STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1730

In re the Paternity of: B. L. T., T. L. M.,
Appellant,

vs.

C. G. B. T.,
Respondent.

Filed August 17, 2020
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Scott County District Court
File No. 70-FA-18-11239

Laurie Mack-Wagner, Elizabeth E. Due, Mack & Santana Law Offices, P.C., Minneapolis, Minnesota (for appellant)

Kay Nord-Hunt, Michelle K. Kuhl, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

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

CONNOLLY, Judge

Appellant, the mother of the parties' child, argues that the district court abused its discretion in setting the parenting-time schedule; erred in awarding joint custody after

finding that (1) respondent, the father, had committed domestic abuse without addressing whether the statutory presumption against joint custody in cases where domestic abuse has occurred had been rebutted and (2) none of the best-interest factors supported respondent having custody; and erred in calculating child support. Because we see no abuse of discretion in the parenting-time schedule, we affirm it. We reverse the custody determination and remand for an award of sole legal and physical custody to appellant because the statutory presumption against joint custody in cases where domestic abuse has occurred was not rebutted and the district court's findings support sole legal and sole physical custody with appellant; and we reverse and remand the child-support awards for correction because the parties agree that there are clerical errors or miscalculations in the awards.

FACTS

Appellant T.L.M. and respondent C.G.B.T. are respectively the mother and father of a daughter, B.L.T., who was born in October 2015. Appellant has been her primary caregiver.

In 2017, during a verbal dispute, respondent went to get a handgun and brought it to the room where appellant was with B.L.T. This incident met the statutory definition of domestic abuse.[1] The parties separated in January 2018, and their relationship since then has been generally acrimonious. The initial schedule of approximately equal parenting

[1] *See* Minn. Stat. § 518B.01 (2016) (defining domestic abuse).

time did not work well; appellant then limited respondent's parenting time to alternate weekends.

Appellant brought this action in June 2018 to establish custody and parenting time. The first temporary order set joint legal and physical custody and an equal 2-2-3 parenting-time schedule. Appellant then got a new job that required her to drop B.L.T. off by 8:00 a.m. and pick her up at 6:00 p.m.; she found a daycare that would accommodate these times, but the daycare does not permit children to remain longer than ten hours. When respondent refused to use or to pay for the daycare, the district court issued a second order requiring exchanges to take place at daycare and modifying respondent's child-support obligation.

Following trial in May 2019, the district court (1) issued a parenting-time schedule that had B.L.T. spend nine of every 14 nights with appellant and five with respondent; (2) found that domestic abuse had occurred, but did not address the statutory presumption against joint custody or indicate that it had been rebutted; (3) made findings supported by the record that seven of the 12 best-interest factors relevant to a custody determination favored appellant, two did not apply, three were neutral, and none favored respondent; (4) nevertheless awarded the parties joint legal and joint physical custody; and (5) set respondent's monthly child-support payment and a payment of back child support. Appellant challenges all of these determinations.

D E C I S I O N

1. Parenting Time

A district court has broad discretion in deciding parenting-time questions and will not be reversed absent an abuse of discretion. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017).

Respondent suggested the 14-day 2-2-3 schedule the parties had previously used. It provided seven overnights with each parent; six transfers, of which four were on weekdays and two on weekends; and one day each weekend with each parent.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
App	App	Rsp	Rsp	App	App	App
Rsp	Rsp	App	App	Rsp	Rsp	Rsp

Appellant proposed a 14-day schedule in which respondent had five overnights, two on Wednesdays, when he picked B.L.T. up at daycare and dropped her off Thursday mornings, and three on alternate weekends, when he picked her up Friday afternoon and dropped her off Monday morning. This schedule included six exchanges, all done on weekdays at daycare, so the parties could avoid meeting each other.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
App	App	App	App/Rsp[2]	Rsp/App	App/Rsp	Rsp
Rsp	Rsp/App	App	App/Rsp	Rsp/App	App	App

[2] The first parent listed drops B.L.T. off at daycare, and the second picks her up.

The district court adopted a 14-day schedule very different from respondent's but fairly similar to appellant's: it also gave respondent five nights with B.L.T., including Friday afternoon to Monday morning on alternate weekends. It involved only four exchanges, three on weekdays and one on alternate weekends, when appellant picks B.L.T. up at respondent's home at noon on Saturdays.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
App	App	App	App	App	App/Rsp	Rsp
Rsp	Rsp/App	App	App	App/Rsp	Rsp	Rsp/App

Respondent does not challenge the district court's schedule, but appellant has four objections to it.

First, she argues that it was an abuse of discretion to give respondent every Friday night and Saturday morning as well as alternate full weekends, because appellant's weekend time is limited to part of alternate Saturdays and alternate Sundays. The district court agreed that it was "appropriate and in the best interests of [B.L.T.] for both parents to have some weekend parenting time with [her]," and each parent has some. Appellant has not shown that it was an abuse of discretion to grant respondent more weekend time when appellant has almost two-thirds (64%) of the total time. When appellant picks B.L.T. up at noon on alternate Saturdays, B.L.T. remains with her until 8:00 a.m. the following Friday, or six nights. When respondent picks B.L.T. up at 3:00 p.m. on Friday for his weekends, she remains with him only until Monday morning, or three nights.

Second, the district court provided that if appellant "wishes to make full weekend plans with [B.L.T., she] will need to work together [with respondent] to come to an agreement" and the parties "may agree in writing to a parenting time schedule change, whether one-time or recurring, [which] neither party may unilaterally change." Appellant argues that she is required to "negotiate with her abuser" when she wants additional weekend time. But the weekend arrangements can be made in writing, and the parties are directed to keep their written communication courteous and businesslike. Respondent notes that he did not propose the schedule of having B.L.T. every Friday night and says "[t]here is no reason to assume he would be unwilling to negotiate a different schedule with [appellant.]"

Third, appellant argues that the district court's schedule compels her to see respondent once every two weeks for the Saturday exchange. But the district court's order explicitly permits either parent to "designate a trusted adult to facilitate a parenting time exchange," and appellant has previously asked her mother or her sister to perform this function. Therefore, appellant can avoid seeing respondent if she feels that is necessary.

Fourth, appellant argues that she cannot take B.L.T. on a seven-day vacation, even though each parent is given two such vacations per year, because vacation may not impinge on the other parent's weekend time, and respondent has B.L.T. every Friday night. But the district court's order provides that "[v]acation time takes priority over the regular parenting time schedule," so B.L.T. would not need to cut short a vacation with appellant to resume her scheduled parenting time with respondent. If appellant began a vacation on the Monday

after respondent's weekend, she could actually have B.L.T. for 11 days: after the seven-day vacation, appellant's parenting time would resume for the next four days.

The district court's schedule also avoids another problem resulting from the daycare requirement that a child stay no longer than ten hours. Appellant's job makes it impossible for her to pick B.L.T. up before 6:00 p.m.; respondent's job makes it difficult for him to drop her off after 8:00 a.m. Problems have arisen because respondent dropped her before 8:00 a.m. and appellant could not pick her up until 6:00 p.m. The district court's schedule has respondent dropping B.L.T. off and appellant picking her up only once every two weeks, while appellant's schedule had this occur three times every two weeks. The district court's efforts to devise a parenting-time schedule that accommodates both parents' work schedules and the daycare's ten-hour maximum were not an abuse of discretion.

2. Statutory Presumption against Joint Legal and Joint Physical Custody

Interpretation of the rebuttable statutory presumption against joint legal and joint physical custody in cases where domestic abuse has occurred "requires an interpretation of law[; therefore,] our review is de novo." *Thornton v. Bosquez*, 933 N.W.2d 781, 790 (Minn. 2019).

> The court shall use a rebuttable presumption that joint legal custody or joint 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. In determining whether the presumption is rebutted, the court shall consider 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.

Minn. Stat. § 518.17, subd. 1(b)(9) (2018). "'Domestic abuse' means the following, if committed against a family or household member by a family or household member: . . . (2) the infliction of fear of imminent physical harm, bodily injury, or assault . . . ." Minn. Stat. § 518B.01, subd. 2(a) (2018).

The district court found that:

> domestic abuse, as defined in [Minn. Stat. § 518B.01] has occurred in the parents' relationship. [Respondent] admitted that during a verbal argument with [appellant, respondent] retrieved a handgun and returned with it to an area of the house where [appellant] and [B.L.T.] were present. [Respondent] claimed self-defense because he believed [appellant] was calling in family members to assist her.

Although the district court explicitly found that statutory domestic abuse had occurred, it awarded joint legal and joint physical custody without addressing whether the statutory presumption created against joint custody by domestic abuse had been rebutted.

Minn. Stat. § 518.17, subd. 1(a)(4) (2018), requires a district court not only to determine whether statutory domestic abuse has occurred;

> [it] requires the [district] court to give special focus to "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." Minn. Stat. § 518.17, subd. 1(a)(4). These same factors must also be considered by the [district] court in determining whether the presumption against joint custody is rebutted. *See id*., subd. 1(b)(9).

Thornton, 933 N.W.2d at 793. Nothing in the district court's findings reflects any consideration of these factors to support its implicit conclusion that the presumption had been rebutted. Moreover, "[p]arties can rely upon a variety of evidence from various sources to rebut the presumption, including witness testimony, guardian ad litem reports,

parenting assessments, psychological or chemical health reports, supervised visitation reports, and other materials." *Id.* at 792-93, n.6. The district court's decision does not mention any of these, or any other evidence supporting rebuttal.

> Because the referee found that [the respondent] committed domestic abuse against [the appellant], the referee *was required* to assess whether the statutory presumption that "joint legal custody or joint physical custody is not in the best interests of the child" had been rebutted. Minn. Stat. § 518.17, subd. 1(b)(9).

Thornton, 933 N.W.2d at 788 (emphasis added). It may be inferred that a district court making a finding of domestic abuse in a custody case is required to acknowledge the presumption against joint custody and make findings as to whether the presumption has been rebutted.[3] Absent any explanation of why the presumption against joint legal and joint physical custody has been rebutted, neither the parties nor a reviewing court has any basis for assuming that it was rebutted.

3. Award of Joint Legal and Joint Physical Custody

Even if the presumption had been rebutted, the district court's findings do not support an award of joint legal and joint physical custody. "Appellate review of custody determinations is limited to whether the district court abused its discretion by making

[3] Respondent relies on an unpublished opinion of this court for the propositions that a court may implicitly find that the presumption against joint legal and physical custody in cases where domestic abuse has occurred has been rebutted and need not make detailed findings. But unpublished opinions of this court lack precedential value. Minn. Stat. § 480A.08, subd. 3 (2018). Further, the unpublished opinion respondent relies on is distinguishable because, in that case, the district court did not explicitly find that the respondent had abused the appellant. Here, the district court did explicitly find that respondent had abused appellant.

findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). Here, the district court's findings on the best-interest factors are themselves supported by the evidence, but Minn. Stat. § 518.17, subd. 1(a) (2018), requiring the findings on the factors to be considered in making a custody determination, was not applied.

As to factor one, the child's physical, emotional, cultural, spiritual, and other needs, the district court found that, while the parties were cohabiting, respondent "struggled to meet [B.L.T.]'s physical needs" and "would summon [appellant] when [B.L.T.] was in his care because he was unable or unwilling to meet [her] needs." Respondent "failed to provide adequate safety for a toddler by smoking marijuana around [her], fail[ed] to consistently use a life jacket for [her] while on a boat, fail[ed] to ensure she was properly secured in a car seat, fail[ed] to store his firearms safely, [and] us[ed] an unsecured baby bike seat for her." Respondent "also failed to adequately respond to [B.L.T.'s] illness and relie[d] on [appellant] for at-home care;" he "testified that he redirects [B.L.T.] when she is emotionally upset, and that he meets her emotional needs by 'being with her all the time.'" Finally, respondent's "behavior in relation to parenting time exchanges at [the daycare center] caused the Court concern insofar as [his] lack of understanding as to why his conduct might be creating undue stress for his child." This factor favored appellant.

As to factor two, the child's special medical needs, the district court found that, although B.L.T. is severely lactose intolerant and respondent "claims to have been an active participant in [her] medical care since her birth, [he] testified that he is only aware of [B.L.T.] being lactose intolerant 'from what he has been told' by [appellant].'" Respondent

refused to keep a diary of B.L.T.'s food intake for appellant, but said he would keep one for himself; he "testified that if [B.L.T.] eats dairy while in his care, he gives her lactose pills" and that "he feeds [B.L.T.] a gluten free diet, though he admitted he did not know what gluten was." This factor favored appellant.

As to factor three, the reasonable preference of the child, the district court found that it did not apply because B.L.T. was then only three years old.

As to factor four, whether domestic abuse had occurred, the district court found that it had occurred. "[D]uring a verbal argument with [appellant, respondent] retrieved a handgun and returned with it to an area of the house where [appellant] and [B.L.T.] were present." The district court also found that respondent "continues to send repeated and harassing text messages to [appellant] and expresses a significant level of animosity toward her[, which] inhibits his ability to communicate with [appellant] and make decisions in [B.L.T.]'s best interest." This factor favors appellant.

As to factor five, any physical, mental, or chemical health issue of a parent, the district court noted that B.L.T.'s maternal grandmother "testified that . . . when she was requested to pick up [B.L.T.] when she was sick[, respondent] was in his truck with the child with the windows closed . . . . Upon opening the car door, [the grandmother] noted a strong odor and visible cloud of marijuana smoke and noted [B.L.T.] to be covered in her own vomit." The district court noted that it had "serious concerns about [respondent's] willingness to use marijuana while caring for [B.L.T.] and even more disturbingly in a small enclosed space with [her]." This factor favors appellant.

As to factor six, the nature of each parent's participating in caring for the child, the district court found that, while respondent had sometimes provided day-to-day care for B.L.T. after the parties' separation, he "has shown poor judgment when [she] is sick and by exposing her to conflict between [himself and appellant and appellant's] family members." This factor favored appellant.

Factor seven, the willingness and ability of each parent to provide ongoing care for the child and follow through with parenting time, and factor eight, the effect on the child of changes to home, school, and community, were found to be neutral. Factor nine, the effect of the proposed arrangement on the relationships between the child and each parent, was also found to be neutral, although in relation to that factor, the district court found that respondent "has refused to allow [appellant's] mother or [her] sister to pick [B.L.T.] up from daycare and has interfered with exchanges to prevent anyone other than [appellant] from picking [her] up."

As to factor ten, the benefit to the child in maximizing time with both parents, the district court found that appellant's 14-day parenting-time plan had more consistency for B.L.T. and fewer exchanges than respondent's plan, so that this factor favored appellant.

As to factor eleven, the disposition of each parent to support the child's relationship with the other parent, the district court noted that it does not apply in cases where there has been domestic abuse and therefore does not apply here.

As to factor twelve, the willingness and ability of parents to cooperate in rearing the child, the district court found that respondent "has failed to consistently abide by the Court's [o]rders regarding communications and tries to capitalize on what he sees as

loopholes;" for example, he gives notice every 30 days that he plans to take B.L.T. out of state rather than comply with the requirement that he give notice when he does plan to take her. More significantly, the district court found that, on more than one occasion, respondent "has taken rigid and adversarial positions on issues that are relatively minor" and appears to "value[] winning an argument over what's best for [B.L.T.]." This factor also favors appellant.[4]

After finding that, of the twelve factors, three were neutral, seven favored appellant, none favored respondent, one did not apply because of B.L.T.'s youth, and one did not apply because respondent had abused appellant, the district court concluded that joint legal and joint physical custody were not only feasible but were in B.L.T.'s best interests. Its only explanation for this decision is two sentences: "Neither of these parents is incapable of working jointly to raise their child, though some behavior has indicated an unwillingness to try. Decisions going forward must be child-focused, forcing both parents to set their animosity for each other aside."

But an award of joint custody must be based not only on the parties' theoretical ability to cooperate but on their actual willingness to do so. "Joint custody should not be used to coerce cooperation from parents who have been unable to cooperate or amicably settle disputes about their children." *Chapman v. Chapman*, 352 N.W.2d 437, 439 (Minn.

[4] In addition to its findings on the factors, the district court found that "[respondent] actually avoided service of [this] action and even forfeited parenting time to evade process[,]" "failed to follow the Court's directives as to communications with [appellant,]" and "took every opportunity to interfere with the parenting time exchanges"; it also noted that "the record is replete with [respondent's] hostile text messages and obstreperous conduct."

App. 1984), overruled on other grounds by *Hansen v. Todnem*, 908 N.W.2d 592, 597 (Minn. 2018). Respondent's testimony indicates that he does not believe he and appellant can amicably settle disputes; when asked, "If you have a disagreement with [appellant,] how is it resolved?" he answered, "It's not."

Minn. Stat. § 518.17, subd. 1(a)(12), requires the district court to consider parents' "willingness and ability" to cooperate in the rearing of their child. The record reflects respondent's unwillingness to cooperate far more strongly than it reflects his ability to do so, particularly in regard to maintaining a safe, healthy, and age-appropriate environment for B.L.T. The determination of joint legal and joint physical custody on the basis of the district court's findings was an improper application of the law. *See Pikula*, 374 N.W.2d at 710.

4. Child-Support Awards

The parties agree that the district court erred on both child-support awards. As to respondent's monthly obligation, the district court found in a guidelines worksheet attached to the decree that respondent's basic monthly support obligation is $472 and his monthly child-care support obligation is $570, but concluded that the monthly total was $1,258. The parties agree that the total obligation is actually $1,042 and that the matter should be remanded to correct this mistake.

As to the award of back child support, the district court found that the amount owed for August 31 to December 1, 2018, is $158 per month, or a total of $474. The parties

agree that the guideline amount was $655 per month, or a total of $1,965. We agree that this is a clerical error and remand it for correction.[5]

We affirm the parenting-time determination, reverse the determination of joint legal and joint physical custody and remand for a grant of sole legal and sole physical custody with appellant, and reverse the child-support orders and remand them for correction.

Affirmed in part, reversed in part, and remanded.

[5] We do not find respondent's assumption that the district court intended to depart from the guideline amount but neglected to make the requisite findings and that we should remand for those findings to be persuasive. The district court's unexplained award is less than a fourth of the guideline amount; it is not probable that this was a deliberate departure.