STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1817

In Re the Custody of W. N. M., Peter Edward Marxen, petitioner,
Appellant,

vs.

Janet Ruth Jacobs,
Respondent.

Filed August 19, 2013
Affirmed as modified
Chutich, Judge

Scott County District Court
File No. 70-FA-11-3676

John T. Burns, Jr., Burns Law Office, Burnsville, Minnesota (for appellant)

Julie K. Seymour, Seymour Family Law, Lakeville, Minnesota (for respondent/cross-appellant)

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and Chutich, Judge.

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

CHUTICH, Judge

On appeal in this custody dispute, appellant-father, Peter Edward Marxen, argues that the district court should not have appointed a parenting consultant with powers to which the parties did not agree. By notice of related appeal, cross-appellant-mother,

Janet Ruth Jacobs, contends that the district court erred by denying her motion to modify the custody order, which gives Marxen the final decision-making authority to determine education-related issues for the parties' minor child. We conclude that the district court did not err by denying Jacobs's motion to modify the custody order but did err by ordering that the parenting consultant has the power to decide school-attendance issues. Consequently, we affirm as modified.

FACTS

Appellant Marxen and respondent Jacobs are the parents of a minor child, W.N.M. Marxen was adjudicated the parent of W.N.M. and subsequently commenced a proceeding for custody and parenting time. The parties reached an agreement to share joint legal and physical custody and a partial agreement concerning parenting time. Remaining issues were submitted to the court for determination, including a dispute over the parties' authority to make educational and medical decisions for their child. A guardian ad litem, Sandy LaRoy, was appointed to make recommendations regarding custody and parenting time.

The district court entered a custody order, which awarded the parties joint legal custody, and provided that, "[s]hould the parties be unable to agree on schooling issues, [Marxen] shall be the decision maker in that regard. If the parties are unable to agree on medical issues, [Jacobs] shall be the decision maker in that regard." Both parties brought motions to amend the custody order, or in the alternative, requested a new trial. Jacobs's motion to amend was based in part on her request that LaRoy be reappointed so that she could clarify her recommendations on W.N.M.'s schooling.

The district court held a hearing and issued an amended custody order. As part of the amended order, the district court explained that, due to a submission extension, LaRoy had been discharged before the record closed and had not submitted a letter clarifying her position regarding the best school for the minor child. The district court concluded that the circumstances did not justify reopening the record because, "LaRoy's recommendation[] regarding the school issue is not material evidence because the Custody Order already gives [Marxen] the final decision-making authority on education issues concerning the minor child." Therefore, the district court denied Jacobs's motion for an amended custody order.

Following the entry of the amended custody order, both parties brought motions seeking further amendment. Before the hearing, the parties agreed to appoint Joan Miller as a parenting consultant. At the hearing, the parties informed the district court of their decision to use a parenting consultant and stated that they would work together to develop language for an order regarding the authority to be given to the parenting consultant. The district court requested that the parties submit proposed orders regarding the parenting consultant.

Jacobs submitted a proposed order to appoint a parenting consultant that Marxen alleges contained a provision allowing the parenting consultant to "decide school attendance issues."[1] Marxen's counsel then sent a letter to the court, objecting to the proposed order: "we must strike provisions 9 and 10 on page 3, which authorize the

[1] Jacobs's proposed order in not in the record. Marxen did not cite to anything in the record regarding Jacobs's proposed order. Jacobs cited to her proposed order, but the document cited is in fact Marxen's proposed order.

[parenting consultant] to decide issues related to 'school attendance' and 'appropriate school placement.'" Marxen attached a proposed order along with his letter.

The district court issued an order to appoint a parenting consultant and an amended custody order, denying Jacobs's motion to change the educational decision-maker designation from Marxen to Jacobs. The parenting-consultant order issued by the court gave the parenting consultant the authority to decide school-attendance issues.[2]

Following issuance of these orders, the parties had a disagreement over where the minor child should attend preschool. The parties met with the parenting consultant to discuss the issue. Marxen believed that he had the authority to decide the issue because the custody order gave him authority to be the final decision-maker regarding schooling issues. Jacobs disagreed with this interpretation. The parenting consultant issued a decision stating that Marxen's

> authority over "schooling" does not begin until the parties have a legal obligation to enroll their child in school. There is no legal requirement that a child attend pre-school. Therefore, I advised that [the child] did not need to be removed from the pre-school setting [Jacobs] chose for him. [Marxen] was likewise free to enroll [the child] in the pre-school experience that [Marxen] desired for him.

Marxen appeals from the order appointing a parenting consultant, arguing that the district court erred by appointing a parenting consultant with the power to decide school

[2] Marxen argues that the district court simply signed Jacobs's proposed order. We do not have Jacobs's proposed order, but Marxen appears to be incorrect. He objected to a number of provisions in Jacobs's proposed order that do not appear in the district court's final order. These omissions suggest that the district court reviewed both parties' proposed orders and drafted its own order independently.

attendance issues. By notice of related appeal, Jacobs challenges the district court's denial of her motion to modify the custody order.

D E C I S I O N

I. Parenting consultant

Marxen challenges the district court's order giving the parenting consultant the authority to decide school attendance issues, arguing that the district court did not have the authority to appoint a parenting consultant with powers to which the parties did not agree.

First, we note that Marxen has failed to allege prejudice resulting from the alleged error. On appeal, an appellant must show both error and prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). While Marxen alleges that the district court erred by appointing a parenting consultant with powers to which the parties did not agree, he does not allege any prejudice resulting from the error. In fact, it was Jacobs who explained in her brief that Marxen challenged the order only after the parenting consultant made preschool recommendations with which Marxen did not agree. Even though Marxen did not allege any prejudice, we decide to address the issue in the interests of justice and judicial economy. *See* Minn. R. Civ. App. P. 103.04; *In re Estate of Vittorio*, 546 N.W.2d 751, 756 (Minn. App. 1996).

"The term 'parenting consultant' is not used in the Minnesota statutes," but "[i]n practice, the term refers to a creature of contract or of an agreement of the parties which is generally incorporated into . . . a district court's custody ruling." *Szarzynski v.*

Szarzynski, 732 N.W.2d 285, 293 (Minn. App. 2007) (stating that nonstatutory "parenting consultants" are distinct from statutory "parenting-time expediters"); *see also* Minn. Stat. § 518.1751, subd. 4 (2012) ("This section [regarding parenting-time expediters] does not preclude the parties from voluntarily agreeing to submit their parenting time dispute to a neutral third party or from otherwise resolving parenting time disputes on a voluntary basis."); Minn. R. Gen. Pract. 114.02(a)(10) ("Parties may by agreement create an ADR process."). We therefore apply rules of contract in interpreting such an agreement. *See, e.g.*, *Blonigen v. Blonigen*, 621 N.W.2d 276, 281 (Minn. App. 2001) (stating that rules of contract construction apply when construing stipulations), *review denied* (Minn. Mar. 13, 2001).

Marxen asserts that the parties did not have a meeting of the minds as to the authority given to the parenting consultant to decide school attendance issues. Jacobs contends that the parties agreed to appoint a parenting consultant and agreed to submit proposed orders to the district court, which "created an inference that the [district] court would then determine the authority of the Parenting Consultant when it drafted the Order to Appoint the Parenting Consultant."

A contractual stipulation between the parties must be based on the existence of an offer and acceptance so as to show a meeting of the minds on the essential terms of the agreement. *Ryan v. Ryan*, 292 Minn. 52, 55, 193 N.W.2d 295, 297 (1971). A district court cannot "impose conditions on the parties to which they did not stipulate . . . ." *Toughill v. Toughill*, 609 N.W.2d 634, 639 n.1 (Minn. App. 2000).

Here, the parties informed the district court that they had agreed to use a parenting consultant and would work together to determine the authority of the parenting consultant. Jacobs submitted a proposed order and Marxen subsequently objected to several provisions, including a provision giving the parenting consultant the authority to determine "school attendance issues." The district court made the other changes that Marxen requested (and in any case, Marxen does not challenge any other provisions of the parenting consultant order on appeal), but included a provision in the final order granting the parenting consultant the authority to decide school attendance issues.

The record shows that the parties did not have a meeting of the minds regarding the parenting consultant's authority to determine school attendance issues. Therefore, the district court erred by granting the parenting consultant this authority. *See id.* And nothing in the record suggests that the parties gave the district court the discretion to determine the scope of the parenting consultant's authority. Because the parties did not have a meeting of the minds on this issue, the district court's parenting consultant order must be modified to remove the provision granting the parenting consultant the authority to determine school attendance issues. We affirm the order as so modified.

Marxen did not challenge the parenting consultant's decision regarding the child's preschool enrollment; nor did he make any showing that the parenting consultant's decision that Marxen's "authority over 'schooling' does not begin until the parties have a legal obligation to enroll their child in school" was a "school attendance issue" improperly reached by the parenting consultant. Consequently, the parenting consultant's decision on the issue of preschool stands.

II. Amendment of Custody Order

By notice of related appeal, Jacobs challenges the district court's denial of her motion to amend the custody order to incorporate the guardian ad litem's recommendation that Jacobs be the designated decision-maker regarding the child's education.

Jacobs has not provided a legal basis for her claim that the district court erred by denying her motion to amend the custody order. Therefore, this issue is waived. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971) ("[A]ssignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

Nor has Jacobs provided this court with the May 17, 2012 motion that she made to the district court requesting that the custody order be amended. Jacobs, as cross-appellant, has the burden of providing us with an adequate record to review this issue. *See Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995) ("An appellant has the burden to provide an adequate record."). Without a legal analysis of the grounds for her motion, either in her brief or in her original motion to the district court, we cannot say that the district court erred by failing to grant her motion to amend custody. *See Noltimer v. Noltimer*, 280 Minn. 28, 29, 157 N.W.2d 530, 531 (1968) ("Error cannot be presumed. . . . Inasmuch as we cannot determine from the record here whether the court

acted arbitrarily or whether the determination of the court is supported by the evidence, we are compelled to hold that the appeal must be dismissed.")

Affirmed as modified.