STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2261

In re the Marriage of:
Jeanie Marie Beberg, petitioner,
Appellant,

vs.

Robert Eugene Beberg,
Respondent.

Filed September 26, 2011
Affirmed
Hudson, Judge

Beltrami County District Court
File No. 04-FA-09-3588

Sue Ann Lind, Pemberton, Sorlie Rufer & Kershner, PLLP, Wadena, Minnesota (for appellant)

Robert Eugene Beberg, Bemidji, Minnesota (pro se respondent)

Considered and decided by Hudson, Presiding Judge; Minge, Judge; and Ross, Judge.

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

HUDSON, Judge

In this appeal from judgment in a marital-dissolution action, appellant-mother argues that the district court abused its discretion by awarding the parties joint physical

custody of their three youngest children. Because the district court reasonably exercised its discretion, we affirm.

FACTS

Appellant Jeanie Marie Hall and respondent Robert Eugene Beberg were married in 1996. They are the parents of four children, who were minors at the time of the dissolution judgment: a 17-year-old son, an 11-year-old son, a 10-year-old son, and a 7-year-old daughter. In 2009, appellant filed a petition for dissolution and left the marital home. At that time, the parties agreed to share physical custody of the children for the pendency of the dissolution proceeding. Pursuant to that agreement, the children resided with each of the parties for a one-week block, although the parties' oldest son eventually started living with appellant exclusively.

Prior to trial, the parties agreed that appellant would have sole physical custody of the parties' oldest son. But appellant requested sole legal custody of all of the children and sole physical custody of the three youngest children. And respondent requested joint legal custody of all of the children and joint physical custody of the three youngest children.

Appellant articulated a number of reasons that respondent should not be awarded joint legal or physical custody of the children. First, appellant testified that respondent had committed acts of domestic abuse against her, the parties' oldest son, and his own niece. Respondent admitted to pleading guilty to a domestic assault against appellant; he did not deny being convicted of fifth-degree assault against the parties' oldest son; and he did not testify to the alleged incident of domestic abuse between himself and his niece.

But appellant presented no evidence about how these assaults affected the three youngest children.

Next, appellant testified that respondent is suffering from mental-health conditions that are harmful to the children. Appellant testified that respondent became very depressed when his mother passed away approximately four years ago, that he has threatened suicide, and that he has abused prescription medications obtained from outside of the United States. Respondent testified that he was depressed when his mother passed away, but that he sought counseling and is feeling much better. Respondent also testified that he obtained prescription medications from outside of the United States to save money, but he stated that he only obtained medications for which he had a prescription. Appellant presented no evidence that respondent had exhibited depressive tendencies or suicidal ideations recently.

Third, appellant identified a number of concerns regarding respondent's ability to co-parent the children. Appellant testified that respondent was not involved in the children's lives until the separation and that he now tries to buy the children's affection. Appellant also testified that respondent has refused to acknowledge that their daughter has gained significant weight since the parties' separation or to assist appellant in monitoring the daughter's diet. Appellant also testified that respondent does not contribute to the cost of the children's extracurricular activities, nor, until recently, did he ensure that they attend them.

Respondent, his friend, and his father testified that respondent has always been involved in the children's lives. Respondent acknowledged that the parties' daughter has

gained weight over the past year, but he did not testify as to whether he agreed that her weight should be monitored. Respondent also testified that he did not know their daughter was in counseling until she informed him about it, but that once she did, he spoke to the counselor and answered all of the counselor's questions. Respondent also testified that he attends extracurricular activities with his children and that he is willing to contribute to the cost.

The parties agreed that the children are performing well in school at this time. Respondent testified that the children were well-adjusted to the parties' joint physical custody arrangement and that they look forward to time at both parties' homes. Respondent testified that, when the children are staying at his home, he helps them get ready for school, prepares their meals, ensures that they complete their homework, and takes them to extracurricular activities. Respondent also testified that the children get along well with his live-in girlfriend.

The district court awarded the parties joint legal custody of all of the children and joint physical custody of the three youngest children.[1] The district court did not make any explicit credibility findings, but it found that the best-interests and joint-custody factors supported the award of joint physical custody. Appellant filed a motion to amend the findings, or, in the alternative, to hold a new trial, which the district court denied.

On appeal, appellant challenges the award of joint physical custody, arguing that it is based on clearly erroneous factual findings. Respondent has not filed a brief on appeal.

[1] Prior to trial, the parties agreed that appellant would have sole physical custody of the parties' oldest son.

D E C I S I O N

When making a child-custody determination, the district court must consider the best-interests factors, Minn. Stat. § 518.17, subd. 1 (2010), and when awarding joint physical custody, the district court also must consider the joint-custody factors. Minn. Stat. § 518.17, subd. 2 (2010). "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." *Goldman v. Greenwood*, 748 N.W.2d 279, 281–82 (Minn. 2008) (quotation omitted). The district court's findings must be sustained unless they are clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985); *Vettleson v. Special Sch. Dist. No. 1*, 361 N.W.2d 425, 428 (Minn. App. 1985) (applying the clearly erroneous standard to an implicit finding of fact).

This court views the record in the light most favorable to the district court's findings and is permitted to reverse only if "[it] is left with the definite and firm conviction that a mistake has been made." *Dailey v. Chermak*, 709 N.W.2d 626, 629 (Minn. App. 2006), *review denied* (Minn. May 16, 2006) (quotation omitted). That the record might support findings other than those made by the [district] court does not show that the court's findings are defective. *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). According to appellant, a number of the district court's findings were clearly erroneous, and the district court's custody determination constituted an abuse of discretion because it was based on those findings. We examine each of the disputed findings in turn.

A. Best-interests factors

1. Primary caretaker

Appellant initially challenges the district court's finding that, prior to and after the parties' separation, both parties contributed to the care and upbringing of the children. Appellant points out that she ran an in-home daycare for much of the parties' marriage and that she homeschooled two of the children for a period of time. But respondent, his friend, and his father also testified that respondent was involved in the children's lives even before the parties separated. Based on this record, the district court's finding is not clearly erroneous.

2. Intimacy of the relationship between each parent and the child

Appellant next attacks the district court's finding that "the strained relationship between [the parties' oldest son] and respondent has no effect on respondent's relationship with [the parties' three youngest children]." Appellant appears to argue that, because respondent had a strained relationship with the parties' oldest son, he must have had a similar relationship with the parties' three youngest children. But appellant has produced no evidence to support her contention, and the district court's finding is not clearly erroneous.

3. Length of time the child has lived in a stable environment

Appellant also challenges the district court's finding that neither party's home has been a long-term residence of the children. Appellant points out that, as of the date of trial, mother had lived in her home for at least one year, whereas respondent had been living in his home for only one month. But the fact that appellant has resided in her

home longer than respondent has resided in his does not make the district court's finding clearly erroneous. Nor does the fact that respondent has experienced significant financial difficulties over the past year show that respondent's home is unstable, particularly in light of respondent's uncontroverted testimony that the children are doing well in school and have adjusted to their current homes. The district court's finding is not clearly erroneous.

4. & 5. Child's adjustment to home, school, and community and permanence, as a family unit, of the existing or proposed custodial home

Appellant also challenges the district court's findings that "all three of the children are well adjusted to their current homes and the occupants of their homes, given the parties' voluntary parenting schedule for the year," arguing that the record lacks evidence that the children are well-adjusted to respondent's girlfriend. Respondent testified that the children are doing "excellent," and he described them as excited to stay with both parties and stated that they are all doing well in school. He also testified that they get along well with his girlfriend. Respondent also testified that he had not observed any changes in the children over the past year, other than the difficulty of seeing their parents separated. Appellant failed to present any evidence directly contradicting respondent's testimony. Accordingly, the district court's findings are not clearly erroneous.

6. Mental and physical health of all individuals involved

Appellant next challenges the district court's finding that respondent did not have any current emotional or physical health issues that would affect his ability to care for the children. The district court did not explicitly discuss respondent's admitted depression or

appellant's allegations of suicide threats and drug abuse. But the district court appears to have implicitly found that, regardless of the mental-health issues that appellant has faced in the past, he is not suffering from those conditions currently, or even if he is still suffering from those conditions, they are not severe enough to interfere with his ability to care for the children. And significantly, appellant presented no evidence that respondent's depression is ongoing or that he is currently making suicidal threats. It would have been preferable for the district court to discuss respondent's mental health more explicitly. But on this record, the district court did not clearly err in finding that respondent did not have a current mental-health condition that would interfere with his ability to care for the children.

Appellant also contends that the district court's findings were clearly erroneous because they failed to address the mental health of the parties' daughter. Appellant points out that their daughter has gained significant weight since the parties' separation and that she is in counseling. But appellant presented no evidence, such as a report or testimony from a counselor, indicating that the increase in her daughter's weight is due to a mental-health issue or living with respondent. Appellant has also presented little evidence as to why her daughter is in counseling, other than generally stating that her daughter had "problems . . . dealing with things that occurred to her from her dad." In light of the scant record on the cause of the daughter's weight gain and the reason for her to be in counseling, the district court did not clearly err by failing to explicitly address the daughter's mental health.

7. Capacity of the parties to give the children love, affection, and guidance

Appellant challenges the district court's finding that "[e]ach parent possesses the ability to provide their children with necessary love, affection, and guidance," based on a lack of evidence "that either petitioner or respondent lacked necessary skills to appropriately raise their children." Appellant points to her testimony that respondent has committed acts of domestic abuse against her and the parties' oldest child, that respondent does not attend to the children's hygiene and safety, and that respondent "buys" the children's love. But there was ample testimony from respondent, his friend, and his father, that respondent cares deeply for the children and works to ensure their well-being. The district court did not specifically address these accusations in evaluating respondent's parenting capacity, but the district court appears to have implicitly found that appellant's accusations were not credible, or that, even if they were credible, they did not show that respondent was incapable of loving and guiding the children. Such findings are not clearly erroneous on this record.

8. Effect on the child of the actions of an abuser

Appellant challenges the district court's finding that, "[a]lthough the petitioner testified that respondent previously committed domestic abuse upon her, she presented no evidence of the [effect] of respondent's actions on the minor children . . . [and] domestic abuse is not an issue in this case." But at trial, appellant presented no evidence of the effect—if any—that these incidents had on the parties' three youngest children. Thus, the district court did not clearly err in finding that domestic abuse is not an issue in this case.

In the alternative, appellant appears to suggest that this court should remand for the district court to consider additional evidence regarding the effect of domestic abuse on the children. Appellant relies on *Lucas v. Lucas*, a case in which mother filed a motion to remove the children to another state, and the district court granted the motion after an evidentiary hearing. 389 N.W.2d 744, 746 (Minn. App. 1986). This court remanded for further inquiry into allegations that mother's boyfriend was abusing and manipulating the children. *Id.* at 746–47.

The facts in *Lucas*, however, are distinguishable from those at issue here. In *Lucas*, less than two months transpired between mother's motion and the district court's order, and the mother's boyfriend's abusive tendencies were first discovered during that period. *Id.* As such, the parties did not have a sufficient opportunity to investigate the allegations against mother's boyfriend before the district court issued its order. *Id.* Here, in contrast, at least a year transpired between the appellant's petition for dissolution and the district court's order, and all of the alleged incidents of domestic abuse occurred at least six months before trial. Thus, unlike the parties in *Lucas*, appellant had sufficient time to obtain evidence—such as a custody evaluation or a counselor's report—regarding the incidents of abuse and any effect on the children. Because she failed to do so, we see no basis for remanding this issue to the district court.

> *9. Except in cases involving domestic abuse, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the children*

Appellant challenges the district court's finding that "given the parties' ability to cooperate and share custody for the past year, . . . each parent will facilitate contact by

the other parent." Appellant contends that the district court erred by considering this factor because this case involved domestic abuse. We agree.

"[E]xcept in cases in which a finding of domestic abuse as defined in section 518B.01 has been made," the district court must consider "the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child." Minn. Stat. § 518.17, subd. 1(13). "Domestic abuse," in turn, is defined as "(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats . . .[,] criminal sexual conduct . . .[,] or interference with an emergency call" if perpetrated against a family or household member. Minn. Stat. § 518B.01, subd. 2(a) (2010). Although appellant did not present any documentary evidence of domestic abuse, she testified that respondent was convicted of assaulting the parties' oldest son, and respondent admitted to pleading guilty to assaulting appellant. Based on this evidence, the district court erred by considering the disposition of each parent in promoting communication with the other.

B. Joint-physical-custody factors

When joint physical custody is sought or contemplated, the district court must consider the parents' ability to cooperate in rearing their children, their methods for resolving disputes, the detriment to the children if one parent has sole authority over the children's upbringing, and any history of domestic abuse between the parents. Minn. Stat. § 518.17, subd. 2. If domestic abuse has occurred between the parents, the district court must apply a rebuttable presumption that joint physical custody is not in the best

interests of the children. *Id.* Generally, "joint physical custody is not preferred." *Nolte v. Mehrens*, 648 N.W.2d 727, 731 (Minn. App. 2002).

1. Ability of the parents to cooperate

Appellant challenges the district court's finding that the parties have demonstrated their ability to cooperate in rearing their children. Specifically, appellant contends that respondent has been unwilling to cooperate in monitoring their daughter's weight and taking her to counseling, taking the children to extracurricular activities, choosing the children's school, developing the children's holiday schedule, and obtaining the children's health insurance. The district court did not specifically address whether respondent had refused to cooperate with appellant on each of these issues. But the district court implicitly found that the parties' relative success in sharing physical custody of the children since their separation supported the finding that the parties were able to cooperate on most issues. This finding is not clearly erroneous. *See Veit v. Veit*, 413 N.W.2d 601, 605 (Minn. App. 1987) (concluding that district court did not clearly err in finding that parties could cooperate in raising children when record demonstrated that they had successfully shared custody since their separation and had only recently had difficulty cooperating).

2. Methods for resolving disputes

The district court found that the parties have "methods in place to resolve disputes, including communication by telephone." Appellant contends that the record does not contain evidence that the parties have identified methods for resolving disputes nor that they have demonstrated a willingness to use those methods. But again, the district court

appears to have implicitly found that, because the parties have been relatively successfully in implementing their joint-physical-custody arrangement, the parties must have established successful methods for resolving disputes. On this record, the district court's finding is not clearly erroneous.

3. Sole authority over the children's upbringing

Appellant challenges the district court's finding that "it would be detrimental to the upbringing of these children if one parent were to have sole authority over their decision making" because "[t]he children have a very close relationship with each parent and have become accustomed to spending time with each parent in one week blocks." But the undisputed evidence shows that the children are generally thriving under the shared-custody arrangement, and there is no evidence to indicate that respondent is to blame for any of daughter's emotional or physical problems. The district court's finding is not clearly erroneous.

4. Domestic abuse between the parties

Appellant contends that the district court clearly erred by failing to take into consideration the fact that respondent committed domestic abuse against appellant. In its order, the district court did not explicitly find that respondent had abused appellant, nor did it explicitly address whether the presumption against joint physical custody applied. But in light of respondent's admission that he had pleaded guilty to assaulting appellant, the district court was required to find that domestic abuse had occurred between the parties and to recognize the presumption against joint physical custody.

Nonetheless, in discussing the effect of respondent's actions on the children, the district court acknowledged appellant's testimony that "respondent previously committed domestic abuse upon her." But the district court found that, "[i]n light of the [parties'] ability to voluntarily share custody for the past year, with only minimal and expected difficulties, the [c]ourt finds that domestic abuse is not an issue in this case." In making this finding, the district court appears to have implicitly found that domestic abuse had occurred and that the presumption against joint custody applied, but that respondent had overcome that presumption by showing that the parties have successfully shared physical custody of the children since their separation. Viewing the record as a whole, the district court's finding is not clearly erroneous.

C. Conclusion

Although the district court improperly considered the parties' ability to cooperate with one another when the record contained evidence of domestic abuse, and although the district court could have made more explicit findings on several of the best-interests and joint-custody factors, we conclude that, viewing this record as a whole, the district court's findings are not clearly erroneous, and the district court did not abuse its discretion by granting the parties joint physical custody of their three youngest children.

Affirmed.