STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0907

In re the Marriage of: Ellen Jo Schneider, petitioner,
Respondent,

vs.

Jeffrey Daniel Schneider,
Appellant.

Filed August 1, 2022
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-FA-19-1528

Joani C. Moberg, Susan A. Daudelin, Henschel Moberg, P.A., Minneapolis, Minnesota (for respondent)

Timothy J. Simonson, Beyer & Simonson, LLC, Edina, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant-father, a resident of Canada, argues that the district court abused its discretion by setting his parenting time with the parties' son and in dividing the parties' property. Because we see no abuse of discretion, we affirm.

FACTS

Appellant Jeffrey Schneider, a resident of Canada, and respondent Ellen Schneider, a resident of Minnesota, were married in Canada in 2011; their son, O., was born in October 2016. Appellant has had little involvement with O. The parties separated in June 2018, and respondent moved with O. to Minnesota in July 2018. In October 2018, she filed a petition for legal and physical custody of O. During 2018, appellant saw O. for a total of five days.

In February 2019, appellant filed a petition for legal and physical custody of O. or in the alternative for parenting time. In March 2019, respondent filed a petition for dissolution of the marriage.

In July 2019, the district court granted respondent sole legal and physical custody of O., granted appellant temporary non-overnight parenting time with O., ordered appellant to pay child support of $636 monthly, and prohibited appellant from removing O. from Minnesota.

In February 2020, respondent filed a motion to compel discovery; the district court granted her motion and awarded her conduct-based attorney fees in May 2020. In September 2020, the district court found appellant in contempt of court, due partly to his failure to comply with the child-support order. Appellant was fined $100 per day until he complied and ordered to pay respondent $9,502.50 in conduct-based attorney fees.

Trial was scheduled for February 16-17, 2021. Appellant's three motions for a continuance, dated February 1, 8, and 11, were all denied. At the time of trial, appellant had not seen O. since November 2019. Following a remote trial on the scheduled dates,

the district court on May 19, 2021, issued its judgment and decree. Based on appellant's production of documents at trial that had not been previously produced, his refusal to comply with the child-support order, and his general lack of candor, including an undisclosed residence, the district court found appellant not to be a credible witness.

As to parenting time, the district court awarded respondent sole legal and physical custody of O. and awarded appellant phone visits twice a week until the pandemic-related limits on travel between Canada and the United States were reduced or removed, then gradually increasing weekend visits until O. turns eight in October 2024, when he will begin spending alternate weekends with appellant. All visitation will take place in Minnesota. As to child support, the district court set appellant's monthly obligation at $1,578, based on his imputed monthly income of $12,616 (or 51% of the parties' combined parental income for child support (PICS)), respondent's monthly income of $11,415 (49% of the PICS), and respondent's providing medical and dental insurance and childcare.

As to property, the district court awarded respondent all the personal property then in her possession and all the bank accounts and retirement accounts in her name and reserved both the division of appellant's personal property, bank accounts, and retirement accounts and respondent's potential claim for dissipation of marital assets. The district court also awarded respondent $252,835CAD as her half of the proceeds of the sale of farmland appellant purchased from his father for about $350,000CAD and sold for $850,000CAD during the marriage.

Appellant filed a notice of appeal in September 2021, arguing that the district court abused its discretion in setting parenting time and in awarding respondent all her personal

property and reserving jurisdiction over her dissipation claim and that the district court erred in finding that the profit from the sale of the farmland was marital property and therefore divisible between the parties.[1]

DECISION

1. Parenting Time

The 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). "It is well established that the ultimate question in all disputes over visitation is what is in the best interest of the child." *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *rev. denied* (Minn. June 12, 1984).

In an extremely detailed and thoughtful opinion, the district court concluded that the 25% parenting time to which appellant is presumptively entitled under Minn. Stat. § 518.175, subd. 1(g) (2020), was not appropriate, "given [appellant's] extensive absence and voluntary lack of involvement in [O.'s] life up until this point, missing important medical and physical-therapy appointments the first year of [his] life, not being in touch with [his] emotional, medical, and other needs through [his life]; [his] young age and his

[1]Appellant does not challenge either the award of legal and physical custody to respondent or the denial of spousal maintenance that he requested so he could pay $16,700 in contempt fines. The district court found that, with his graduate education at Dartmouth and the London School of Economics and work experience as an investment banker, appellant was capable of full-time employment and self-support, and concluded that a request for spousal maintenance to pay contempt fines was not appropriate or within the intended purpose of spousal maintenance. Nor does appellant challenge the reservation of the division of his property in his brief, so he has waived that issue. "Failure to brief an issue for this court waives the issue." *Clark v. Peterson*, 741 N.W.2d 136, 139 n.1 (Minn. App. 2007).

residence with [respondent] for his entire life, and [appellant's] residence outside of the United States." The district court observed further that appellant testified that he lives in Canada with his fiancée and their son, who is O.'s younger half-brother, and that respondent testified that O. resides with his maternal grandparents in Minnesota and has a close relationship with them. The district court went on to conclude that it is in O.'s best interest "to have appropriate contact with [his] maternal grandparents and [respondent], as well as his [half-]sibling and [appellant]," but that "a sudden change of his environment is not in his best interest."

Because travel between Canada and the U.S. was not possible at that time due to the COVID-19 pandemic, appellant was awarded virtual parenting time twice a week, using video-application calls for a maximum of an hour. Once travel became possible, he was awarded three-hour visits on Saturday and Sunday of alternate weeks until O. turns six in October 2022; then eight-hour visits on Saturday and Sunday of alternate weeks until O. turns seven in October 2023, then after-school Friday visits and eight-hour visits on Saturday and Sunday of alternate weeks until O. turns eight in October 2024; then overnight visits from after school Friday until Monday morning of alternate weeks until O. turns ten in October 2026. Vacation visits of one week in June, one week in July, and one week in August, as well as visits on Father's Day every year, and Easter, July 4, Thanksgiving, and Christmas Eve in alternate years, would begin in 2024. Appellant was not allowed to remove O. from Minnesota without the written authorization of respondent and the district court.

Appellant argues that he should be permitted to have overnight parenting time with O. at his home in Canada now. He does not dispute any of the district court's reasons for setting parenting time; he argues instead that the district court abused its discretion in setting parenting time without having found that parenting time with appellant in Canada is likely to endanger O. But a finding of endangerment is required only when parenting time is being modified, not when it is being initially determined. *See* Minn. Stat. § 518.175, subd. 5(c) (2020). Moreover, "[a]lthough a 'restriction' requires a finding of endangerment . . . , parenting-time allocations that merely fall below the 25% presumption can be justified by reasons related to the child's best interests and considerations of what is feasible given the circumstances of the parties." *Hagen v. Schirmers*, 783 N.W.2d 212, 218 (Minn. App. 2010). *Hagen* concluded that the district court had erred in not considering the 25% presumption. *Id.* Here, in contrast, the district court explicitly addressed the presumption and gave its reasons for not applying it.

Appellant relies on *Newstrand v. Arend*, 869 N.W.2d 681 (Minn. App. 2015), *rev. denied* (Minn. Dec. 15, 2015) to argue that, because the district court did not make a finding that overnight visitation in Canada would endanger O., it abused its discretion in denying overnight visitation until O. is eight and in denying appellant the right to remove O. from Minnesota without prior written authorization from respondent and the district court. In *Newstrand*, the district court found that the best interests of a child "require[d] an examination of father's mental health" before father was given unsupervised visitation time with that child, based in part on findings of "mother's role as [the child's] primary caregiver during much of his life" and "father's opposition to mental-health services and concerns

about his mental health." *Id.* at 691-92. This court affirmed, noting that "the [district] court's findings demonstrate a reasoned balance between enabling a parental bond between [the child] and father and protecting [the child] from the emotional harm likely to result from unsupervised parenting time with father." *Id*. at 692. Here, the parenting-time schedule devised by the district court for a five-year-old child who lives in Minnesota and has had only minimal contact with his father who lives in Canada also demonstrates a reasoned balance between enabling a bond between O. and appellant and protecting O. from the emotional harm by permitting a sudden and complete change in his environment.

Appellant also argues that the district court erred by not finding that O.'s best interests are served by the district court's parenting-time decision. But to support its custody determination, the district court provided a thorough review of each of the 12 best-interest factors set out in Minn. Stat. § 518.17, subd. 1 (2020) "based on the evidence presented by the parties." Specifically, the district court noted the absence of any evidence that appellant "has been meeting . . . or . . . can meet the spiritual needs of the minor child" or that he "read the December 9, 2020, messages" from respondent about O.'s behavioral concerns or that he "communicated with [respondent] or anyone else regarding the minor child's behavioral incident." The district court noted further that appellant "failed to provide any evidence to support his position that a four-year-old child is of sufficient age, ability, and maturity to express an independent, reliable preference" on parenting time and that appellant "did not testify as to his financial ability to provide ongoing care for [O.] . . . [or] his ability to provide ongoing care for [O.] or support [his] development." The district court found that "it is in [O.'s] best interests to remain with [respondent] as

[appellant] resides in Canada and [O.] is established at his preschool," that "it is not in [O.'s] best interest . . . to change his home, school or community," and that "a sudden change of [O.]'s environment is not in his best interest." Thus, the district court did make findings that O's best interests will be served by the gradual increase of appellant's parenting time and would not be served by his sudden removal to Canada and separation from respondent, with whom he has spent his entire life.

There was no abuse of discretion in the district court's parenting-time decision.

2. Property Division

In a marital-dissolution case, the district court has broad discretion in dividing property and will not be overturned except for an abuse of that discretion; its division of property will be affirmed if it had an acceptable basis in fact and principle even though this court might have divided it differently. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). The district court noted that neither party testified to any problems with respondent's disclosure of income, assets, or liabilities and awarded respondent all the property that was in her name. Appellant challenges both that decision and the district court's reservation of jurisdiction over respondent's claim that he dissipated marital property.

A. Appellant's Property Issues[2]

Appellant challenges the district court's findings that appellant failed to disclose a second residence and a bank account.

Respondent testified that appellant had not disclosed a Saskatchewan bank account. The district court found that "[respondent] identified page five of [appellant's] Exhibit 101 as one direct Deposit Statement dated September 2020 for $1,489 made into [appellant's] account in Saskatchewan. [Appellant] did not disclose the bank account in Saskatchewan during discovery and [respondent] was unable to identify the Saskatchewan account." Appellant testified that the account belonged to his fiancée, not to him. But the exhibit on which the district court relied for its finding was a direct-deposit statement addressed only to appellant that said "Your benefit payment has been deposited to your bank account"; the statement includes a deposit date and a deposit number. The name of the bank is blacked out. Respondent testified that she zoomed in on the blacked-out portion and read Canadian Imperial Bank of Canada with an address in Saskatoon. Appellant objected to her testimony on the ground that his fiancée, to whom the bank account belonged, had not consented to having her banking information provided to the court. The district court overruled the objection. Respondent's and the district court's inference that the account listed on a deposit statement addressed solely to appellant was appellant's account was reasonable.

[2]Appellant also argues that the property division was a punitive measure against him for failing to cooperate in discovery and to disclose his assets, but nothing in the district court's opinion supports this argument, and we reject it.

As to the second residence, the district court found that: (1) "[a]t trial, [appellant] admitted that he and his current partner . . . live in Banff, Canada, which is a ski resort town. [He] had not previously disclosed this second residence"; (2) "[appellant] testified that he currently lives with his fiancée and a non-joint minor child in a home owned by his fiancée's parents in the ski-town of Banff"; and (3) "the parties do not pay rent or expenses associated with the property." To refute the statement that he had an undisclosed residence, appellant relies on the testimony of his friend, K.D., but the district court found that K.D. "was not qualified as an expert witness in any field relevant to this proceeding and no exhibit was received relating to his testimony. The Court also does not find [K.D.] to be a credible witness." Thus, the district court's findings that appellant had not disclosed a bank account and a residence are supported by the record.

B. The Dissipation Claim

Appellant also challenges the district court's reservation of appellant's dissipation claim. *See* Minn. Stat. § 518.58, subd 1a (2020) (providing that, if one party to a dissolution transfers or disposes of marital assets without the other party's consent and the transfer is not in the usual course of business or for the necessities of life, the other party will be compensated by the district court placing both parties in the position they would have been in had the transfer or dissipation not occurred). The district court wrote:

> [Respondent] testified that she has been unable to fully analyze [appellant's] income or spending related to this specific issue of dissipation because [appellant] has still not fully responded to discovery. She asks the Court to reserve this issue pending [appellant] providing discovery. The Court finds [respondent's] testimony credible and will reserve the issue of

> dissipation of assets. If [respondent] chooses, in the future she can file a motion for the Court to consider this issue.

Appellant argues that, because respondent did not meet one element of a dissipation claim by providing evidence that appellant spent extravagantly while contemplating the divorce, the district court is "without basis to award, much less reserve, [her] claim." But appellant's failure to comply with discovery requests as to his financial affairs made it impossible for respondent to meet the elements of a possible dissipation claim and for the district court to decide on the merits of that claim. Reserving jurisdiction over a possible dissipation claim by respondent was not an abuse of discretion.

3. Appellant's Nonmarital Property

This court reviews de novo whether property is marital or nonmarital, because that is a question of law; however, it does not overturn a district court's evaluation and division of property unless the court abuses its discretion. *Gill v. Gill*, 919 N.W.2d 297, 301 (Minn. 2018).[3]

The district court found that: (1) in 2017, appellant took out a mortgage of $350,000CAD on marital property to purchase farmland in Alberta, Canada, from his father; (2) the worth of the land at that time was disputed and the court was unable to

[3]Appellant challenges this standard of review, arguing that, because the evidence that the farmland was marital property was documentary, "there is no necessity to defer to the trial court's assessment of the meaning and credibility of that evidence." But in 1985, Minn. R. Civ. P. 52.01 was amended to read that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." In any event, this court does not find facts on appeal. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

determine its specific value at the time of the purchase; (3) in 2018, appellant sold the property for $850,000CAD and used $344,000CAD to pay off the mortgage and property taxes, leaving $505,670CAD, which was marital property; and (4) respondent was entitled to half that amount, or $252,835CAD. The district court noted that appellant claimed that his father's sale of the property was a gift to appellant only and the property was therefore nonmarital; respondent claimed that the sale was either a transaction between appellant and his father intended to raise funds or a gift from appellant's father to both appellant and respondent and therefore marital property.

Appellant offered as evidence of his father's donative intent an email from his father to someone involved with finance.

> [My sons, one of whom was appellant] would like to keep the option of moving home and farming open, have a little more [time] off farm then move home and farm full time . . . . To that end, are there any programs you could steer me towards that would allow me to sell 4 quarters [of farmland] to my sons immediately, then transition the remainder to them over time? . . . To facilitate this financing could you forward the appropriate forms that we need to fill out and submit asap. In the interim I will have our net worth statements updated and forwarded to you along with my two sons[' statements].
>
> I have discussed the issue with my neighbor who is in the market for farmland in the area, he informed me that he personally knows of two deals that have closed at $850,000/qtr section. . . . I would never burden my sons with this kind of debt, . . . I want to net $2,000,000 out of this transaction, and if required will co-sign for our sons (hopefully $600,000 per quarter works for everyone).

The district court disagreed with appellant's view that this letter was evidence of his father's donative intent, saying "the letter contains repeated references to 'selling' and [appellant's father's] hope to 'net $2,000,000 out of this *transaction*.'" The district court

went on to find that "[appellant] purchased this property during the parties' marriage for which he took out a mortgage, which he then paid off using marital funds. . . . [Appellant] failed to show by a preponderance of the evidence that this sale of farmland was intended as a non-marital gift." Nothing in the letter indicates that appellant's father intended to give the farmland only to his son, and appellant did not call either his father or the addressee of the letter as witnesses.

There was no abuse of discretion in the district court's finding that the farmland and the proceeds from its sale were marital property and that respondent was entitled to half the proceeds.

Affirmed.