STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2256

In re the Marriage of:
Nancy Kathryn Darling, petitioner,
Respondent,

vs.

Kenneth Scott Koeneman,
Appellant.

Filed August 8, 2011
Affirmed
Collins, Judge[*]

Washington County District Court
File No. 82-FA-08-2665

Elizabeth Clysdale, Victoria Lynn Jacobson Brenner, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for respondent)

John P. Guzik, Guzik Law Office, P.A., Roseville, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Collins, Judge.

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

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

COLLINS, Judge

Appellant challenges the judgment in this dissolution matter, arguing that the district court abused its discretion in (1) denying him a continuance of the trial in order to retain counsel; (2) limiting his evidence in the trial; (3) awarding respondent sole legal and sole physical custody of the parties' minor children, and restricting appellant's parenting time; (4) determining valuation dates for the division of certain marital property, and determining respondent's contribution to the homestead; (5) considering appellant's alleged mental-health issues in restricting parenting time, but not in imputing income for child-support purposes; and (6) awarding respondent need-based attorney's fees. We affirm.

FACTS

In April 2008, respondent Nancy Darling petitioned for dissolution of her nearly 18-year marriage to appellant Kenneth Koeneman. Appellant retained an attorney, in July the attorney withdrew, and in September 2008, appellant retained another attorney.

In August 2009, the district court appointed Matthew Shore as a neutral child-custody evaluator. Appellant's attorney received Shore's evaluation on February 22, 2010. Appellant "strongly opposed" Shore's recommendation that appellant have limited contact with the parties' children. On February 25 he moved for a continuance of the March 31 trial date in order to employ another child-custody evaluator. On March 26, the district court granted the continuance, extended discovery and filing deadlines, and rescheduled the trial to June 7, 2010. Respondent timely disclosed and filed her exhibit

and witness lists. When appellant failed to do so, respondent moved the district court to preclude appellant from calling witnesses at trial and to refuse admission of his offered exhibits.[1]

On May 28, 2010, appellant's attorney filed a notice of withdrawal, appellant having purportedly discharged her on May 20. On June 7, before commencing the trial, the district court inquired as to appellant's legal representation. Appellant replied that he had been unsuccessful in finding a suitable attorney and that he was not prepared for trial. The court stated:

> You've known since May 20th that you don't have a lawyer and you've not said anything to this court until this morning.
>
> . . . .
>
> And what I have seen in this case is repeated incidents of your noncooperation, ignoring Court orders, ignoring parenting time schedules. I remember at least once . . . you [] refus[ed] to return a child from parenting time. And, frankly, at that point, it sounded like . . . your lawyer was concerned you wouldn't follow Court orders.
>
> I've ordered . . . you to sign releases of information for your historical and current mental health information. That has never been done.
>
> . . . .
>
> I can't make people do much of anything. At some point I can put them in jail and make them sign things and do things, but the reality is you've created your own situation.
>
> So you're here without Counsel. You're here with limited evidence. And it is appropriate for the [] Court to

[1] Additionally, appellant provided incomplete responses to interrogatories and requests for documents served in April 2009. Appellant failed to correct deficiencies when requested to do so in July and October 2009, and January 2010. Appellant failed to respond to a second set of requests for documents served in January 2010. He also failed to respond to a demand for medical disclosure with attached medical release authorizations served in January 2010.

> limit your presentation of evidence because you haven't played by the rules. [Respondent] has done exactly what the rules require, you have not.
>
> Now, you'll be able to testify and you'll be able to offer . . . information that you want to about your children, and about your life and other issues in the dissolution, but you will have restrictions.
>
> . . . .
>
> [A]ny witnesses that have not been disclosed . . . will not be coming up, because it's unfair to [respondent] who has prepared for known issues. And I'm not going to make them prepare for surprise issues.

Shore testified that he analyzed the best-interest factors and recommended that respondent should be awarded sole physical and sole legal custody of the children and that appellant should have supervised parenting time. William Schwab, a real-estate appraiser, testified that, as of March 15, 2010, the parties' homestead had a value of $555,000. Appellant asked Schwab if he was aware of an appraisal conducted on October 1, 2009, that indicated the homestead's value was $670,000. Schwab was aware of the appraisal, but disregarded it as flawed because in determining market value the appraiser identified only one closed sale and relied on listings of comparable properties that had not been sold. Schwab opined that a financial institution would not approve a mortgage-loan application based on such an appraisal. Appellant valued the homestead at $658,000, which was the purchase price in 2004, and contended that it will be worth "about a million dollars in anywhere from two to five years."

Appellant testified that he does not have a mental illness. He stated that respondent made disparaging statements about his mental health to discredit him and blamed these statements for the trouble he experienced in his career as a surgeon.

Appellant testified that in 2008 he earned more than $300,000, but that he was not currently employed in a clinical setting, which reduced his income to "basically nothing." Appellant testified that he is not voluntarily unemployed and that he would like to resume his career as a surgeon. He stated that he has been pursuing employment opportunities and applied for "120 to 150" positions throughout the country, but that "incidents" from his past employment prevented him from being selected for suitable employment. Appellant stated that he had received offers, but they were not "viable." Appellant testified that he would support his children financially by "be[ing] a competent physician and surgeon of urologic malignancies," which he has "been doing for the last 20 years," and would resume "sometime soon."

The district court's order for judgment and judgment and decree addressed appellant's request for a continuance made on the first day of trial. The court noted that appellant had been represented until May 20, 2010, and stated that appellant's claim that his attorney was not diligent was unsubstantiated. The district court found Shore to be credible and, after due analysis of the best-interest factors, awarded respondent sole legal and sole physical custody of the parties' six minor children and limited appellant to supervised parenting time. The court found that the children believe that their relationships with appellant are "severely ruptured," they do not trust appellant, and view appellant as being "peripheral to their lives and as someone to be avoided." The court found that respondent has been the primary caretaker, has a loving relationship with the children, and lives in the family home where the children are well-adjusted. The court found that appellant has spent little time with the children since the parties separated and

that his behaviors prevent him from effectively participating in the children's school and community involvement. The court found that it could not make a determination as to whether appellant has a mental illness, but did find "evidence of [his] very disturbing, often irrational behaviors." The district court expressed disappointment in learning that from the time the court temporarily adopted Shore's recommendations on March 26, 2010, through the end of the trial on June 25, 2010, only five parenting-time sessions had been scheduled by appellant or his family and appellant had not always stayed through the entire session.

For purposes of child support, the district court found that appellant's "employment situation is unclear" and that he was "very evasive, vague, and argumentative in his testimony and in answering questions . . . regarding his current employment status and events that may have led to changes in his past employment status." The court found that appellant's average-annual income, based on tax returns, has been $313,534; that he is capable of finding employment as a urologist and should be expected to do so without delay; and that he is capable of earning annual income of at least 65% of his historical average, or $203,797. The district court imputed income to appellant and set his child-support obligation at $2,635 per month.

The district court awarded respondent the homestead, finding the value to be $555,000 based on Schwab's appraisal. The court credited respondent $132,000 that she paid on the mortgages during the parties' separation, because during that time, appellant, on average, provided respondent with only $166 per month. The court also found that appellant failed to provide retirement-account statements necessary to determine

distribution amounts as of the pretrial-hearing date, February 26, 2010,. Because the most current statement appellant provided was dated October 26, 2009, the district court found it fair to use that date, rather than the statutory presumptive valuation date, to divide the accounts.

Finally, based on the parties' financial circumstances and the procedural history of the case, the court awarded respondent $10,000 in need-based attorney's fees.[2] This appeal followed.

D E C I S I O N

1. The district court did not abuse its discretion in denying appellant's motion for a continuance of the trial.

Appellant argues that the district court should have granted his motion for a continuance made on the first day of trial in order for him to retain competent counsel. We review the denial of a motion for continuance for an abuse of discretion. *Dunham v. Roer*, 708 N.W.2d 552, 572 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). A district court's denial of a motion for a continuance will withstand an appeal if granting the motion would unfairly prejudice the nonmoving party. *Chahla v. City of St. Paul*, 507 N.W.2d 29, 32 (Minn. App. 1993), *review denied* (Minn. Jan. 20, 1994).

Appellant discharged his attorney on May 20, 2010, for no apparent reason. Appellant had adequate time from then to June 7, the scheduled date of trial, in which to retain another attorney. Appellant asserted that he attempted to do so, but was unable to

[2] The district court also awarded respondent conduct-based attorney's fees after finding that appellant unreasonably contributed to the length and expense of the proceedings by failing to respond to discovery, failing to abide by court orders, and discharging his most recent attorney.

find a suitable attorney before trial. But the district court did not find appellant credible in this regard. We defer to this credibility determination. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations). Further, the district court had previously granted appellant one continuance in order to employ a custody evaluator. Finally, respondent was prepared for trial; the court found that while appellant failed to follow rules and court orders, respondent did everything that the rules required. On this record, we conclude that the district court was within its discretion in denying appellant a continuance of the trial.

2. The district court did not abuse its discretion in limiting appellant's evidence in the trial.

Appellant argues that the district court abused its discretion in precluding him from calling witnesses and offering exhibits. A district court has discretion to determine appropriate sanctions for violations of discovery rules, as it is in the best position to evaluate the degree of prejudice arising from the violations, as well as the efficacy of available remedies that may prevent prejudice resulting from the violations. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977). Minn. R. Civ. P. 37.02(b) authorizes a court to impose sanctions for a party's failure to provide or permit discovery in violation of a court order. *Id.* Those sanctions include "prohibiting [the disobedient] party from introducing designated matters into evidence." Minn. R. Civ. P. 37.02 (b)(2). Here, the district court issued orders setting deadlines for discovery and timelines for serving and filing witness and exhibit lists. Appellant failed to abide by these orders. Therefore, the

district court was within its discretion in sanctioning appellant for such violations by precluding evidence through witnesses and exhibits he failed to disclose.

3. The district court did not abuse its discretion in awarding respondent sole legal and sole physical custody of the parties' minor children, or in restricting appellant's parenting time.

Appellant argues that the district court abused its discretion by awarding respondent sole legal and sole physical custody of the parties' six minor children and granting appellant only supervised parenting time. A district court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Our review of a custody determination "is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We view "the record in the light most favorable to the [district] court's findings." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). Findings of fact are reviewed for clear error. *Pikula*, 374 N.W.2d at 710. This court defers to and does not reassess the district court's credibility determinations. *Sefkow*, 427 N.W.2d at 210 (Minn. 1988).

"[T]he ultimate question in all disputes over [parenting time] is what is in the best interest of the child." *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984).

> [T]he court shall . . . grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child.
>
> If the court finds, after a hearing, that parenting time with a parent is likely to endanger the child's physical or

> emotional health or impair the child's emotional development, the court shall restrict parenting time with that parent as to time, place, duration, or supervision and may deny parenting time entirely, as the circumstances warrant.

Minn. Stat. § 518.175, subd. 1(a) (2010).

The district court found Shore to be credible and adopted his recommendations, which are supported by the record. The district court explicitly addressed the relevant custody factors, finding that the children believe that their relationship with appellant is "severely ruptured," the children do not trust appellant, and they view him as "peripheral to their lives and as someone to be avoided." The court found that respondent has been the primary caretaker, has a loving relationship with the children, and lives in the family home where the children are well-adjusted. The court found that appellant has spent little time with the children since the parties separated. Further, the district court found that appellant's behavior prevents him from effectively participating in the children's school and community activities. The court found that it could not make a determination as to whether appellant has a mental-health problem, but found "evidence of very disturbing, often irrational behaviors by [appellant] outlined in [the] custody evaluation." The district court expressed disappointment in learning that from March 26, 2010, when the court temporarily adopted Shore's recommendations, to the last day of trial on June 25, 2010, approximately five parenting-time sessions had been scheduled by appellant or his family and appellant did not always stay for the entire sessions. Thus, appellant failed to take advantage of the parenting time he had available to him. On this record, we

conclude that the district court did not abuse its discretion in awarding respondent sole legal and sole physical custody, or in limiting appellant to supervised parenting time.

4. The district court did not abuse its discretion in determining the valuation date for division of the retirement accounts or in evaluating the parties' homestead.

Appellant next contends that the district court abused its discretion by applying an arbitrary valuation date to the retirement accounts. A district court "shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference, unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable." Minn. Stat. § 518.58, subd. 1 (2010). Here, appellant asserts that the district court used July 1, 2010, as the valuation date in dividing his retirement accounts. This assertion is incorrect. The court noted that appellant, who was the custodian of the retirement accounts, failed to provide account statements as of the pretrial-hearing date, February 26, 2010. The court found that it was fair and equitable to rely on the most current statement that appellant provided, dated October 26, 2009, and used that as the valuation date in dividing the accounts. On a record where appellant failed to provide valuation of the retirement accounts as of the statutory presumptive date and the district court made specific findings that the selected valuation date was fair and equitable, we are satisfied that the district court did not abuse its discretion in this regard.

Appellant also challenges the district court's valuation of the parties' homestead, contending, without support, that the value should be at least what it was when purchased in 2004. *Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984). Here, Schwab testified in

support of his appraisal and as to the flaws inherent in appellant's previous appraisal. On this record, the district court was within its discretion in adopting Schwab's appraised value of the homestead.

5. The district court did not abuse its discretion regarding consideration of appellant's alleged mental-health issues.

Appellant next argues that the district court abused its discretion in finding that appellant's alleged mental-health issues affected his ability to parent, but had no effect on his earning ability. First, appellant denies, and the district court did not find, that he has a mental-health issue or mental illness. In restricting appellant's parenting time, the district court relied on objective evidence of behavior and the children's stated perceptions and feelings, noting that each child discussed specific incidents that resulted in certain feelings about appellant. But the district court did not attribute appellant's behavior to a mental illness.

A district court "must" base child support on "potential income" if a parent is "voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income." Minn. Stat. § 518A.32, subd. 1 (2010). When a district court imputes income it exercises broad discretion, and we review that imputation only for an abuse of discretion. *Cf. Butt v. Schmidt*, 747 N.W.2d 566, 574-77 (Minn. 2008) (analyzing failure to impute income under predecessor child-support statute for abuse of discretion).

The district court found that, for whatever reasons, appellant's "employment situation is unclear" and that he was "very evasive, vague, and argumentative in his

testimony and in answering questions . . . regarding his current employment status and events that may have led to changes in his past employment status." The court found that appellant's average yearly income, based on tax returns, has been $313,534. The court determined that appellant is capable of finding employment as a urologist and expected him to do so without delay. The court found that appellant is capable of earning at least 65% of his historical average income, or $203,797 per year. The district court imputed such income and concluded that appellant's child-support obligation is $2,635 per month.

The district court's findings and conclusion are supported by the record. Appellant consistently testified that he is able to earn income consistent with his historical average. He stated that he would provide financially for his children by being a "competent physician and surgeon of urologic malignancies," which he has done "for the last 20 years." He asserted that, since mid-2009, he applied for approximately "120 to 150" positions throughout the country, but did not accept resulting offers that were not "viable." Appellant stated that he would "be a busy physician . . . sometime soon." Appellant's testimony supports the imputation of income; thus, the district court did not abuse its discretion on this issue.

6. The district court did not abuse its discretion in awarding respondent need-based attorney's fees.

Finally, appellant challenges the district court's award of $10,000 in need-based attorney's fees to respondent. An award of need-based attorney's fees is discretionary with the district court. *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). The district court "shall award attorney fees, costs, and disbursements" in a dissolution proceeding

> in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds: (1) that the fees are necessary for the good faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding; (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1 (2010).

The district court awarded respondent need-based attorney's fees based on the parties' relative financial circumstances, and the findings are supported by the record. Appellant contends that respondent earns more income than he does, but appellant failed to provide evidence regarding his income, and the district court found that appellant was "evasive, vague, and argumentative" in describing his employment status. On this record, we conclude that the district court did not abuse its broad discretion in awarding respondent need-based attorney's fees.

Affirmed.