STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0083

In re the Marriage of:

Lauri Sue Gruenstein, petitioner,
Respondent,

vs.

Daniel H. Gruenstein,
Appellant.

Filed August 15, 2016
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Hennepin County District Court
File No. 27-FA-13-3117

Kay Nord Hunt, Lommen Abdo, P.A., Minneapolis, Minnesota; and Jonathan J. Fogel, Seiler Schindel, PLLC, Minneapolis, Minnesota (for appellant)

Alan C. Eidsness, Lisa T. Spencer, Henson & Efron, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Peterson, Judge; and Bjorkman, Judge.

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

RODENBERG, Judge

Appellant-father appeals from the consensual special magistrate's rulings concerning custody, father's request to relocate the children to Chicago, spousal

maintenance, child support, and conduct-based attorney fees. We affirm on all issues except the award of conduct-based attorney fees, which we reverse and remand.

FACTS

Appellant-father and respondent-mother were married in September 1997. They have four children, who were 15, 12, 11, and 8 years of age at the time of the decree. Father is a physician, specializing in pediatric interventional cardiology. Mother became a registered nurse in 1998 and worked in her profession until the birth of the first child, when she agreed to work full-time as a stay-at-home parent. During their marriage, the parties relocated three times to advance father's career: from Cincinnati to Rhode Island, from Rhode Island to Cleveland, and, in 2006, from Cleveland to Minnesota. They were both residing in Hennepin County at the time of trial. In response to financial changes caused by the parties' separation, mother reactivated her nursing license in 2012 and returned to work part-time, answering a nursing hotline.

Mother began this dissolution proceeding in district court on April 29, 2013. The parties agreed to participate in mediation, and later agreed to use the mediator's services as a consensual special magistrate[1] if mediation was unsuccessful.

On September 20, 2013, the magistrate issued a temporary order to govern the parties during the mediation and litigation proceedings. It provided that the parties would have temporary joint legal and physical custody of the children. On September 30, 2013,

[1] A consensual special magistrate is "[a] forum in which the parties present their positions to a neutral in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal to the Minnesota Court of Appeals." Minn. Gen. R. Prac. 114.02(a)(2). *See also* Minn. Stat. § 484.74, subd. 2a (2014).

the district court ordered a custody evaluation and a psychological evaluation of both parties.

The custody evaluator began her investigation in October 2013. In March 2014, father received notice that his employment at the University of Minnesota would be terminated. In May 2014, the custody evaluator recommended a parenting plan that provided approximately equal parenting time to each parent, and presumed that both parents would be living in the Twin Cities area. In June 2014, the district court amended its earlier custody-evaluation order and directed that, because father's current employment was ending and "there are limited locations throughout the country where [he] can practice his specialty," the evaluator should include "a recommendation on custody and parenting time if the parties live in different geographic regions."

On July 1, 2014, the custody evaluator completed a second recommended parenting plan, presuming that father would be living outside of Minnesota and that the children would reside primarily in Minnesota with mother. This second plan provided approximately two weekends per month when father would exercise parenting time in Minnesota, with several longer breaks and holidays when he would have parenting time with the children at his out-of-state home or elsewhere. This second plan provided that the children would spend the majority of their summer vacation from school with father at his home.

On July 16, 2014, father notified the custody evaluator of his decision to accept a job offer from the University of Chicago. His proposal was that the children would join him in Chicago and he would have primary custody of them.

On August 4, 2014, the custody evaluator issued her final report. The report thoroughly addressed each of the 13 best-interests factors, *see* Minn. Stat. § 518.17, subd. 1(a) (2014), as well as the 4 joint-custody factors, *see* Minn. Stat. § 518.17, subd. 2(b) (2014), but did not evaluate each factor as it applied to father's proposal to relocate the children to Chicago.[2] Just before stating final recommendations, the report briefly addressed the district court's instruction to consider a possible Chicago move, stating: "This evaluator has carefully examined the issue of moving the children to Chicago. Since this option was not evaluated in a detailed way, conclusions are based on general information about Chicago." The report went on to state that the evaluator presumed

> that the children would be able to live in a number of safe areas of the metropolitan area, that they would be able to attend high-quality schools, and that they would be able to engage in age-appropriate activities. The evaluator knows the children would be very sad away from their mother, but the evaluator is highly concerned that [mother]'s attitudes and behaviors would put the children at risk without [father]'s involvement.

The custody evaluator recommended joint legal custody, while expressing "pessimism" that mother would be able or willing to engage in cooperative decision-making with father for the benefit of the children. The custody evaluator prepared two alternative parenting-time schedules, one presuming both parents would be living in Chicago, and one

[2] Minn. Stat. § 518.17 was substantially amended by 2015 Minn. Laws ch. 30, art. 1, §§ 3-5. The magistrate decided this case under the earlier version of the statute, and the parties have briefed and argued the case on appeal under the pre-2015 statute. Because the language of the revised statute does not contain clear evidence of retroactive intent, we do not consider the amendments. *See* Minn. Stat. § 645.21 (2014) ("No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."); *K.E. v. Hoffman*, 452 N.W.2d 509, 512 (Minn. App. 1990) (holding that statute applicable to "all cases pending" had retroactive effect and applied to a case on appeal, as a "pending" action), *review denied* (Minn. May 7, 1990).

presuming mother would remain in Minnesota while father and children lived in Chicago. She recommended a parenting consultant, and either a co-parenting coach (if in Minnesota) or parenting coordinator (if in Illinois).[3] The final custody evaluation also recommended that, if father were to move to Chicago and mother remained in Minnesota, the children should reside primarily with father in Chicago.

Mediation did not resolve the case, and the case was tried to the consensual special magistrate over three days in November 2014. Father sought sole legal and joint physical custody, and permission to relocate the children to Chicago. He maintained that he would not move to Chicago without the children. Mother sought joint legal and joint physical custody.

The parties disputed the admissibility of the custody evaluator's report and recommendation. Mother argued that the report was inadmissible due to the evaluator's failure to analyze the possible Chicago move under the 13 best-interests factors, and that the conclusory remarks based on "general information" about Chicago should not be considered. Father argued that the report was admissible and that mother's arguments properly concerned the weight to be given the recommendation. The magistrate admitted the custody evaluation, but stated:

> The weight, the probative value of [the custody evaluator's] work on the issue of whether or not the children should relocate to Chicago, that is very much an open question. . . . It is not apparent to this Court from the evaluation on its face what [the custody evaluator] actually did to evaluate the move to

[3] At trial, the custody evaluator testified that, if the parties failed to involve a parenting consultant, she would recommend sole legal custody to father. At the time of trial, the parties had not engaged a parenting consultant.

> Chicago. Her testimony will be necessary, very necessary on that process question.

The custody evaluator testified at length and was questioned by both of counsel. She conceded that her report was inadequate concerning the proposed Chicago move, and that she did not apply the 13 best-interests factors to the proposed move. She admitted that she had no information about father's work hours or proposed residence in Chicago, including details about his work schedule, his intention to employ an au pair, or where and in what type of housing he would be living.

The magistrate's decree was issued on March 8, 2015, and judgment was entered by the district court on April 28, 2015. The magistrate found that father had committed domestic abuse against mother during the marriage, and therefore determined that the presumption in favor of joint custody did not apply. The magistrate also concluded that entrusting sole physical custody of the children to their mother was in their best interests because the parties were incapable of effectively co-parenting. The decree granted sole legal and physical custody of all four children to mother, with defined parenting time to father.

The magistrate found that father's claim that he would not move to Chicago without the children was not credible, and found as a fact that father had accepted the employment and would move to the Chicago area. But the decree provided two alternative parenting-time schedules depending upon whether or not both parents resided in Minnesota. Father's request to relocate the children's primary residence to Chicago was denied.

The decree awarded mother permanent spousal maintenance of $12,000 per month and total child support of $1,181 per month. The child-support award consisted of $536 in basic support, $495 in childcare support, and $150 in medical support. The district court also awarded $40,000 in conduct-based attorney fees to be paid by father to mother. The decree divided assets and obligations, and resolved other issues not challenged on appeal.

In May 2015, father moved for an amended order or, in the alternative, for a new trial. He moved to Chicago after trial, and the children spent the summer of 2015 in Chicago with him, as ordered by the decree.

In August 2015, days before the children were to return to Minnesota to be with mother for the school year, father filed an emergency motion seeking modification of custody and other relief based on his discovery of self-injury by one of the children. The magistrate denied the emergency motion and ordered that the children be returned to mother according to the parenting-time schedule.

The district court and the magistrate ultimately rejected each of father's post-trial requests (except correcting a clerical error concerning one child's birthdate). Father appeals the magistrate's rulings on custody, relocation, spousal maintenance, child support, and attorney fees.

D E C I S I O N

I. Custody and relocation

Although father argued at trial that the custody evaluation was valuable evidence and that any inadequacies could be weighed by the factfinder, he argues on appeal that the custody evaluator's failure to thoroughly evaluate the possibility of relocation to Chicago

requires a new trial. He also argues that the magistrate erred by relying too heavily on the domestic-abuse finding in determining custody.[4]

In reviewing a custody determination, the law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). "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." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We review a district court's factual findings concerning custody for clear error. *Vangsness*, 607 N.W.2d at 472; *see* Minn. R. Civ. P. 52.01 (stating that findings of fact are not set aside unless clearly erroneous). We defer to a district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). We need not "discuss and review in detail the evidence for the purpose of demonstrating that it supports the [district] court's findings." *Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951). An appellate court's role is satisfied when it considers all of the evidence and concludes that the record "reasonably supports the findings." *Id.*

Thirteen best-interests factors

A district court's primary objective in custody matters is determining the best interests of the child. Minn. Stat. § 518.17, subd. 1 (2014). A district court must consider "all relevant factors," including 13 statutory factors relevant to a child's best interests. *Id.*

[4] On appeal, father does not challenge the finding that domestic abuse occurred, although he disputed those allegations at trial.

The magistrate here analyzed each of the 13 statutory factors in detail, and, under each factor, evaluated two possible scenarios: one in which both parents remained in Minnesota and another in which father would relocate to Chicago. Under the both-parents-in-Minnesota scenario, the magistrate found that four factors favored an award of physical custody to mother and that nine factors were neutral. Under the father-in-Chicago scenario, the magistrate found that ten factors favored entrusting physical custody to mother and that three factors were neutral.

Four joint-custody factors

A district court must analyze four joint-custody factors if either party or the court contemplates or seeks joint legal or joint physical custody. Minn. Stat. § 518.17, subd. 2(b). These factors are: (1) the parents' ability to cooperate in rearing their child; (2) methods for resolving parenting disputes and the parties' willingness to use them; (3) whether it would be detrimental to the child to give one parent sole authority; and (4) whether domestic abuse, as defined under Minn. Stat. § 518B.01, has occurred between the parents. *Id.* The statute directs the district court to "use a rebuttable presumption that joint legal or physical custody is not in the best interests of the child if domestic abuse, as defined in section 518B.01, has occurred between the parents." *Id.* Here, both parties sought joint legal custody.

The magistrate concluded that all four statutory factors disfavored joint custody. Of particular importance, the magistrate found that father committed domestic abuse against mother during the marriage, and summarized:

> Father and Mother are embroiled in the sort of conflict that causes actual harm to children who become caught in the

> middle. An award of joint custody would be detrimental to the children as it would cause too much risk of their needs going unmet while the parties engaged in conflict over the options inherent in each decision about child rearing.

Eight relocation factors are not required

Minnesota law provides eight relocation factors that a district court must consider "when considering the request of the parent with whom the child resides to move the child's residence to another state." Minn. Stat. § 518.175, subd. 3(b) (2014). These eight factors apply only to a proposed move *following* entry of a judgment on custody, and not to an initial custody determination in which a parent is seeking permission to relocate the children. *In re Kremer v. Kremer*, 827 N.W.2d 454, 461 (Minn. App. 2013), *review denied* (Minn. Apr. 16, 2013). Consequently, in making an initial custody determination where out-of-state relocation is proposed by one or both parents, analysis under the 13 best-interests factors of section 518.17 will suffice so long as the court has considered the impact of each parent's location. *Id.* Here, the magistrate properly disregarded the eight relocation factors, and instead correctly considered father's relocation proposal under the 13 best-interests factors.

Despite father's claim that the outcome was prejudiced by the magistrate's consideration of the arguably inadequate custody evaluation, and that the magistrate relied too heavily on the domestic-abuse finding, it is clear to us on careful review of the record that the magistrate carefully considered the relevant evidence, applied the relevant statutory factors, and made factual findings supported by the record. The record, consisting of approximately 5,000 pages, was accurately and completely considered by the magistrate in a decree consisting of 75 pages. It is clear that the magistrate did not base the custody

decision solely on the finding of domestic abuse (or any other single factor), and was not unduly influenced by the inadequate report of the custody evaluator (whose recommendation the magistrate did not adopt). On the contrary, the magistrate analyzed each of the 13 best-interests factors, and made two alternative conclusions for each factor because of father's uncertain and disputed future living arrangements. Additionally, the magistrate correctly applied the presumption against joint custody where domestic abuse has occurred.

The magistrate found that father "was one of the most insincere witnesses the Court ever has observed in a dissolution trial or evidentiary hearing," and made several specific findings that father was not credible in his testimony on particular issues. We give due regard "to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. It is not our proper role on appeal to make credibility findings, especially when the factfinder has made a proper and thorough balancing of the best-interests factors. *See Vangsness*, 607 N.W.2d at 477.

The custody and parenting-time decisions were well within the magistrate's discretion.

II. Spousal maintenance and child support

Father argues that the magistrate erred by considering his future (Chicago) income in calculating the maintenance award. He posits that only his actual income at the time of trial can be considered. He also challenges the maintenance award as having been improperly premised on the marital standard of living because the sum of the magistrate's findings of mother's needs, the children's needs, and father's needs exceeds father's net

income while he was employed at the University of Minnesota. Father also argues that full-time income should have been imputed to mother, and that temporary maintenance would have been a more appropriate award. Father claims that the magistrate's calculations fail to account for the fact that mother will not have to provide for the children during the summer months, and that mother has not demonstrated any specific need for assistance with childcare. Finally, father claims that the magistrate's calculations fail to account for his having to pay for childcare while the children are with him during the summer, and fail to account for his cost of commuting to exercise his school-year parenting time. Father argues that healthcare support for the children was counted twice: once in the spousal-maintenance award, and once in the child-support award.

A district court or a magistrate has broad discretion in determining spousal maintenance and child support, and we review such decisions for abuse of discretion. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002) (child support); *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997) (spousal maintenance). An abuse of discretion occurs when the decision is against logic or not supported by the record. *Robert v. Zygmunt*, 652 N.W.2d 537, 544 (Minn. App. 2002), *review denied* (Minn. Dec. 30, 2002).

Spousal maintenance is appropriate if one spouse "lacks sufficient property" to provide for her "reasonable needs in light of the standard of living established during the marriage." *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). Maintenance is also limited by an obligor's ability to pay. *See Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004). A spousal-maintenance award may be either temporary or permanent, depending on what the court considers to be

just, and considering the relevant factors. Minn. Stat. § 518.552, subd. 2 (2014). "Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification." *Id.*, subd. 3 (2014). "[T]he [district court] must of necessity 'balance the equities' in the light of facts then existing or in the light of facts that will with reasonable probability exist in the future." *Brugger v. Brugger*, 303 Minn. 488, 491, 229 N.W.2d 131, 134 (1975) (quotation marks omitted).

The determination of a party's income is a finding of fact and will not be set aside unless clearly erroneous. *Peterka*, 675 N.W.2d at 357. Similarly, factual findings regarding monthly expenses in a spousal-maintenance determination "must be upheld unless clearly erroneous." *McCulloch v. McCulloch*, 435 N.W.2d 564, 566 (Minn. App. 1989) (quotation omitted). But "[a] [district] court's calculation of living expenses must be supported by the evidence." *Rask v. Rask*, 445 N.W.2d 849, 854 (Minn. App. 1989). "Because maintenance is awarded to meet need, maintenance depends on a showing of need." *Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989); *see also Lee v. Lee*, 775 N.W.2d 631, 642 (Minn. 2009) (stating that the district court awarded mother more maintenance than she reasonably needed to support herself and instructing the district court on remand to make findings that support the current award or to make a different award).

Relying on *Carrick v. Carrick*, father asserts that future income cannot be considered in calculating the capacity of an obligor-spouse to pay spousal maintenance. 560 N.W.2d 407 (Minn. App. 1997). In *Carrick*, we reversed an award of maintenance because, in part, the district court anticipated a possible future reduction in income when it determined the obligor-spouse's ability to pay. *Id.* at 412. Here, unlike the situation in

Carrick, it was known at the time of trial that father's University of Minnesota income would soon end. The magistrate found as a fact that father had accepted the employment offer from the University of Chicago and would move there. Father mailed a final and fully executed offer letter, signed by him, shortly before trial. A handwritten note near his signature accepting the job offer indicated his enthusiasm in accepting the position in Chicago: "I am thrilled to be partnering with you . . . ." His new title was then anticipated to be, and did become, Chief of the Section of Pediatric Cardiology at the University of Chicago. Father's attorney actually unsealed and opened a copy of the letter in the presence of the magistrate at trial. Under these circumstances, with no other reasonable alternative source of income, the magistrate acted with appropriate discretion in finding as a fact that father had effectively accepted the Chicago employment and would work there.[5] The magistrate's order left open the possibility of a motion to modify should father find work in Minnesota commensurate with his professional skills. The record supports the magistrate's findings.

Father also argues that the magistrate's findings concerning the reasonable monthly expenses of father, mother, and children cannot be correct because the sum of those amounts exceeds father's income during the marriage. We are aware of no authority for

[5] Father argues the magistrate inappropriately "imputed" income to him. Minnesota appellate courts have used the word "impute" in situations where the district court concludes that a party could and should be earning at a certain income level but has refused to do so. *See Passolt v. Passolt*, 804 N.W.2d 18, 22 (Minn. App. 2011); *Melius v. Melius*, 765 N.W.2d 411, 414-16 (Minn. App. 2009). Here, the magistrate did not "impute" income in this sense. Instead, the magistrate found that father was not credible in claiming he might later reject the employment offer from the University of Chicago, and therefore determined child support and spousal maintenance based on the factual finding of father's income from accepted employment in Chicago.

the proposition that the reasonable needs of a maintenance obligee in light of the standard of living established during the marriage are somehow "capped" by the household expenses before separation. Maintaining the marital standard of living for two households is naturally going to be more expensive than maintaining that standard of living in a single household. *See Maiers v. Maiers*, 775 N.W.2d 666, 670 (Minn. App. 2009) (recognizing that a district court's statement "may be a comment on the realities of dissolution, that both parties may suffer a reduction in standard of living"). Fortunately, father's income has substantially increased. The magistrate found that the combined reasonable expenses of the parties have increased. The record supports the findings concerning expenses, and father has the ability to pay the ordered maintenance by reason of his increased income.

Father's other claims regarding spousal maintenance and child support challenge the details of each party's reasonable expenses. While both parties' expenses are thinly documented in the otherwise-voluminous record, the magistrate made factual findings that we decline to disturb. *See* Minn. R. Civ. P. 52.01 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . ."); *McCulloch*, 435 N.W.2d at 566. Concerning childcare support, the magistrate found that, while both parties submitted a line item in mother's budget for childcare, "neither [] had submitted a reasonably accurate amount." The magistrate determined a monthly childcare-expense amount within the range of monthly childcare expenses estimated by the parties. Under the circumstances, where both parties were projecting unknown future expenses, the magistrate's decision to take an approximate average of the parties' claims was an appropriate exercise of discretion.

Father also fails to demonstrate reversible error in the magistrate's having declined to impute full-time income to mother, or in the magistrate having ordered permanent spousal maintenance. As noted, we review maintenance awards for abuse of discretion. *Dobrin*, 569 N.W.2d at 202. We see no abuse of discretion here. The magistrate thoroughly and carefully considered the extensive record, including mother's post-separation return to work and evidence that she would be capable of returning to full-time work at some point. Finding uncertainty as to the necessity of a permanent award, the magistrate ordered permanent maintenance, subject to possible later modification. Minn. Stat. § 518.522, subd. 2. The record supports the magistrate's findings and there was no abuse of discretion.

III. Conduct-based attorney fees

Both parties sought conduct-based attorney fees, and mother also sought need-based attorney fees. The magistrate awarded mother $40,000 in conduct-based fees and denied all other fee requests. In making the award, the magistrate made factual findings about father's conduct and relied on two affidavits of mother's counsel with attached exhibits, including detailed billing records. The magistrate relied on five categories of father's conduct in awarding conduct-based fees in favor of mother: (1) failure to cooperate with discovery; (2) delay in selecting a therapist for the parties' oldest child; (3) refusal to follow the temporary parenting-time schedule for a period of time; (4) uncooperativeness with mother's efforts to retrieve her personal property; and (5) uncooperativeness in facilitating mother's scheduled walkthrough of the homestead.

Conduct-based attorney fees "are discretionary with the district court," or, in this case, the magistrate. *See Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007). Conduct-based attorney fees may be awarded "against a party who unreasonably contributes to the length or expense of [a dissolution] proceeding." Minn. Stat. § 518.14, subd. 1 (2014). To award conduct-based attorney fees under section 518.14, a district court or magistrate must identify behavior that occurred during the proceeding that had the effect of increasing the proceeding's cost or duration. *Geske v. Marcolina*, 624 N.W.2d 813, 819 (Minn. App. 2001), *review denied* (Minn. Aug. 20, 2002). An award of conduct-based attorney fees is reviewed for an abuse of discretion. *Sanvik v. Sanvik*, 850 N.W.2d 732, 737 (Minn. App. 2014). "An abuse of discretion occurs when the judge improperly applies the law to the facts." *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998).

Mother's counsel identified the total amount billed to mother as $243,789.31. He estimated that, of the total billed amount, $40,000 was attributable to father's unreasonable conduct. Counsel's affidavit does not separately itemize or identify specific costs and billed hours attributed to father's litigation conduct. Instead, the affidavit provides a general description of father's ostensibly unreasonable conduct.

Two categories of conduct relied on by the magistrate, concerning personal-property retrieval and the homestead walk-through, were not referenced at all in mother's request for conduct-based fees. The record contains neither any evidence of the fact or the amount of increased fees, nor even a claim by mother for fees, occasioned by father's conduct in these matters. A conduct-based fee award for these categories of conduct is unsupported by the record.

Regarding father's conduct during discovery, we note that mother never moved to compel discovery. Although it appears that there were some discovery disputes and delays, they were insufficiently important to have warranted a motion for relief. Noncompliance with discovery may be an appropriate *basis* for an award of conduct-based fees, but the awarded conduct-based fees must be tethered to an increase in the opposing party's costs. *See Geske*, 624 N.W.2d at 819.

Concerning father's role in delaying the selection of a therapist for one of the parties' children, the magistrate found that father's conduct "forced the issue to be decided by the court," but that father eventually conceded that mother could make the final decision. That is in the nature of things in family-law disputes. It is not unreasonable or atypical that parties in a dissolution proceeding require court intervention regarding some issues. Indeed, the magistrate and the district court issued several temporary orders in this case. Father took a position on the therapist-selection issue from which he later retreated. Initial disagreement on a subject followed by a party reexamining his position and agreeing with the other party should be regarded positively, if at all. The record does not support that this period of disagreement concerning selection of a therapist "unreasonably" contributed to the length and cost of this mammoth file. *See* Minn. Stat. § 518.14, subd. 1.

Likewise, regarding the third category of father's ostensibly unreasonable conduct, the record reveals a dispute concerning the temporary parenting-time schedule that required the magistrate's intervention. Without more, this is not a proper basis for conduct-based fees. While mother alleged that father simply "refused to follow" the temporary parenting-time schedule, the record instead reflects that the parties had a genuine disagreement on

how to interpret the temporary schedule. The parties had a regrettable frequency and volume of conflict throughout this litigation, but requiring judicial intervention to clarify a parenting-time schedule is not unreasonable litigation conduct in the context of this contentious divorce.

The magistrate, who found father to be "insincere" in several respects, concluded that father had unreasonably contributed to the length and expense of the proceedings. But the amount of the award—$40,000—is untethered to anything in the record. Neither wife's attorney nor the magistrate identifies specific charges for fees necessitated by father's litigation conduct found to be unreasonable. While we defer to the magistrate's credibility findings, as discussed above, we cannot abdicate our responsibility to carefully review the record to determine if it supports the magistrate's findings of fact and the amount of fees awarded. *See Geske*, 624 N.W.2d at 818 (stating that conduct-based attorney fees must be tied to litigation conduct that unnecessarily increases length or expense of proceeding). The amount of fees awarded here is unsupported by the magistrate's findings of fact. We therefore reverse and remand on that issue. Fees awarded on remand for unreasonable litigation conduct, if any, must be causally tethered to properly sanctionable litigation conduct. Whether to reopen the record on remand shall be discretionary with the district court.

Affirmed in part, reversed in part, and remanded.