STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1451

In re the Marriage of:
Deborah Lynn Garner, f/k/a
Deborah Lynn Garland Smith, petitioner,
Respondent,

vs.

Vaughn Garland Smith,
Appellant.

Filed March 26, 2012
Affirmed
Cleary, Judge

Washington County District Court
File No. 82-F8-06-008117

Christopher D. Johnson, Johnson & Turner, P.A., Forest Lake, Minnesota (for respondent)

Vaughn Garland Smith, Edina, Minnesota (pro se appellant)

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and Cleary, Judge.

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

CLEARY, Judge

Appellant Vaughn Garland Smith challenges the district court's order granting respondent Deborah Garner's motion to remove the residence of the parties' minor child

from Minnesota. Appellant claims that the parties' dissolution decree contains a valid locale restriction, which the court implicitly invalidated by granting removal. Appellant also argues that the court erred by applying Minn. Stat. § 518.175, subd. 3 (2010), rather than Minn. Stat. § 518.18(d) (2010), when determining whether to grant removal. Finally, appellant argues that the court erred by finding that there was a pattern of conduct on the part of respondent to promote and facilitate, rather than thwart, the relationship between the child and appellant, and by finding that awarding primary physical custody to appellant would be detrimental to the child's relationships with respondent and respondent's extended family. We affirm.

FACTS

The parties are the parents of one minor child, C.S., born on January 22, 2004. The parties' marriage was dissolved by stipulated Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree (decree) entered on January 9, 2009. Conclusions of Law paragraph 3 of the decree is entitled "CUSTODY AND PARENTING ACCESS TIME" and states that the parties are awarded joint legal custody of the child and that respondent "is awarded the sole physical custody as the primary parent in residence of the minor child . . . ." Paragraph 3 goes on to set a parenting-time schedule and holiday schedule and list several parenting requirements. Conclusions of Law paragraph 10 of the decree is entitled "REMOVAL FROM MINNESOTA" and states:

> Neither party shall remove the minor child of the parties from the State of Minnesota for the purpose of changing place of residence without the written consent of the other party, or

> until further Order of the Court, so long as either party is a resident of the State of Minnesota.

Both parties were residents of Minnesota when the decree was entered.

In February 2011, respondent filed a motion in district court requesting that she "be allowed to remove the child's residence from the State of Minnesota to the State of Virginia pursuant to Minn. Stat. § 518.175, subd. 3," and that the parenting-time schedule be amended to give appellant parenting time during the child's spring, summer, and winter school breaks. Respondent had become engaged to a man who is currently on active military duty stationed in Norfolk, Virginia, and the couple planned to marry in July of 2011 and live in Virginia. Appellant filed a responsive motion requesting that respondent's motion be dismissed in its entirety pursuant to Minn. Stat. §§ 518.18(d) and 518.175, subds. 1, 3 (2010).

The district court held an evidentiary hearing on the parties' motions, during which the court received testimony from both parties and friends and relatives of the parties. The district court subsequently issued an order granting respondent's motion to allow the child to move out of Minnesota. The order states:

> When considering the request of the custodial parent to move a child to another state, the court must apply a best interests standard. The court must consider 8 statutory factors, and all other relevant information, that affects the best interests of the child. The burden of proof rests with the party seeking to move the child out of the state.

The district court then went on to analyze each of the eight factors articulated in Minn. Stat. § 518.175, subd. 3(b), ultimately determining that it would be in the child's best interests to be allowed to move out of Minnesota with respondent. This appeal followed.

D E C I S I O N

I. The REMOVAL-FROM-MINNESOTA provision in the decree is not a locale restriction.

Appellant argues that the REMOVAL-FROM-MINNESOTA provision in the parties' decree is a valid locale restriction. "The rules of contract construction apply when construing a stipulated provision in a dissolution judgment." *Blonigen v. Blonigen*, 621 N.W.2d 276, 281 (Minn. App. 2001), *review denied* (Minn. Mar. 13, 2001). Under those rules, if no ambiguity exists, interpretation of the contract is a question of law subject to de novo review. *Id.*

A locale restriction is a provision that grants custody to a party on the condition that the party remains with the child in a certain location. *See Goldman v. Greenwood*, 748 N.W.2d 279, 281–82 (Minn. 2008) (determining that a locale restriction awarding a mother sole physical custody contingent on her remaining in Minnesota was valid); *LaChapelle v. Mitten*, 607 N.W.2d 151, 163–65 (Minn. App. 2000) (upholding as constitutional a provision awarding sole physical custody to a mother on the condition that she provide a permanent residence for the child in Minnesota), *review denied* (Minn. May 16, 2000).

The parties' decree does not contain such a locale restriction. The CUSTODY-AND-PARENTING-ACCESS-TIME provision that awards respondent sole physical custody of the child does not make that custody contingent on her remaining with the child in Minnesota. Likewise, the REMOVAL-FROM-MINNESOTA provision does not make custody contingent on respondent remaining in Minnesota, but merely states that a

party shall not remove the child from Minnesota for the purpose of changing place of residence without the written consent of the other party or a court order. Appellant misreads the caselaw when he describes the decree's REMOVAL-FROM-MINNESOTA provision as a locale restriction.

Appellant also argues that the district court implicitly invalidated the REMOVAL-FROM-MINNESOTA provision by granting removal. However, the court's granting of removal did not and could not invalidate the provision. The provision states, "Neither party shall remove the minor child of the parties from the State of Minnesota . . . without the written consent of the other party, *or until further Order of the Court* . . . ." (Emphasis added.) A court order granting removal does not invalidate this provision.

II. The district court properly applied Minn. Stat. § 518.175, subd. 3, rather than Minn. Stat. § 518.18(d), when determining whether to grant removal.

Appellant argues that the district court applied the incorrect statute when determining whether to grant respondent's request to remove the child from Minnesota. "Determination of the applicable statutory standard, and the interpretation of statutes, are questions of law that we review de novo." *Goldman*, 748 N.W.2d at 282 (citations omitted). "A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotation omitted).

Minn. Stat. § 518.175, subd. 3, entitled "Move to another state," declares:

> (a) The parent with whom the child resides shall not move the residence of the child to another state except upon

> order of the court or with the consent of the other parent, if the other parent has been given parenting time by the decree. If the purpose of the move is to interfere with parenting time given to the other parent by the decree, the court shall not permit the child's residence to be moved to another state.
>
> (b) The court shall apply a best interests standard when considering the request of the parent with whom the child resides to move the child's residence to another state.

Clause (b) lists eight factors that the court must consider when determining what is in the child's best interests, although the court is not limited to just those factors in making the decision whether to grant removal. *Id*. The district court applied this statute when it granted respondent's motion to allow the child to move out of Minnesota and discussed each of the eight factors in its order.

Appellant argues that the district court should have applied Minn. Stat. § 518.18(d), rather than Minn. Stat. § 518.175, subd. 3. Minn. Stat. § 518.18(d) states:

> If the court has jurisdiction to determine child custody matters, the court shall not modify a prior custody order or a parenting plan provision which specifies the child's primary residence unless it finds, upon the basis of facts, including unwarranted denial of, or interference with, a duly established parenting time schedule, that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custody arrangement or the parenting plan provision specifying the child's primary residence that was established by the prior order unless . . . .

The statute then lists five circumstances in which a custody arrangement or parenting-plan provision may be changed. *Id*. The district court did not discuss any of these

circumstances in its order. Appellant claims that, because none of these circumstances have been found to apply, the court erred in granting removal.

When faced with the question of which statute governed a motion for removal in *Goldman*, the Minnesota Supreme Court determined that "[s]ection 518.18(d), not section 518.175, subd. 3, governs a motion for removal brought by a sole physical custodian subject to a locale restriction." 748 N.W.2d at 283–84. The locale restriction in *Goldman* awarded the mother sole physical custody contingent on her remaining in Minnesota. *Id*. at 280. The court reasoned that, because the defining feature of a locale restriction is that it is part of the custody order, and because the restriction is implicitly invalidated if Minn. Stat. § 518.175, subd. 3, is applied, the heightened standard for custody-order modification under Minn. Stat. § 518.18(d) applies when faced with a locale restriction. *Id.* at 283–84. The *Goldman* court did not speak to which statutory section applies in the absence of a locale restriction.

As discussed above, the parties' decree does not contain a locale restriction. Application of Minn. Stat. § 518.175, subd. 3, to the parties' situation does not invalidate any provision of the decree. In fact, the language of the REMOVAL-FROM-MINNESOTA provision mirrors that of Minn. Stat. § 518.175, subd. 3(a), making it appear as though the parties had this subdivision in mind when drafting the provision.

Moreover, language contained in Minn. Stat. § 518.175, subd. 3(a), indicates that this subdivision applies where, as here, a custodial parent is attempting to move a child to another state and thereby modify the parenting time that was awarded to the nonmoving parent in a judgment and decree. *See id.* ("The parent with whom the child resides shall

not move the residence of the child to another state . . . *if the other parent has been given parenting time by the decree*. If the purpose of the move is to interfere with *parenting time given to the other parent by the decree* . . . .") (emphasis added). *See also Rutz v. Rutz*, 644 N.W.2d 489, 492–94 (Minn. App. 2002) (applying Minn. Stat. § 518.175, subd. 3, when, after a decree awarded the parents joint legal custody, the mother sole physical custody, and the father parenting time, the mother brought a motion to move the children to Hawaii).

Approval to modify a prior custody order or parenting-plan provision is difficult to obtain under Minn. Stat. § 518.18(d). This court noted this in *Sydnes v. Sydnes*, where, after a decree awarding parents joint legal and joint physical custody of their children, the mother brought a motion to move the children to France during the school year and have them return to live with the father in Minnesota during the summer. 388 N.W.2d 3, 5 (Minn. App. 1986). The court stated that "[m]odifications are difficult to justify" if applying Minn. Stat. § 518.18(d), and that "[t]he standard set out in § 518.18(d) is unworkable in a situation such as this; rarely can a party show that removal from a state or the country is warranted because the children's present environment endangers their physical or emotional health." *Id.* at 6. Instead, the court applied a best-interests standard, stating that "the focus should remain, where the legislature has placed it, on the best interests of the child." *Id*. (quotation omitted).

Minn. Stat. § 518.175, subd. 3, governs removal of a child's residence from Minnesota by the parent with whom the child lives. Therefore, the district court properly

applied Minn. Stat. § 518.175, subd. 3, rather than Minn. Stat. § 518.18(d), when determining whether to grant removal of the child from Minnesota.

III. The district court did not clearly err by finding that there was a pattern of conduct on the part of respondent to promote and facilitate the relationship between the child and appellant, and by not finding conduct on the part of respondent that would tend to thwart that relationship.

Appellant argues that the district court erred by making findings contrary to what he asserts is a pattern of conduct on the part of respondent to thwart the relationship between the child and appellant. "Appellate courts set aside a district court's findings of fact only if clearly erroneous, giving deference to the district court's opportunity to evaluate witness credibility." *Goldman*, 748 N.W.2d at 284. "Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made." *Id*. (quotation omitted). "When determining whether findings are clearly erroneous, an appellate court views the record in the light most favorable to the trial court's findings." *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). "That the record might support findings other than those made by the trial court does not show that the court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

In its order, the district court considered the statutory factor of "whether there is an established pattern of conduct of the person seeking the relocation either to promote or thwart the relationship of the child and the nonrelocating person . . . ." Minn. Stat. § 518.175, subd. 3(b)(5). Relating to that factor, the court stated:

> 1. The court finds that there is an established pattern on the part of Ms. Garner to promote and facilitate a relationship between [C.S.] and Mr. Smith (and Mr. Smith's family).
>
> 2. The court is satisfied that this pattern is based upon a good faith and sincere desire to foster better relationships between [C.S.] and Mr. Smith (and his family).
>
> 3. The court does not find any conduct that would tend to thwart such relationships.

Appellant argues that the district court erred in finding that respondent has not attempted to thwart the child's relationship with appellant. Appellant testified at the evidentiary hearing on April 13, 2011, that he was given little parenting time during the marriage-dissolution proceedings; that there have been many times when it has been difficult to get access to the child; that he has been left out of important decisions regarding the child; that he has not been given important information regarding the child; and that respondent has denied him make-up days for missed parenting time. Additionally, appellant and appellant's wife and step-father submitted affidavits to the district court which indicate that, since the parties' separation, respondent has repeatedly interfered with appellant's time and relationship with the child. Appellant also claims that the district court should have accorded greater credibility to the custody evaluation dated March 23, 2008, which was conducted during the dissolution proceedings and suggests that respondent was limiting and withholding appellant's parenting time, preventing appellant from participating in daycare and healthcare decisions regarding the child, and generally impeding appellant's ability to co-parent the child.

However, the district court also had before it evidence indicating that respondent has promoted a relationship between the child and appellant. Respondent testified at the evidentiary hearing that she has agreed to changes in the parenting-time schedule to accommodate appellant's work and travel schedules and to allow appellant to make up parenting time. Additionally, respondent stated in an affidavit filed with the district court that she has promoted appellant's relationship with the child by rearranging the parenting-time schedule and the child's activities to accommodate appellant's schedule. Appellant also admitted during his testimony at the evidentiary hearing that respondent has been willing to adapt the parenting-time schedule and the child's schedule around appellant's work and travel obligations.

The district court was able to weigh the credibility of the evidence and testimony before it. Faced with this conflicting evidence, the court could reasonably determine that there was an established pattern on the part of respondent to promote, facilitate, and foster, rather than thwart, a relationship between the child and appellant. The district court's findings of fact on this issue are supported by the record and are not clearly erroneous.

IV. The district court did not clearly err by finding that awarding primary physical custody to appellant would be detrimental to the child's relationships with respondent and respondent's extended family.

Appellant argues that the district court erred by assessing a level of detriment to the child if appellant were awarded primary physical custody. As stated above, a district court's findings of fact should only be set aside if clearly erroneous. *Goldman*, 748 N.W.2d at 284.

In its order, the district court found that appellant has had little recent contact with members of his own extended family and with respondent's extended family, and that appellant has exerted very little effort to arrange interaction between the child and appellant's extended family. The district court stated, "All of this causes the court to conclude that if [appellant] were to end up with primary physical custody that [respondent's] family would be very unlikely to have any interaction with [C.S.] again." The district court went on to state that it "believes that it would be detrimental to [C.S.] if [appellant] were to have primary physical custody . . . because the court believes [appellant] would exclude [respondent's] family from contact and would be unlikely to make efforts to facilitate contact with [respondent]." On the other hand, the district court found that respondent had facilitated interaction and relationships between the child and both sides of the child's extended family.

The district court had evidence before it that appellant has promoted some interaction between the child and respondent's relatives, and that appellant appeared willing to continue to do so if awarded physical custody of the child. The parties both testified at the evidentiary hearing that, at least on some occasions, appellant has facilitated the child spending time with the child's maternal relatives, even during appellant's scheduled parenting time. Appellant testified that he would be willing to set up regular visits between the child and respondent's family if awarded physical custody, and that he would make efforts to allow the child and respondent to see each other as regularly as possible. Additionally, appellant's wife provided an affidavit to the district court stating that, if respondent moves to Virginia and the child remains in Minnesota,

she and appellant are "committed to continue in supporting and fostering the relationships with both [respondent's] entire family along with our own."

However, the district court also had evidence before it that appellant has not facilitated interaction between the child and the child's relatives, and that instead, respondent has been the one to promote relationships between the child and the child's extended family. In an affidavit submitted to the district court, respondent stated that appellant "has had very little contact with his family since beginning his new family. I have maintained a relationship with my former in-laws and the only reason [C.S.] maintains a relationship with [appellant's] family is solely because of and through me." Respondent's mother testified at the evidentiary hearing that she has not maintained a relationship with appellant since the parties' marriage dissolution and does not know of anyone in her family who has. In an affidavit, respondent's mother further stated that she is "confident that [appellant] will not allow us, or any of our family, to see [C.S.] during his parenting time." The district court received similar statements from respondent's brothers, who likewise have not remained in contact with appellant since the parties' separation. Appellant admitted at the evidentiary hearing that he has not had contact with respondent's brothers and that he has spent little time with respondent's parents since the marriage dissolution.

The district court was in the best position to weigh the credibility of this conflicting evidence. Based upon the testimony and affidavits, the court could reasonably find that awarding primary physical custody to appellant would be detrimental to the child because appellant would exclude respondent's family from contact and would

be unlikely to make efforts to facilitate contact with respondent. The district court's findings of fact on this issue are supported by the record and are not clearly erroneous.

Affirmed.