STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1993

In re the Matter of: Amy Sue Hagen, petitioner,
Respondent,

vs.

Daniel John Schirmers,
Appellant.

Filed July 5, 2011
Affirmed
Stoneburner, Judge

Benton County District Court
File No. 05F304050166

Lori L. Athmann, Rajkowski Hansmeier, Ltd., St. Cloud, Minnesota (for respondent)

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

Appellant father challenges, as an abuse of discretion, an award of parenting time that is significantly less than the rebuttable presumption of at least 25% of parenting time

described in Minn. Stat. § 518.175, subd. 1(e) (2010).[1] Father also asserts that only a finding of endangerment under Minn. Stat. § 518.175, subd. 5(1) (2010), could support the degree of departure from the statutory presumption involved in this case. Because we conclude that the district court may, based on adequate findings, award less than the presumptive amount of parenting time without finding endangerment, and because the record supports the district court's award of parenting time in this case, we affirm.

FACTS

Appellant Daniel John Schirmers (father) and respondent Amy Sue Hagen (mother) were never married to each other but have a child who was born in 2004. In 2005, the district court issued a custody and parenting-time order implementing the parties' stipulated agreement. The order awarded the parties joint legal custody, sole physical custody to mother, and parenting time to father that increased gradually to, on the child's fifth birthday, 48 hours every other weekend and 4 hours one day each week, with extended summer parenting time to be discussed at a later date. *See Hagen v. Schirmers*, 783 N.W.2d 212, 214 (Minn. App. 2010) (*Hagen I*).

In November 2008, mother petitioned the district court for permission to relocate with the child to California and submitted a proposed parenting-time schedule giving father 32 days of parenting time per year. *Id.* Father requested parenting time for all of the child's summer vacation from school, alternating school breaks, and half-time during

[1] Father asserted in his brief on appeal that the district court abused its discretion by failing to ensure that the parenting time it granted was "effectively enforceable." We decline to address this issue due to father's failure to adequately brief the issue on appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

his visits to California. *Id.* The district court granted mother's petition and adopted her proposed parenting-time schedule. *Id.* Father appealed, arguing that the district court abused its discretion by misapplying the statutory factors for allowing the custodial parent to relocate to another state with the child and by reducing his parenting time to less than the statutory presumption. *Id.* at 214–15.

This court affirmed the district court's decision to allow mother to move to California with the child but remanded to the district court with instructions for the district court to (1) "determine parenting time with due regard for the rebuttable presumption that father receive 25% parenting-time; (2) determine parenting-time percentages; (3) make findings supporting its determinations; and (4) state the basis for departing from the statutory presumption and the prior parenting-time order in this case, if applicable." *Id.* at 219.

On remand, the district court made 28 detailed findings supporting its decision to award father the following parenting time:

a. 3 days in February over the "Washington's Day" school break
b. 7 days in April over the child's spring break
c. 31 days in July during the child's summer break
d. 3 days in October over the school break
e. 5 days in November over Thanksgiving
f. 7 days in December over the child's winter break.

The district court determined that this award gives father 15% of the parenting time, which is 1% less than the amount of parenting time awarded in the prior order implementing the parties' stipulation. Although not included in the calculation of father's percentage of parenting time, the district court specifically contemplated

additional parenting time in California, relying on mother's assertion that she would accommodate additional parenting time should father be in California for business or vacation.

In this appeal, father asserts that the district court abused its discretion by limiting his parenting time to 60% of the statutorily presumed amount of parenting time and argues that such a deviation from the presumption should not be permitted absent a finding of endangerment under Minn. Stat. § 518.175, subd. 5(1).

D E C I S I O N

District courts have broad discretion in deciding parenting-time questions, and a reviewing court will reverse the district court's conclusions only when that discretion is abused. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). A district court abuses its discretion by making findings unsupported by the evidence or improperly applying the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). Findings of fact are reviewed for clear error. *Id.*

This court has held that the parenting-time presumption stated in Minn. Stat. § 518.175, subd. 1(e), is a "legislatively imposed benchmark for parenting time" that a district court must consider. *Hagen I*, 783 N.W.2d at 218. But we stated that "the statute . . . does not restrict the bases for reducing parenting time." *Id.* "[P]arenting-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." *Id.* The presumption in Minn. Stat. § 518.175, subd. 1(e),

can be overcome "when the district court finds that 'sufficient evidence . . . justi[fies] a finding . . . contrary to the assumed fact.'" *Id.* (quoting Minn. R. Evid. 301 cmt.).

Father attacks specific findings primarily by arguing that the record would have supported different findings. But the fact "[t]hat the record might support findings other than those made by the [district] court does not show that the [district] court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). In order to successfully challenge a district court's findings of fact, "the party challenging the findings must show that despite viewing the evidence in the light most favorable to the [district] court's findings . . . , the record still [shows that a] definite and firm conviction that a mistake was made." *Id.* Given the district court's broad discretion in determining parenting time and the fact that the district court specifically followed this court's instructions on remand, we are not left with the definite and firm conviction that a mistake was made in this case, even though we might have allocated parenting time in a different manner, had we been making the decision in the first instance.

Father criticizes the district court's consideration of the prior order that was based on the parties' stipulation. Father appears to argue that because Minn. Stat. § 518.175, subd. 1(e), was enacted after the order was entered, the order is not relevant. But Minn. Stat. § 518.175, subd. 1(e), states that the rebuttable presumption that a parent is entitled to receive at least 25% of the parenting time only applies "[i]n the absence of other evidence." In this case, the prior order establishing parenting time based on the parties' agreement is "other evidence." We presume that, absent specific evidence to the contrary, parents, rather than the legislature or the courts, are in the best position to

determine what is in the best interests of their children. We conclude that the district court did not abuse its discretion by considering the parties' parenting-time agreement in its consideration of the statutory presumption.

Father next criticizes the district court's findings concerning the difficulties that the move has created in scheduling parenting time. Father does not assert that any of the findings are unsupported by evidence, but implies that the district court should not have permitted the move that created the difficulties. We are sympathetic to the fact that mother's decision to move to California has significantly restructured father's parenting time from frequent, short contacts to significantly less frequent, but longer, periods of time with his child. But we previously affirmed the district court's grant of mother's petition to relocate with the child to California, and the district court did not abuse its discretion by making findings about logistical complications in scheduling parenting time between parents who live far apart.

Father severely criticizes the district court's assumption that his summer work schedule has not changed since 2007. But father did not present any evidence that his work schedule had changed. "On appeal, a party cannot complain about a district court's failure to rule in [his] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question." *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). And the parenting time awarded does not reflect any reduction in father's parenting time due to father's summer work hours. The district court did not abuse its discretion by making findings based on the evidence in

the record about father's work schedule, and because father's work schedule was not a determining factor in the parenting time awarded, any discrepancy between the record and father's actual current work hours is harmless.

The district court observed that, as the child becomes more attached to her step-siblings, school, and neighborhood friends in California, "distancing from those connections will be more difficult for her." Because the same can be said about the attachments and connections the child has made, and will make, in Minnesota, the implicit finding that the child will have more difficulty in leaving California connections than she will have in leaving Minnesota connections is not supported by the record. But the district court also found that the child "has had the opportunity to adjust to being away from her mother for longer periods and to spending more time with [father] . . . [and] it would be in the child's best interests to more fully develop her relationship with her father though some additional parenting time." We therefore conclude that the unsupported implicit finding that it will be more difficult for the child to travel from California to Minnesota than from Minnesota to California does not make the district court's overall award of parenting time an abuse of discretion.

Father takes issue with the district court's consideration of transportation issues, asserting that transportation issues are not his "fault" or his "problem." But the district court has an obligation to make a parenting-time award that is in the best interests of the child. Minn. Stat. § 518.175, subd. 1(a) (2010). The district court did not abuse its discretion in considering transportation issues that affect the child.

Father asserts that the district court abused its discretion by failing to award him more parenting time in California, but the record reflects that father received all of the parenting time in California that he requested. And the district court stated that father "can of course visit with [the child] on trips to California" and noted that mother has "offered to accommodate additional visits for [father] should he be vacationing in California or be there for other business." The district court relied on mother's "good faith" in making this offer, noting that she has demonstrated a "spirit of accommodation and good faith" throughout the proceedings.

The district court did not abuse its discretion by scheduling father's parenting time in Minnesota around the child's school schedule. The district court specifically approved additional parenting time in California should father seek such parenting time. Currently, there is nothing in the record indicating that the district court's trust in mother's assurances that she will accommodate additional parenting time in California is misplaced. And we trust that the district court has signaled its willingness to order such time if mother does not voluntarily accommodate reasonable requests for additional parenting time in California. We note that a specific award of several additional days of parenting time in California would achieve the percentage of parenting time that father sought.

Father argues that the district court should not be allowed to award him substantially less than 25% of the parenting time without finding that additional parenting time is likely to endanger the child under Minn. Stat. § 518.175, subd. 5(1). But father's argument is based on the false premise that the district court restricted his parenting time.

This court noted in the first appeal that modifications in parenting time caused by a good-faith removal of the child to another state is not generally a "restriction" in parenting time for purposes of Minn. Stat. § 518.175, subd. 5. *Hagen I*, 783 N.W.2d at 219 (citing *Danielson v. Danielson*, 393 N.W.2d 405, 407 (Minn. App. 1986) for the proposition that removal to another state necessarily requires reduction in parenting time and therefore reasonable reductions contingent on removal are not "restrictions"). In this case, the district court did not "restrict" father's parenting time even though his parenting time was reduced from what the parties had anticipated would be reasonable by the time the child reached the age of five and beyond, absent further agreement of the parties. And the district court expects and encourages additional parenting time should father be able to travel to California more often during the school year. Father correctly asserts that, if the child had remained in Minnesota, he would have been able to have more frequent contact with her. But the reduction in the frequency of parenting time is balanced by the increase in the length of each contact the child has with father. Father's argument that the district court was required to make a finding of endangerment under Minn. Stat. § 518. 175, subd. 5(1), in these circumstances, is without merit.

In this case, the district court followed this court's instructions on remand. The district court gave due regard to the statutory presumption contained in Minn. Stat. § 518.175, subd. 1(e), and made thorough findings supported by evidence in the record, explaining why the statutory presumption was not applied in this case.

Affirmed.