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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1663

In re the Marriage of:

Danielle M. Kerr, n/k/a Danielle Dubois, petitioner,
Respondent,

vs.

Jonathan R. Kerr,
Appellant,

and

County of Dakota, intervenor,
Respondent.

Filed May 6, 2013
Affirmed in part and remanded
Hooten, Judge

Dakota County District Court
File No. 19-F8-07-010912

Christine J. Cassellius, Jessica L. Sanborn, Dougherty, Molenda, Solfest, Hills & Bauer, P.A., Apple Valley, Minnesota (for respondent)

Jonathan R. Kerr, Minneapolis, Minnesota (pro se appellant)

Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Smith, Judge.

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

HOOTEN, Judge

Appellant challenges the district court's reversal of a parenting consultant's decision, arguing that the parenting consultant's decision was binding upon the parties and that the district court improperly placed upon him the burden to establish that the proposed modification of parenting time was in the children's best interests. Appellant also asserts that the district court erred by ruling on a motion and supporting documents that were untimely filed, by failing to modify his parenting-time percentage above 45.1%, and by treating his motion for amended findings as a motion for reconsideration and denying such motion. We affirm as to all of these issues raised by appellant, but remand to the district court for a clarification as to the parties' monthly child support obligation.

FACTS

Appellant Jonathan Kerr and respondent Danielle Kerr, n/k/a Danielle Dubois, were married in May 2002. The marriage was dissolved by a judgment and degree in August 2008. The parties share joint legal and joint physical custody of their two minor children.

This is appellant's third appeal to this court since entry of the judgment and decree. Prior to their dissolution trial, the parties created a parenting-time schedule whereby appellant would have the children for six overnights and respondent would have the children for eight overnights during every two-week period. The district court adopted the parties' proposed biweekly parenting-time schedule and ordered appellant to pay monthly basic child support of $1,135. After trial, the district court calculated

appellant's basic monthly child-support obligation to be $1,141, affirmed the existing biweekly parenting-time schedule, adopted a parenting-time schedule for holidays and vacation time, and determined that appellant's parenting time was 42.8%.

After numerous motions addressing the parenting-time schedule and appellant's parenting-time percentage, the parties hired their second parenting consultant in August 2011. On May 15, 2012, the parenting consultant granted appellant's request to extend his summer weekend parenting time to include Sunday overnights, rather than returning the children to respondent on Sundays at 5:00 p.m. On May 22, 2012, appellant filed a motion requesting a modification of his support obligation so that he would pay $283 per month in child care expenses and $81 in basic support, as well as a modification of the parenting-time percentage to reflect the parenting consultant's decision. Respondent filed a responsive motion requesting reversal of the parenting consultant's decision and denial of appellant's motion. Her motion also requested modification of the child-support order to account for changes in child care expenses and the parties' current incomes. Appellant was served with this motion on May 29, 2012.

On June 8, 2012, respondent served on appellant an amended responsive motion, a memorandum in support of her responsive motion and in opposition to appellant's motion to modify support, and a supporting affidavit. While the district court's register of actions reflects that these three documents were filed by respondent on July 12, 2012, the amended notice of motion and motion and memorandum are stamped with a filing date of June 12, 2012. No filing stamp appears on respondent's affidavit, which is dated June 7, 2012. On June 12, 2012, appellant filed a memorandum in opposition to respondent's

motion to reverse the parenting consultant's decision, responding to arguments raised in respondent's original motion and in her amended responsive motion, memorandum, and affidavit.

At the motion hearing on June 19, 2012, the district court noted that it had not received respondent's affidavit or memorandum. Appellant stated that he received the motion and an affidavit, and respondent's attorney explained that she sent the materials directly to the district court judge hearing the motion. Respondent's attorney also stated that appellant was personally served, and appellant, proceeding pro se, stated that he had "a copy of that." Because there was no objection by appellant, the district court proceeded to hear the merits of the parties' respective motions.

The district court denied appellant's motion, which it interpreted as a motion to modify the parenting-time schedule and his support obligation. After noting the provision in the parenting consultant agreement that the parties had the right to object to the parenting consultant's decisions, the parenting consultant's failure to address the children's best interests, and the procedural history of the case, the district court concluded that "[g]iven . . . [appellant's] statements during the hearing, his primary motivation is to reduce his child support responsibility, and not the children's best interests."

Appellant subsequently filed a motion for amended findings, arguing, in part, that the district court lacked "jurisdiction" to rule on respondent's amended responsive motion insofar that it was merely sent to the district court judge and not filed with district court administration at least 10 days before the hearing, and that the district court erred

by placing on him the burden of establishing that the parenting consultant's decision to modify parenting time was in the best interests of the children. The district court filed an order construing appellant's motion for amended findings as a motion to reconsider, and finding that there were no compelling circumstances for such motion. This appeal follows.

DECISION

I. Did the district court err by considering respondent's amended responsive motion and supporting documentation despite her failure to timely file these materials with court administration?

Appellant argues that the district court had no "jurisdiction" to consider respondent's amended responsive motion because it was untimely filed. However, the substance of his argument is not jurisdictional, but instead focuses upon whether respondent's motion satisfied relevant procedural requirements. We have recognized that litigants "often use concepts and language associated with 'jurisdiction' imprecisely to refer to, among other things, nonjurisdictional claims-processing rules or nonjurisdictional limits on a court's authority to address a question." *Moore v. Moore*, 734 N.W.2d 285, 287 n.1 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). "Family dissolution remedies, including remedies in child support decisions, rely on the district court's inherent equitable powers. Thus, cases involving family law fall within the district court's original jurisdiction." *Holmberg v. Holmberg*, 588 N.W.2d 720, 724 (Minn. 1999). "A court may very well have the subject-matter jurisdiction to adjudicate the case, but rules of procedure or statutes of repose prevent the exercise of the

jurisdiction." *Bode v. Minn. Dep't of Natural Res.*, 594 N.W.2d 257, 260 (Minn. App. 1999), *aff'd*, 612 N.W.2d 862 (Minn. 2000).

As set forth in the advisory comments to Minn. R. Gen. Pract. 115.06, from which Minn. R. Gen. Pract. 303.03(a)–(d) are derived, if responsive papers are not properly served and filed, the district court retains the discretion to hear matters even if there has been non-compliance with the rules. *See Lee v. Lee*, 749 N.W.2d 51, 62 (Minn. App. 2008) ("It is within the district court's discretion to rule on a motion despite respondent's late filings."), *aff'd in part, rev'd in part on other grounds*, 775 N.W.2d 631 (Minn. 2009); *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 483 (Minn. App. 2001) ("[I]t is within the district court's discretion to rule on the motion despite appellant's late filings and, based on the discretion afforded the district court, we will not reverse here because of noncompliance with the rules even though another result is defensible."), *review denied* (Minn. Sept. 11, 2001); *see also* Minn. Stat. § 484.33 (2012) ("[I]n furtherance of justice, [the General Rules of Practice] may be relaxed or modified in any case, or a party relieved from the effect thereof, on such terms as may be just."). Thus, we discern no cognizable claim implicating any jurisdictional deficiency in the proceedings at issue.

Rather, we conclude that appellant waived any issue implicating the procedural irregularities of respondent's amended responsive motion. There is no dispute that at the June 19, 2012 hearing, appellant had been timely served with respondent's documents and he did not object to the district court continuing with the hearing, even though the district court indicated that it did not have all of respondent's documents in its file at the

time of the hearing.[1] Thus, appellant waived any claim that the district court could not hear respondent's motion because of procedural irregularities when he failed to object or otherwise raise this issue at the time of the hearing. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellant court will not consider matters not argued and considered by the district court). The fact that appellant did not raise this objection until he brought his motion for amended findings prohibits us from considering this issue on appeal. *Superior Shores Lakehome Ass'n v. Jensen-Re Partners*, 792 N.W.2d 865, 868 (Minn. App. 2011); *see also Allen v. Central Motors*, 204 Minn. 295, 297, 283 N.W. 490, 492 (1939) (concluding that a new issue may not be raised for the first time in a motion for amended findings).

II. Did the district court err by treating the parenting consultant's decision as a "recommendation," and by determining that appellant's request for modification was not in the children's best interests?

a. District court review of parenting consultant's decision

Appellant argues that the district court misinterpreted the parties' parenting consultant agreement by treating the parenting consultant's decision as a

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[1] There was no explanation provided as to why respondent's amended motion, memorandum and affidavit were date-stamped on June 12, 2012, by district court administration, but the district court's register of actions indicates that the documents were not filed until July 12, 2012. Accepting the June 12, 2012 date stamp as the filing date would indicate that respondent's documents were also timely filed under Minn. R. Gen. Pract. 303.03(a)(3). Generally, a document is filed with the district court when it is delivered to or received by the office where it is required to be filed. *See Cederberg v. City of Inver Grove Heights*, 686 N.W.2d 853, 856–67 (Minn. App. 2004) ("A document is filed when it is delivered to the court clerk or record custodian for placement into the official record." (quotations and alterations omitted)). Here despite the July 12, 2012 date shown on the Register of Action's, the fact that the amended motion, memorandum, and affidavit are date-stamped June 12, 2012, shows that those documents were delivered to and received by the district court by that date.

"recommendation" and by failing to place the burden on respondent to establish that such decision was not in the children's best interests. His argument assumes that the parenting-time schedule was effectively modified by the parenting consultant and that respondent, as the party seeking modification of the parenting consultant's decision, had the burden of proof upon review of that decision. The parties' parenting consultant agreement provides that if the parties

> are unable to agree about a particular issue, [the consultant] will make a decision that will be binding on the Parties. [The consultant] will put all decisions in writing, with copies going to each Party and his or her attorneys. If either or both Parties disagree with a decision, it is their responsibility to schedule a hearing with the Court within fourteen (14) days of receipt of [the consultant's] written decision. The Parties agree to follow the decision unless or until it is modified by the Court.

While the parenting consultant agreement specifically provided that a party who objected to the parenting consultant's decision could schedule a hearing before the district court, the agreement is silent as to which party would have the burden of proof at the hearing or whether the district court is to defer to the parenting consultant's decision or simply consider it as a "recommendation."

Appellate courts have not yet considered the amount of deference, if any, that a district court must provide to a parenting consultant's decision implicating a child's best interests. Pursuant to statute, the district court "shall modify the decision-making provisions of a parenting plan or an order granting or denying parenting time," if modification is in a child's best interests and does not change the child's primary residence. Minn. Stat. § 518.175, subd. 5 (2012). "The statute and caselaw make clear

that the ultimate issue is the child's best interests as assessed under the totality of the considered factors." *Hagen v. Schirmers*, 783 N.W.2d 212, 216 (Minn. App. 2010); *see also Simmons v. Simmons*, 486 N.W.2d 788, 791–92 (Minn. App. 1992) (noting, in context of visitation stipulation, that "the welfare of the child takes precedence even if the case involves a stipulation"); *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984) ("It is well established that the ultimate question in all disputes over [parenting time] is what is in the best interest of the child."), *review denied* (Minn. June 12, 1984).

"The term 'parenting consultant' is not used in the Minnesota statutes. In practice, the term refers to a creature of contract or of an agreement of the parties which is generally incorporated into (or at least referred to in) a district court's custody ruling." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 293 (Minn. App. 2007). No Minnesota statute specifically controls the modification of parenting time by a parenting consultant or establishes the interplay between a district court and a parenting consultant. In *Szarzynski*, which discusses the interplay between the district court and a parenting consultant in a case which, unlike this case, involved a parenting plan, we affirmed the district court's removal of a parenting consultant for good cause even though the parenting consultant agreement "explicitly state[d] that the parenting consultant ha[d] the authority to make binding custody and parenting-time decisions, [and did] not state that the district court ha[d] direct authority over parenting time." *Id.* at 293. In so doing, we held that where the parenting consultant was "not acting in the children's best interest," the district court had the authority to remove the parenting consultant for good cause. *Id.* at 293–94. We also held that if the father in that case wanted unsupervised parenting

time, instead of supervised parenting time as provided in the parenting plan, he needed to either "obtain a determination from the parenting consultant that he has satisfied the requirements for unsupervised parenting time" or "move the district court to modify the parenting plan to allow the district court to make that determination." *Id.* at 290-291.

Implicit in our holding in *Szarzynski* is that even when the parenting consultant agreement does not expressly retain the district court's authority over parenting issues, Chapter 518 authorizes continuing jurisdiction of parenting time by the district court. *See, e.g.*, Minn. Stat. § 518.1705, subd. 5 (2012) (describing the role of the court in creating a parenting plan); Minn. Stat. §§ 518.175, .1751 (2012) (setting forth the continuing authority of the district court to decide and modify parenting time and appoint or remove a parenting time expeditor, and to review parenting time decisions made by the expeditor); Minn. Stat. § 518.18 (2012) (authorizing the district court to modify a custody order or parenting plan). These provisions establish that the district court, in exercising this authority, must consider the best interests of the children. *See* Minn. Stat. § 518.175, subd. 1 (2012) ("[T]he court shall . . . grant such parenting time . . . as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child."); Minn. Stat. § 518.18(d) (2012) (stating that the district court may modify custody if it is "necessary to serve the best interests of the child").

The use of a parenting consultant, usually with court approval and supervision, is another type of alternative dispute resolution (ADR). *See* Minn. Stat. § 518.1751, subd. 4 (2012) (providing that the parties may voluntarily agree "to submit their parenting time dispute to a neutral third party"); Minn. R. Gen. Pract. 114.02(a)(10) (providing that the

parties may agree to create an ADR process). In conjunction with the use of a statutorily created parenting-time expeditor, the district court is specifically authorized to enforce, modify, or vacate an agreement by the parties or a decision by the expeditor. *See* Minn. Stat. § 518.1751, subd. 3(d) (2012).

Here, where the parenting consultant agreement specifically sets forth that the decisions of the parenting consultant are reviewable by the district court, it is clear that the district court, in the exercise of its authority, must ensure that such decisions are in the best interests of the children. *See Kaiser v. Kaiser*, 290 Minn. 173, 180, 186 N.W.2d 678, 683 (1971) (stating that, in context of child support requirements, "the nonbargainable interests of the children . . . are less subject to restraint by stipulation"). In its consideration of the best interests of the children, the district court may consider the recommendation of the parenting consultant as a third party neutral, but there is no authority or case law requiring the district court to defer to the parenting consultant, particularly where, as in this case, the district court determines that the parenting consultant's decision regarding parenting time is not in the children's best interests.[2] Moreover, as the merits of the proposed parenting-time modification remain unresolved for purposes of the district court's review of the parenting consultant's decision, appellant remains the party pursuing modification and accordingly has the burden of establishing that the proposed modification is in the best interests of the children. *See Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978) (stating that party seeking modification of a

[2] We note that a parenting consultant is oftentimes not an attorney and frequently serves as a mediator prior to assuming the role of arbitrator with regard to a particular dispute. 14 Martin L. Swaden & Linda A. Olup, *Minnesota Practice* § 6.52 (3d ed. 2008).

previous order granting or denying parenting time has the burden of establishing that the proposed modification is in the children's best interests). Under these circumstances, where a party has brought a timely objection to a parenting consultant's decision, the district court did not err by reviewing the parenting consultant's decision de novo.

b. Modification of the parenting-time schedule

The remainder of appellant's challenge focuses on the district court's conclusion that the modification of parenting time is not in the children's best interests. "The trial court has broad discretion to determine what is in the best interests of the child in the area of visitation and its determination will not be overturned absent an abuse of discretion." *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law. A district court's findings of fact underlying a parenting-time decision will be upheld unless they are clearly erroneous." *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009) (citation omitted).

In support of his request for his parenting time to include Sunday overnights, appellant argues that the children already stay with him on Sunday nights during his parenting time on holidays and occasional birthdays, and that the addition of Sunday overnights during his regular parenting time would not disrupt the children's schedule. However, there is evidence supporting the district court's finding that the modification would not be in the children's best interests. The district court found that appellant had few Sunday overnights during holidays and birthdays, and reasoned that increasing appellant's parenting time to include Sunday overnights during the summer would

detrimentally affect the children's routine at the beginning of the school year, especially in light of their young ages. Given our deferential standard of review, we find no error in the district court's conclusion that six additional Sunday overnights during the summer may detrimentally affect the continuity of the children's routine once school begins. The district court's conclusion was not, as asserted by appellant, wholly unsupported by the record.

Moreover, the district court's conclusion that appellant's motion was motivated by financial consideration is consistent with the record and appellant's own argument. Appellant asserts that his financial interests are in the children's best interests because he would be able to afford to move from Minneapolis to Eagan (where respondent resides and the children attend daycare and school) if his parenting time is set above the 45.1% threshold and his support obligation is modified to reflect such a change. While it might be true that the children's best interests would be served by the parties living closer to one another, appellant does not explain how his current living situation, described as a "2 bedroom, 1 bath condo in southwest Minneapolis," is harmful or detrimental to the children beyond the effort required of the parents to transport the children between the two locations on various occasions each week. The record does not support appellant's claim that the current support obligation and parenting-time schedule fails to advance the children's best interests.

Appellant cites no authority in support of his assertion that remand is required because the district court failed to "consider the impact on the children's residence, friends or financial well-being." The district court adequately addressed considerations

pertinent to the children's Sunday overnight schedule pertaining to appellant's request for modification of the parenting time schedule. It was not necessary for the court to re-visit all of the best-interest factors that supported the custody and parenting-time arrangements that were previously decided by the district court prior to appellant's request for modification of parenting time.

Nor does appellant provide authority for his argument that the district court erred in failing to consider how this minor change in parenting time would improve his financial situation. While noting that he "has amassed debt over the years as a result of a large child support obligation [which] negatively impacts the parties' children," he fails to set forth any evidence that the children have been negatively impacted by his financial situation, or that a reduction in his child support would be in their best interests. Rather, these arguments support the district court's conclusion that appellant's requested modification was for his own financial benefit, rather than the benefit of his children.

III. Did the district court err by treating appellant's motion for amended findings as a motion for reconsideration?

Appellant argues that the district court erred by treating his motion for amended findings under rule 52.02, as actually being a motion to reconsider under Minn. R. Gen. Pract. 115.11. "[A] proper motion for amended findings must both identify the alleged defect in the challenged findings *and* explain *why* the challenged findings are defective" in a manner that "address[es] the relevant standard for amending findings." *Lewis v. Lewis*, 572 N.W.2d 313, 315-16 (Minn. App. 1997), *review denied* (Minn. Feb. 19,

1998).[3] "[A] motion for amended findings that does no more than reargue a prior motion[, however,] is really a motion to reconsider." *Id.* at 315 (quotations omitted).

Appellant's motion does not satisfy the requirements for a motion for amended findings set out in *Lewis*. Instead, it functionally reargues his motion to modify parenting time by seeking to rewrite the memorandum attached to the order filed by the district court on July 20, 2012. Therefore, appellant's motion cannot be a motion for amended findings[4] and, by construing appellant's motion as one for reconsideration, the district court avoided having to rule the motion procedurally defective and allowed itself to address the merits of that motion. On this record, appellant has not shown that the district court erred by treating his motion as one for reconsideration.

Finally, the record does not support appellant's assertion that the district court displayed bias in denying his motion for "amended findings." Appellant's assertion is based on correspondence sent to him by the district court, after he sent notice of his intent to pursue his motion for "amended findings," stating that it would consider whether the motion qualified as a motion for reconsideration at the motion hearing. However, this correspondence does not support appellant's claims of bias. The district court merely

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[3] *Lewis* has been overruled insofar as it suggests "that the merits of a motion for amended findings bear on whether an appeal time is tolled." *State by Fort Snelling State Park Ass'n v. Minneapolis Park & Recreation Bd.*, 673 N.W.2d 169, 178 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004). However, its "articulation of the [necessary] components of a motion for amended findings" remains good law. *Id.*

[4] Even if appellant's motion is deemed to be a motion for amended findings, its failure to satisfy the minimum requirements of that type of motion means that the district court cannot have abused its discretion by denying that motion. *See Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006) (noting that a district court's decision to deny a motion for amended findings is reviewed for an abuse of discretion), *review denied* (Minn. Nov. 14, 2006).

advised appellant that the characterization of his motion would be an issue at the hearing and, at the same time, found good cause to extend the 60-day time period set forth in Minn. R. Civ. P. 59.03 when scheduling appellant's motion. Notice of an impending legal issue and the extension of time does not support appellant's claim of bias.

IV. Remand for Clarification of Parties' Monthly Child Care Obligation

The parties agree that the provision in the district court's order of July 20, 2012 requiring appellant to pay monthly child care support of $295.50 is error. Appellant claims that the correct amount is $255 per month, and respondent claims that the correct amount is $260 per month. While the parties do not dispute that the total monthly cost of child care has been reduced to $591, the district court ordered appellant to pay half this amount. However, "[u]nless otherwise agreed to by the parties and approved by the court, the court must order that work-related or education-related child care costs of joint children be divided between the obligor and obligee based on their proportionate share of the parties' combined monthly PICS." Minn. Stat. § 518A.40, subd. 1 (2012). "Child care costs shall be adjusted by the amount of the estimated federal and state child care credit payable on behalf of a joint child." *Id.* The parties agree that the district court failed to comply with this latter requirement. Thus, we remand on this single issue for clarification of appellant's monthly child care obligation pursuant to Minn. Stat. § 518A.40, subd. 1.

D E C I S I O N

The district court did not abuse its discretion by: (1) proceeding with the hearing regarding appellant's request for modification of parenting time where appellant had been

timely served with respondent's responsive motion and supporting documents, but respondent's filed motion and documents were not yet placed in the district court judge's file; (2) ruling that appellant had failed to meet his burden of proof that his requested modification of parenting time was in the best interests of the children; (3) treating appellant's motion for amended findings as a motion for reconsideration; and (4) denying appellant's motion for reconsideration because there were no compelling circumstances for such reconsideration. The district court did not err in conducting a de novo review of the parenting consultant's decision and in its treatment of such decision as a recommendation of a neutral third party.

Affirmed in part and remanded.