STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1672

In re the Marriage of:

Terrence Michael Zelenka, petitioner,
Respondent,

vs.

Annie Valeria Anderson, f/k/a Anne Zelenka,
Appellant.

Filed July 15, 2019
Affirmed
Rodenberg, Judge

Dakota County District Court
File No. 19AV-FA-14-1274

Ryan J. Bies, Sharon K. Hills, Dougherty, Molenda, Solfest, Hills & Bauer P.A., Apple Valley, Minnesota (for respondent)

Annie Valeria Anderson, St. Charles, Minnesota (pro se appellant)

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

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

RODENBERG, Judge

In this appeal from the district court's denial of her parenting-time-assistance motion, appellant-mother Annie Anderson argues that the district court made findings of fact that are not supported by the record, should have granted her motion for additional

parenting time under the parties' earlier schedule, and should have awarded her at least 25% parenting time. We affirm.

FACTS

Appellant and respondent-father Terrence Zelenka are the parents of K.Z., S.Z., and M.Z.[1] A stipulated judgment and decree dissolved the marriage of appellant and respondent in 2009. The decree provided that the parties would have joint legal custody of the children. Respondent was awarded sole physical custody of the children, subject to appellant's supervised visitation. Appellant's supervised visitation was subject to conditions, including that appellant maintain "absolute sobriety" and complete chemical-dependency treatment as recommended by appellant's counselors. In April 2014, pursuant to a stipulated order, the district court expanded appellant's parenting time to include unsupervised parenting time, subject to conditions including appellant's absolute sobriety. If appellant failed to abide by the conditions, appellant's parenting time would immediately revert to supervised visitation until otherwise ordered by the court. In the summer of 2014, appellant's parenting time reverted to supervised visitation at the Children's Safety Center due to appellant's alcohol and drug use.

In May 2018, appellant moved the district court for parenting-time assistance and sought to revert to the April 2014 parenting schedule. By affidavit in support of her motion, appellant asserted that she has been sober since December 2014.

[1] This appeal concerns only the parenting time of M.Z. The other two children are legally emancipated.

The district court denied appellant's motion. It found that appellant had provided no independent support for her claim of sobriety since December 2014. Appellant provided a Mayo Clinic medical report dated April 4, 2018, indicating that her chemical abuse is in remission. But the district court explained that the report appears to be based on self-reporting, it states that appellant felt the need "to reduce alcohol," and a need to "reduce alcohol" does not support the claim of continuous sobriety since December 2014. The district court analyzed all of the statutory best-interests factors under Minn. Stat. § 518.17, subd. 1(a) (2018), and concluded that it is in the best interests of the child for the parenting-time schedule to remain unchanged.

This appeal followed.

D E C I S I O N

As an initial matter, we note that appellant's argument on appeal does not provide adequate citation to legal authority. Generally, an assignment of error based on mere assertion, unsupported by argument or authority, is waived unless prejudicial error is obvious on mere inspection. *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015); *see Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations unsupported by legal analysis or citation). Reviewing courts are not required to address inadequately briefed arguments, even for parties acting pro se. *Carpenter v. Woodvale, Inc.*, 400 N.W.2d 727, 729 (Minn. 1987) (explaining that, while an appellant acting pro se is "usually accorded some leeway in attempting to comply with court rules, he [or she] is still not relieved of the burden of, at least, adequately communicating to the court what it is he wants accomplished and by whom"). But even

overlooking the inadequacy of appellant's briefing, her arguments do not succeed on the merits in any event.

Appellant posits that the applicable standard of review for the district court's denial of her parenting-time request is de novo. This is incorrect. A district court has broad discretion in deciding parenting-time questions and will not be reversed absent an abuse of that discretion. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017). "Reversible abuses of discretion include misapplying the law or relying on findings of fact that are not supported by the record." *Id.* (quotation omitted). On appeal, findings of fact are accepted by a reviewing court unless the findings are clearly erroneous. *Suleski v. Rupe*, 855 N.W.2d 330, 334 (Minn. App. 2014).

Next, in arguing that the district court abused its discretion in denying her motion, appellant relies on information outside of the record on appeal. The record on appeal consists of "[t]he documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. "The court will strike documents included in a party's brief that are not part of the appellate record." *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993); *see Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977) (stating that "[i]t is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered"). Appellant included several documents in the addendum to her brief which

were neither filed with the district court nor received as exhibits.[2] Regardless of whatever persuasive value these documents might have, we review the record as it exists; we generally do not consider documents that are not included in the record and disregard references in the briefing to documents not in the record. *See AFSCME, Council No. 14 v. County of Scott*, 530 N.W.2d 218, 223 (Minn. App. 1995) (stating that court may selectively disregard improper references to evidence outside the record without striking the entire brief), *review denied* (Minn. May 16, June 14, 1995).

Appellant argues that the district court's finding that appellant's parenting time reverted to supervised visits in 2014 is clearly erroneous because appellant's supervised time reverted to supervised in 2015. Appellant's affidavit admits the she "lost parenting time" in 2014 because of her relapse and, pursuant to the decree, appellant's parenting time would immediately revert to supervised visitation upon any failure to maintain complete sobriety. Respondent's affidavit claims that appellant's current parenting time has been supervised since early 2015, but also claims that appellant began using alcohol in summer of 2014, which triggered the immediate suspension of parenting time and required supervised visits. Despite the lack of precision concerning dates, the district court's findings are not clearly erroneous. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000) ("That the record might support findings other than those made by the [district] court does not show that the court's findings are defective.").

[2] Appellant appears to have reviewed at least one of those documents with the district court judge during the proceedings below, and she acknowledges that she "mistakenly thought that this information would be part of the record."

Appellant also challenges several of the district court's best-interests findings. This argument fails for two reasons—the district court's findings are supported by the record, and the district court's ultimate best-interests determination was not a clear abuse of its discretion.

It is well established that the ultimate question in disputes concerning parenting time is what is in the best interests of the child. *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984). "[T]here is scant if any room for this court to question a district court's balancing of best-interests considerations." *In re Welfare of C.F.N.*, 923 N.W.2d 325, 334 (Minn. App. 2018) (quotation omitted), *review denied* (Minn. Mar. 19, 2019). We address the district court findings that appellant assigns as error.

"History and nature of each parent's participation in providing care for the child."

The district court found that each parent has a relationship with the child, respondent is the primary caregiver, the child's visits with appellant have been mostly supervised, and appellant was using intoxicants the last time the child was in her care. Appellant argues that she was not using intoxicants the last time the child was in her care. However, the record supports the district court's finding on this factor because there is record evidence that appellant was using alcohol the last time the child was under the unsupervised care of appellant. That there is contrary evidence that might have supported different findings is no indication that the district court's finding is clearly erroneous. *Vangsness*, 607 N.W.2d at 474.

"The effect on the child's well-being and development of changes to home, school, and community."

The district court was concerned that disrupting the child's current schedule and reverting to the April 2014 parenting schedule would have a negative effect on the child. Appellant argues that there is no endangerment finding based on the child's age. The record supports the district court's finding that disrupting the child's schedule could be detrimental.

"The benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent."

The district court found that the child is accustomed to the current parenting schedule, living with respondent and visiting appellant once per week. It further found that, without verification of appellant's sobriety and/or treatment, the degree of potential detriment to the child of returning to unsupervised parenting time with appellant is "infinite." Appellant argues that she has provided documentation of successful chemical-dependency treatment. However, this argument rests primarily on information that is not in the record. Appellant did provide an April 2018 Mayo Clinic document in support of this claim, but the district court found that document to be based upon self-reporting and included appellant's statement of the need to "reduce alcohol," indicating appellant had not maintained complete sobriety. Appellant also argues that she is only able to see the child every other week, contrary to the district court's finding of once a week. This assertion is also premised on a document that is not in the record on appeal. The district court's finding that appellant visits the child once a week is not clearly erroneous.

Ultimately, the district court's determination that retaining the current parenting time is in the child's best interests was within its discretion.

Lastly, appellant raises in her statement of issues the claim that the district court abused its discretion because the parenting time schedule affords her less than 25% parenting time and ignores the 25%-parenting-time presumption under Minn. Stat. § 518.175, subd. 1(e) (2018). The statute provides a rebuttable presumption that a parent is entitled to receive at least 25% of the parenting time for the child. *Hagen v. Schirmers*, 783 N.W.2d 212, 217 (Minn. App. 2010). "A court determining a noncustodial parent's parenting time must address application of the statutory presumption for 25% parenting time when the statutory presumption is raised by a party and the court awards less than the presumed amount." *Id.* at 214.

There are two problems with appellant's argument. First, appellant did not raise the statutory presumption to the district court. Second, although noted in appellant's statement of issues, appellant did not include this argument in her brief to this court. The argument is therefore waived. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (arguments not briefed are waived in an appeal in which the appellant "alludes to" an issue but "fails to address them in the argument portion of [her] brief").

To be sure, appellant's situation is a difficult one. Her relapse in 2014 continues to impair the frequency and nature of her time with her child. But the district court is best situated to ascertain and protect the child's best interests, and we defer to the district court's discretion. We see no abuse of that discretion here.

Affirmed.