STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0299

In re the Marriage of:
Holly Ann Walsh, petitioner,
Respondent,

vs.

Chad Robert Walsh,
Appellant.

Filed November 5, 2012
Affirmed in part and reversed in part
Stoneburner, Judge

St. Louis County District Court
File No. 69-F5-03-600167

Larry M. Nord, Orman, Nord & Hurd, P.L.L.P., Duluth, Minnesota (for respondent)

Richard E. Prebich, Rachel C. Delich-Sullivan, Law Office of Richard E. Prebich, Hibbing, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

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

STONEBURNER, Judge

Father appeals the district court's order denying his request for modification of parenting time and requiring father to forfeit parenting time if he is unable to take his children to any activity scheduled to occur during his parenting time. Because the district

court did not abuse its discretion by denying father's request for additional parenting time, we affirm in part. But we reverse the district court's limitation on the exercise of summer parenting time to "no more than one week at a time," contained in paragraph one of the challenged order, because we conclude that the district court abused its discretion by ignoring, without explanation, the parents' agreement that summer parenting time may be exercised in two-week periods. And we reverse paragraph four of the challenged order because we conclude that the district court abused its discretion by (1) sua sponte expanding father's responsibilities regarding the children's activities and (2) sua sponte enforcing father's increased responsibilities with an imprecise parenting-time forfeiture provision.

FACTS

The parties' 2003 dissolution decree awards appellant Chad Walsh (father) and respondent Holly Walsh (mother) joint legal custody of their children, B.W., born in 2001, and D.W., born in 2002. The decree awards mother sole physical custody subject to father's parenting time, which, at the time of the decree, included two overnights on alternate weekends, portions of two weekdays as agreed to by the parties, alternate holidays, and father's birthday. At the time the decree was entered, father lived in South Dakota and mother lived in Duluth, but father routinely exercised his weekend parenting time. After father relocated to Proctor, mother refused to agree to weekday parenting time for father.

Father subsequently moved for a change of custody. In a February 2007 order, the district court denied father's motion for a change of custody, found mother in contempt

of court for refusing to engage in mandated mediation, and modified parenting time to provide father with parenting time on Tuesdays from 4:30 p.m. until 7:30 p.m., with mother delivering the children to father's home and father returning the children to mother's home. The 2007 order further provides:

> The parties shall make every attempt to not have scheduled activities on Tuesday evenings. In the event an activity . . . is on a Tuesday, [father] shall be responsible for getting the children to the scheduled activity. In the future, if it appears that there will always be scheduled activities on Tuesdays, then the parties shall meet and discuss another evening during the week that [father] may have his court-ordered parenting time.

The district court also sua sponte addressed summer parenting time, which had not been addressed in the decree. The district court provided for increasing summer parenting time such that, as of 2011, father has no less than six full weeks of summer parenting time. The 2007 order does not specify how summer parenting time is to be exercised other than stating that "[t]he weeks for the summer parenting time do not have to be consecutive."

In May 2011 father remarried and moved to Hibbing, but he continues to work in the Duluth area. When father moved to Hibbing, mother refused to allow father to exercise Tuesday parenting time because she was not willing to transport the children to Hibbing. Father moved to modify parenting time to give him overnight parenting time every Tuesday and on Sundays during his weekends with the children. This modification would allow father to be responsible for all transportation, picking up the children at school and returning them to school. Father also sought to have the children from 8:30

a.m. on Christmas Day through noon on December 26 every year and to exercise his six weeks of summer parenting time in two-week periods in June, July, and August, advising mother of the specific dates by May 1 of every year.

Mother opposed the motion with the exception of father picking up the children from school and exercising his summer parenting time in two-week periods. Mother asserted that, if the children stayed overnight at father's home on Sunday and Tuesday nights, their usual school-night and morning schedules would be unduly disrupted. Father disputed that the children would have to get up earlier at his home than they normally get up at mother's home.

After hearing arguments on father's motion, the district court issued an order on December 23, 2011 (2011 order), permitting father to pick up the children from school for his parenting time but denying father's request for weekday and Sunday overnights.[1] The 2011 order requires the parents to meet at an agreed-on location halfway between their homes for return of the children to mother's home. Despite mother's agreement to exercise summer parenting time in two-week periods, paragraph one of the 2011 order limits the exercise of summer parenting time to "no more than one week at a time," but also provides that "[i]f the parties agree, they may modify the schedule to allow them each longer periods for vacations." In paragraph four of the 2011 order, the district court sua sponte ordered that

> [father] shall be responsible for getting the children to any activities they have for hockey or Boy Scouts on his

[1] The 2011 order erroneously asserts that father has parenting time on Thursday evenings and that father sought to expand that parenting time to include Thursday overnights.

> scheduled parenting time, whether this is for a game, a practice, a meeting, *or any other form of activity.* If [father] is *unable* to get the children to *an activity* that falls on or during his parenting time, the children shall remain with [mother] and the parenting time shall be forfeited.

(Emphasis added.) The 2011 order does not explicitly address father's requested modification of Christmas parenting time, but implicitly denies this request by providing that all prior orders regarding parenting time "remain of full force and effect to the extent they are not modified by this Order."

Father requested permission to file a motion for reconsideration of the provision that parenting time is forfeited if he is unable to get the children to all scheduled activities. Father sought clarification about whether the provision applies only to hockey and Boy Scouts or to all activities, and asserted that the provision undermines the statutory presumption of 25% parenting time under Minn. Stat. § 518.175 (2010) and fosters parent alienation. The district court denied the request. This appeal followed.

D E C I S I O N

On appeal, father asserts that the district court abused its discretion by denying his request for modification of parenting time, including the exercise of summer parenting time in two-week periods, and by ordering forfeiture of parenting time should he be unable to bring the children to activities scheduled during his parenting time. The district court has broad discretion in deciding parenting time. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). This court reviews an order modifying parenting time for an abuse of that discretion. *Id.* (citing *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995)). The district court abuses its discretion when its findings are unsupported by the

record or when it improperly applies the law. *Id.* The district court's factual findings are reviewed under the clearly erroneous standard of review. *Id.* "When determining whether findings are clearly erroneous, the appellate court views the record in the light most favorable to the [district] court's findings." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). A district court's finding is not clearly erroneous merely because the record might support a finding other than the finding made by the district court. *Id.* at 474. In order to successfully challenge a district court's finding of fact, the challenging party must show that, even viewing the evidence in the light most favorable to the finding, the record requires the definite and firm conviction that a mistake was made. *Id.* The party seeking modification of a previous order granting or denying parenting time has the burden of establishing that the proposed modification is in the children's best interests. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978).

I. Requests for modification of parenting time

On appeal, father argues that his request for additional overnights on Tuesdays and alternate Sundays is in the best interests of the children. But the district court, while acknowledging that "transportation would be easier" under father's proposal, found that father failed to "adequately demonstrate how this change is in anyone's best interest but his own."

Despite the district court's error in asserting that father was seeking *two* week-day overnights, which may have affected the district court's assessment of the impact of father's request on the children's schedules, we are not left with a definite and firm conviction that a mistake was made in denying father's request for additional overnight

parenting time. Father's affidavit, filed in support of his modification motion, fails to address the best interests of the children and focuses only on the benefit to the parents of having father pick up the children from school and return them to school the next morning.

For the first time on appeal, father makes the additional arguments that the requested changes are (1) "minor," (2) would prevent the children from spending "significant time in the car just when they have settled into . . . [father's] home," and (3) would allow the children to have dinner with father and participate in an activity. We generally decline to consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But even if we were to consider these arguments, we would not be left with a definite and firm conviction that the district court's finding is clearly erroneous. Changing the children's school-night sleeping location and schedule once every week and twice every two weeks is not a "minor" modification when viewed through the eyes of a child, and father's proposal does not decrease any travel time for the children. Under these circumstances, we cannot conclude that the district court abused its discretion by denying father's request for overnights on every Tuesday and alternate Sundays.

Father also argues that the district court abused its discretion by not allowing him to continue his Tuesday parenting time during mother's summer parenting time. The district court stated that it denied this requested modification because it disrupts the children's extended time with mother, gives mother less summer parenting time than father, and requires too-frequent transfers for the children. Father points out that the

district court's order erroneously stated that he has both Tuesday and Thursday parenting time, such that the district court's findings are not based in fact. But the district court's factual error appears to mainly affect the finding of too-frequent transfers, and the finding that weekday visitation interferes with and diminishes mother's summer parenting time remains accurate, as does the finding that weekday parenting time would disrupt any extended vacation plans for mother and the children. The 2007 order specifically gives the parents equal parenting time in the summer, and father has not demonstrated that the modification he requests is in the best interests of the children. The district court did not abuse its discretion by denying father's request to continue Tuesday parenting time during mother's summer parenting time.

Father argues that the district court abused its discretion by denying his motion to exercise his summer parenting time in two-week periods. We agree. The 2011 order both restricts the exercise of parenting time to one-week periods and provides that the parents can modify the schedule by agreement. The order ignores the parents' pre-hearing agreement that summer parenting time may be exercised in two-week periods. We conclude that the district court abused its discretion by failing to incorporate the parents' agreement into the 2011 order. We therefore reverse the restriction in paragraph one of the 2011 order that limits summer parenting time to one-week periods so that the parents may exercise summer parenting time in two-week periods, consistent with their agreement. The provision in the 2007 order requiring the parents to be in contact with each other to determine father's summer parenting time by May 1 of each year remains in force under the provision of the 2011 order.

Father's challenge to the district court's denial of his request for a modification of the Christmas holiday parenting-time schedule fails. Father failed to demonstrate why changing the longstanding holiday schedule is in the children's best interests. On this record, we cannot conclude that denying this portion of father's motion was an abuse of discretion.

II. Increase in father's responsibilities for the children's activities and forfeiture provision

The 2007 order required mother and father to "make every attempt not to have scheduled activities on Tuesday evenings," but made father responsible for getting the children to an activity that was nonetheless scheduled on a Tuesday evening. The 2007 order provided that if "there will always be scheduled activities on Tuesdays, then the [parents] shall meet and discuss another evening during the week that [father] may have his court-ordered parenting time."

Mother's affidavit opposing father's 2011 motion asserts that father "has steadfastly and completely refused" to take the children to their regularly scheduled activities. But mother did not seek any change in the 2007 order with regard to the children's activities. Nonetheless, in paragraph four of the 2011 order, the district court sua sponte expanded father's responsibilities from getting the children to scheduled activities that fall on Tuesday evenings to getting the children to activities scheduled to occur during *any* of his parenting time. The 2011 order further requires that father forfeit parenting time in the event he is "unable to get the children to an activity." The district court denied father's request for a clarification of this provision. On appeal, father

objects to the lack of clarity in the provision and asserts that it constitutes an unwarranted restriction on his parenting time.

Because the 2011 order does not define the scope of "any other form of activity" and does not state under what circumstances father will be deemed to have forfeited parenting time, we are unable to review father's claim that the provision is an unwarranted restriction of his parenting time. And, although the district court expounded on the importance of the children's involvement in activities, we conclude that the broad and imprecise language of paragraph four constitutes an abuse of discretion by failing to plainly state what activities are contemplated and under what circumstances father will be deemed to have forfeited parenting time. The phrase "any other form of activity," even if read to relate only to hockey and Boy Scouts, appears to cover an infinite number of activities that may have little to do with the expectations of the hockey or Boy Scouts programs regarding the children's participation in those programs. Likewise, mandating forfeiture of parenting time for father's *inability* to get the children to a scheduled activity appears to punish father for circumstances that may be beyond his control, such as a blizzard, illness, or the occurrence of an important family event not scheduled by father. Because neither the expansion of father's responsibilities for getting the children to activities nor a penalty for failing to take the children to an activity was requested by mother, and because the provision as written is too ambiguous to give father notice of what conduct will result in forfeiture of parenting time, we reverse this paragraph. The effect of reversal is to leave in effect the provision in the 2007 order (1) requiring every attempt to avoid scheduled activities on Tuesdays; (2) making father responsible for

getting the children to Tuesday activities that cannot be avoided; and (3) requiring the parents to renegotiate weekday parenting time if activities are scheduled for every Tuesday.[2]

Affirmed in part and reversed in part.

[2] Because we have reversed the 2011 order's forfeiture provision on other grounds, we need not consider father's argument that the provision constitutes parental alienation and interferes with his ability to parent.