STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1546

In re the Matter of: Bamidele Adetifa, petitioner,
Appellant,

vs.

Nehplainseh Pay-Bayee,
Respondent.

Filed August 14, 2023
Affirmed; motion granted
Kirk, Judge[*]

Hennepin County District Court
File No. 27-FA-20-6312

Randall A. Smith, Lake Harriet Law Office, LLC, Minneapolis, Minnesota (for appellant)

Amy Helsene, Larkin Hoffman, Minneapolis, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge; and Kirk, Judge.

NONPRECEDENTIAL OPINION

KIRK, Judge

Appellant petitioner Bamidele Adetifa (father) appeals the district court's September 2022 order for custody, parenting time, and child support. Because the district court did not err in either its physical-custody, parenting-time, child-support, attorney-fees,

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

or tax-dependency-exemption decisions, we affirm the district court's order. And we award mother $6,380 in need-based attorney fees for this appeal because she satisfies the statutory requirements.

FACTS

Father appeals the district court's September 2022 order for custody, parenting time, and child support. Father and respondent Nehplainseh Pay-Bayee (mother) were never married and share one child, born in December 2019. According to the custody and parenting-time evaluator's report, father's initial attempts to be a part of child's life were met with resistance from mother, who requested that father relinquish his parental rights. As a result, in November 2020, father filed a petition with the court seeking joint physical and joint legal custody rights to child with an equal parenting-time schedule. Soon after, father filed a voluntary recognition of parentage.

The district court ordered parents to participate in a custody and parenting-time evaluation and to file the agreement reached with the court by September 30, 2021. On September 10, 2021, the parties alerted the court via written submissions that they had reached an agreement on custody and parenting time, but they did not file the agreement with the court. In November 2021, the district court filed an order granting father some daytime parenting time, stating that the parties had not filed the agreement by the deadline, and giving them until November 29 to file the agreement. After this order, father sent correspondence to the court indicating that no final stipulation had been reached, and the district court set the matter for trial.

In March 2022, as the parties were preparing for trial, the district court filed a temporary order granting father three overnights with child per two-week period in response to the parties' written motions for temporary relief. The custody and parenting-time evaluator filed his report on March 28, 2022. The parties participated in a hearing before the district court on April 4 and May 16, 2022.

In September 2022, the district court filed its order for custody, parenting time, and child support. It awarded the parties joint legal custody, and it awarded mother sole physical custody. The district court ordered parenting time to follow a three-phase plan with father receiving three overnights per two-week period from September 2022 until December 2022, four overnights per two-week period from December 2022 until March 2023, and five overnights per two-week period from March 2023 onward. The order acknowledged that father would likely request an increase in parenting time to reach equal parenting time, and it stated that the court would address that motion when it is brought. The district court also added that "the Court finds the Child is a bit young for effective equal parenting time at present, particularly drawing on the expert opinion of the Evaluator and the parties' current communication problems."

In its order, the district court awarded both prospective and retroactive child support. For prospective child support, the district court forecasted father's 2022 income based on his income in 2021 and his testimony at trial. The district court used a presumption of 21% parenting time for father in its prospective-child-support calculation, corresponding to the first phase of the three-phase plan. And for retroactive child support, the district court

awarded mother $5,689 for unreimbursed medical expenses from child's birth and neonatal care, among other expenses.

The district court also awarded conduct-based attorney fees to mother because father's counsel unreasonably contributed to the length and expense of the proceedings by first representing that he had reached a settlement agreement with mother and then waiting three months to repudiate that agreement. The district court left the record open to receive an affidavit from mother's attorney about the fees incurred due to that delay, and after receiving that affidavit, it filed an order awarding mother conduct-based attorney fees on September 27, 2022, and judgment on the fee award was entered the next day. Finally, the district court declined to award the income-tax-dependency exemption for child to either parent because it found that it did not have enough information before it to address the statutory factors required to make that decision.

Father moved to amend the district court findings in October 2022, alleging numerous errors of fact and law. This motion was filed after the 30-day deadline, so the district court dismissed it. Minn. R. Civ P. 52.02, 59.03. In response, mother again moved for conduct-based attorney fees due to the need to respond to father's untimely motion, and the district court granted this request. Father appealed both the September 2022 order and the dismissal of his motion for amended findings[1], and we construed his appeal to include

[1] Because father does not bring any arguments about the dismissal of his motion to amend the district court findings to this court, we decline to address this issue on appeal. *See Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (explaining that on appeal, error is never presumed, it must be made to appear affirmatively before there can be reversal, and the burden of showing error rests upon the one who relies upon it).

the September 28, 2022 order granting mother conduct-based attorney fees. Father argues that the district court erred by (1) granting mother sole physical custody, (2) not including an equal parenting-time phase in its order, (3) awarding mother certain child support and birth-related expenses, (4) awarding mother conduct-based attorney fees, and (5) reserving the tax-dependency exemption decision.

After father appealed, mother moved this court for need-based attorney fees.

DECISION

I. The district court did not abuse its discretion when it determined that the best interests of child favor granting mother sole physical custody.

Father contends that the district court abused its discretion when it awarded mother sole physical custody of child. A district court has broad discretion in making custody determinations. *In re Welfare of C.F.N.*, 923 N.W.2d 325, 334 (Minn. App. 2018), *rev. denied* (Minn. Mar. 19, 2019). A district court abuses its discretion by making findings of fact that are unsupported by the record, misapplying the law, or resolving the question in a way contrary to logic and the facts on record. *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022).

The district court made its custody decision based on the 12 best-interests factors of Minn. Stat. § 518.17, subd. 1 (2022). Father challenges these findings—specifically factors six and ten—arguing that the trial court used these factors to restrict his access to child.

Father posits that under factor six, the history and nature of each parent's participation in providing care for child, Minn. Stat. § 518.17, subd. 1(a)(6), the district court did not properly consider "the specific historical reasons that Father did not have

parenting time during the first eight months" of child's life. But in its findings of fact, the court did consider the reasons for father's absence from the first months of child's life and found that these reasons were not legally relevant to child's best interests. And the cases that father cites to allow the district court to look beyond the historical reasons for his lack of presence in child's life toward his future ability to provide for his child neither deal with this factor nor direct the district court to look toward the future. *Hoffa v. Hoffa*, 382 N.W.2d 522, 525 (Minn. App. 1986); *Trebelhorn v. Uecker*, 362 N.W.2d 342, 345 (Minn. App. 1985). Father has not demonstrated that the district court abused its discretion in its analysis of factor six.

Father also challenges the district court's findings under factor ten, the benefit to child in maximizing parenting time with both parents and the detriment to child in limiting parenting time with either parent, Minn. Stat. § 518.17, subd. 1(a)(10), arguing that the trial court did not fully consider an equal schedule at a future date, despite testimony that this was in the best interests of child. But the district court heard testimony from father, mother, and the custody and parenting-time evaluator about this topic, and had the benefit of the custody and parenting-time evaluator's report, which recommended that "a schedule culminating with an equally shared schedule should be considered in the future." Because appellate review of custody determinations is limited to whether the trial court abused its discretion by making findings unsupported by evidence or by improperly applying law, and father has not demonstrated that the district court erred in either of these two ways, the district court did not abuse its discretion. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985).

II. The district court did not abuse its discretion when it determined the parenting-time schedule.

Father argues that the district court abused its discretion in its parenting-time decision. A district court also has broad discretion in deciding parenting-time questions. *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017). Specifically, father argues that the district court erred when it found that child was "a bit young for effective equal parenting time." He points to the custody and parenting-time evaluator's observation that child was comfortable with him during the parent-child observation and the evaluator's statement that "a schedule culminating with an equally shared schedule should be considered in the future." But father cites neither caselaw nor statute outside the standard of review to support his contention that the district court abused its discretion. And the district court followed the custody and parenting-time evaluator's recommendation in its parenting-time decision, so the pieces of evidence father points to were before the district court when it made its decision. Accordingly, father has not demonstrated that the district court abused its discretion in its parenting-time decision.[2]

III. The district court did not err when it awarded mother child support and birth-related expenses.

Father argues that the district court abused its discretion in its calculation of his child-support obligation and ordering him to pay birth expenses. The district court has broad discretion to provide for the support of the parties' child. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Father makes five arguments about this issue.

[2] We also note that the district court order and the custody and parenting-time evaluator's report were detailed, thorough, and helpful to us in reaching our decision.

First, father contends that the district court erred in using his income from 2021 to forecast his income for 2022 for the purpose of child-support payments. We review a district court's determination regarding a party's income for clear error because it is a factual finding. *Newstrand v. Arend*, 869 N.W.2d 681, 685 (Minn. App. 2015), *rev. denied* (Minn. Dec. 15, 2015). When calculating a party's gross income, the district court includes, among other forms of periodic payments, the party's salaries, wages, commissions, and self-employment income. Minn. Stat. § 518A.29(a) (2022). The district court's order includes the following information about father's income:

- Father made $167,429 in 2020.
- Father made $153,589 in 2021.
- Father will earn the same income from his primary employer in 2022 that he earned in 2021, $81,304, and will earn $120,000 from a secondary employer resulting in a total annual income of $201,304.

Almost all of these findings are supported by the record. Father testified that he made about $167,000 in 2020. Father testified that he worked for three employers in 2021. And his tax return from 2021 shows that he made about $153,000 that year. Father testified that the secondary employer will pay him $120,000 in 2022. And he did not testify that he will not be employed by his primary employer in 2022.

The district court did not clearly err by finding that father will continue to earn the same income from his primary employer in 2022. At trial, father indicated that he may change jobs in 2022 given the likelihood that he will be unable to continue to work remotely and his changing childcare obligations. In its order, the district court wrote:

> While Father testified that he did not know if he would be able to continue to perform all of his employment duties for multiple employers remotely as he is doing now, there is no basis to find that this employment will end at any certain date. Father is free to move to modify child support if his income situation changes in the future.

Given the clear-error standard of review, the district court did not err. When applying the clear-error standard, we view the evidence in the light most favorable to the district court's findings and do not reweigh the evidence or reconcile conflicting evidence. *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221-22 (Minn. 2021); *see also Bayer v. Bayer*, 979 N.W.2d 507, 513 (Minn. App. 2022) (citing *Kenney* in a family-law appeal). "We will not conclude that a fact[-]finder clearly erred unless, on the entire evidence, we are left with a definite and firm conviction that a mistake has been committed." *Kenney*, 963 N.W.2d at 221 (quotation omitted). Given that father did not testify that he would not be working for his primary employer in 2022 and he did testify that he would make $120,000 from his secondary employer, there is no definite or firm conviction that the district court committed a mistake in its calculation of father's 2022 income.[3]

Second, father argues that his child-support payment should be adjusted for the phases of parenting time in the district court's order. In its child-support calculations, the district court used a 21% (father) 79% (mother) parenting-time ratio to calculate prospective child-support payments. This ratio corresponds to the first phase of the three-phase parenting-time schedule that the district court implemented in its September

[3] Father also argues that the district court cannot calculate his 2022 income without his 2022 tax return. But because the case he cites to support this proposition does not involve tax returns, we are not persuaded by his argument. *Newstrand*, 869 N.W.2d at 681.

2022 order. The plan is as follows: from September until December 2022, father has three overnights per two-week period, from December 2022 until March 2023 father has four overnights per two-week period, and from March 2023 onward, father has five overnights per two-week period. Three overnights in a two-week period amounts to roughly 21% parenting time.

Under the district court's order, father pays $1,338 in basic support obligation after an adjustment for parenting time. This number added to father's child-care-support obligation amount ($383) and his medical-support obligation amount ($35) results in a total prospective child-support obligation of $1,756 per month.

Given that father is scheduled to receive additional parenting time, it is possible that the district court erred in not scheduling father's prospective child-support payments to correspond with his parenting-time schedule. On the other hand, to modify child-support payments, a party must show a substantial change in circumstances, which can include a 20% change in monthly child support. *See* Minn. Stat. § 518A.39, subd. 2(b)(1) (2022). Four overnights per two-week period would result in father paying $1,262 in basic support obligation after adjustments for parenting time, and five overnights per two-week period would result in father paying $1,102 in basic support obligation after parenting-time adjustment.[4] As seen in the table below, these changes do not result in a change to the total child-support amount exceeding 20%.

[4] These calculations were completed using the numbers in the district court's parenting order and following the formula in Minnesota Statutes section 518A.36, subdivision 2 (2022).

Number of overnights per week	Parenting time adjusted basic support obligation	Total child-support obligation	Percentage change from original
3	$1,338	$1,756	0%
4	$1,262	$1,680	4.3%
5	$1,102	$1,520	13.4%

We affirm the district court's decision and observe that father can bring a modification motion if there is a substantial change in circumstances warranting modification of child-support payments.[5]

Third, father alleges that the district court erred in ordering him to pay retroactive child support. But the only support he offers for this argument is arguing against the computation of his 2022 income based on his 2021 income and testimony at trial. And because we were not persuaded by that argument above, it does not convince us here.

Fourth, father argues that because mother withheld child from him, his child-support obligation should be waived. But the case he cites to support this proposition involves the court suspending child-support payments until a mother returned a child to the jurisdiction. *Eberhart v. Eberhart*, 189 N.W. 592, 592 (Minn. 1922). This case is distinguishable because although father did not spend considerable time with daughter until after her first birthday, mother never removed child from the jurisdiction, father did not have any visitation rights until the district court's November 2021 order, and father did not have any legal or physical custody rights until the September 2022 order. Thus father's argument here fails.

[5] At oral argument, father's counsel agreed that it would be close on whether father would be able to meet the 20% threshold to bring a modification motion.

Finally, father argues that if child's birth had been covered by his insurance, mother would not have incurred the unreimbursed medical expenses that the district court ordered he pay. But mother's insurance did cover part of the bill, making the medical expenses incurred unreimbursed medical expenses under Minnesota Statutes section 518A.41, subdivision 1(h) (2022). And that same statute states that the district court "must order that the cost of . . . unreimbursed . . . medical expenses under the health plan be divided between [father] and [mother] based on their proportionate share of the parties' combined monthly [parental income for determining child support (PICS)]." Minn. Stat. § 518A.41, subd. 5(a) (2022). And here, the district court allocated the unreimbursed medical expenses according to father's PICS percentage in the year the bill was incurred. Accordingly, the district court did not abuse its discretion because it did not make a finding of fact unsupported by the record or improperly apply the law. *Woolsey*, 975 N.W.2d at 506.

IV. The district court did not abuse its discretion by awarding mother conduct-based attorney fees.

The trial court awarded mother conduct-based attorney fees limited in scope to the fees incurred attempting to document the settlement agreement that father's original counsel represented that they had reached in August 2021. Father alleges that because there was no finding of bad faith, the district court's award of conduct-based attorney fees was improper.[6] We review awards of conduct-based attorney fees for an abuse of

[6] While father's notice of appeal states that he challenges both the district court's September 2022 order and its October 2022 order denying his motion for amended

discretion. *Schallinger v. Schallinger*, 699 N.W.2d 15, 24 (Minn. App. 2005), *rev. denied* (Minn. Sept. 28, 2005).

In a proceeding for child support, the district court may, "in its discretion," award attorney fees "against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2022). "The district court must make findings to explain an award of conduct-based attorney fees." *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007). The case that father cites to support the existence of a bad-faith requirement refers to attorney fees that a district court awards under its inherent power, which involves a different standard than conduct-based attorney fees. *Peterson v. 2004 Ford Crown Victoria*, 792 N.W.2d 454, 462 (Minn. App. 2010).

Here, the district court found that father unreasonably contributed to the length and expense of the proceeding by first representing (though his counsel) that he had reached a settlement, then not repudiating that settlement until almost three months after the representation was made. This decision is supported by the record, which includes emails between mother's counsel and the custody and parenting-time evaluator, letters between mother's counsel and the district court referee, emails between mother's counsel and father's counsel, and mother's counsel's affidavit about the work she did to document the purported settlement agreement.

In return, father argues that, because there never was a settlement agreement, it was an abuse of discretion for the district court to order father to pay conduct-based attorney

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findings, his appellate brief challenges only the attorney fees awarded in the September 2022 order, not the October 2022 order.

fees. But even if there was no settlement agreement, father's counsel unreasonably contributed to the length or expense of the proceeding by obfuscating this fact. Therefore, the district court did not abuse its discretion in awarding these conduct-based attorney fees.

V. The district court did not abuse its discretion in its decision to reserve the income tax dependency exemption.

Finally, father argues that the district court abused its discretion in reserving the income tax dependency exemption. We review the allocation of a tax-dependency exemption for an abuse of discretion. *Hansen v. Todnem*, 891 N.W.2d 51, 63 (Minn. App. 2017), *aff'd on other grounds*, 908 N.W.2d 592 (Minn. 2018). Minnesota Statutes section 518A.38, subdivision 7 (2022), provides that a district court "may allocate income tax dependency exemptions for a child," and Minnesota Statutes section 645.44, subdivision 15 (2022), provides that "'[m]ay' is permissive." Here, the district court found that neither party's exhibits, testimony, or proposed orders specifically addressed the statutory factors required for a court to award the income tax dependency exemption to them. Father does not point to the information required to address those four factors in the record. Therefore, because the district court had no obligation to address the income tax dependency exemption, there is no error in its choice not to do so.[7]

VI. We award mother some need-based attorney fees.

After father filed his appeal, mother moved this court for need-based attorney fees, arguing that she lacks sufficient assets or income to pay her attorney fees for this appeal.

[7] We note that though the district court did not abuse its discretion by reserving its decision to award the tax-dependency exemption, the parties seemed to agree at oral argument that mother should receive it.

Mother can apply for a pre-decision award of fees under rule 139.05, subdivision 3 of the Minnesota Rules of Civil Appellate Procedure, and this court awards need-based attorney fees if it finds that the factors in Minnesota Statutes section 518.14, subdivision 1 are met.

> Attorney fees under Minn. Stat. § 518.14, subd. 1[,] may be awarded at any point in the proceeding. And whether to award need-based attorney fees on appeal is discretionary with this court. Need based attorney fees as well as costs and disbursements shall be awarded in an amount necessary to enable a party to carry on or contest the proceeding if the court finds (a) the fees are necessary for a good-faith assertion of rights; (b) the payor has the ability to pay the award; and (c) the recipient lacks the ability to pay [their] own fees.

Clark v. Clark, 642 N.W.2d 459, 466 (Minn. App. 2002) (citation and quotations omitted).

Here, mother asks this court to grant her need-based attorney fees of $7,000 for this appeal. The statutory criteria are met. *See* Minn. Stat. § 518.14, subd. 1. Mother states in her affidavit that she has not received any of the prospective or retrospective child support ordered by the district court and father has not paid the conduct-based attorney fees that the district court awarded. And the district court found mother's monthly income in 2022 was approximately $5,800. In father's affidavit opposing mother's motion for attorney fees, he states that he does not have the financial ability to contribute to mother's attorney fees because his monthly expenses ($12,000) roughly equal his monthly income ($13,333.33). But the numbers he lists for his monthly budget add up to roughly $8,000, not the $12,000 monthly budget he alleges. The district court found that father's monthly income is approximately $16,000 per month, so he can afford to pay the award. But because mother's attorney's affidavit anticipates spending time reviewing father's reply

brief, which he did not submit, we subtract $620 from the $7,000 request and award $6,380.[8]

In sum, the district court did not abuse its discretion when it determined that the best interests of child favor granting mother sole physical custody because the district court's best-interests analysis was thorough and not an abuse of discretion. Second, the district court did not abuse its discretion when it determined the parenting-time schedule because its decision was based on the evaluator's recommendation and supported by the record. Third, while the district court perhaps erred in its calculation of some parts of father's child-support obligation, because this error is less than the 20% requirement for modification, the district court's error is not enough to show an abuse of discretion. Fourth, the district court did not abuse its discretion in awarding mother conduct-based attorney fees because the record supports that father's attorney unreasonably contributed to the length of the proceedings. Fifth, the district court did not abuse its discretion in its decision to reserve the tax-dependency exemption because it has the discretion whether to award that exemption, and it reasonably decided it did not have the information before it to make that award. Finally, we award mother $6,380 in need-based attorney fees because she satisfies the statutory requirements.

Affirmed; motion granted.

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[8] Mother's attorney's affidavit states that she anticipates spending four hours reviewing father's reply brief and preparing for and attending oral argument. Mother's attorney bills at $310 per hour, so assuming that mother's attorney would have spent two hours reviewing the brief and two hours preparing for and attending oral argument, we subtract two hours' worth of work from the $7,000 total.