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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1445

James Eric Hanson, petitioner,
Respondent,

vs.

Michelle Lynn Wetherby,
f/k/a Michelle Lynn Hanson,
Michelle Lynn Benson,
Appellant.

Filed April 29, 2013
Affirmed; motion denied
Hudson, Judge

Hennepin County District Court
File No. 27-FA-05-1035

Diane B. Bratvold, Daniel J. Supalla, Briggs and Morgan, P.A., Minneapolis, Minnesota; and

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Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota; and

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Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Kirk, Judge.

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

HUDSON, Judge

Appellant mother challenges the district court's order rejecting a parenting consultant's decision on the school district in which the parties' minor children should attend school, arguing that the district court erred by concluding that the parenting consultant's decision was unenforceable and abused its discretion by concluding that it was in the children's best interests to continue attending school in their current school district. We affirm.

FACTS

The district court dissolved the marriage of appellant Michelle Lynn Wetherby and respondent James Eric Hanson by stipulated judgment in 2006. The district court granted the parties joint legal and physical custody of their two children, then ages five and two. Since the dissolution, respondent has lived in the family homestead in Hanover; appellant moved initially to Maple Grove and then, when she remarried, to Mahtomedi. Since the dissolution, the children have had a schedule by which they spend Mondays and Tuesdays at their father's, Wednesdays and Thursdays at their mother's, and weekends alternating between parents.

The judgment directed the parties to use a parenting consultant, then Dr. Susan Phipps-Yonas, to assist them with resolving issues regarding their children, including the issue of which schools the children would attend. In 2008-09, Dr. Phipps-Yonas conducted a "mini-study" and concluded that the children should continue to attend elementary school in Hanover for the 2009-10 school year; that it would not disadvantage

them to attend that school for two or three years; and that it would be desirable for respondent to move to Mahtomedi so that the children could take advantage of expanded opportunities in Mahtomedi schools and have a balanced schedule of overnights with both parents without a long commute.

At the expiration of Phipps-Yonas's appointment in 2009, the district court appointed Kelly Semler as the parenting consultant with "authority to recommend changes in the children's schedule with each parent." The order stated that the parenting consultant "may decide to try to mediate a resolution with the parties, and/or if the mediation is deemed not possible by the Parenting Consultant, then the Parenting Consultant shall arbitrate the issue and advise the parents of his/her decision in writing." The order provided that a party who disagrees with the parenting consultant's decision "must obtain a Court hearing date[,] . . . provide written notice of the hearing date to the other parent, and the Parenting Consultant, within fourteen (14) days of receiving the decision[,] . . . [and] file and serve pleadings on the Motion within the time frame of the law and rules governing Family Court." The order also stated that "[a]ll decisions of the Parenting Consultant shall be binding on the parties."

At the parties' request, in March 2010 Semler made a decision regarding the district in which the children should attend school. She reported that both parties lived within a few miles of the elementary schools in their respective school districts, that respondent worked primarily out of his home, and that appellant also had flexibility that occasionally allowed her to work from home. Semler decided that, "[p]roviding there are no major family changes," the children would remain at Hanover Elementary for the next

two years, but would transfer to Mahtomedi schools in fall 2012, when the older child would start middle school. She reasoned that, although the children would probably do well in either school district, the Mahtomedi school district would be a better fit for middle school because it had higher testing scores and fewer students. She also stated that the children would have a shorter commute to school in Mahtomedi, based on the distance from the parties' homes to the middle and high schools in their respective school districts. Respondent did not challenge Semler's decision in the district court pursuant to the parenting consultant order.

In November 2011, the parties met again with Semler and considered, among other issues, the children's upcoming transition to the Mahtomedi school district. At that time, respondent told Semler that his job now required him to work more often in offices in St. Cloud and expressed concern that, once the children started school in Mahtomedi, it would be almost impossible for him to take them to and from school. Semler informed the parties that her decision about the children's school district would still be in effect.

In May 2012, respondent moved the district court to require the children to continue attending school in the Hanover/Buffalo school district. He argued that changing schools was not in their best interests and that, based on his change in work location, he would have an extremely long commute in transporting them to and from school in Mahtomedi, which would also affect the children. Appellant moved to enforce the parenting consultant's decision.

The referee, affirmed by the district court, ordered that the children continue to attend school in the Hanover/Buffalo school district. The district court determined that

the parenting consultant's 2010 school-district attendance decision "exceeded the scope of her role and the evidence presented to her" because she could not have projected the children's best interests two years in the future. The district court found that the decision was speculative and overreaching and concluded that it was unenforceable. The district court found that the parenting consultant's decision implicitly relied on respondent's ability to relocate to the Mahtomedi area and that his inability to do so was an unanticipated major change in circumstances. The district court also found that, if the children were to attend school in Mahtomedi, respondent's relationship with the children would be negatively affected and dramatically limited. The district court weighed the "best interests" factors as defined by Minn. Stat. § 518.17 (2012) and found that, while most factors were neutral, three factors favored respondent: the length of time that the children had lived in a stable environment and the desirability of maintaining continuity; the permanence of the custodial home as a family unit; and the disposition of each parent to encourage frequent contact by the child with the other parent. The district court concluded that, based on its analysis of these factors, the children's best interests weighed in favor of their continued attendance in the Hanover/Buffalo school district. This appeal follows.

D E C I S I O N

I

Appellant challenges the district court's conclusion that the parenting consultant's decision was unenforceable because it exceeded the scope of her role and was based on speculation as to the children's best interests two years in the future.

At the outset, we address respondent's motion to strike appellant's argument in the reply brief that the district court erred by failing to apply arbitration standards in reviewing the parenting consultant's decision. Respondent maintains that this argument is improper because it was not considered by the district court or previously raised in appellate briefing. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that a reviewing court may generally consider issues that were presented to, and considered by, the district court); Minn. R. Civ. App. 128.02, subd. 4 (stating that "[t]he reply brief must be confined to new matter raised in the brief of the respondent"); *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (stating that issues not addressed in appellant's principal brief are "waived and cannot be revived by addressing them in the reply brief"), *review denied* (Minn. Sept. 28, 1990). But appellant argued before the district court and in her principal appellate brief that the district court should have enforced the parenting consultant's decision, based on its order stating that if mediation were not possible, "the [p]arenting [c]onsultant shall arbitrate the issue." We conclude that appellant sufficiently raised the question in district court and appropriately raised the issue before this court. Therefore, we deny respondent's motion to strike. *See Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 522–23 (Minn. 2007) (determining that a refinement of an issue presented below, which could be evaluated on facts in the record, was properly before an appellate court).

Nonetheless, we reject this argument on its merits. The Minnesota Rules of General Practice define arbitration as "[a] forum in which a neutral third party renders a specific award after presiding over an adversarial hearing at which each party and its

counsel presented its position." Minn. R. Gen. Pract. 114.02. Although the parenting-consultant order stated that it provided for "arbitration," the parties' dispute-resolution process with the parenting consultant did not contain the elements required by this rule. *See id*. We also note that the parties did not waive their right to challenge the parenting consultant's decision in district court; in fact, the district court's order provided a process for that review. *Cf. Adam v. Adam*, 358 N.W.2d 487, 489 (Minn. App. 1984) (defining waiver as intentional or voluntary relinquishment of a known right). Therefore, the district court did not err by failing to accord deference to the parenting consultant's decision as the decision of an arbitrator.

Appellant next argues that, because the parties stipulated to the parenting consultant's binding resolution of child-related issues, including school choice, the district court erred by concluding that the parenting consultant's resulting decision was not enforceable. This court reviews de novo the district court's legal conclusion relating to the enforceability and interpretation of a dissolution-related stipulation. *Kielley v. Kielley*, 674 N.W.2d 770, 777 (Minn. App. 2004). "The term 'parenting consultant' . . . refers to a creature of contract or of an agreement of the parties which is generally incorporated into (or at least referred to in) a district court's custody ruling." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 293 (Minn. App. 2007). Parties may stipulate to something that a district court may not order. *See Liefur v. Liefur*, 820 N.W.2d 40, 43 (Minn. App. 2012) (noting that parties may, by stipulation, allow the district court to impose obligations that the district court could not impose without a stipulation, but that

"the parties cannot by stipulation confer on the [district] court authority to do something that the legislature has explicitly prohibited"), *review dismissed* (Minn. Nov. 1, 2012).

Appellant argues that the district court erred in ruling that the parenting consultant, in making her decision, "exceeded the scope of her role." Because the parties agreed to submit to the parenting consultant the question of the school district in which the children would attend school, appellant may be correct. We conclude, however, that, on this record, any error by the district court in addressing the scope of the parenting consultant's role is harmless because, when the district court reviewed the parenting consultant's decision, consistent with the relevant statutes and caselaw, it did not give the parenting consultant's decision deference regarding the best interests of the children. In examining custody-related issues, the district court has a statutory mandate to consider and weigh the children's best interests. *See* Minn. Stat. § 518.17, subd. 1 (2012) (defining child's best interests as "all relevant factors to be considered and evaluated by the court"). Although a court gives "considerable weight" to intelligently entered stipulations, "[i]n determining questions of custody the paramount issue remains the welfare and best interests of the children. The court must in every case exercise an independent judgment and is not bound by the stipulation." *Petersen v. Petersen*, 296 Minn. 147, 148, 206 N.W.2d 658, 659 (1973); *see also Sydnes v. Sydnes*, 388 N.W.2d 3, 7 (Minn. App. 1986) (district court was not bound to adhere to guardian ad litem's custody recommendation which failed to recognize change in circumstances); *cf. Kielley*, 674 N.W.2d at 777 (stating that, in dissolution-related proceedings, the district court functions as a third party and "has duties to protect the interests of both parties and to ensure that [a]

stipulation is fair and reasonable to all") (quotation omitted). This principle applies equally to custody-related issues, such as the choice of schools children will attend. *See Novak v. Novak*, 446 N.W.2d 422, 424 (Minn. App. 1989) (stating that no legal distinction exists between general custody determinations and resolution of specific custodial-care issues), *review denied* (Minn. Dec. 1, 1989).[1] Therefore, we conclude that in addressing the custody-related matter of school-district attendance, the district court was required to exercise its independent judgment in assessing the children's best interests and was not bound by the parenting consultant's decision.

Appellant argues that the district court's interpretation of the parenting-consultant agreement would render meaningless the agreement and the district court's order requiring a timely challenge to a parenting consultant's decision. Respondent acknowledges that he did not challenge the 2010 parenting consultant's decision, or the November 2011 reiteration of that decision, until May 2012—well after the time specified for obtaining district court review. Appellant points out that—for obvious practical reasons—school-attendance decisions are generally made by January of the previous school year and that, by May 2012, the children had already begun activities to transition to the Mahtomedi school district during the next school year.

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[1] Although the dissolution judgment provided that the parties would work with a parenting consultant post-dissolution to assist them with matters relating to the children, neither party has argued that the judgment created a parenting plan as defined by Minn. Stat. § 518.1705 (2012). *See id.* (providing for creation of parenting plan "in lieu of an order for child custody and parenting time" and that such a plan "must include," among other things, "a schedule of the time each parent spends with the child" and "a designation of decision-making responsibilities regarding the child").

Appellant's point is well-taken, and we are troubled by respondent's failure to challenge the parenting consultant's decision within the specified time frame for district-court review or as soon as his work situation created new circumstances. But in light of the district court's duty to exercise its independent judgment in custody-related issues based on the children's best interests, we cannot conclude that, on this record, the district court erred by considering respondent's challenge to the parenting-consultant's decision, even after the time designated for review. *See Petersen*, 296 Minn. at 148, 206 N.W.2d at 659.

Appellant also challenges the district court's reasoning that the parenting consultant's 2010 decision was speculative because it improperly projected the children's best interests two years in the future. Appellant points out that there were no time limits placed on the parenting consultant's authority to make school-attendance decisions and that such decisions must be made prospectively. We note that, because the district court referred to the parenting consultant's 2010 decision but also found that she reiterated that decision in November 2011, any portion of the 2010 decision that was initially speculative was functionally reviewed and found to be still appropriate. Nonetheless, we agree with appellant that the district court's findings with respect to the operative date of the parenting consultant's decision are, to some extent, inconsistent. But this inconsistency is not fatal to the district court's decision. The district court appropriately recognized that in assessing the children's best interests, it must examine their current circumstances and those of their parents. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 212

(Minn. 1988) (recognizing the importance of a child's current circumstances in making a best-interests determination).

The district court found that the parenting consultant's 2010 decision implicitly relied on respondent's ability to move to the Mahtomedi area; that, based on respondent's work relocation, he was no longer able to do so; and that this inability to relocate constituted a major change in circumstances, so that the proposed school-attendance change would dramatically limit his parenting time. These findings are not clearly erroneous. We conclude that the district court did not err by considering respondent's change in work location as a change of circumstances and appropriately applied the best-interests standards in evaluating the children's school attendance in light of that change. *See, e.g.*, *Anderson v. Archer*, 510 N.W.2d 1, 4–5 (Minn. App. 1993) (applying best-interests standard in evaluating modification of visitation resulting from changes in parties' and children's circumstances).

II

Appellant argues in the alternative that the district court abused its discretion by concluding that it is in the children's best interests to remain in the Buffalo/Hanover school district. Appellate review of this custody-related determination is limited to whether the district court abused its discretion by making findings that were unsupported by the evidence or by improperly applying the law. *Sefkow*, 427 N.W.2d at 210. The law "leaves scant if any room for an appellate court to question the [district] court's balancing of best-interests considerations." *Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (Minn. App. 2000). A finding is clearly erroneous if the reviewing court is left with the definite

and firm conviction that a mistake has been made. *Id*. at 474. "That the record might support findings other than those made by the [district] court does not show that the court's findings are defective." *Id.*

Disputes regarding the choice of schooling for a child must be resolved according to the best interests of the child. *Novak*, 446 N.W.2d at 424. A child's best interests are defined as "all relevant factors," including those listed in Minn. Stat. § 518.17, subd. 1(a)(1)–(13). Minn. Stat. § 518.17, subd. 1(a). The district court made findings on the statutory custody factors relevant to the school-attendance issue. The district court found that most factors were neutral, but three factors favored respondent: the length of time that the children have lived in a stable environment and the desirability of continuity; the permanence of the custodial home as a family unit; and the disposition of each parent to encourage the children's frequent and continuing contact with the other parent. *See* Minn. Stat. § 518.17, subd. 1(a)(7), (8), (13). Based on these findings, the district court concluded that the best interests of the children favored continuing their school attendance in the Buffalo/Hanover school district.

The district court found that respondent will provide a more stable environment for the children because appellant has moved twice in four years, while respondent has remained in the family home. Appellant notes that she had a legitimate reason for moving to Mahtomedi and a reasonable plan for accommodating the children's schooling needs in that district. She maintains that the district court's finding on respondent's stability is unsupported by the record because he had been facing foreclosure and brought his mortgage payments current only when appellant raised that issue in district court. But

based on the record, the district court did not clearly err by rejecting appellant's argument on this issue. The district court's findings on the comparative stability and permanence of the parties' homes are not clearly erroneous.

Appellant argues that the district court ignored the additional relevant fact that the Mahtomedi schools offer better educational opportunities for the children as they grow older. *See, e.g.*, *Lutzi v. Lutzi*, 485 N.W.2d 311, 316 (Minn. App. 1992) (noting educational opportunity as an "important consideration" when parties are joint legal custodians). But this fact does not make the district court's reliance on stability and permanence an abuse of discretion. *See Novak*, 446 N.W.2d at 424 (noting that school decisions must be resolved according to children's best interests).

The district court found that, based on the changed circumstances of respondent's work, a change in school attendance to the Mahtomedi schools would erode the children's relationship with respondent by making him less available. Appellant argues that this finding reflects respondent's interests, not the children's. But the record shows that if the children were to attend Mahtomedi schools, respondent's change in job location would require him to drive between St. Cloud and Mahtomedi, a distance of 90 miles, at least once per week, and that in making the transition, he would need to leave home with the children at 6:30 a.m. and drop the younger child off an hour before her scheduled school start time. The district court's consideration of the effect of changing schools on the father-child relationship is not an abuse of discretion.

Finally, appellant challenges the district court's finding that she had a propensity to minimize respondent's significance and presence in the children's lives. The district

court made findings on this factor based on two minor incidents. We agree with appellant that these incidents, which tended only to show that one child did not consciously include respondent in activities in Mahtomedi, are de minimis and irrelevant to the district court's school-district attendance decision. Nonetheless, the record as a whole supports the district court's findings, and we conclude that the district court did not abuse its discretion by determining that it was in the children's best interests to remain in the Buffalo/Hanover school district.

Affirmed; motion denied.