STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1929

Jennifer Ann Bertrand,
Appellant,

vs.

Jeffrey Robert Krenz,
Respondent.

Filed July 22, 2013
Affirmed
Stoneburner, Judge

Blue Earth County District Court
File No. 07F403050135

Jon G. Sarff, Sarff Law Office, Mankato, Minnesota (for appellant)

Jason Kohlmeyer, Tony Larson, Rosengren Kohlmeyer Law Office, Chtd., Mankato, Minnesota (for respondent)

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

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

STONEBURNER, Judge

In this challenge to the district court's order denying appellant-mother's motion for an order permitting her to move the parties' nine-year-old son out of the state, mother asserts that the district court abused its discretion in making numerous findings and conclusions of law and abused its discretion in denying her motion for amended findings

of fact or a new hearing. Because (1) none of the challenged findings are clearly erroneous; (2) the record supports the district court's conclusion that mother failed to establish that moving out of the state is in the child's best interests; and (3) mother failed to establish that she is entitled to a new hearing, we affirm the denial of mother's motion for leave to move out of state with the child. Because mother did not properly raise, in the district court, the issue of amending the custody order to incorporate the parties' agreement on sharing medical expenses, the issue is waived.

FACTS

Appellant Jennifer Ann Bertrand (mother) and respondent Jeffrey Robert Krenz (father) are the parents of D.M.K-B. (child), born October 14, 2002, in Mankato. Mother and father have never been married to each other and have never lived together with child. They share legal custody of child, and mother has sole physical custody, subject to father's parenting time. The parties lived in Mankato until mother and child moved to Sartell in 2006. Father then moved to Sartell, and the parties have continued to live in Sartell.

Mother married in May 2012. Her husband had recently taken a job in Illinois, and he moved to nearby Dunlap, IL. Mother brought a motion for an order to allow her to move to Illinois with child and to modify father's parenting time to accommodate the move. Mother's proposed parenting-time schedule modifies the current holiday schedule by eliminating father's week-day overnight and alternate weekend parenting time, but

giving father extended parenting time in the summer. Father opposed mother's motion, and the district court referee conducted an evidentiary hearing.[1]

At the hearing, mother asserted that her proposed parenting-time schedule gives father "almost the same number of days" as he receives under the current parenting-time schedule. But the district court concluded that mother's proposal reduces father's overnights from approximately 106 overnights per year to 42 overnights per year and "reduces the time [f]ather could spend with his son by more than half. . . . [to] below the statutory 25% presumption of parenting time under Minnesota Statute [§] 518.175(1)(e)." The district court stated that mother's proposed restriction on father's parenting time "requires a finding of endangerment or noncompliance with court orders," and found that mother "has not met her burden of proving any justifiable reason for departing from the presumption for [father's] 25% parenting time." The district court then made extensive findings on each of the statutorily required factors contained in Minn. Stat. § 518.175, subd. 3. The district court concluded that mother failed to meet her burden of proving that child's removal to Illinois is in his best interests and that mother's proposed parenting schedule "interferes with father's parenting time, does not meet the 25% presumptive parenting time and is not in the best interests of [child]." The district court denied mother's motion to move out of state with child.

[1] This opinion refers to the fact finder/decision maker as the district court because the district court signed the referee's order and "[t]he findings of the referee, to the extent adopted by the [district] court, shall be considered as findings of the [district] court." Minn. R. Civ. P. 52.01.

Mother moved for amended findings of fact and conclusions of law or a new trial. In her motion, mother sought to amend nine findings, delete two findings, and add one new finding. Some of the proposed amendments relied on new evidence, and another proposed amendment concerned an issue that was not properly presented at the hearing. The district court denied mother's motion, concluding that mother's new evidence could have been presented at trial and that, while "[a] motion to amend findings of fact is appropriate to have the trial court correct errors that it has made[, i]t is not intended to permit a wholesale re-trial of the case." The district court also concluded that mother had failed to identify any errors that would justify amended findings or a new trial. This appeal follows.

D E C I S I O N

I. Standard of review, burden of proof

Our review of a removal decision "is limited to considering whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation omitted). We will "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." *Id.* "Findings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made."[2] *Id.* (quotations and citations omitted). "When determining whether findings are clearly erroneous, the

[2] Mother erroneously argues that the district court's factual findings are reviewed for abuse of discretion. We apply the correct standard, reviewing the district court's findings for clear error.

appellate court views 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). The burden is on the party challenging the findings to make such a showing. *Id.* at 474. In determining whether to permit a parent to move a child's residence to another state over the objection of the other parent, the district court must base the decision on the best interests of the child and must assess eight non-exclusive factors set out in Minn. Stat. § 518.175, subd. 3(b).[3]

"The function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (citations omitted). "It is not within the province of [appellate courts] to determine issues of fact on appeal." *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966).

II. Statutory factors for moving out of the state

The factors that the district court must consider in determining the child's best interests are:

> (1) the nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the nonrelocating person . . . ;
>
> (2) the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development . . . ;
>
> (3) the feasibility of preserving the relationship between the nonrelocating person and the child through

[3] In this case, the custody order, which was based on a stipulation of the parties, incorporates this statute by providing that, "if [mother] wishes to move the residence of [child], outside the state of Minnesota, she would have no presumption to allow her to do so in any motion before the Court, and any motion for a change in custody based on anticipation of such a move would be based on the best interest standard, rather than the endangerment standard."

> suitable parenting time arrangements, considering the logistics and financial circumstances of the parties;
>
> (4) the child's preference, taking into consideration the age and maturity of the child;
>
> (5) 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;
>
> (6) whether the relocation of the child will enhance the general quality of the life for both the custodial parent seeking the relocation and the child including, but not limited to, financial or emotional benefit or educational opportunity;
>
> (7) the reasons of each person for seeking or opposing the relocation; and
>
> (8) the effect on the safety and welfare of the child . . . .

Minn. Stat. § 518.175, subd. 3(b). Mother challenges the district court's findings and conclusions regarding six of the statutory factors.

A. Factor One: The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the nonrelocating person

After extensive, specific findings on child's relationship with mother and separate, equally extensive and specific findings on child's relationship with father, the district court found that the first factor favors neither parent. Mother challenges this finding, arguing that because she is the primary caregiver, attends all medical and dental appointments and school conferences, has sole physical custody, and "[n]o one disputes the close bond between the minor child and . . . [m]other," the district court "abused its discretion" by not finding that the first factor favors mother.

The record supports mother's recited facts, but it also supports the district court's finding that "[f]ather has been involved throughout [child's] first nine years of life and

has been actively involved in his day to day activities. . . . Father and [child] have a loving, secure relationship." There is nothing in the record to leave this court with the "definite and firm conviction that a mistake has been made," *Goldman*, 748 N.W.2d at 284, by the district court's finding that the first factor of the analysis is neutral. The district court did not clearly err by finding that the first factor favors neither parent.

B. Factor two: The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development

The district court found that mother failed to meet her burden on the second factor because she "failed to produce evidence of [child's] developmental stage or his personality traits and how those traits . . . might impact his ability to cope with the potential move issues." The district court noted mother's failure to present evidence from "any experts, teachers, or therapists who could provide information on [child's] developmental stages and personal needs," and weighed that failure against a move "that could disturb the excellent progress [child] has made so far." The district court found that this factor favors father because mother failed to meet her burden.

Mother challenges the district court's finding, arguing that "the [a]ffidavit of the child's school counselor makes it clear that . . . [f]ather precluded . . . child's counselor from being involved in counseling . . . child or providing expert testimony at the trial." But, the affidavit to which mother refers was signed on July 30, 2012, nearly two months after the hearing on her motion for permission to move out of state and 27 days after the district court's order denying the motion. There is nothing in the record indicating that this information was presented to the district court at the time of the original hearing on

the motion. *See Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977) (stating that "[i]t is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered"). And we do not consider issues not argued to and considered by the district court. *Thiel v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The record supports the district court's finding that mother did not meet her burden of proof on the second factor and the district court did not clearly err by finding that this factor therefore favors father.

C. Factor three: The feasibility of preserving the relationship between the nonrelocating person and the child through suitable parenting time arrangements, considering the logistics and financial circumstances of the parties

The district court found that mother's proposed parenting-time schedule "only minimally attempt[ed] to preserve the [f]ather/[child] relationship if she is allowed to move [child] away" and that her "proposal reduces parenting time for father and causes it to fall below the 25% presumption . . . [with] no explanation for doing so [even though] there was time available that might have put it closer to maintaining the time he currently enjoys." The district court also found that mother's proposed modification of child support "would further exacerbate the financial disparity between the parties" and that mother's "reluctance to offer a generous schedule that maximized the number of days [f]ather has with [child]" is not in child's best interest. The court concluded that this factor favors father.

Mother challenges this finding, arguing that because Minn. Stat. § 518.175, subd. 3(b), does not specifically require consideration of the parenting-time presumption, the district court erred by considering the presumption. Mother cites *Schisel v. Schisel*, 762 N.W.2d 265, 271 (Minn. App. 2009), as support for her argument. In *Schisel*, this court stated that "the mere fact that a residence relocation might collaterally benefit one parent and create a detriment to the other is not sufficient to justify a residence restriction; the proper focus is always to be the children's best interests." Mother accuses the district court of making "the same basic error of law" here as it did in *Schisel*. But *Schisel* dealt with a parent seeking to relocate within Minnesota, and therefore the facts and applicable law are of limited value in this situation. And the district court in *Schisel* made no finding that the relocating parent's requested move would substantially impair the nonrelocating parent's presumptive minimum of 25% parenting time. In this case, the district court's focus properly remained on child's best interests, and we conclude that *Schisel* does not advance mother's argument.

Plainly the legislature intends that a minimum of 25% of the parenting time is *presumptively* in the best interests of the child unless there is evidence that effectively rebuts the presumption. Minn. Stat. § 518.175, subd. 1(e) ("In the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child."). And we have held that a district court's failure to consider the presumptive minimum of 25% parenting time is reversible error when one parent seeks to move out of the state. *Hagen v. Schirmers*, 783 N.W.2d 212, 218 (Minn. App. 2010). The district court did not err by considering whether mother

rebutted the presumption and whether mother's proposal to reduce father's parenting time to below the presumptive minimum serves the child's best interests.

Mother asserts that the district court was "attempt[ing] to amend or change Minn. Stat. [§] 518.175, [s]ubd. 3[,] by stating that the move cannot reduce the other parent's parenting time below the presumptive 25% requirement absent a showing of endangerment." Mother points to the district court's statement that her proposed parenting schedule "is a restriction that requires a finding of endangerment or noncompliance with court orders." But the district court's statement correctly reflects the provision in Minn. Stat. §518.175, subd. 5 (2012), that, except under circumstances not relevant here, a district court "may not restrict parenting time unless it finds" endangerment or chronic and unreasonable failure to comply with court-ordered parenting time.

The district court additionally stated that mother had not met her burden of proving justifiable reasons for departing from the presumptive 25 % minimum parenting time. Mother reads the statements together as the district court's legal conclusion that the parenting-time presumption can only be rebutted by a finding of endangerment or chronic failure to comply with district court orders. That is not what the district court stated and, because we do not presume error, we reject this interpretation of the district court's order. *See Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) ("It is well to bear in mind that on appeal error is never presumed.").

In *Hagen*, we held that, while the district court did not abuse its discretion by allowing one parent to relocate to another state with the child, it erred by failing to

consider the 25% presumptive minimum in determining parenting time. *Hagen*, 783 N.W.2d at 218. *Hagen* states that reasons relating to the child's best interests but falling short of endangerment can support a parenting-time allocation that "merely fall[s] below the 25% presumption" as long as the "evidentiary presumption can be overcome . . . [because] the district court finds that sufficient evidence justifies a finding contrary to the assumed fact." *Id.* (citations omitted). Here, the district court found that mother did not advance any evidence to rebut the presumption. We reject mother's argument that she is entitled to amended findings or a new trial because the district court applied the wrong legal standard to its consideration of the parenting-time presumption, thereby entitling mother to amended findings or a new trial. The district court did not err by considering the parenting-time presumption.[4] The district court's finding on factor three is not clearly erroneous.

D. Factor four: The child's preference

Both parents testified that child has expressed a preference that supports their opposing positions on the relocation motion. The district court found that mother had failed to meet her burden of proving that child had a reasonable preference to move, noting that mother had presented no testimony from anyone other than herself about statements that child had made about the move. The district court also noted that "[t]here was no discussion regarding [child's] maturity level and nothing regarding whether or not

[4] On appeal, mother asserts that father's current level of parenting time "could be maintained under . . . [m]other's [newly] proposed 114 day parenting time schedule." But mother first proposed this parenting time schedule in her motion for amended findings, and the district court correctly rejected mother's attempt to rely on evidence not presented at the hearing.

any statements of his express a *reasonable* preference." (Emphasis added.) The district court found that, because mother failed to meet her burden, this factor favors father.

Although mother testified at the hearing that child had expressed a preference to move, mother now argues that, at nine years old, child is too young to express a preference. She also argues that father prevented child's counselor from testifying at trial, but, as discussed above, she failed to advance this argument or evidence until the post-hearing motions. The record does not show that the district court's conclusion is unsupported by the evidence. *Goldman*, 748 N.W.2d at 284. The district court did not clearly err in its finding on factor four.

E. Factor five: Whether there is an established pattern of conduct of the person seeking relocation either to promote or thwart the relationship of the child and the nonrelocating parent

The district court found that mother has not engaged in a pattern of thwarting child's relationship with father and that mother, despite non-optimal communications between the parents, has ensured that child spends time with father. Mother does not challenge the district court's findings on this factor.

F. Factor six: Whether the relocation of the child will enhance the general quality of the life for both the custodial parent seeking the relocation and the child including, but not limited to, financial or emotional benefit or educational opportunity

The district court found that, while it is clear that mother's husband's employment in Illinois allows him to "earn[] substantially more than he did at his previous job in the Sartell area," mother had presented no evidence of the cost of living in Illinois versus the cost of living in Sartell so it was "unclear . . . whether the increase in earnings matches

the additional costs of a more urban setting." The district court also found that mother did not offer any evidence showing that the schools in Illinois are "somehow superior" to those in Sartell, that there was no evidence pertaining to child's emotional wellbeing presented at the hearing, and that moving away from father would likely be an emotional detriment to child. But the district court also found that, because child resides primarily with mother, it would likely be emotionally detrimental for her to move without him and that denial of mother's motion could put stress on mother and her husband because her husband is already living and working in Illinois. The district court ultimately found that this factor favors neither parent.

Mother argues that, because it is "crystal clear" that mother's income will increase if she is allowed to move, and because the statutory factors do not require a consideration of the cost of living, the district court abused its discretion by finding that this factor does not favor mother over father. She also challenges the district court's "assumption" that any potential expert testimony (testimony not offered at the hearing) would *not* favor mother's position. But the district court merely stated that there was no expert testimony on the issue of child's emotional wellbeing, and did not assume that any such testimony would not favor mother's position. Based on the record from the hearing, the district court did not clearly err by finding this factor neutral.

G. Factor seven: The reasons of each person for seeking or opposing relocation

The district court found that both parents have appropriate reasons for advocating their positions on relocation. Mother does not challenge this finding.

H. Factor eight: The effect on the safety and welfare of the child

The district court acknowledged mother's concerns about father's use of alcohol, and her concern that father's lifestyle has resulted in several complaints to law enforcement of "loud music" coming from father's home. But the record supports the district court's finding that because mother has never sought to limit father's contact with child based on these concerns, this factor favors neither mother nor father.

Mother challenges this finding, arguing that "[f]ather's history of alcohol abuse and . . . disturbances at his home" mean that child will be at risk if he is "placed under the extended care" of father. But the issue before the district court was whether mother's proposed move out of state is in child's best interests, not whether father is the appropriate primary custodian of child. Mother did not produce any evidence that moving child to Illinois is in child's best interest due to safety or welfare concerns.

III. Denial of motion for a new hearing

As an alternative to her argument that the district court abused its discretion by not amending the findings and conclusions, mother argues that the district court should have granted her a new hearing on the motion. We review a district court's ruling on a motion for a new trial for abuse of discretion. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 890 (Minn. 2010). The district court may grant a new trial in a seven situations. *See* Minn. R. Civ. P. 59.01. The two that are relevant here are when a party makes a new discovery of evidence that could not have been presented at trial, and when an error of law has occurred. Minn. R. Civ. P. 59.01 (d), (f). The district court concluded that mother's motion for a new trial failed to demonstrate any errors of law that would require

a new trial and that mother presented no evidence she could not have produced at the hearing.

Mother argues that

> [r]ather than speculate about what expert witnesses may have said regarding the child's preference as well as comparisons of the cost-of-living and educational systems in the two communities, the [district] [c]ourt should have either made a decision based on the evidence the two parties offered at trial or the [district] [c]ourt should have called for this type of expert testimony and afforded the parties a new trial to present this information.

But mother's claim that the district court speculated about what expert testimony may have said about child's wellbeing mischaracterizes the district court's statements about expert testimony. The district court stated that, for multiple factors, mother could have and maybe should have presented expert testimony because without it, she failed to show that moving was in child's best interests. The district court did not speculate about what additional evidence might have shown. And mother does not argue that she could not have presented additional evidence at the hearing. We find no merit in mother's assertion that the district court's statements about what additional information would have been helpful entitle her to a new trial.

Mother makes no claim on appeal that any of the circumstances found in Minn. R. Civ. P. 59.01 are met in this case. The district court's denial of her motion to move out of state plainly displeases mother, and she would like the opportunity to present additional evidence, but this circumstance does not require a new hearing. The district court did not abuse its discretion by denying mother's motion for a new trial.

IV. Request for order regarding medical expenses

Mother argues that the district court abused its discretion by "failing to order the parties to each share in the cost of the minor child's medical and other health related costs and unreimbursed expenses." But mother did not move to amend child support in the district court. The only reference to the medical-insurance issue was made during mother's testimony, when she stated that she wanted the district court to add the parties' existing agreement concerning insurance to the custody order, which does not contain a provision for medical expenses. Mother does not otherwise mention the medical-insurance issue in the record, in her motion for leave to move out of state, or in her proposed findings. Because appellate courts do not consider issues not argued to and considered by the district court, this issue is waived. *See Thiele*, 425 N.W.2d at 582.

Affirmed.