STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0164

In re the Matter of: Awal Ismael Hussein,
Appellant,

vs.

Lensa Mohamed Musa,
Respondent.

Filed November 12, 2019
Affirmed in part and remanded
Reilly, Judge

Hennepin County District Court
File No. 27-FA-16-8245

Robert A. Manson, Robert A. Manson, P.A., White Bear Lake, Minnesota (for appellant)

Shellie Lundgren, Minneapolis, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

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

REILLY, Judge

In this parenting dispute, appellant-father argues that the record does not support awarding respondent-mother sole legal and physical custody of the minor child, and that the district court erred by declining to award parenting time to father. We affirm the district court's custody determination. However, we remand the district court's parenting-time

determination with instructions to make factual findings regarding father's request for parenting time.

FACTS

Appellant-father Awal Ismael Hussein and respondent-mother Lensa Mohamed Musa are the parents of a minor child born in 2010 in Seattle, Washington. The couple describe their relationship as a cultural marriage, although no legal marriage occurred. In 2008, mother gave birth to the couple's older child, who is not part of this dispute. Mother gave birth to their second child in 2010. In 2012, mother and the younger child moved to Minnesota, while father and the older child remained in Washington.

In December 2016, father filed a summons and petition to establish custody and parenting time with regard to the younger child. In December 2017, the district court issued an order for custody and a parenting-time evaluation. In May 2018, Hennepin County Family Court Services (the county) submitted a custody and parenting-time evaluation report to the district court. The report noted that father's and mother's accounts of their relationship history differed greatly. Mother described the relationship as verbally and physically abusive, while father described the relationship as "good" and denied any allegations of abuse. The report indicated that "there is little outside data available to lend credence" to either account. The report noted that "[t]he parties have lived apart for six years with each [parent] hav[ing] complete responsibility for the day-to-day care and legal decision-making of the child in their care, and with little to no contact with the other child." The county noted that "[n]o face-to-face parenting time occurred during the course of [the]

evaluation," and that it was not possible to directly assess father's home environment in Washington.

The district court conducted a trial in August 2018, and issued an order in October 2018, awarding mother sole legal and physical custody of the child. The district court granted father parenting time via telephone and video-chat once per week, and permitted mother to record those conversations. Father filed a motion for amended findings and a new trial, which the district court denied. This appeal follows.

D E C I S I O N

I. We Affirm the District Court's Custody Determination.

Father challenges the district court order awarding mother sole legal and physical custody of the child. Our review of the district court's custody decision is "limited to determining whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Zander v. Zander*, 720 N.W.2d 360, 365-66 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). We will sustain a district court's findings of fact unless they are clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We defer to a district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

The best interests of the child are central to determining custody. Minn. Stat. § 518.17, subd. 1(a) (2018). The statute articulates twelve factors to consider in evaluating the best interests of the child, including:

> (1) a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development;

(2) any special medical, mental health, or educational needs that the child may have that may require special parenting arrangements or access to recommended services;

(3) the reasonable preference of the child, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference;

(4) whether domestic abuse . . . has occurred in the parents' or either parent's household or relationship; the nature and context of the domestic abuse; and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs;

(5) any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs;

(6) the history and nature of each parent's participation in providing care for the child;

(7) the willingness and ability of each parent to provide ongoing care for the child; to meet the child's ongoing developmental, emotional, spiritual, and cultural needs; and to maintain consistency and follow through with parenting time;

(8) the effect on the child's well-being and development of changes to home, school, and community;

(9) the effect of the proposed arrangements on the ongoing relationships between the child and each parent, siblings, and other significant persons in the child's life;

(10) 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;

(11) except in cases in which domestic abuse . . . has occurred, the disposition of each parent to support the child's relationship with the other parent and to encourage and permit frequent and continuing contact between the child and the other parent; and

(12) the willingness and ability of parents to cooperate in the rearing of their child; to maximize sharing information and minimize exposure of the child to parental conflict; and to

> utilize methods for resolving disputes regarding any major decision concerning the life of the child.

Id., subd. 1(a)(1)-(12).

The district court must make "detailed" factual findings on each factor and explain how each factor led to the district court's conclusions, and to the ultimate determination of custody and parenting time. *Id*., subd. 1(b)(1) (2018). The statute prohibits the district court from using "one factor to the exclusion of all others." *Id*. The statute also requires the district court to use a rebuttable presumption that, upon the request of either or both parties, joint legal custody is in the best interests of the child. *Id*., subd. 1(b)(9) (2018). However, "[t]here is no presumption for or against joint physical custody," absent evidence of domestic abuse. *Id*., subds. 1(b)(7), (9) (2018). The district court "shall consider" both parents as having the capacity to develop and sustain nurturing relationships with the child. *Id*., subd. 1(b)(3) (2018). The district court must consider "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." *Id*., subd. 1(a)(10).

Here, the district court carefully considered each statutory factor and made detailed findings addressing each factor.

The district court found that the first factor weighed against father's request. The district court found that father exhibited "a general disregard for the physical and emotional needs" of the child, and failed to appreciate that his proposal to move the child from Minnesota to Washington would harm her physical and emotional needs. The district court credited the county's conclusion that the child was "thriving in her current environment

with Mother," and found that the child was succeeding in school and in her religious studies.

The district court found that the child did not have special needs requiring special arrangements, and considered this factor to be neutral.

With respect to the third factor, the district court found that the child was not of sufficient ability, age, or maturity to express an independent and reliable preference.

Under the fourth factor, the district court noted that mother alleged that father abused her, while father denied her allegations. Neither party provided evidence to support or contradict their accounts. Given the contradictory testimony and the absence of corroborating evidence, the district court considered this factor to be neutral.

The district court found that neither party presented concerns regarding any physical, mental, or chemical health issues of the other parent that could affect the child's safety or developmental needs.

Under the sixth factor, the district court found that father "has not been involved in providing care for [the child] since she was approximately 2 years old." The district court noted that there was "no dispute that Mother has been the primary caregiver for the majority of [the child]'s life." Accordingly, the district court determined that "Father's almost complete absence from the child's life and Mother's sole role as caregiver makes this factor weigh heavily in favor of granting Mother sole legal and physical custody."

With respect to the seventh factor, the district court found that father expressed a desire for the child to be successful in school and in her faith-based studies. But the district court noted that father admitted to "not possessing the personal knowledge of [the child's]

day-to-day activities as a result of not being involved in her life since she was 2." By contrast, the district court found that mother "provides consistent religious activities" for the child and raises her in a supportive religious environment. The district court determined that this factor weighed against father's custody request.

The district court also found that the eighth factor, "the effect on the child's well-being and development of changes to home, school, and community," weighed "strongly in favor of denying Father's request." Minn. Stat. § 518.17, subd. 1(a)(8). Father's proposal to move the child from Minnesota to Washington would "sever" her relationships with her mother, stepfather, and half-brother. The district court noted that the child has not lived in Washington since she was two years old, and a move would "greatly impact her well-being."

For the ninth factor, the district court considered "the effect of the proposed arrangements on the ongoing relationships between the child and each parent, siblings, and other significant persons in the child's life." *Id.*, subd. 1(a)(9). The district court found that moving the child to Washington would allow her to build a relationship with her older sibling, but would sever the child's relationship with her mother. However, keeping the child in Minnesota would preserve the child's relationship with her mother, stepfather, and half-brother. The district court found that the parents' proposals "have the potential to sever any relationship with at least one important family member," and determined that the factor was neutral.

The district court found that the tenth, eleventh, and twelfth factors were neutral because "[n]either parent supports a relationship between [the child] and the other parent."

The district court found that while parenting time with either parent would be beneficial for the child, neither parent's custody proposal would allow for such contact. Moreover, the district court found that "[t]he parents are not willing nor are they able to cooperate in the rearing of [the child]" and were "unlikely" to utilize constructive methods for resolving any disputes involving the child.

Based on its analysis of the statutory factors, the district court found that it was in the child's best interests to award sole physical and legal custody to mother. The district court concluded that:

> While the Court is required to consider all factors . . . , only a few factors apply and all of them weigh in favor of denying Father's requests. The strongest and clearest factors in favor of denying [Father's request for custody] are those relating to [the child] being able to maintain the consistency and life she has grown up in prior to Father's petition. In effect, Father's requests would move [the child] from everything she has known in Minnesota only to transplant her across the country and into a living arrangement with family members she has had little interaction with for 6 years. Father fails to recognize the impact this would have on [the child] and appears to be motivated only by his religious concerns.

The district court properly applied the law and considered the statutory findings enumerated in Minn. Stat. § 518.17, subd. 1(a) in reaching its custody determination. The district court made detailed findings supporting each statutory factor, and the district court's findings are supported by the record evidence. While the record may have supported alternate findings—as father suggests—the district court's findings and its assessment that an award of sole custody to the mother is in the child's best interests is not clearly erroneous. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000)

(recognizing that the law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations"). We therefore conclude that the district court did not abuse its discretion by granting mother sole legal and physical custody of the child.

II. We Remand the District Court's Parenting-Time Determination.

Father challenges the district court's parenting-time determination. "[A] district court has broad discretion to decide parenting-time questions" and this court "will not reverse a parenting-time decision unless the district court abused its discretion by misapplying the law or by relying on findings of fact that are not supported by the record." *Suleski v. Rupe*, 855 N.W.2d 330, 334 (Minn. App. 2014).

"In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive a minimum of 25 percent of the parenting time for the child." Minn. Stat. § 518.175, subd. 1(g) (2018). The district court must generally demonstrate some awareness of this parenting-time presumption in its findings if properly raised by a party. *Dahl v. Dahl*, 765 N.W.2d 118, 124 (Minn. App. 2009); *see also Hagen v. Schirmers*, 783 N.W.2d 212, 217 (Minn. App. 2010) (noting that court must "demonstrate an awareness and application of the 25% presumption when the issue is appropriately raised and the court awards less than 25% parenting time"). When the presumption is raised, the district court must identify both its decision and the reasons for that decision. *Hagen*, 783 N.W.2d at 217.

Here, father's petition sought an award of custody and reasonable parenting time. The district court ordered a custody and parenting-time evaluation, and the county

submitted an evaluation report to the district court addressing these issues. During the course of litigation, the district court came to understand that the parenting-time request was no longer an issue because father was exclusively interested in sole legal and physical custody of the child. After speaking with both parents, the county evaluator stated in the report that, "I spoke with each parent individually about the benefits of [the child] having parenting time with both parents. Each parent was adamant this would not occur. Neither parent wavered on allowing the other parent time with the child." The county evaluator also noted that "as [the evaluator] was unable to observe the father and child together, it is not possible to make recommendations as to parenting time."

In its order, the district court found that while parenting time with either parent would be beneficial for the child, neither parent's custody proposal would allow for such contact. For this reason, the district court did not fully address father's parenting-time request. Nevertheless, the district court granted father parenting time "via telephone and video-chat once per week." We agree with father's counsel that video-chat does not constitute a valid form of parenting time. *See, e.g.*, *Hagen* 783 N.W.2d at 219 (acknowledging the emergence of video-call programs such as Skype to enhance long-distance parent-child communication but noting that "electronic communication is not parenting time and does not count towards the 25% presumption"). Accordingly, we remand to the district court to make findings of fact regarding father's request for parenting time. On remand, the district court, in its discretion, may choose whether to reopen the record or proceed based on the record already before the district court.

Affirmed in part and remanded.