STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0207

In re the Marriage of:
Mary Karen Marcouiller, petitioner,

Respondent,

vs.

Gregory Thomas Quirk,
Appellant.

Filed November 24, 2014
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-FA-11-9300

Karen I. Linder, Linder, Dittberner, Bryant & Winter, Ltd., Edina, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges the dissolution judgment, contending that the district court abused its discretion by awarding sole physical custody to respondent and improperly calculating the spousal-maintenance and child-support awards. We affirm.

FACTS

Appellant Gregory Thomas Quirk and respondent Mary Karen Marcouiller were married on December 30, 1995. They have three minor children, who were born in 1997, 2000, and 2003. Mother earned a business degree prior to the marriage and held accounting, sales, and program-manager positions through 1999. At that time, she pursued part-time work as a personal trainer so that she could spend most of her time caring for the children. Mother is self-employed and continues to work part-time. Father works full-time as an engineer.

The parties separated in August 2011. Mother stayed with the children in the family home, and father moved to a duplex that the couple owned nearby. In October, mother commenced this dissolution action, seeking joint legal custody and sole physical custody of the minor children, subject to father's reasonable parenting time, and awards of spousal maintenance and child support. Father requested joint legal and physical custody of the minor children, and objected to mother's request for spousal maintenance.

The district court appointed Jennifer Joseph as a neutral custody and parenting-time evaluator. Joseph met with the parties, the children, teachers, therapists of the parents and children, and family friends. In her written report, Joseph recommended that

the parties have joint legal and physical custody, with the children's primary residence remaining with mother.

In May 2013, the district court held a trial, hearing testimony from the parties, Joseph, and Phillip Haber, Psy.D., a certified rehabilitation counselor who evaluated mother's earning capacity. Dr. Haber testified that mother is able to work 30-36 billable hours per week as a personal trainer. Mother testified that 25 billable hours per week is considered full-time in the industry because of the physical demands of the work, and that her $65 hourly rate is "in the mid to higher end" in the industry. She explained that she typically has 14 to 15 client sessions per week, but that 25 sessions per week would be reasonable. Documentary evidence showed that father expected his 2013 annual income to be $120,771, and that mother earned a profit of $16,745.96 in 2012. The evidence also showed that mother's first quarter earnings in 2013 averaged $2,249.47 per month, a substantial increase from her 2012 monthly average of $1,395.50.

The district court admitted several e-mails and text messages father sent to mother during the six months leading up to trial. The district court found the following messages from father to be relevant:

- November 28, 2012 e-mail: "Our battle will continue until you are willing to equally share time with the kids."
- December 19, 2012 e-mail: "[I]f you want a healthy positive [co-parenting] relationship, agree to joint 50-50 custody, move out of OUR home and agree to minimal spousal maintenance for a short term. Unless you do this we will never have a healthy positive relationship."
- December 20, 2012 e-mail: "As far as I'm concerned Hell is not hot enough for you and the sooner you get there the better."

- January 29, 2013 text message: "Keep fueling my anger Karen, it is going to come back to haunt you."
- February 21, 2013 e-mail: "We will NEVER have a co-parenting relationship with flexibility until you agree to a 50-50 custody schedule. . . . Trial is looming and it will be ugly and costly. You can avoid it by finally compromising, vacate the house, 50-50 custody and get a real job."
- March 13, 2013 text message: "I will never forgive u."
- April 1, 2013 e-mail: "Until you respect me as a father and compromise on our settlement our relationship will only grow worse."

The district court admitted Joseph's report, which stated that both parents should share both legal and physical custody of the children, into evidence. But when confronted with the e-mails and text messages, Joseph testified that joint physical custody presents a risk, given father's threat to continue to "battle" for 50/50 parenting time. She acknowledged having "some concern about the parents' ability to recover a sense of equilibrium at this point given the significant length of time that they've been in their current state." And she stated that if the district court decided to award one parent sole physical custody of the minor children that it should be awarded to mother.

In August 2013, the district court entered judgment awarding the parties joint legal custody of their minor children and mother sole physical custody, subject to father's parenting time. The district court found that mother had a monthly income of $1,395.50 and reasonable monthly expenses of $6,963, and father had a monthly income of $10,975.17 and reasonable monthly expenses of $4,835. Based on its calculations, the district court ordered father to pay $2,500 per month in spousal maintenance until July 2015, followed by $1,875 per month thereafter. The district court set father's monthly child-support obligation at $1,685 until July 2015, and $1,672 per month after that date.

Father moved the district court to award joint physical custody and to reduce his spousal-maintenance and child-support obligations.[1] The district court denied his motion, issued amended findings unrelated to this appeal, and entered an amended dissolution judgment. Father appeals.

D E C I S I O N

I. The district court did not abuse its discretion in awarding sole physical custody to mother.

A district court has broad discretion to determine custody matters. *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 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." *Id.* A district court's factual findings will be upheld unless clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). "A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotations omitted). When determining whether findings are clearly erroneous, we view the record in the light most favorable to the district court's findings. *N.A.K.*, 649 N.W.2d at 174. And we defer to the district court's credibility assessments. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Father contends that because "Joseph did not make a sole custody recommendation," the record "provides no basis for the rejection of joint physical

[1] Mother also moved for amended findings on grounds that are unrelated to this appeal.

custody under the circumstances of this case." And he argues that the district court clearly erred in finding that he is "not motivated by [his children's] best interests." We are not persuaded.

Father correctly observes that Joseph's written report recommends joint physical custody. But our analysis does not end there. At trial, Joseph expressed concern that father's threats to continue the "battle" over custody had persisted since she submitted her report. When pressed to offer an alternative recommendation if joint custody were not an option, she stated that she would "tend towards sole physical [custody] to mom." Although father asserts that this testimony falls short of a recommendation, he cites no authority prohibiting the district court from considering it along with the other evidence.

Moreover, the district court's detailed findings demonstrate that it considered all of the evidence, independently analyzed each of the statutory best-interests factors, and identified the concerns that shaped its consideration of the custody issue. *See Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991) (stating that a district court may reject the recommendations in a custody study if the court explains why it is doing so or makes detailed findings regarding the child's best interests). The court found that father "appeared more motivated by a desire to achieve equivalency in the quantity of time rather than the practicalities of what is best for the minor children." The district court characterized father's attempts to control the children's access to medical care as "a somewhat petty attempt . . . to assert control over a situation during a period when he was particularly upset about the dissolution." And it found that father "continues to be unable to control his anger about the divorce and [mother's] refusal to accede to his settlement

demands," citing not only father's e-mails, but also his "body language and demeanor during the trial proceedings." In short, the district court relied not only on Joseph's written custody recommendations and trial testimony, but the other record evidence, in making and explaining its custody determination.

On this record, we see no clear error. And because the record shows that the district court independently reviewed the children's best interests, considered Joseph's recommendations only as a part of its independent analysis of the custody issue, and made a supplementary credibility determination based on father's in-court behavior, we conclude that the district court did not abuse its broad discretion by awarding sole physical custody to mother.

II. The district court did not abuse its discretion in calculating spousal maintenance and child support.

A district court has "broad discretion with respect to the . . . allowance of . . . maintenance, and provision for the . . . support of the children of the parties." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We review a district court's determination of income and reasonable expenses for clear error. *See Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). "That the record might support findings other than those made by the trial court does not show that the court's findings are defective." *Vangsness*, 607 N.W.2d at 474.

Father challenges three aspects of the district court's spousal-maintenance and child-support calculations. He contends that the district court (1) clearly erred when calculating mother's income, (2) clearly erred when considering mother's monthly

medical expenses, and (3) failed to properly consider his debt load when calculating his reasonable monthly expenses. We address each argument in turn.

First, father argues that the district court's findings regarding mother's income are clearly erroneous because they are based on her 2012 income, rather than her January and February 2013 income and her prediction that the increases she experienced during those months would continue. We disagree. The district court's decision to rely on mother's actual 2012 income rather than her receipts during the first two months of 2013 does not reflect error. *See id.* (explaining that clear error has not occurred solely because "the record might support findings other than those made by the trial court"). More importantly, the district court also found, based on the evidence of mother's income and expenses, that "even if [mother] doubles her 2012 net profit in 2013, a spousal maintenance award of $2,500 is required." On this record, any error occasioned by the district court's use of the 2012 income number is harmless. *See Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (noting Minn. R. Civ. P. 61 "requir[es] courts to disregard harmless error").

Father also asserts that the district court clearly erred in finding that mother is only able to work 20 hours per week. He points to mother's testimony that she could work 25 or more billable hours per week, and Dr. Haber's opinion that mother could work 30-36 billable hours per week. We are not persuaded. Father's interpretation of conflicting trial testimony is plausible, but not exclusively so. When asked to clarify the number of hours she was able to work, mother testified that she expected to work a maximum of 20 paid

hours "less or more" per week. The district court explicitly found this testimony to be credible, a determination to which we defer. *See Sefkow*, 427 N.W.2d at 210.

Second, father contends that the district court's finding regarding mother's medical expenses is clearly erroneous because they include amounts for potential future orthodontic expenses, driver's education expenses, and an overly expensive insurance plan. But father cites no authority barring a district court from considering expenses, such as orthodontia and driver's education, that are reasonably certain in amount, are certain to occur, and must be planned for in advance in spite of their "one-time" nature. More importantly, he cites no authority requiring that a district court allow only the least expensive medical-insurance plan when calculating a party's reasonable monthly expenses. Accordingly, father's challenge to the district court's medical-expense findings fails. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) ("An 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.").

Finally, father argues that the district court clearly erred by failing to consider father's debt load when calculating his reasonable monthly expenses. Father again cites no authority to support the notion that the district court is required to consider debt-servicing costs—particularly for debt accrued after the parties separated—when determining reasonable monthly expenses. His argument is therefore waived. *See id.* And the district court specifically declined to consider *either* party's debt-servicing costs as part of their reasonable monthly expenses.

In sum, we conclude that the district court's findings with respect to the parties' income and reasonable expenses are not clearly erroneous and the district court did not abuse its discretion in awarding spousal maintenance and child support.

Affirmed.