STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0590

In re the Paternity of: G. M. E. Maria Elena Petrilak, petitioner,
Respondent,

vs.

Brian Paul Elliott,
Appellant,

and

Ramsey County, intervenor,
Respondent.

Filed December 23, 2013
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-FA-10-3324

Maria Petrilak, Mechanicsburg, Pennsylvania (pro se respondent)

Michelle L. MacDonald, Athena V. Hollins, MacDonald Law Firm, LLC, West St. Paul, Minnesota (for appellant)

John J. Choi, Ramsey County Attorney, Richard J. Diffatte, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

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

LARKIN, Judge

In this proceeding to establish paternity, child-custody rights, and an award of parenting time, appellant-father challenges the constitutionality of Minn. Stat. § 257.66 (2012). He also assigns error to certain district court rulings and its award of sole legal and physical custody to respondent-mother. Because appellant-father's constitutional challenge is not properly before this court on appeal, we do not address it. And because the district court did not abuse its discretion in its rulings or custody determination, we affirm.

FACTS

Respondent Maria Elena Petrilak gave birth to a female child, G.M.E., on August 3, 2008. Petrilak was not married when the child was born. Appellant Brian Paul Elliott is listed as the child's biological father on the child's birth certificate. Elliott and Petrilak executed a voluntary recognition of parentage form, indicating that Elliott is the child's father. At all times since the child's conception, Elliott and Petrilak have acknowledged to family and friends that Elliott is the father of G.M.E.

Before the underlying paternity and custody action began, the parties and child resided together as a family. Petrilak decided to end her relationship with Elliott and to leave Minnesota. She made plans to move to Pennsylvania, with the parties' child, to be closer to her family and her new romantic interest.

On November 29, 2010, Petrilak initiated the underlying paternity action by service of a summons and petition on Elliott. Petrilak sought a judgment from the district

court adjudicating Elliott the father of G.M.E., granting her legal and physical custody, granting Elliott supervised parenting time, and directing Elliott to pay child support.

On November 30, Elliott served an answer and counterpetition, asking the district court to adjudicate him the father of G.M.E, grant him sole legal and physical custody of the child subject to supervised parenting time with Petrilak, and award child support under the Minnesota Child Support Guidelines. He also petitioned the district court for an ex parte order granting him temporary sole custody of the child and precluding Petrilak from removing the child from the state. The district court granted the ex parte order on December 1. At a December 13 hearing, the district court vacated the order transferring custody to Elliott and awarded him temporary unsupervised parenting time pending the outcome of the case. Under the terms of the order, the parties had equal parenting time.

On April 5, 2011, the district court filed an order for temporary relief, which awarded Petrilak temporary sole legal and physical custody of the child. The order granted Elliott temporary parenting time but slightly reduced his parenting time to a little less than three days per week.

The case was tried to the court on March 27, March 28, and May 21, 2012. On September 17, the district court filed its findings of fact, conclusions of law, order for judgment and judgment awarding Petrilak sole legal and physical custody, authorizing Petrilak to immediately move G.M.E. to Pennsylvania, providing parenting time for Elliott, and ordering Elliott to pay child support.

On October 17, Elliott moved for amended findings or a new trial. In his posttrial submissions, he asserted, for the first time, "that Minn. Stat. § 257.66 (incorporating § 257.541, § 518 and § 518A) is unconstitutional as written and applied." Elliott's supporting memorandum set forth extensive arguments regarding the constitutionality of Minnesota's statutory scheme for determining the custodial rights of unmarried parents.

The district court heard oral argument on Elliott's motion on January 15, 2013. Elliott's attorney explained the breadth of his new constitutional challenge as follows:

> [W]e are asserting the unconstitutionality of Minnesota Statutes 257.66 which is a judgment or order and I want to be clear that our claim as to the unconstitutionality of Minnesota Statutes 257.66 judgment order includes Minnesota Statutes 518 which is the marriage dissolution statute and Minnesota Statutes 518[A] which is the child support statute and 257.66 incorporates both of these statutes so I want to make it clear that we are asserting the unconstitutionality of the whole thing.

Elliott's attorney devoted her oral motion argument exclusively to the constitutionality of the statutory scheme, despite the district court's interruption and request that she address the detailed list of requested amendments included in Elliott's motion papers and the legal grounds for a new trial. The district court advised Elliott and his attorney that "somebody bigger than me can make [the] decision whether this is constitutional or not."

At the conclusion of the hearing, the district court denied Elliott's motions on the record. The district court explained its reasoning as follows:

> I expected today that we would have further arguments with regard to how you would want the findings to be amended. I did not get that and you have not put forth any new facts that

> would lead this court to decide differently on these findings. The findings that this court issued after a three day trial [were] based on testimony that was brought forth in court, on exhibits that were formally admitted into evidence, and the Court's prior orders.
>
> And the Court finds no basis on which to amend its findings. In addition, you've not brought forth any other evidence that would make this court believe that . . . the findings . . . were contrary to law and your motion for a new trial is denied. The motion for amended findings is denied. You have not met your burden in terms of making this court believe that they were clearly erroneous.
>
> In addition, your argument with regard to the constitutionality of Statute 257, and I believe you were referring to the whole statute not just to 257.6[6] but this is a paternity statute as being unconstitutional. This court did not hear any arguments that [would] put into question the constitutionality of those statutes. It's a schema that's set up to allow unmarried parents to have custody and parenting time I believe and child support and I believe that that's how this court is carrying it out. That's it. Your motion is denied in its entirety.

On February 5, the district court filed its order regarding the posttrial ruling, which summarily rejected Elliott's constitutional challenge. The order states that Elliott's "argument that Minn. Stat. § 257.66 is unconstitutional is without merit and is not properly before this [c]ourt. His motion is denied."

Elliott appeals from the September 17 findings of fact, conclusions of law, order for judgment and judgment, and the February 5 order denying his motion for amended findings or a new trial.

D E C I S I O N

I.

On appeal, Elliott challenges the constitutionality of the statutory scheme for determining the custodial and parenting-time rights, as well as the child-support obligations, of unmarried parents. *See* Minn. Stat. § 257.66 (governing judgments under Minnesota's Parentage Act and referencing chapter 518 regarding marital dissolution and chapter 518A regarding child support). In denying Elliott's motion for amended findings and a new trial, the district court ruled that Elliott's constitutional challenge "is without merit and is not properly before this [c]ourt." "We review a district court's new trial decision under an abuse of discretion standard." *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010).

The "general practice [of appellate courts] is to avoid a constitutional ruling if there is another basis on which a case can be decided." *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 732 n.7 (Minn. 2003). Generally, constitutional issues will not be addressed for the first time on appeal. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address a constitutional issue raised for the first time on appeal from an order terminating parental rights). Moreover, appellate courts generally do not address questions that were not presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). A claim is made "too late" in district court when it is made for the first time in a new trial motion. *Antonson v. Ekvall*, 289 Minn. 536, 539, 186 N.W.2d 187, 189 (1971). And an issue is raised "too late" when it is first raised in a

motion for amended findings. *Allen v. Cent. Motors, Inc.*, 204 Minn. 295, 299, 283 N.W. 490, 492 (1939).

Elliott did not challenge the constitutionality of the governing statutes before or during the three-day hearing on the parties' competing petitions for custody. Instead, he raised his constitutional challenge for the first time in his motion for amended findings or a new trial. Elliott's strategy is best described as a proverbial attempt to have his cake and eat it too.

When Petrilak petitioned for legal and physical custody of the parties' child, Elliott counter-petitioned for court-ordered custody and child support. Then, he litigated the competing custody requests in the judicial process and participated in a three-day court hearing on the custody issues. After the hearing, Elliott submitted a set of proposed findings of fact, conclusions of law, order for judgment and judgment that would have awarded him joint legal and physical custody rights. His proposed findings of fact included a detailed analysis of the best-interests factors under Minn. Stat. § 518.17 (2012), including the factors specific to an award of joint custody. *See* Minn. Stat. § 518.17, subd. 2 (setting forth factors that a court must consider before awarding joint custody). His proposed findings also addressed and applied the Minnesota Child Support Guidelines under Minn. Stat. § 518A.35 (2012) and proposed that he be ordered to pay basic child support in the amount of $55 per month.

Elliott's proposed conclusions of law similarly relied on the statutory scheme that he now challenges. His proposed conclusions stated that the custody determination is governed by Minn. Stat. § 257.541, subd. 1 (2012) (establishing the custody rights of

"[t]he biological mother of a child born to a mother who was not married to the child's father when the child was born") and Minn. Stat. § 257.541, subd. 3 (2012) ("If paternity has been recognized under section 275.75, the father may petition for rights of parenting time or custody in an independent action under section 518.156. The proceeding must be treated as an initial determination of custody under section 518.17."). His proposed conclusions also stated that because he "signed a recognition of parentage and properly petitioned for custody and parenting time," the district court should "evaluate[] his petition using the factors in Minn. Stat. § 518.17." In addition, his proposed conclusions addressed an award of attorney fees under Minn. Stat. § 518.14 (2012).

In sum, Elliott sought relief under section 257.66 and chapters 518 and 518A, and he had no quarrel with the constitutionality of those statutes until the district court did not grant the relief he wanted. Only at that point did Elliott raise his sweeping constitutional challenge, arguing in part, that "[w]ithout abuse, or parental unfitness, the court's entry into the realm of family, by means of a parents' service of process was violative of the constitution." Elliott raised his constitutional challenge far too late in the proceeding, and the district court soundly rejected it as not properly before the district court. *See Antonson*, 289 Minn. at 539, 186 N.W.2d at 189 ("Thus, for all practical purposes, the claim was not pleaded nor was it presented or litigated at the trial. The claim came too late when suggested for the first time by plaintiff's motions for a new trial.").

We similarly reject the constitutional challenge as not properly before this court. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele*,

425 N.W.2d at 582 (quotation omitted). We recognize that the district court allowed Elliott to make oral argument regarding his constitutional challenge at the motion hearing and invited Petrilak, who appeared pro se, to "tell us if 257.66 is unconstitutional." But the record as a whole satisfies us that the district court did not consider the merits of Elliott's constitutional challenge in deciding the child-custody issues. The district court's oral explanation of its ruling on the constitutional challenge is limited to the following statement: "This court did not hear any arguments that [would] put into question the constitutionality of those statutes." The written order that followed similarly rejected the merits of the constitutional challenge without analysis or discussion: "[Elliott's] argument that Minn. Stat. § 257.66 is unconstitutional is without merit . . . ." That single-line rejection starkly contrasts with the district court's explanation regarding its consideration and denial of the remainder of Elliott's motion, which spans four pages.

At the end of the motion hearing, in what may have been an attempt to preserve the constitutional challenge for appeal, Elliott's attorney asked the district court, "And I think what you are ruling today, so that I'm clear, is that 257.66, 257 which incorporates 518 and 518[A] is not unconstitutional?" The district court responded, "Right. Okay. All right, [any]thing else? It's all taken care of. All right that's it." The tenor of the district court's response, its earlier request that counsel shift the focus of her oral motion argument to her detailed list of proposed amendments, and its statement that "somebody bigger than me can make [the] decision whether this is constitutional" satisfies us that the district court rejected the constitutional claim on procedural grounds without considering the merits of the claim. In our view, the district court indulged Elliott's attempt to raise a

constitutional challenge for the first time in a posttrial motion but rejected the challenge on the procedural ground that it was not properly before the district court. Accordingly, we limit our review of the constitutional claim to the district court's procedural ruling,[1] and we affirm the ruling as a proper exercise of the district court's discretion.

II.

There are a few assignments of nonconstitutional error embedded within Elliott's extensive briefing regarding the constitutionality of Minn. Stat. § 257.66. We address those errors in turn.

Evidentiary Rulings

Elliott argues that the district court "abused its discretion by sustaining objections to *all* of [his] exhibits the day the trial began, purportedly receiving all of [Petrilak's] [e]xhibits, and then carelessly not marking or receiving any [e]xhibits understood to be in evidence." "Matters involving trial procedure or evidentiary rulings are subject to appellate review only if there has been a motion for a new trial [under Minn. R. Civ. P. 59.01] in which the matters have been assigned as error." *Tasker v. Tasker*, 395 N.W.2d 100, 103 (Minn. App. 1986).

[1] Nonetheless, we observe that Elliott's strategy of fully engaging the judicial process for two years in an attempt to obtain relief under section 257.66, only to challenge the constitutionality of that statute when he did not obtain the relief he wanted, contributes to one of the problems that he cites as a basis for relief. *See Meyer v. Meyer*, 441 N.W.2d 544, 548 (Minn. App. 1989) (discussing whether family-law disputes should be removed from the adversarial system because of "the escalating cost of attorney fees in family law matters"), *review denied* (Minn. Aug. 15, 1989).

Rule 59.01 sets forth the "causes" for a new trial. Elliott relied solely on paragraph (g) of the rule, arguing that "a new trial may be granted if the decision is not justified by the evidence, or is contrary to law." *See* Minn. R. Civ. P. 59.01(g) ("[t]he verdict, decision, or report is not justified by the evidence, or is contrary to law"). He did not assign error to the evidentiary rulings that he now challenges on appeal. *See id.*(a) ("[i]rregularity in the proceedings of the court, . . . or any order or abuse of discretion, whereby the moving party was deprived of a fair trial"), (f) ("[e]rrors of law occurring at the trial, and objected to at the time or, if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the notice of motion"). Because Elliott did not raise the purported evidentiary errors in his new trial motion, we do not consider them. *See Tasker*, 395 N.W.2d at 103 (refusing to consider assignments of error based on evidentiary rulings in a child-custody proceeding because the errors were not raised in a new trial motion).

Verbatim Adoption of Petrilak's Proposed Findings, Conclusion, and Order

Elliott contests the district court's findings, conclusions, and order, arguing that the district court "adopted word for word the 270 orders proposed by [Petrilak's] attorney." A district court's findings of fact in a custody determination will be sustained unless they are clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). The supreme court has stated that "it is preferable for a court to independently develop its own findings." *Dukes v. State*, 621 N.W.2d 246, 258 (Minn. 2001). But if the findings are not clearly erroneous, the verbatim adoption, standing alone, is not grounds for reversal. *Id*. at 259.

Respondent Ramsey County argues that "the [district] court order is not a verbatim adoption of [Petrilak's] proposed order." We need not decide the extent to which the district court adopted Petrilak's proposals verbatim because Elliott does not assert that the adopted findings are clearly erroneous. *See id.* Instead, Elliott claims that the "district court's procedure of simultaneous submissions that preclude a response to proposed orders yet to be written by another party is ex parte communications by the [c]ourt, in contravention of the Minnesota Code of Judicial Conduct, Canon 2, Rule 2.9."

The Minnesota Code of Judicial Conduct states that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter." Minn. Code Jud. Conduct Rule 2.9(A). Elliott cites *Pederson v. State*, in which the supreme court cited the ex parte rule and reversed the district court's findings, conclusions, and order because the district court "adopted verbatim [the state's proposed] findings, conclusions and order, without providing Pederson's counsel a chance to review the state's submissions or an opportunity to submit proposed findings, conclusions and an order on Pederson's behalf." 649 N.W.2d 161, 164 (Minn. 2002). The supreme court reversed in the interests of justice, explaining that "[t]o maintain public trust and confidence in the judiciary, judges should avoid the appearance of impropriety and should act to assure that parties have no reason to think their case is not being fairly judged." *Id.* at 164-65.

But *Pederson* is inapposite. In this case, unlike *Pederson*, Elliott submitted his own proposed findings, conclusions, and order. Thus, the concerns that prompted the

reversal in *Pederson* are not present here. In sum, the district court did not err in asking both parties to simultaneously submit proposed findings.

Award of Attorney Fees, Custody Evaluator Fee, and Life Insurance

Elliott contends that the district court's orders that Elliott pay a portion of Petrilak's attorney fees and reimburse Petrilak for his court-ordered share of the custody evaluator's fee "must be reversed as an unconstitutional application" and "also as contrary to the law." He further contends that the district court's orders that he maintain life insurance to secure his child-support obligation and granting Petrilak the right to claim the child as an exemption on her federal and state income tax returns "was unlawful." As support, Elliott asserts that it is "unconscionable" for the court to order him to pay "$47,000" of Petrilak's attorney fees[2] because "it is clear that [he] had no means to pay the evaluator, or his own attorneys."

The district court ordered Elliott to pay $37,200 of Petrilak's attorney fees and costs, not $47,000 as Elliott contends. The district court also ordered Elliott to reimburse Petrilak for her payment of $5,516.25 to the custody evaluator. That amount is Elliott's unpaid, court-ordered, one-half share of the evaluator's fees. In addition to Elliott's failure to explain the $47,000 figure, Elliott fails to explain why the district court's orders regarding the attorney and custody-evaluator fees, life insurance, and tax exemption are erroneous.

"[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. Not only that, but the burden of showing error rests upon

[2] The district court found that Petrilak's attorney fees will likely exceed $62,000.

the one who relies upon it." *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (quotation omitted). Moreover, "[a]n assignment 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." *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quotation omitted).

The district court's findings of fact, conclusions of law, order for judgment and judgment set forth the factual basis for its orders and reasoning, and our review does not reveal obvious prejudicial error. Thus, Elliott's unsupported assertions of error are waived. *See id.*

Misapplication of Law

Elliott contends that the district court misapplied the law by favoring an unmarried mother and presuming that Petrilak had the right to move. He argues that the district court "misapplie[d] Minn. Stat. § 518.175, subd. 3 [(2012)], which states that the primary custodial parent shall *not* move the child out of state without order of the court or . . . the consent of the other parent."

In his posttrial motion submissions, Elliott objected to the district court's finding that "Petrilak would have been within her rights to take [the child] to Pennsylvania without . . . Elliott's permission," arguing that Minnesota law "is precisely the opposite." In rejecting Elliott's posttrial argument, the district court explained that

> [t]he [c]ourt did not misapply the law with respect to [Petrilak's] out-of-state move with the minor child. [Petrilak] and [Elliott] were not married at the time of the birth of the

> child. From the time of [the child's] birth, [Petrilak] was the sole legal and sole physical custodian. At any point, she could have moved with [the child] to Pennsylvania. Instead [Petrilak] commenced the paternity action . . . thereby subjecting herself and [the child] to Minnesota's jurisdiction. Up until she filed the paternity action, [Petrilak] was in her right to move out of state. That she had not done so signified her desire to act in [the child's] best interests.

Minn. Stat. § 257.541 (2012) addresses custody and parenting time with children born outside of marriage. It states that

> [t]he biological mother of a child born to a mother who was not married to the child's father when the child was born and was not married to the child's father when the child was conceived has sole custody of the child until paternity has been established under sections 257.51 to 257.74, or until custody is determined in a separate proceeding under section 518.156.

Minn. Stat. § 257.541, subd. 1. "If paternity has been recognized under section 257.75, the father may petition for rights of parenting time or custody in an independent action under section 518.156." *Id*., subd. 3. Although Petrilak and Elliott executed a recognition of paternity under Minn. Stat. § 257.75 (2012), Elliott does not contend that he obtained court-ordered custody or parenting-time rights prior to Petrilak's initiation of the underlying action.

The full text of the relevant portion of section 518.175, subdivision 3, reads as follows: "The parent with whom the child resides shall not move the residence of the child to another state except upon order of the court or with the consent of the other parent, *if the other parent has been given parenting time by the decree.*" Minn. Stat. § 518.175, subd. 3(a) (emphasis added). Because Elliott did not have court-ordered

parenting rights when Petrilak commenced the underlying proceeding, the district court's explanation of Petrilak's legal rights at that time is not a misstatement of law.

In considering Petrilak's request to move the child to Pennsylvania, the district court applied a best-interests analysis. *See id.*, subd. 3(b) ("The court shall apply a best interests standard when considering the request of the parent with whom the child resides to move the child's residence to another state."). We discern no reversible error in the district court's application of section 518.175, subd. 3(b), or its determination of the issue. *See Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951) (stating that the function of an appellate court "does not require us to discuss and review in detail the evidence for the purpose of demonstrating that it supports the [district] court's findings" and that our "duty is performed when we consider all the evidence, as we have done here, and determine that it reasonably supports the findings"); *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000) (applying *Wilson* in a custody case and stating, "[t]here is sufficient evidence of record to support the [district] court's findings that numerous best-interests factors favor neither party. Because the court's findings are not clearly erroneous, it is unnecessary for us to further address appellant's discussion of evidence").

Sufficiency of the Evidence

Elliott argues that the district court's custody determination must be reversed "because it is not supported by substantial evidence." 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. A district court's findings of fact will be sustained unless they are clearly erroneous. *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.

In arguing that the evidence does not support the district court's custody determination, Elliott focuses on the weight of the evidence and the credibility of the witnesses. Those arguments are inconsistent with our narrow scope of review: "The function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). When reviewing a district court's child-custody determination, de novo review of the entire record is inappropriate. *Pikula*, 374 N.W.2d at 710. This court may not usurp "the role of the [district] court by reweighing the evidence and finding its own facts." *Sefkow*, 427 N.W.2d at 210. Moreover, we must give deference to the district court's opportunity to assess the credibility of the witnesses. *Id*.

The district court's findings of fact, conclusions of law, order for judgment and judgment shows that it carefully considered the trial evidence and weighed the best-interests factors. Moreover, our review of the record satisfies us that the evidence adequately supports the district court's findings of fact regarding the custody factors, as well as its custody award. *See Vangsness*, 607 N.W.2d at 474 ("Because the court's

findings are not clearly erroneous, it is unnecessary for us to further address appellant's discussion of evidence."). We therefore affirm the custody determination.

Affirmed.