all relevant factors to be considered and evaluated by the court," including 13 statutory factors. Minn. Stat. § 518.17, subd. 1(a) (2006).

> The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the [13] factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.

Id. The law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness*, 607 N.W.2d at 477.

A. Primary Caretaker

Heavily relying on the fact that she stayed at home with the children, wife argues that because she "was clearly the primary parent and caregiver," the district court abused its discretion when it awarded husband sole physical custody of the three youngest children. When determining the best interests of the child, the district court may consider which parent was the child's "primary caretaker." Minn. Stat. § 518.17, subd. 1(a) (3) (2006). But this factor, like the other best-interest factors, may not alone determine the child's custody. *See id*., subd. 1(a) ("The court may not use one factor to the exclusion of all others."); *Schumm v. Schumm*, 510 N.W.2d 13, 14 (Minn. App. 1993). The district court found that wife "had been the children's primary caregiver but [husband] not only was an involved parent, but had to be an involved parent based upon the reality that the parties have five minor children, all appearing to be involved in activities."

Wife's contention that "the law requires the primary parent be given custody of the younger children absent exigent circumstances" is incorrect. The marital-dissolution statute expressly provides that "[t]he primary caretaker factor may not be used as a presumption in determining the best interests of the child." Minn. Stat. § 518.17, subd. 1(a); *see also Maxfield v. Maxfield*, 452 N.W.2d 219, 222 n.2 (Minn. 1990) (noting "the fact that one parent may be the primary caretaker does not necessarily control who gets custody").

The record demonstrates that in reaching its custody determination, the district court considered the report of two custody evaluators, the recommendations of the guardian ad litem, and the testimony of the parties. After evaluating all of this evidence,

the district court made findings regarding the 13 statutory best-interests factors and determined that it was in the best interests of the children to grant wife sole physical and sole legal custody of the two oldest children, to grant husband sole physical custody of the three youngest children, and to grant the parties joint legal custody of the three youngest children.

B. Split custody

Wife also argues that the district court abused its discretion by splitting the custody of the five children between the two parents. As a general matter, Minnesota courts disfavor split custody. *See Sefkow*, 427 N.W.2d at 215 (stating that "we do not favor split custody as a general rule"). That is, it is desirable to place children under "one roof." *Fish v. Fish*, 280 Minn. 316, 322 159 N.W.2d 271, 275 (1968). Despite this general policy, "the welfare of the child is paramount, and the decision to split custody is not conclusively erroneous." *Sefkow*, 427 N.W.2d at 215. If the record supports the conclusion that split custody best protects the child's welfare, then this court will not disturb the district court's decision to split custody. *See id*.; *Borchert v. Borchert*, 279 Minn. 16, 19-20, 154 N.W.2d 902, 905 (1967).

Wife argues that "[a]bsolutely no consideration was given to the harmful effects of splitting these children, or to the inter reactions between siblings" and that "[n]o testimony was received into the record as to why the children were separated, and no findings were made that justified that separation." But the record demonstrates that the district court carefully considered the possible effects of its custody decision.

The custody-evaluators' report described the parties' inability to communicate with each other and explained that "it would be [] difficult for either parent to be the sole physical custodian of five children given the demands of full time employment[1] and attempting to meet the needs and schedules of numerous children." The custody evaluators concluded that "[t]he children's best interest would be significantly compromised if a mutual decision was required on any issue by these parties" and recommended that wife be granted sole legal and physical custody of the two oldest children and that husband be granted sole legal and physical custody of the three youngest children. The guardian ad litem also concluded that some form of split custody was in the best interests of the children.

The district court granted wife sole legal and physical of the two oldest children, but it did not follow all of the custody-evaluators' recommendations with respect to the three youngest children. Instead of granting husband sole legal and physical custody of the three youngest children, the court granted him sole physical custody with joint legal custody to both parents. The district court found that granting husband sole legal custody was not in the three youngest children's best interests, in spite of the tension between the parents, because "[wife], by all accounts, was their primary parent, and this Court is not comfortable depriving [her] of input into major decisions in their lives."

[1] The evaluators' report indicates that wife intends to seek employment at Waconia Hospital or Fairview Southdale Hospital.

Because wife has not shown that in awarding custody of the children, the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law, we affirm the custody award.

II.

Wife argues that the family court referee's refusal to grant her a continuance was an abuse of discretion when her attorney had taken over the case only two days before the trial. Whether to grant or deny a continuance is "within the sound discretion of the district court, and its decision will not be reversed unless it has abused its discretion." *Dunham v. Roer*, 708 N.W.2d 552, 572 (Minn. App. 2006). On appeal, the critical question in evaluating the denial of a continuance "is whether a denial prejudices the outcome of the trial." *Jones v. Jones*, 402 N.W.2d 146, 150 (Minn. App. 1987). Generally, the district court should grant continuances liberally. *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 831 (Minn. App. 2001).

At the beginning of the trial, wife's counsel moved for a 30-day continuance and stated two reasons for the continuance: (1) he had been hired on the day before trial, and (2) the parties had not exchanged witness and exhibit lists.[2] Wife's counsel stated to the court that he had only briefly examined the pleadings and other documents and was "woefully inadequately prepared to try this case." The referee denied the motion.

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[2] Wife also argues that the referee should have recused himself because he owns stock of the company that employs husband. We reject this argument because the referee disclosed his relationship with husband's employer to wife's counsel at a hearing in 2004, and both wife and the attorney then representing her agreed to proceed.

Although wife hired her attorney only a day or two before trial, there are facts in the record that support the denial of a continuance. First, the referee was aware that wife had been represented by approximately six attorneys since she filed her dissolution petition in 2004. This explains why the referee was not persuaded by wife's request to further delay the trial because her attorney withdrew and she had hired another attorney shortly before trial. *Cf.* Minn. R. Gen. Pract. 105 ("Withdrawal of counsel does not create any right to continuance of any scheduled trial or hearing.").

Second, both parties failed to comply with the court-ordered exchange of witness lists and other documents. The district court had ordered the parties to exchange these documents by December 2, 2005. Only husband transferred a witness list and exhibits to wife before trial, although husband did not forward his materials to the court. And although the record shows that wife attempted to contact husband's attorney to exchange materials, wife nonetheless failed to comply with the order regarding witness lists and exhibits. The referee stated that he would not reward the parties' non-compliance with a continuance: "The parties don't get to . . . . ignore the order and just come in and have the trial be continued because you're ignoring the order." Failure to disclose witnesses or exhibits before trial can deprive the parties of due process. *See Prechtel v. Gonse*, 396 N.W.2d 837, 840 (Minn. App. 1986) (stating district court should grant continuance when a party fails to disclose witnesses and the other party is prejudiced). But here, the only witnesses called at trial were the parties and one of wife's friends, and the failure to disclose witnesses did not prejudice wife. *Cf. id*. (affirming denial of continuance where the party was not prejudiced).

In addition, the trial date had been set for two months and was set to accommodate wife's medical procedure. Finally, the referee stated that a high percentage of family-court litigants proceed pro se, and he was not moved by wife's counsel's request for a continuance, even if that meant that she had to proceed pro se. Although continuances should be liberally granted, wife has not shown that the denial of a continuance was an abuse of the referee's discretion or that the denial of a continuance prejudiced the outcome of the trial.

III.

Wife argues that the district court should have awarded her additional need-based attorney fees. In the order scheduling the case for trial, husband was ordered to pay $5,000 for wife's attorney fees. Following the trial, wife's request for additional fees was denied.

A district court shall award need-based attorney fees to a party in a marital dissolution if the court finds that (1) the recipient needs the fees for a good-faith assertion of rights; (2) the payor can afford the fees; and (3) the recipient cannot. Minn. Stat. § 518.14, subd. 1 (2006). An attorney-fee award "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).

The district court did not make findings that expressly address each of the statutory conditions for an attorney-fee award, but the court did find that wife has obtained employment at a reported $62,000 annual salary, and the court reserved any

spousal-maintenance award to be paid by husband to wife because the amount of debt that husband will be responsible for after the sale of the parties' homestead[3] is uncertain. Thus, it is not clear that husband has the ability to pay attorney fees incurred by wife. Also, in denying wife's request for additional attorney fees, the district court found that when the dissolution began in 2004, both parties had $5,000 of marital funds to pay attorneys. In November 2004, husband agreed to pay $10,000 for wife's credit-card debt, but he then discovered that wife had withdrawn approximately $10,000 to pay her attorneys. Then, during a six-week period between December 2004 and February 2005, wife incurred $14,000 in attorney fees, which was more than husband had spent on legal fees during the entire dissolution proceeding up to that point. And, as we have already noted, when the case was scheduled for trial, the court ordered husband to pay wife $5,000 for attorney fees even though she had incurred fees for approximately six attorneys in an amount greater than the fees that husband had incurred.

Based on these findings, which wife does not challenge, the district court concluded that both parties should be responsible for their remaining costs and attorney fees. Wife contends that because she did not have effective and continuous legal representation, she was not able to effectively bring pressure to obtain discovery and a fair property settlement. But wife does not explain why she was not able to obtain effective legal representation with the more than $30,000 that she paid attorneys.

[3] In its findings regarding the division of marital property, the district court determined that husband will be responsible for in excess of $500,000 of remaining marital debt after the homestead has been sold.

Furthermore, wife's argument that, at times, she did not have legal representation does not support a posttrial request for additional attorney fees because wife did not incur attorney fees during any time that she did not have legal representation. Wife has not shown that the district court abused its discretion when it denied her request for additional attorney fees.

IV.

Wife argues that the property award in the December 28, 2004 judgment and decree "should be vacated in the interest of justice due to severe non disclosure of income" by husband.

> On motion and upon terms as are just, the court may relieve a party from a judgment and decree . . . and may order a new trial or grant other relief as may be just for . . . fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party.

Minn. Stat. § 518.145, subd. 2(3) (2006).

But wife did not bring a motion in the district court to obtain relief under Minn. Stat. § 518.145, subd. 2. "A reviewing court must limit itself to a consideration of only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982), *abrogated on other grounds by Onvoy, Inc. v. Shal, LLC.*, 669 N.W.2d 344, 351 (Minn. 2003). Therefore, because this issue was not presented to the district court, we will not consider it for the first time on appeal.

Affirmed.