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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A16-1334**

In re the Matter of: J. S. S., petitioner,  
Respondent,

vs.

G. I. S.,  
Appellant.

**Filed April 3, 2017  
Affirmed  
Cleary, Chief Judge**

Hennepin County District Court  
File No. 27-PA-FA-15-32

Kathryn A. Engman, Engman Law Firm, Bloomington, Minnesota (for respondent)

G. I. S., Orono, Minnesota (pro se appellant)

Considered and decided by Cleary, Chief Judge; Halbrooks, Judge; and Jesson,  
Judge.

**UNPUBLISHED OPINION**

**CLEARY**, Chief Judge

Appellant-mother challenges the district court's determination of custody and parenting-time issues and argues that the district court (1) erred by ordering the parties to participate in mediation where it made a finding of domestic abuse, (2) abused its discretion

by denying her request for sole legal and physical custody of J.N.S., (3) erred by failing to designate her home as J.N.S.'s primary residence, (4) abused its discretion by awarding a stepped-up parenting-time schedule terminating in a 5-2-2-5 equal parenting-time schedule, (5) abused its discretion by denying her motion for a new trial, and (6) abused its discretion by denying her attorney-fee requests. Because we conclude that the district court properly exercised its discretion and committed no error, we affirm.

## **FACTS**

The parties are the parents of one minor child, J.N.S. In January 2015, mother filed a petition seeking an order for protection (OFP) against father. At the hearing, father denied mother's allegations, but agreed to the issuance of an OFP. In the OFP, the district court did not make any findings of domestic abuse, but required that all of father's parenting time with J.N.S. be supervised. The OFP was amended to allow the parties to participate in court-ordered custody appointments and to reflect adjusted parenting-time exchange provisions in the parties' custody file. The OFP terminated no later than the final entry of judgment regarding custody and paternity.

In January 2015, father filed a complaint to establish paternity and custody of J.N.S. In March 2015, the district court appointed a guardian ad litem and established a temporary parenting-time schedule granting father parenting time with J.N.S. The district court found that the parties were unable to agree on legal and physical custody and parenting-time issues, and that the parties agreed to participate in a custody and parenting-time evaluation.

In May 2015, both father and mother filed motions. Father's motion requested, among other things, joint legal and physical custody of J.N.S., modification of the parties' parenting-time schedule, and an order requiring mother to contribute to father's attorney fees and court costs. Mother's motion requested, among other things, that she be awarded need-based attorney fees and that the guardian ad litem be removed. In July 2015, the district court issued a temporary order discharging the guardian ad litem, awarding additional parenting time to father, denying father's motion for attorney fees, and reserving mother's motion for attorney fees. In October 2015, the district court denied mother's request for need-based attorney fees. Mother requested permission to bring a motion for reconsideration of the order denying her request for attorney fees pursuant to Minn. R. Gen. Pract. 115.11.

On November 16, 2015, the district court held a trial to determine custody and parenting-time issues. During the two-day trial, the district court heard testimony from the parties and several witnesses, including the custody evaluator and a psychologist who had performed a case-file review. The district court received a number of exhibits, including the custody evaluation, the psychologist's case-file review, and the parties' psychological evaluations.

In February 2016, the district court granted mother's request to bring a motion for reconsideration, and mother submitted affidavits in support of her motion.

On March 8, 2016, the district court filed an order that determined custody and parenting-time issues, and judgment was entered on the order that day. The district court

made a finding of domestic abuse. It explained that, in June 2014, father threatened to shove a piece of steel decking through mother's throat and that this single incident rose to the level of domestic abuse. The district court acknowledged that mother alleged other incidents of abuse, but found that some incidents did not rise to the level of domestic abuse and that others could not be corroborated with independent evidence. The district court presumed that neither joint legal nor joint physical custody was in J.N.S.'s best interests, but determined that father rebutted this presumption. After concluding that joint custody and a stepped-up 5-2-2-5 parenting-time schedule were in J.N.S.'s best interests, the district court ordered that the parties have joint legal and physical custody and that a stepped-up 5-2-2-5 parenting-time schedule be used. It also denied both parties' requests for conduct-based attorney fees. On March 10, 2016, the OFP was dismissed.

Both parties filed motions in response to the March 8, 2016 judgment. Father requested that the district court correct clerical mistakes in its order, and mother requested that the district court amend its findings or, in the alternative, grant a new trial. In April 2016, the district court denied father's motion to correct clerical mistakes, and father moved for an order requiring mother to sign the necessary tax forms to allow him to claim the tax dependency exemption for J.N.S. for 2015 and to reimburse his attorney fees. Mother moved for an order awarding her attorney fees and filed a separate motion seeking a modification of child support. On May 27, 2016, the district court denied mother's motion for reconsideration and her request for need-based attorney fees incurred through trial. On June 30, 2016, the district court denied mother's requests to modify basic child

support and medical support, but granted the parties' request to modify child-care support based on increased child-care costs.

On August 1, 2016, the district court filed an order amending its March 8, 2016 judgment, and subsequently judgment was entered on the amended order. In its amended order, the district court again concluded that it was in J.N.S.'s best interests that the parties have joint legal and physical custody and follow a stepped-up 5-2-2-5 parenting-time schedule. The amended order denied mother's request for a new trial and again denied the parties' requests for conduct-based attorney fees. Mother now appeals.

## **D E C I S I O N**

### **I. Mediation Order**

Mother argues that the district court violated Minn. Stat. § 518.619 (2016) by ordering the parties to participate in mediation where it made a finding of domestic abuse. Father argues that mother failed to properly raise this issue because she never requested that the district court excuse her from participating in mediation. To the contrary, mother represented to the district court that she was willing to use mediation to resolve disputes involving custody and parenting time. Mother filed proposed findings of fact, conclusions of law, order for judgment and judgment and decree in December 2015. In this document, mother asked the district court to find "that both parents would be willing to utilize mediation . . . but would prefer to avoid having a third party make [parenting] decisions." After the March 8, 2016 judgment, mother submitted a motion for amended findings. In

this motion, mother did not object to the mediation requirement, but merely requested that a greater proportion of the mediation fees be allocated to father.

Whether a party has taken the proper steps to preserve issues for review on appeal affects this court's scope of review. Minn. R. Civ. App. P. 103.04. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Although this court generally does not review issues and legal theories that were not presented to the district court, it may do so in the interest of justice. *See id.* (limiting the scope of review generally); Minn. R. Civ. App. P. 103.04 (allowing appellate courts to review "any other matter as the interest of justice may require"). Because mother submitted filings to the district court indicating her willingness to participate in mediation, the interest of justice does not favor the exercise of permissive review of the mediation question in this appeal. We decline to review mother's argument opposing court-ordered mediation of custody and parenting-time issues.

## **II. Legal and Physical Custody**

Mother next asserts that the district court committed reversible error by awarding the parties joint legal and physical custody of J.N.S. A district court has broad discretion in determining custody matters. *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008). Our 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. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996). When determining

whether findings are clearly erroneous, an appellate court views the record in the light most favorable to the district court's findings and defers to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). "We cannot reweigh the evidence presented to the trial court." *Id.* at 475.

The best interests of the child are central to resolving custody issues. Minn. Stat. § 518.17, subd. 1(a) (2016). When determining custody awards, a district court must consider the 12 best-interest factors listed in Minn. Stat. § 518.17, subd. 1(a), make detailed findings with respect to each factor, and explain how each factor led to its conclusions. *Id.*, subd. 1(b)(1) (2016). No single factor is dispositive, and a district court must consider that the factors may be interrelated. *Id.*

#### **A. Custody Evaluation**

Mother argues that the district court relied on a biased and deficient custody evaluation, disregarded evidence in her favor and evidence that reflected negatively on father, and failed to independently weigh the credibility of the witnesses. Mother presented evidence to the district court to show that the custody evaluation was unreliable. She submitted a psychologist's case-file review, which criticized the custody evaluation because of the evaluator's: (1) failure to make collateral contacts to inquire into mother's allegations of domestic abuse; (2) failure to use a formal domestic-abuse assessment; (3) failure to note his efforts to investigate the alleged financial control that father exerted over mother; (4) failure to use collateral contacts to substantiate his conclusion that mother has mental-health issues; (5) suggestion that mother should complete dialectical behavior

therapy despite a lack of evidence that such treatment was appropriate; and (6) failure to note that he reviewed an article that mother submitted concerning post-separation overnight care of children.

At trial, the psychologist who reviewed the case file testified that she was also concerned that the custody evaluator took input from the guardian ad litem, who had a strong opinion of the parties' situation and mother's behavior. The psychologist testified about specific issues or omissions that may have impacted the evaluation's reliability or validity and explained that she would have performed different steps had she completed the custody evaluation. However, the psychologist did not conclude that the evaluation was invalid or defective and explained that she could not guarantee that she would have made different recommendations.

After reviewing the record, we cannot say that the district court abused its discretion by relying on the custody evaluation. Although mother attempted to establish that the custody evaluator performed a poor evaluation and was biased against her, evidence in the record supports a finding that the evaluation was valid. Because we do not reweigh the evidence on appeal, we defer to the district court's decision regarding the reliability of the custody evaluation where there is evidence supporting its validity. We similarly defer to the district court's credibility determinations because the record does not show that the district court improperly disregarded evidence or failed to independently weigh the credibility of the witnesses. The district court did not abuse its discretion when considering the evidence before it.

## **B. *Domestic Abuse***

Mother argues that the district court's custody determination should be reversed because there was evidence of domestic abuse. Where domestic abuse has occurred between the parents, a court shall use a rebuttable presumption that joint legal or joint physical custody is not in the child's best interests. Minn. Stat. § 518.17, subd. 1(b)(9) (2016). To determine whether the presumption is rebutted, a court must consider (1) "the nature and context of the domestic abuse" and (2) "the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs." *Id.*

Here, the district court found that the incident with the deck piece rose to the level of domestic abuse. As a result of this finding, a rebuttable presumption against joint legal or physical custody applies. The district court explicitly applied this presumption. It considered the extended conflict between the parties and the alleged incidents of abuse. The district court noted that many of the incidents alleged did not rise to the level of domestic abuse contemplated by the statute. Considered in the context of the parties' interactions over time, the district court determined that the incident with the deck piece was not part of a continuing pattern that would have negative implications for J.N.S.'s well-being. Rather, it determined that whatever domestic abuse had occurred was situation-specific. Because the district court found that J.N.S.'s well-being and developmental needs were not affected by the abuse, it concluded that the presumption against joint legal or physical custody was rebutted.

From our careful review of the record, we cannot say that the district court improperly applied the law or made findings that were unsupported by the evidence. After finding that domestic abuse occurred, the district court properly applied the statutory presumption against joint legal or physical custody. When determining whether the presumption was rebutted, the district court properly considered the nature and context of the domestic abuse and the implications it had for parenting and the child's safety, well-being, and developmental needs. Because evidence in the record supports the district court's findings, we conclude that the district court did not abuse its discretion by awarding the parties joint legal and physical custody.

### **C. *Parties' Ability to Resolve Disputes and Cooperate in Co-parenting***

Mother also argues that the district court's custody determination should be reversed because the parties are unable to resolve disputes and cooperate in co-parenting J.N.S. She first asserts that the parties' only alternative to litigation is mediation, which cannot be ordered in cases of domestic abuse. We are unpersuaded. Where a court finds that there has been domestic abuse between the parents, it cannot require or refer the parties to mediation and must apply a *rebuttable presumption* that joint legal or physical custody is not in the child's best interests. Minn. Stat. §§ 518.17, subd. 1(b)(9), .619, subd. 2. If a court's inability to order mediation was sufficient to render joint custody inappropriate, the presumption against joint custody would be irrebuttable. For this reason, a court's inability to order mediation does not, without more, require the court to grant one parent sole legal and physical custody.

Mother next argues that the district court's award of joint legal and physical custody is erroneous because of the parties' high-conflict relationship. To support this argument, mother relies on caselaw addressing the joint-custody factors specified in Minn. Stat. § 518.17, subd. 2 (2014). However, the legislature repealed subdivision 2 in 2015. 2015 Minn. Laws ch. 30, art. 1, § 13, at 283. Simultaneously, the legislature altered the language of subdivision 1 to require consideration of many of the same factors that had previously been required by subdivision 2. 2015 Minn. Laws ch. 30, art. 1, § 3, at 272 (requiring the court to consider the parents' willingness to cooperate in rearing the child, the parents' ability to use methods for resolving disputes, and whether domestic abuse has occurred between the parents). Whether caselaw addressing the joint-custody factors of Minn. Stat. § 518.17, subd. 2, remains applicable under the current form of the statute has not yet been decided by this court or the supreme court.

Neither party argues that the caselaw decided under the previous form of the statute is inapplicable due to the repeal of subdivision 2.<sup>1</sup> For this reason, we assume, as the parties do, that such caselaw remains applicable for the purpose of deciding this case.

In cases addressing the prior Minn. Stat. § 518.17, subd. 2, this court has held that joint legal custody should be granted only where parents can cooperate in making parenting decisions and is inappropriate where the parties lack the ability to cooperate and communicate. *See Wopata v. Wopata*, 498 N.W.2d 478, 482, 486 (Minn. App. 1993)

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<sup>1</sup> In her reply brief, mother argues against relying on Minn. Stat. § 518.17, subd. 2, which was repealed before this matter came before the district court. However, mother does not argue that the caselaw decided under Minn. Stat. § 518.17, subd. 2, is no longer applicable.

(reversing the grant of joint legal and physical custody where the parents could neither agree nor communicate); *Estby v. Estby*, 371 N.W.2d 647, 649 (Minn. App. 1985) (explaining that parents who cannot cooperate in parenting decisions should not be granted joint legal custody).

Here, the district court found that the tension between the parties was high and explained that the stressful events of litigation caused each parent to become more critical of the other. Despite this high conflict, the district court determined that it was in J.N.S.'s best interests to award joint custody to the parties. In reaching this determination, the district court considered testimony showing that both parties were willing to cooperate in rearing J.N.S. and reasoned that they would have fewer reasons to expose J.N.S. to conflict once their rights and duties were established by a court order. Because the record supports the district court's determination, we cannot say that the district court abused its discretion by awarding joint legal and physical custody.

Here, the district court properly considered all of the best-interest factors, made detailed findings with respect to each factor, and explained how each factor led to its conclusions and custody determination. Because the evidence supports the district court's findings, we conclude that the district court did not abuse its discretion by awarding joint legal and physical custody to the parties.

### **III. Designation of Primary Residence**

Mother next asks that this court remand to the district court with instructions that mother's residence should be designated as J.N.S.'s primary residence.<sup>2</sup> She first argues that her residence should be J.N.S.'s primary residence, in accordance with the award of sole custody to her. Because we conclude that the district court properly awarded joint custody to the parties, mother's argument does not support her residence-designation request.

Mother additionally asserts that she made the residence-designation request at trial and that father's failure to object supports the grant of the designation. However, mother has failed to cite legal authority that would support her argument that she is entitled to have her home designated as J.N.S.'s primary residence. Mother cites, *Thiele*, 425 N.W.2d at 582, to support her assertion that father forfeited his right to secure the child's residence by failing to argue that his home should be designated.<sup>3</sup> However, mother does not cite any legal authority that would require a court to grant one party's residence-designation request, where the parties share joint legal and physical custody, and where the other party failed to object or request the designation of his own home. An assignment of error based

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<sup>2</sup> Father argues that this court should not address the residence-designation issue because mother failed to raise it before the district court. Contrary to father's assertion, the district court's March 8, 2016 order explicitly states that mother proposed that her home be designated as J.N.S.'s primary residence. Because mother properly raised the issue before the district court, we will consider it on appeal.

<sup>3</sup> “[F]orfeiture is the failure to make the timely assertion of a right, [while] waiver is the intentional relinquishment or abandonment of a known right.” *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (quotation omitted).

on mere assertion and not supported by any argument or authorities in an appellant's brief is forfeited and will not be considered on appeal unless prejudicial error is obvious. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971). Because mother has not provided any legal authority that would support her argument that she is entitled to have her home designated as J.N.S.'s primary residence, and because no prejudicial error is obvious to us, her argument is forfeited. We deny mother's request to remand the residence-designation issue to the district court.

#### **IV. Parenting-time Schedule**

Mother asserts that the district court abused its discretion by ordering a stepped-up parenting-time schedule, ultimately concluding in a 5-2-2-5 parenting-time schedule. "The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion." *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). A district court abuses its discretion if its findings are unsupported by the evidence or if it misapplies the law. *Id.* This court will uphold the findings of fact underlying a parenting-time decision unless they are clearly erroneous. *Id.*

The best interests of the child are central to determining parenting-time issues. Minn. Stat. § 518.17, subd. 1(a); *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984). When evaluating whether a parenting-time schedule is in the best interests of the child, a court must consider the same best-interest factors that are used in custody determinations, make detailed findings with respect to each factor, and explain how each factor led to its conclusions. Minn. Stat. § 518.17, subd. 1(a)-(b). No

single factor is dispositive, and the court must consider that the factors may be interrelated. *Id.*, subd. 1(b)(1).

Mother asserts that a 5-2-2-5 parenting-time schedule is developmentally inappropriate for J.N.S. and argues that the district court failed to make adequate findings to support its conclusion that the ordered schedule was in the child's best interests. While before the district court, mother offered evidence to show that a 5-2-2-5 parenting-time schedule is developmentally inappropriate. However, other evidence in the record supports the district's court's finding that a stepped-up 5-2-2-5 parenting-time schedule is appropriate. The evaluator recommended a stepped-up parenting-time schedule that would ultimately result in a 5-2-2-5 schedule, and explained that each step would be suitable to J.N.S.'s developmental needs. Father testified that, as of the time of the custody trial, the parties followed a parenting-time schedule comparable to the second phase of the evaluator's recommended schedule and that J.N.S. ate well, slept well, and was generally doing well on this schedule. Based upon this evidence, we cannot say that the district court abused its discretion by determining that the ordered schedule is developmentally appropriate.

Mother additionally argues that the ordered parenting-time schedule is inappropriate given the finding of domestic abuse, the parties' inability to co-parent, and the district court's misplaced reliance on the custody evaluator. As previously explained, the district court: (1) properly considered the nature and context of the domestic abuse and the implications it had for parenting and the child's safety, well-being, and developmental

needs; (2) did not abuse its discretion by concluding that co-parenting was possible despite the high level of conflict between the parties; and (3) did not abuse its discretion by relying on the custody evaluator.

The district court properly applied the law and considered the statutory factors enumerated in Minn. Stat. § 518.17, subd. 1(a). Because the district court's findings are supported by the evidence, the district court did not abuse its discretion by ordering a stepped-up 5-2-2-5 parenting-time schedule.

## **V. New Trial**

Mother argues that the district court erred by denying her motion for a new trial. An appellate court reviews a district court's new-trial decision for an abuse of discretion. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010). We generally defer to the district court's broad discretion in deciding whether to grant a new trial and will uphold the district court's findings of fact unless they are clearly erroneous. *Vangsness*, 607 N.W.2d at 472. When determining whether findings are clearly erroneous, we view the record in the light most favorable to the district court's findings. *Id.*

Mother first argues that the district court's findings were tainted by the custody evaluator's inadequate report. Although mother presented evidence that called into question the custody evaluation's reliability and validity, other evidence in the record supports a finding that the evaluation was sound. Because evidence supports the validity of the evaluation, the district court did not err by considering it.

Mother also argues that the district court’s reliance on father’s psychological evaluation was flawed because the evaluation failed to include certain screenings and assessments. After reviewing the record, we cannot say that the district court erred by considering the psychological evaluation. Because the district court did not err by relying on the custody evaluation or father’s psychological evaluation, we conclude that the district court did not abuse its discretion by denying mother’s motion for a new trial.

## **VI. Attorney Fees**

Mother asserts that the district court erred by denying her motion for need-based and conduct-based attorney fees pursuant to Minn. Stat. § 518.14 (2016). We review a district court’s decision regarding attorney fees under Minn. Stat. § 518.14, subd. 1, for an abuse of discretion. *Haefele v. Haefele*, 621 N.W.2d 758, 767 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001).

### **A. *Need-Based Attorney Fees***

In a proceeding under chapter 518 or chapter 518A, a court “shall”<sup>4</sup> award attorney fees, costs, and disbursements to enable a party to carry on the proceeding if it finds:

- (1) that the fees are necessary for the good faith assertion of the party’s rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
- (2) that the party from whom the fees, costs, and disbursements are sought has the means to pay them; and
- (3) that the party to whom the fees, costs, and disbursements are awarded does not have the means to pay them.

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<sup>4</sup> In *Geske v. Marcolina*, this court recognized a possible conflict between the language of Minn. Stat. § 518.14, subd. 1, and Minnesota caselaw on the standard of review. 624 N.W.2d 813, 816 n.1 (Minn. App. 2001). Because the parties have not briefed this issue, we do not address how to reconcile these potentially conflicting standards.

Minn. Stat. § 518.14, subd. 1. The party seeking need-based attorney fees has the burden of establishing the elements that would entitle her to fees under the statute. *See In re Marriage of Sammons*, 642 N.W.2d 450, 458 (Minn. App. 2002) (refusing to award need-based attorney fees when the party failed to establish the existence of the elements required by section 518.14). A court must make appropriate findings where a party requests need-based attorney fees. *Kronick v. Kronick*, 482 N.W.2d 533, 536 (Minn. App. 1992).

In May 2015, mother moved for need-based attorney fees<sup>5</sup> and filed and served an affidavit of attorney fees on August 7, 2015. In an order dated October 21, 2015, the district court denied mother's motion for need-based attorney fees. The district court provided detailed findings with respect to each element under Minn. Stat. § 518.14, subd. 1, and concluded that mother had not established any of the elements required for an award of need-based fees. First, the district court determined that a fee award was not necessary for the good faith assertion of mother's rights because it found that mother behaved contentiously, had been unable to reach reasonable compromises, disregarded evaluators' recommendations, and chose to appoint numerous attorneys during the course of the proceedings. Next, the district court found that father struggled to pay his own attorney fees and concluded that father was unable to pay mother's fees. Finally, the district court

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<sup>5</sup> Mother moved for fees pursuant to Minn. Stat. § 257.69 (2016), *Pitkin v. Gross*, 385 N.W.2d 367, 371 (Minn. App. 1986), and Minn. R. Gen. Pract. 119. In *Pitkin*, this court held that a district court may award attorney fees under Minn. Stat. § 518.14 to a party who retains private counsel in a chapter 257 parentage action where issues are determined in accordance with chapter 518. 385 N.W.2d at 367, 371.

determined that mother did not establish her inability to pay her attorney fees because she failed to show the actual balances she owed to two law firms, admitted that her income varies due to the nature of her employment, and did not provide documents concerning her current expenses, savings, or the value of her claimed assets.<sup>6</sup>

In February 2016, the district court granted mother's request to allow a motion to reconsider under Minn. R. Gen. Pract. 115.11, and mother filed her motion, which requested that the district court reconsider its denial of need-based attorney fees. In an order dated May 27, 2016, the district court denied mother's motion to reconsider, explaining that it would not consider evidence that was available to mother on August 7, 2015 or that concerned information beyond the relevant time period. The district court concluded that even if it had found that mother's fees were necessary for the good-faith assertion of her rights, mother failed to establish father's ability to pay and her own inability to pay. The district court next considered mother's request for subsequent fees incurred in bringing the case to trial. The district court denied mother's request for subsequent fees, concluding that the high amount of fees was not *necessary* for the assertion of mother's rights and that father was unable to pay the fees.

The district court denied both mother's original and subsequent requests for need-based fees because it concluded that father was unable to pay her fees. Mother argues that the district court's conclusion is erroneous. First, she asserts that the district court should

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<sup>6</sup> The district court also explained that it would not award fees for the firm that mother had paid in full because such payment showed mother's ability to pay.

have included income from father's rental properties when calculating his income. The district court declined to include father's rental income in its calculation because it was not provided with sufficient information about this type of income. Between 2012 and 2014, father's rental income varied and was at times reported as a loss. Given this variable rental income and the limited information provided about the rental properties, we cannot say that the district court abused its discretion by declining to include father's rental properties when calculating his income. Mother additionally argues that the district court erred by concluding that father was unable to pay her fees because father's budget included anticipated costs and unnecessary vacation, dining, and cabin expenses. The district court found that father's monthly income only slightly exceeded his expenses and that he struggled to pay his own attorney fees. Because evidence in the record supports these findings, the district court did not err in concluding that father was unable to pay mother's attorney fees. Because mother failed to establish one of the statutory elements of Minn. Stat. § 518.14, subd. 1, the district court did not abuse its discretion when it denied mother's requests for need-based fees.

#### **B. *Conduct-Based Attorney Fees***

Mother argues that the district court erred by denying her request for conduct-based attorney fees. She asserts that the court clearly erred by failing to find that her conduct was reasonable and claims that she is entitled to conduct-based fees because father repeatedly cited to settlement discussions, was not entirely honest throughout the proceedings, and

caused her to incur unnecessary attorney fees by refusing to communicate directly with her regarding parenting issues.

A court may, “in its discretion, [award] additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding.” Minn. Stat. § 518.14, subd. 1. The district court found that “both parties contributed to the length and expense of these proceedings” and denied both parties’ requests for conduct-based attorney fees. In *Kahn v. Tronnier*, we reviewed a district court’s decision to deny conduct-based attorney fees where it found that both parties contributed to the unnecessary length of the proceedings. 547 N.W.2d 425, 431 n.5 (Minn. App. 1996), *review denied* (Minn. July 10, 1996). The party requesting fees neither disputed the court’s finding that she prolonged the proceedings, nor cited cases to support the award of conduct-based fees to a party who contributed to the proceedings’ length. *Id.* As a result, we concluded that the district court did not abuse its discretion by denying her request for conduct-based fees.

*Id.*

Here, the record supports the district court’s finding that mother contributed to the length and expense of the proceedings. Because mother does not cite any law that supports the award of conduct-based attorney fees to a party who contributed to the proceedings’ length and expense, the district court did not err by denying her request for conduct-based fees.

**Affirmed.**