STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0179

In re the Marriage of:
Hannah Leigh Stancek, petitioner,
Appellant,

vs.

Nathan Edward Stancek,
Respondent.

Filed March 10, 2014
Affirmed as modified
Rodenberg, Judge

McLeod County District Court
File No. 43-FA-10-1850

Kathleen M. Newman, Kathleen M. Newman & Associates, P.A., Minneapolis, Minnesota; and

Michael P. Boulette, Lindquist & Vennum, LLP, Minneapolis, Minnesota (for appellant)

Jason M. Thiemann, Gavin, Winters, Twiss, Thiemann & Long, Ltd., Glencoe, Minnesota (for respondent)

John R. Hill, Larkin, Hoffman, Daly & Lindgren, Bloomington, Minnesota (for amicus curiae Faith & Freedom Fund, Inc.)

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

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

RODENBERG, Judge

On appeal in this child custody dispute, appellant-mother Hannah Leigh Stancek argues that the district court erred in awarding respondent-father Nathan Edward Stancek the sole legal and physical custody of the parties' children and in prohibiting the parties' children from attending or participating in any activities at her church. Because we determine that the award of sole legal and physical custody to father is supported by the record, but that the limitation on the children attending or participating in mother's church is not supported by the record, we affirm as modified.

FACTS

The parties were married on March 19, 2004. They have three daughters: H.S.S. (born April 4, 2005), A.F.S. (born December 21, 2006), and S.F.S. (born July 30, 2009). Mother has another daughter, A.C., from a previous marriage. Both parties were long-time members of Word of Life Church. Mother's father, Pastor James Hall, who acted as the parties' spiritual advisor and marriage counselor, is the church's spiritual director. Mother's mother and brother are also pastors there.

The parties separated on May 25, 2009. Mother started proceedings for dissolution of the marriage on October 19, 2010, less than two weeks after an incident where Pastor Hall intervened in an argument between the parties. Although father filed a report with the police, alleging that Pastor Hall had assaulted him during that incident, no charges were filed. Following the incident, father received an unsigned letter from Word of Life Church's Board of Trustees informing him that he was prohibited from attending

Word of Life Church. Because he was prohibited from being on church property, father was also forbidden from attending events at its school, Agape Christian Academy, where H.S.S. was attending kindergarten. On December 6, 2010, the district court issued a temporary order that awarded the parties joint legal custody of all three children. Mother was granted the temporary sole physical custody of them.

On August 15, 2011, mother reported that father was sexually abusing the children. An investigation determined that father had not sexually abused the children and that he posed no threat to them. Around this same time, the district court appointed Karen Clasen DeVoto, a trained custody evaluator, to perform a custody evaluation. DeVoto interviewed several people, examined and evaluated all of the statutory custody factors, and recommended that father be awarded sole legal and sole physical custody of the children.

On September 20, 2011, and after a hearing on the parties' competing motions to amend the temporary order, the district court continued the joint legal custody but awarded temporary physical custody to father. Although the district court prohibited the children from attending school at Agape Christian Academy, at least so long as father was prohibited from the premises, it also ordered that "the children shall attend Sunday church services at the discretion of whichever parent has parenting time that particular Sunday." The district court warned the parties that their actions did not show "that any type of joint custody, legal or physical, is possible in this case," urged the parties to work together to demonstrate that joint custody could work, and stated that, if the parties could not agree on school attendance and a holiday parenting schedule, it would "view this as

further indication that joint custody will be problematical." In September 2011, mother wrote to the Word of Life Church Board of Trustees, requesting that it lift the prohibition on father being on church premises. The ban was promptly lifted.

In April 2012, the district court granted mother's motion for an independent custody evaluation by Dr. Jane McNaught at mother's expense. Dr. McNaught, who has a Ph.D. in counseling and is a board-certified forensic psychologist, reported that the children "have a strong attachment to both parents." She opined that both parents are "excellent" and that "it would be detrimental for either parent to have sole authority over the children." Dr. McNaught recommended that "the children reside with their mother during the school week" and with their father on weekends. But Dr. McNaught did not make specific recommendations regarding legal and physical custody of the children.

A custody trial was held over seven days in July and August 2012, after which the district court issued a detailed order, including factual findings concerning each of the statutory custody factors. *See* Minn. Stat. § 518.17 (2012). Based on its analysis of the custody factors, the district court awarded sole legal and sole physical custody of the children to father, concluding: "Father is marginally better than mother to see that the noncustodial parent is included in the children's lives. Therefore, he is awarded sole legal and physical custody of the children." The district court also created a detailed parenting-time schedule and allowed mother to parent the children when they would otherwise be in daycare, as long as her care was not provided on the grounds of Word of Life Church. In reaching its decision, the district court concluded that the recommendations in the DeVoto custody evaluation were more reasonable than Dr.

McNaught's recommendations and concluded that DeVoto's recommendations "were corroborated by other evidence that the court received in this lengthy trial."

The district court also concluded that the decision to ban father from Word of Life Church was made by Pastor Hall and other members of mother's family. The district court stated:

> This court would prefer to permit or even encourage the children to participate in the faith life of Word of Life Church. However, the actions of [mother], her parents, church employees and members of the congregation in the past compel the court to find that an active membership of the children in that Church would likely lead to the alienation of the children from their father in the worst case scenario, or result in an uncomfortable worship scenario for the children and their parents in the best case scenario.

The district court reasoned that it would be "impossible for the court to permit the children to be a part of the congregation they grew up in." The district court therefore concluded that "it is one of the very sad requirements of this court to find and rule that the children cannot be a part of the Word of Life Church congregation. Under the circumstances, it is the only thing this court can do." This appeal followed.

D E C I S I O N

The district court has broad discretion in making child custody determinations. *Matson v. Matson*, 638 N.W.2d 462, 465 (Minn. App. 2002). "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). A district court's findings of fact in a custody determination will be "sustained unless clearly erroneous." *Id.* We view the

record in the light most favorable to the district court's findings and defer to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). The district court's findings are not defective simply because the record might also support other findings. *Id.* at 474.

"A child's best interests are the fundamental focus of custody decisions." *Schisel v. Schisel*, 762 N.W.2d 265, 270 (Minn. App. 2009). The 13 factors to be weighed when considering the best interests of a child are set forth in Minn. Stat. § 518.17, subd. 1(a)(1)-(13). The district court "may not use one factor to the exclusion of all others." Minn. Stat. § 518.17, subd. 1(a). When a party seeks joint legal or joint physical custody, a district court must consider four additional factors. *Id.*, subd. 2(a)-(d). Because mother sought joint legal and joint physical custody here, the district court properly considered both the best-interests factors and the joint-custody factors.

We first address the district court's declination to award the parties either joint legal or joint physical custody. There is a "rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child." *Id.*, subd. 2. Mother argues that the district court's findings are insufficient to rebut this presumption and are erroneous because the parties agreed to joint legal custody. "But joint legal custody 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). Moreover, a district court is not required to award joint or sole custody when it is requested by the parties. *See* Minn. Stat. § 518.17, subd. 2 (explaining that the presumption in favor of joint legal custody is rebuttable based on the best interests of the

children, even when joint custody is requested by both parties); *Wopata v. Wopata*, 498 N.W.2d 478, 483 (Minn. App. 1993) (reversing joint custody after reviewing the statutory custody factors because "the fact that appellant and respondent are equally qualified to raise the children does not mean that they are qualified to raise them jointly").

The record evidence supports the district court's joint custody findings. The guardian ad litem testified that she "couldn't get [the parties] to move forward on one thing" and that "every issue had to be debated," including exchanges of the children, doctor appointments, co-parenting, and learning to co-parent. Similarly, Dr. McNaught testified that she was concerned about recommending joint legal custody because the parties were unable to agree to anything. In its temporary custody order, the district court had warned the parties that their actions did not show "that any type of joint custody, legal or physical, is possible in this case" and urged them to work together to show that joint custody could work. Over a year after this warning, the district court determined that the parties "have been able to agree only on the smallest of items, at the last minute, under the strong suggestion of the court." The parties remained unable to agree about "which schools [the children] should attend, which doctor they should see or which church they should attend." Decisions regarding parenting time also remained contentious. Although the parties agreed to the appointment of a parenting consultant, the district court did not consider this agreement as indicating that a joint custody arrangement would amount to an effective method for resolving disputes, *see* Minn. Stat. § 518.17, subd. 2(b), because the parties had previously involved third-party decision-

makers without success. The district court considered the reluctance of both custody evaluations to recommend joint legal or joint physical custody and evaluated the entire record to make the findings required by Minn. Stat. § 518.17. Given these findings, which are supported by the record evidence, the district court did not abuse its discretion in determining that joint legal or physical custody was not in the children's best interests.

Mother contends that the district court abused its discretion in granting sole custody to father because the record shows that both parents are fit and because mother was the primary caregiver during the parties' marriage. But our legislature has specifically provided that "the primary caretaker factor may not be used as a presumption in determining" best interests, and that no one factor is to be used "to the exclusion of all others." Minn. Stat. § 518.17, subd. 1(a). And we will not reverse the district court's custody determination simply because the record might also support a finding in favor of joint custody. *Vangsness*, 607 N.W.2d at 474. The district court specifically found that each party "is a very good parent to [the] girls," but it concluded that "the extraordinary animosity that plagues this couple's relationship with each other" necessitated an award of sole custody to only one parent. And the record supports the district court's determination that awarding sole legal and sole physical custody to father is in the best interests of the children.

Mother argues that the district court's award of sole custody to father was based on the district judge's prejudice against her church rather than a fair weighing of the record evidence. She maintains that this prejudice caused the district court to improperly weigh certain statutory factors in favor of granting physical custody to father. We

disagree. The evidence before the district court included extensive testimony regarding the ban on father attending Word of Life Church and mother's restriction of father's access to and relationship with the children. The district court found as a fact that the church was "utilized by [mother] and her parents to restrict [father's] access to his children." The district court properly weighed this evidence along with all of the other evidence in this lengthy trial. *See Andros v. Andros*, 396 N.W.2d 917, 924 (Minn. App. 1986) (holding that a district court can properly consider matters of religion when evaluating the custody factors and the children's best interests). The district court's discussion of father's ban from Word of Life Church was only one aspect of its finding that mother interfered with father's relationship with the children. The district court concluded that each parent interfered with the other's relationship with the children, but that mother was "more culpable in this regard." Some of the evidence of mother's interference concerned her use of the prohibition on father being at church property to keep him from participating in the children's school activities. Our careful review of the record convinces us that the district court's concern was mother's limitation of father's access to the children, and that its references to Word of Life Church were not indicative of the judge's bias against that church or its beliefs. Indeed, both parents were active in that church before October 2010, and the record discloses that father continues to attend a church with teachings apparently similar to Word of Life Church. The district court's conclusion regarding physical custody is supported by this and other evidence in the record.

Mother also argues that the district court erred in relying on DeVoto's custody evaluation. She argues that DeVoto was "untrained, biased, and improperly evaluated the best interests standard." Mother's disagreement with the DeVoto report has some merit, including questions regarding whether DeVoto actually spoke to several of the witnesses whom she quoted. During the trial, the district court heard testimony regarding these issues and independently analyzed the credibility of DeVoto and the other witnesses. We defer to the district court's credibility determinations. *Vangsness*, 607 N.W.2d at 472. It is evident to us that the district court did not simply adopt DeVoto's findings or her opinions. The district court instead performed its own detailed analysis of the statutory factors concerning the custody of the children. In its discussion of the factors, the district court found that "DeVoto's findings and recommendations were more reasonable than Dr. McNaught's and, most importantly, were corroborated by other evidence that the court received in this lengthy trial." DeVoto's findings regarding those witnesses she interviewed were "similar to the [c]ourt's appraisal of the same witnesses."

Mother contends that the district court improperly disregarded Dr. McNaught's testimony. But the district court discussed Dr. McNaught's qualifications and her findings and opinions in some detail in its memorandum. Moreover, the district court explained that, given the length of the trial and the number of exhibits, it could not "comment on each exhibit or even each witness" in the memorandum. Even though it did not comment on each witness, the district court stated that it "carefully considered not only the testimony of the witnesses, but their demeanor and the relationship of each witness' testimony in light of the balance of the evidence received." Given the district

court's explicit discussion of Dr. McNaught's findings and opinions and the district court's comparative analysis of her evaluation, that of DeVoto, and the testimony of the guardian ad litem, we cannot agree that the district court disregarded Dr. McNaught's testimony. To be sure, the district court did not give Dr. McNaught's opinions the weight that mother thinks those opinions ought to have been given. But that disagreement is not a basis for reversal. *See id.* at 474 (explaining that we do not reverse a district court's findings simply because the record might also support other findings).

Despite our deference to the district court's findings of fact, we conclude that one factual finding is not supported by the record evidence. In its discussion of the best-interests factor enumerated at Minn. Stat. § 518.17, subd. 1(a)(10), the district court determined that "the actions of [mother]'s parents—pastors of Word of Life Church—and the church's employees and congregation members simply make it impossible for the court to permit the children to be a part of the congregation they grew up in, and where their maternal grandparents serve as pastors." The record does not support the finding that it is "impossible" for the children to attend Word of Life Church. Tellingly, neither party asked the district court to prohibit the children from attending Word of Life Church or to prohibit any particular spiritual practice. There was no testimony concerning whether it was possible for the children to attend Word of Life Church or any other church. The temporary custody order allowed both parents to take the children to their respective churches, and there was no evidence at trial that this arrangement has harmed the children. In fact, father testified that his relationship with the children had "reflourished," despite the children attending Word of Life Church with mother under

both temporary orders. Because the record does not support the district court's conclusion that it is "impossible" for or harmful to the children to attend Word of Life Church, that factual finding is stricken from the district court's findings.

Because we modify the district court's factual findings to exclude the finding of impossibility of the children attending Word of Life Church, we also modify the district court's conclusions of law on that subject. The district court's conclusion regarding daycare is modified so that mother's provision of care for the children (as an alternative to daycare) may be either at her home or at any daycare facility where she works (without regard to whether the facility is located at her church). Without the finding that it is impossible for the children to attend Word of Life Church, the district court's prohibition on mother caring for her children on church grounds is unsupported. Similarly, the prohibition on the children attending or otherwise being part of the Word of Life congregation is unsupported by the findings as modified, and the prohibition is therefore reversed.

In the interest of clarity, we note that legal custody "means the right to determine the child's upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(a) (2012). Because we affirm the district court's grant of sole legal custody to father, he is by statute responsible for determining the children's religious training. *Id.*; *see Andros*, 396 N.W.2d at 921. The record simply does not

support the district court's conclusion that *it* must prohibit the children's attendance at mother's church.[1]

The amicus brief of Faith & Freedom Fund, Inc. argues that the district court's order violates both mother's constitutional right to freely exercise her religion and the establishment clause of the state and federal constitutions. *See* U.S. Const. amend. I; Minn. Const. art. I, § 16. Concerning the establishment clause, Faith & Freedom Fund contends that the district court's designation of father as sole legal custodian of the children amounts to impermissible government entanglement in family matters of religion. It argues that "Minnesota courts routinely abrogate the rights of noncustodial parents to participate in the religious upbringing of their children" and that the designation of one parent to make religious decisions as a sole legal custodian therefore amounts to an establishment clause violation.

[1] That the record as now constituted does not support the prohibition by the district court on the children's attendance at and involvement in Word of Life Church does not mean that such a prohibition could *never* be supported. *See Andros*, 396 N.W.2d at 923-24 (affirming a district court's prohibition on a father taking his children to his church because the parties' conflict over religion endangered the children's emotional health and the prohibition did not violate the father's freedom of religion). We join the district court in its entirely appropriate admonitions to the parties that the children would be better served by a cooperative problem-solving approach concerning church attendance and all other matters relating to the care of the children. In entrusting father with the sole legal and physical custody of the children, the district court has placed upon father the high expectation and obligation that he must act in the best interests of the children. Should father misuse this authority or the responsibility entrusted to him by virtue of his status as sole legal and physical custodian, or should mother disrupt the lives of the children during her parenting time in relation to church activities or otherwise, the district court may hear future motions for such other and further orders as necessary to serve the children's best interests.

Minnesota law defines legal custody as including the right of a parent "to determine the child's upbringing, including . . . religious training." Minn. Stat. § 518.003, subd. 3(a). We held in *Andros* that an award of legal custody to one parent does not require a demonstration of a compelling state interest because the noncustodial parent's right to practice his or her own chosen religion is not affected by the designation of the other parent as sole legal custodian. 396 N.W.2d at 924. But *Andros* was primarily concerned with the noncustodial parent's free-exercise claims. *Id.* at 923-24.

The establishment clause arguments, while thoroughly briefed by Faith & Freedom Fund, were not preserved by either party to the appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (explaining that issues not briefed by the parties on appeal are deemed waived). We therefore decline to address the establishment clause issue raised only by amicus Faith & Freedom Fund. *See League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 645 n.7 (Minn. 2012) ("Generally, we do not decide issues raised by an amicus that are not raised by the litigants themselves."); *State by Clark v. Applebaums Food Mkts., Inc.*, 259 Minn. 209, 216, 106 N.W.2d 896, 901 (1960) (declining to address the constitutionality of a statute when the issue was raised solely by an amicus curiae).

In sum, we affirm the district court's award of sole legal and physical custody to father. But we modify the district court's order because its prohibition on the children attending or "being a part of" Word of Life Church is not supported by the record. Because we modify the district court's order and eliminate the limitation on the children attending or "being a part of" Word of Life Church as unsupported by the record, we do not reach the free-exercise issues raised by mother and Faith & Freedom Fund. We also

decline to address the establishment clause issues raised by amicus Faith & Freedom Fund but not presented by either of the parties.

Affirmed as modified.