STATE OF MINNESOTA
IN COURT OF APPEALS
A11-921

In re the Matter of:
Amy Sue Hagen, petitioner,
Respondent,

vs.

Daniel John Schirmers,
Appellant.

Filed January 17, 2012
Affirmed in part and reversed in part
Klaphake, Judge

Benton County District Court
File No. 05-F3-04-050166

Lori L. Athmann, Susan M. Kadlec, Rajkowski Hansmeier, Ltd., St. Cloud, Minnesota (for respondent)

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Klaphake, Judge; and Minge, Judge.

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

KLAPHAKE, Judge

Appellant Daniel John Schirmers challenges a district court order denying his motion for compensatory parenting time and granting respondent Amy Sue Hagen's cross-motion for $750 in attorney fees as a sanction for appellant's assertion of a motion

deemed frivolous by the district court. We conclude that the district court did not abuse its discretion by denying appellant's motion for compensatory parenting time because there is factual support for the court's determination. However, we conclude that the district court abused its discretion by awarding respondent attorney fees, because appellant asserted a colorable factual claim for compensatory parenting time and his motion was therefore not frivolous.

FACTS

In 2004, T.R.H. was born to the parties, who have never been married to each other. In an initial custody order, the district court granted the parties joint legal custody of the child, with sole physical custody to respondent, subject to appellant's receiving scheduled parenting time. The district court granted respondent's motion to relocate with T.R.H. to California in 2009. On appeal, this court affirmed the district court's relocation decision as a proper exercise of its discretion, but remanded for the district court to consider application of Minn. Stat. § 518.175, subd. 1(e) (2008), which sets forth a statutory presumption that a non-custodial parent is entitled to receive at least 25% parenting time for a child. *Hagen v. Schirmers*, 783 N.W.2d 212, 217 (Minn. App. 2010) (*Hagen I*). On remand, the district court applied the statutory presumption, considering each statutory factor, and determined that appellant was entitled to 15% parenting time. This court affirmed in *Hagen v. Schirmers*, No. A10-1993, 2011 WL 2648836 (Minn. App. July 5, 2011) (*Hagen II*), *review denied* (Minn. Sept. 20, 2011). The ordered parenting time included three days in February, seven days in April, thirty-one days in July, three days in October, five days in November, and seven days in December. *Id.* at

*1-2. This court also noted that "the district court specifically contemplated additional parenting time in California, relying on mother's assertion that she would accommodate additional parenting time should father be in California for business or vacation." *Id.* at *2.

On March 14, 2011, appellant filed a motion asking the district court to require respondent to give him his "full April visitation" and "compensatory visitation in July, 2011," seeking "makeup" parenting time days, and seeking reimbursement for half of T.R.H.'s transportation costs to Minnesota. In a responsive cross-motion, respondent asked the court to deny appellant's motion in its entirety and to award her conduct-based attorney fees and costs. Following a hearing, the district court denied appellant's motion for compensatory parenting time and granted respondent's motion for costs and conduct-based attorney fees, ordering appellant to pay $750 in respondent's attorney fees as a sanction for asserting a frivolous motion.

D E C I S I O N

I. Compensatory Parenting Time Claim

When a parent interferes with another parent's court-ordered parenting time, the district court may order compensatory parenting time in favor of the parent who was deprived of parenting time or deny the request after making findings explaining its reasons for doing so. Minn. Stat. § 518.175, subd. 6(a), (b) (2010). The following standard of review applies to a district court's determination of parenting time:

> District courts have broad discretion in deciding parenting-time questions. A district court abuses that discretion by making findings unsupported by the evidence or improperly

> applying the law. Fact findings are reviewed for clear error. The appellate court defers to and does not reassess the district court's credibility determinations.

Hagen I, 783 N.W.2d at 215 (citations omitted).

Appellant's claimed parenting time deficiencies include that respondent "cut his visitation by a day and a half over Thanksgiving, a half day over Christmas, and three days in February." The court addressed each period individually and did not rule in favor of appellant on any of his claims.

Thanksgiving

As to T.R.H.'s five-day Thanksgiving parenting time, the district court found that T.R.H. traveled on the first and last days of the break. In interpreting its post-*Hagen I* parenting time order, the court stated that it had clearly "intended" to prevent the child from missing school and did not intend to require the six-year-old child "to travel at odd hours in order for [appellant] to receive full 24-hour days of parenting time."

Christmas

As to T.R.H.'s two-week Christmas break, the district court noted that appellant was to have a week of parenting time, during either the first or second week of the vacation, so that each parent would spend the holiday with the child on alternating years. The district court interpreted this provision so as not to require the child to travel on the holiday itself, because that would "defeat" the purpose of the order; the court also found that it was "unreasonable to require the child to miss school on Monday morning so that [appellant] could spend the entire Sunday with the child."

February

As to this three-day period, appellant argued that he should not have been required to travel to California to exercise his parenting time, but the court found that it was the clear intention of its prior order, as well as the agreement of the parties, that this parenting time occur in California.

Appellant also sought compensatory time for the following future parenting time dates granted to him.

April

Although the district court's post-*Hagen I* parenting order granted appellant seven days of parenting time over T.R.H.'s spring break, respondent asked to reduce this period by one day so that the child could participate in a soccer game. The court denied appellant's request that the child miss the game, directing the parties to act in the child's best interests and permitting appellant to travel to California if he "truly believes that the additional day of parenting time is in the child's best interests." The court also noted that respondent had agreed to make an alternative additional parenting day available to appellant.

Summer

The court refused to "penalize" respondent for proposing an alternate parenting time arrangement that split appellant's thirty-one days of parenting time into two periods that totaled the same amount of time. The court noted that its previous order had granted the parties the right to amend the parenting time schedule by mutual agreement.

Appellant's arguments essentially rely on the interpretation of "time" in parenting time. Minn. Stat. § 518.175 does not delineate a precise definition of "time." But in the portion of the statute providing for the rebuttable presumption that the non-custodial parent is entitled to 25% parenting time, the statute states:

> [T]he percentage of parenting time may be determined by calculating the number of overnights that a child spends with a parent or by using a method other than overnights if the parent has significant time periods on separate days when the child is in the parent's physical custody but does not stay overnight. The court may consider the age of the child in determining whether a child is with a parent for a significant period of time.

Id., subd. 1(e) (2010).[1]

The bulk of appellant's arguments depend on minor alleged deficiencies in his parenting time. When added together, they do not demonstrate a violation of the district court's parenting time order. As noted by this court in *Hagen II*, each grant of parenting time to appellant was planned to coincide with T.R.H.'s school breaks. 2011 WL 2648836, at *1-2. The parenting time order referred to periods of time, expressed in a number of days "over" or "during" the child's school breaks. Appellant's urging that the grant of parenting time in units of days meant that each grant was for 24 hours is unrealistic in light of the actual time that the child was available during school breaks, particularly considering the travel distance between the parents.

[1] *Accord* Minn. Stat. § 518A.36, subd. 1(a) (2010) (stating that for child support purposes, parenting time is determined by "calculating the number of overnights that a child spends with a parent, or by using a method other than overnights if the parent has significant time periods on separate days where the child is in the parent's physical custody and under the direct care of the parent but does not stay overnight").

Further, the parenting time order does not violate Minn. Stat. § 518.175, subd. 1(e), which defines parenting time with reference to "overnights" or other "significant periods of time." The statute does not require the precision sought by appellant, and, instead, recognizes an approximate approach to time that is flexible, in accordance with the needs of the parties and the best interests of the child, including a specific reference to the child's age. The district court recognized this by stating that the child should not have to either be absent from school or to travel at odd hours in order to facilitate appellant's parenting time. The district court found that "[respondent's] explanations are reasonable and were contemplated in the Court's previous Order—as evidenced by the Court scheduling parenting time over the child's school breaks."

For these reasons, and because some of appellant's arguments depend on events that have not yet occurred, we conclude that the district court did not abuse its discretion by denying his motion for compensatory parenting time. *See* Minn. Stat. § 518.175, subd. 1(a) (stating that purpose of parenting time is to "enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child").

2. Attorney Fees Award

Appellant next contends that the district court abused its discretion by ordering him to pay $750 in attorney fees for his assertion of a motion which the district court deemed "frivolous" and "unreasonably contributed to the duration and expense of these proceedings." Minn. Stat. § 518.14, subd. 1 (2010) permits the district court to require a party to pay "fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of [a] proceeding." While the district court did not cite Minn.

Stat. § 518.14 as authority for ordering appellant to pay respondent's attorney fees, its order tracks the language of the statute.

This court reviews a district court's decision to impose attorney fees for an abuse of discretion. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999); *Brodsky v. Brodsky*, 733 N.W.2d 471, 476 (Minn. App. 2007) (awarding conduct-based attorney fees under section 518.14). An award of conduct-based fees under Minn. Stat. § 518.14 "rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999).

Here, Minn. Stat. § 518.175, subd. 1(e), applies a statutory presumption that a non-custodial parent is entitled to receive "at least 25 percent of the parenting time for the child" unless circumstances warrant a different award. Under this provision, the percentage of parenting time is calculated either by the number of overnights or by the days on which a child "has significant time periods" in the parent's physical custody. *Id.* While we have upheld the reduction in appellant's parenting time from 25% to 15%, appellant should receive at least the 15% parenting time ordered by the court. His claim that he did not receive this amount because of T.R.H.'s travel time or other events is not frivolous. Thus, although the district court did not find in his favor on the merits, we conclude that the district court abused its discretion by awarding costs and attorney fees for assertion of a frivolous claim.

Affirmed in part and reversed in part.