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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-0742**

In re the Marriage of: Richard Allen Waagen, petitioner,
Appellant,

vs.

Laurie Jean Waagen,
Respondent.

**Filed July 16, 2012
Affirmed
Rodenberg, Judge**

Morrison County District Court
File No. 49FA09555

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Considered and decided by Cleary, Presiding Judge; Stauber, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this marital-dissolution dispute, appellant challenges the district court's determinations regarding child custody and the valuation of his nonmarital interest in the parties' farm, including its determination of the mortgage encumbrance on that farm. We affirm.

FACTS

Appellant Richard Allen Waagen and respondent Laurie Jean Waagen were married in 1992. They have three minor children: R.W., M.W., and T.W. During the parties' marriage, respondent worked as a licensed practical nurse and then as a registered nurse. For almost two years, she worked full-time while attending school to become a registered nurse. She regularly worked night shifts throughout the marriage. Appellant was primarily a stay-at-home father during the marriage, though he also worked at the parties' commercial Laundromats, sold scrap metal, and farmed.

Throughout the marriage, the parties lived on a farm in Randall, Minnesota, that initially belonged to appellant's parents. In April of 2002, appellant's parents prepared a purchase agreement to sell the 240-acre farm to the parties for \$117,000.¹ The fair market value of the property at that time was approximately twice that amount, and the purchase agreement acknowledged that the sale price was below market value.

Shortly after conveying the homestead portion of the property to the parties as joint tenants, appellant's parents cancelled the purchase agreement with regard to the 220-acre parcel, apparently due to a family dispute. Appellant's parents then agreed that they would convey the 220-acre parcel to the parties but that there would be an offset against appellant's inheritance of \$62,000 (the same amount as the purchase price for this portion of the property). About nine months later, appellant's parents conveyed the 220-acre parcel to the parties, as joint tenants, by warranty deed.

¹ The farm was divided into two parcels: a 20-acre homestead and a 220-acre parcel of land. The purchase agreement specified that the sale price of the 220-acre parcel was \$62,000.

Following the parties' separation in September 2008, appellant continued to live on the farm. Respondent moved to the nearby town of Little Falls, where she rented a two-bedroom apartment. The parties shared custody of the children while the dissolution proceedings were pending.

Following a four-day trial, the district court granted respondent sole legal and physical custody of the three children, subject to appellant's parenting time on alternating weekends and holidays. With regard to property division, it found that appellant had a \$62,000 nonmarital interest in the 220-acre parcel of the farm by reason of gift or inheritance from his parents. It found that his parents intended the substantial difference between the market value of the property and the credit against appellant's inheritance to be a joint gift to the parties.

Appellant filed a notice of appeal and respondent filed a notice of related appeal. As respondent's brief withdraws her appeal of spousal maintenance and attorney fees, only appellant's arguments remain.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion in granting sole physical custody of the parties' three children to respondent. Specifically, appellant maintains that (1) the court's finding that both parties shared primary caretaking duties was unsupported by the record; (2) the court abused its discretion in failing to ascertain, through an in camera interview, the preferences of the children; and (3) the court abused its discretion in balancing the best-interests factors.

District courts have broad discretion in determining child custody matters. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). The law “leaves scant if any room for an appellate court to question the trial court’s balancing of best-interests considerations.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). Appellate review 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 will sustain the court’s findings of fact unless they are clearly erroneous, viewing the record in the light most favorable to the findings. *Vangsness*, 607 N.W.2d at 472.

Custody determinations must center on the children’s best interests. *Id.* at 476. The district court must consider, at minimum, the thirteen statutory best-interests factors to the extent they are relevant. Minn. Stat. § 518.17, subd. 1(a) (2010). No one factor is determinative. *Id.*

A. Primary caretaker

One of the statutory best-interests factors the court must consider is which parent was the children’s primary caretaker. Minn. Stat. § 518.17, subd. 1(a)(3). Here, the district court found that both parties shared primary caretaking duties. Appellant contends that the record does not support this finding because it was undisputed that he was a stay-at-home father after the first child was born.

The primary-caretaker factor takes into account a number of day-to-day duties, including meal preparation, grooming, medical care, transportation, discipline, teaching the children skills and manners, and cultivating their social interactions. *Pikula*, 374

N.W.2d at 713. The record supports the court's finding that both parents shared these duties. Respondent testified that from about 1999 onward, she worked three night shifts per week, which allowed her to have four days off each week. When she was not working, she resumed "all duties," including cooking, assisting the children with their homework, and performing other household chores. As appellant would generally be working outside when respondent was at home, she tended to the children more during those times. The district court therefore did not clearly err in finding that the parties shared primary caretaking duties.

B. Children's preferences

Appellant argues that the district court abused its discretion in failing to ascertain the preferences of the children and in denying his motion requesting that the court conduct an in camera interview with the children. In custody proceedings, the district court must consider "the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference." Minn. Stat. § 518.17, subd. 1(a)(2). Courts have discretion to conduct in camera interviews of the children to ascertain their reasonable preferences. Minn. Stat. § 518.166 (2010). However, a child's preference should not be accorded weight if it is the product of parental manipulation. *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 691 (Minn. App. 1989), *review denied* (Minn. June 21, 1989).

After declining to conduct an in camera interview, the district court found that T.W., who was five years old at the time of trial, was not old enough to express a preference as to custody. It noted that M.W., who was thirteen years old, had expressed a

preference to live on the farm with appellant. However, it found her preference unreliable because appellant had drawn M.W. into the proceedings and rewarded her for supporting him, thereby putting emotional pressure on her.² The court acted within its discretion by disregarding her preference as the product of parental manipulation. *See Edsten v. Edsten*, 407 N.W.2d 102, 104 (Minn. App. 1987) (noting that child’s preference is probative only when “it is clear to the trial court that it is not the product of manipulation by the non-custodial parent”). Finally, the district court found that R.W., who was sixteen years old, lacked the “maturity necessary to make such a decision,” and noted that R.W. had been diagnosed with several psychological disorders, that he struggled academically and socially, and that he functioned at a lower level for his age group. The record contains evidence sufficient to support these findings, particularly in the reports of the custody evaluator and the guardian ad litem.

Appellant challenges the district court’s declination to conduct an in camera interview with the children to ascertain their preferences. As noted above, the decision to interview children is discretionary, and “[a]n interview is not the only way to determine a child’s preference.” *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. App. 1985). The district court here decided not to interview the children because (1) the custody reports provided sufficient information regarding the children’s preferences and (2) involving the children in the proceedings would be detrimental to their well-being. The district court

² The custody reports observe that appellant put M.W. “in the middle” and emotionally rewarded her for aligning with him, thereby influencing her custody preference. Other evidence in the record supports the district court’s finding that appellant emotionally pressured M.W. by showing her favoritism, alienating her from respondent, denigrating respondent in front of her, and inappropriately involving M.W. in adult issues.

also expressed concern that, given appellant's emotional pressuring of M.W. in the past, he would further coach or pressure her with regard to any interview. As the record supports this reasoning, the district court did not abuse its discretion in declining to interview the children.

Appellant argues that the custody evaluator did not expressly ask the children about their preferences. The custody evaluator testified that, as a rule, she never asks children where they "want to be." Instead, she asks them what they like to do with each parent and what they like about each parent, apparently as an indirect means of ascertaining their preferences. Regardless of the method of obtaining this information, the reports of both the evaluator and guardian contain sufficient detail to permit the district court to discern the children's preferences and the reasons for their preferences. The district court therefore did not err in relying on the reports. *Cf. Uhl v. Uhl*, 395 N.W.2d 106, 110 (Minn. App. 1986) (holding that the district court did not err in failing to directly ask the children to state a preference when the record adequately reflected the children's preferences).

C. Balance of factors

Appellant argues that the district court abused its discretion in balancing the best-interests factors. He contends that the court essentially relied on a single factor—appellant's anger toward respondent—and ignored the other factors in his favor.

The district court found that a number of factors weighed against granting appellant sole or joint physical custody. Based on the custody evaluation, it found that appellant's inappropriate anger, which still consumed him almost two years after the

parties' separation, inhibited his ability to be a proper role model and provide guidance for the children. The custody evaluator reported that appellant was "overwhelmed by the changes that are required of him, resulting in confusion and loss of direction."

Additionally, the court's findings note several examples of appellant's detrimental conduct toward the children. In one instance, appellant failed to follow medical recommendations for M.W. following her wrestling-related injury. Appellant also failed to implement a consistent schedule or support the school's efforts with regard to R.W. R.W.'s homework and hygiene suffered when he was in appellant's care. The custody report observes that respondent was the parent more sensitive to the children's needs and more realistic about co-parenting.

The trial court also found that appellant's anger contributed to a decreased likelihood that he would permit and encourage the children to maintain a relationship with respondent. Appellant had previously encouraged the children not to visit respondent and had engaged in other alienating behaviors, such as frequently downgrading their mother in front of the children. Appellant's own expert witness testified that his behavior in this regard would be a detriment to the children if it continued. The custody evaluator opined that respondent was the parent more likely to encourage the children's relationship with the other parent.

Finally, the court and custody professionals were also concerned about appellant's continuing contact with a former family friend who may have inappropriately touched M.W. in the past. Prior to the parties' separation, they had banned this man from the home. Although criminal charges were never filed, the court, custody evaluator, and

even appellant's own expert witness all found M.W.'s report of the incident credible. Appellant's persistence in regularly inviting this man into the home posed a risk to M.W.'s safety and emotional well-being.

Appellant argues that, in balancing the best-interests factors, the district court failed to take into account respondent's work schedule, as her night shifts would cause the children to spend a significant amount of time with a non-parent. The district court specifically found that respondent's work schedule was "not an issue" because she has generally worked night shifts, she "only" worked six of every fourteen nights, and she had made appropriate child-care arrangements. The court found that placing the children in appellant's care every work night was not feasible due to appellant's responsibility for operating the Laundromats as well as the children's need for stability. Additionally, the court ordered appellant's parenting time to be scheduled for when respondent was working, to the extent possible. This would minimize the amount of time the children would spend in the care of third parties.

Appellant also argues that the district court failed to properly weigh as a factor in the custody determination the children's removal from the family farm where they had spent their entire lives. As with the other factors, the record supports the district court's determination regarding the children's living situation. The district court found that, although the children enjoyed living on the family farm where they had grown up, they had split their time between the farm and respondent's apartment in Little Falls since the parties' separation. The children felt comfortable and safe in both homes. Thus, the

district court did consider the evidence of the parties' respective living situations in making its custody determination.

In sum, the district court's findings reflect that it fully and carefully considered all of the relevant best-interests factors. We recognize that the facts and record here would have supported other custody outcomes; however, that alone is not enough to render the findings deficient. *See Vangsness*, 607 N.W.2d at 474 ("That the record might support findings other than those made by the trial court does not show that the court's findings are defective."). The district court was in the best position to weigh the custody factors, given its ability to observe the witnesses' demeanors and assess their credibility. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (noting that this court must defer to factfinder's credibility assessments).

II.

Appellant also argues that the district court abused its discretion in granting sole legal custody to respondent. He maintains that because both parties were involved in the children's upbringing, and their lack of cooperation was merely the result of a difficult divorce process, the court should have granted the parents joint legal custody.

When a party requests joint legal custody,³ courts must employ a rebuttable presumption that joint legal custody is in the children's best interests. Minn. Stat. § 518.17, subd. 2 (2010). However, when the record demonstrates that the parties "lack

³ Legal custody is defined as "the right to determine the child's upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(a) (2010). Joint legal custody affords both parents "equal rights and responsibilities" with regard to decision-making in the children's lives. *Id.* at subd. 3(b) (2010).

the ability to cooperate and communicate, joint legal custody is not appropriate.” *Wopata v. Wopata*, 498 N.W.2d 478, 482 (Minn. App. 1993). In such cases, awarding joint custody would compromise the children’s well-being by increasing conflict between the parents. *Heard v. Heard*, 353 N.W.2d 157, 162 (Minn. App. 1984).

When joint legal custody is at issue, the court must consider four additional best-interests factors:

- [1] the ability of parents to cooperate in the rearing of their children;
- [2] methods for resolving disputes regarding any major decision concerning the life of the child, and the parents’ willingness to use those methods;
- [3] whether it would be detrimental to the child if one parent were to have sole authority over the child’s upbringing; and
- [4] whether domestic abuse, as defined in section 518B.01, has occurred between the parents.

Minn. Stat. § 518.17, subd. 2.

Regarding the first factor, the district court found that the parties had not demonstrated the ability to cooperate in childrearing since their separation. The record amply supports this finding. The custody evaluator noted that the parties’ ability to cooperate was minimal, and she cited several incidents of conduct impeding their cooperation. Respondent testified that she felt she had no backing from appellant with regard to parenting decisions, and this lack of cooperation had not changed or substantially improved in almost two years since their separation. The district court credited respondent’s testimony, implicitly finding that the parties’ inability to cooperate was not merely a temporary hurdle incident to the dissolution proceedings.

As to the second factor, the district court found that the parties had not identified any methods for resolving disputes concerning the children. It noted that the parties communicated only through email or text message at appellant's insistence, and found that "[s]uch a limited arrangement is not conducive to making major decisions in the children's lives." At trial, respondent testified that the parties' limited communication inhibited their ability to coordinate the children's care. She testified that respondent did not keep her informed regarding the children's lives; for example, he enrolled their youngest child in kindergarten without consulting her. Additionally, the parties had not successfully utilized mediation or other dispute resolution methods.

The district court found that granting respondent sole legal custody would not be detrimental to the children. Again, this finding is supported by the record, as both the custody evaluator and guardian ad litem recommended granting respondent sole legal custody. *Cf. Nies v. Nies*, 407 N.W.2d 484, 487–88 (Minn. App. 1987) (affirming denial of joint legal custody where parties were unable to effectively communicate, encountered frequent visitation problems, and custody evaluator recommended sole custody based on their minimal cooperation); *Wolter v. Wolter*, 382 N.W.2d 896, 898–99 (Minn. App. 1986) (affirming district court's determination that granting joint legal custody was inappropriate because parties communicated only by letter and encountered major conflicts in making decisions about the children).

As to the last factor, the district court specifically discredited appellant's allegations that respondent had engaged in domestic abuse. It found that appellant

apparently fabricated the allegations to gain a custody advantage. We defer to the district court's credibility determination on this factor. *See Sefkow*, 427 N.W.2d at 210.

The record supports the district court's findings on the joint legal custody factors, and the district court did not abuse its discretion in entrusting sole legal custody of the children to respondent.

III.

Appellant argues that the district court clearly erred by undervaluing his nonmarital interest in the parties' 220-acre farm.

Whether property is nonmarital is a question of law, which this court reviews *de novo*. *Olsen v. Olsen*, 552 N.W.2d 290, 291 (Minn. App. 1996), *aff'd*, 562 N.W.2d 797 (Minn. 1997). However, we review the facts underlying the marital or nonmarital characterization for clear error. *Id.*

Property acquired during the parties' marriage is presumed to be marital unless, *inter alia*, it was a gift or inheritance to one spouse alone. Minn. Stat. § 518.003, subd. 3b (2010). The party seeking the nonmarital characterization has the burden of proof by a preponderance of the evidence. *Swick v. Swick*, 467 N.W.2d 328, 330 (Minn. App. 1991), *review denied* (Minn. May 16, 1991). In determining whether the property was a gift, courts must consider the donor's intent as the most important factor. *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). Intent may be inferred from the surrounding circumstances, including the form of the property's transfer. *Id.* The question of intent is ultimately a factual determination subject to clear-error review. *Id.*

Although one of the donors here (appellant's father) testified that his intent was to give the entire parcel to appellant alone, the district court found, based on the surrounding circumstances, that appellant's parents intended to make a gift to appellant alone of a \$62,000 interest in the parcel. That was the amount recited in the written agreement as a credit against appellant's inheritance. The district court's finding is supported by the record. In cancelling the original purchase agreement, the parties agreed that appellant's inheritance would be reduced by \$62,000 on account of the transfer of the parcel.

Respondent did not receive any monetary consideration for cancelling the prior purchase agreement with respect to the parcel. Thus, the district court found that she relinquished a valuable property right with the understanding that she and appellant would receive the property as a gift (less appellant's inheritance). The form of the transfer—to both parties as joint tenants—also supports the district court's determination. *See Olsen*, 552 N.W.2d at 292–93 (recognizing that although form of conveyance is not determinative in every case, it is generally strong evidence of the transferor's intent).

Moreover, at the time of transfer, the parties had been living on the property with their two children for over ten years. Respondent testified that appellant's parents had always intended the property to be for both of them. She testified that, even after the parties separated, appellant acknowledged that the property belonged to both parties. It is apparent that the district court credited respondent's testimony and discredited the testimony of appellant and his father. The district court therefore did not clearly err in its finding that appellant did not bear his burden of proving a nonmarital claim in the 220-acre parcel beyond the \$62,000 amount recited at the time of the transfer.

IV.

Last, appellant argues that the district court erred in failing to offset the value of the homestead by the amount of the mortgage which encumbered the 220-acre parcel, and by not disregarding that mortgage in determining the net value of the larger parcel. There is evidence that the parties originally intended that this debt would encumber the homestead, but due to a mistake or misunderstanding, the parties encumbered the 220-acre parcel instead. No action to reform the parties' mortgage was ever commenced by any party. The district court applied the mortgage to the 220-acre parcel, in accordance with the terms of the mortgage instrument.

Appellant has not offered any legal argument, analysis, or authority as to why the district court should have reformed the parties' duly-executed mortgage in effectuating property division. *See* Minn. R. Civ. App. P. 128.02, subd. 1(d) (requiring parties on appeal to supply an argument with legal analysis and citations to authorities). Moreover, the record is not clear whether the encumbrance of the 220-acre parcel was due to a clerical error, to the parties' misunderstanding, or to some other reason. No evidence was presented as to the mortgagee's intent, and the mortgagee was not a party to the dissolution proceeding. As a result, the district court did not err in denying appellant's

request to “transfer” the encumbrance from the 220-acre parcel to the homestead in effectuating property division.

Affirmed.