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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A08-0538

A08-0955

In re the Marriage of:
Daniel Lorenz McKinnon, petitioner,
Respondent,

vs.

Rebecca Illingworth McKinnon,
Appellant.

Filed October 28, 2008

Affirmed

Stoneburner, Judge

Ramsey County District Court
File No. F606632

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Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

In these consolidated appeals,¹ appellant-mother asserts that (1) the district court's exclusion of evidence as a sanction for the parties' discovery-order violations was an abuse of discretion, violated due process, and denied her a fair trial; (2) the district court abused its discretion in denying her motion for a new trial; and (3) if a new trial is not granted, custody-related findings should be modified. We affirm.

FACTS

Appellant Rebecca Illingworth McKinnon (mother) and respondent Daniel Lorenz McKinnon (father) were married on June 8, 2002. C.L.M., born on July 8, 2004, is the only child of the marriage. The parties separated in late 2005, and father petitioned for dissolution of marriage in March of 2006. Mother was living in Mahtomedi, and father was living in Shoreview. The parties initially agreed to share parenting time equally. Their agreement was formalized in the order for temporary relief in September of 2006. In early October, working through Ramsey County Domestic Relations (RCDR), the parties agreed to joint physical and joint legal custody. Mother subsequently changed her mind and sought sole physical custody. RCDR then conducted a custody evaluation. RCDR recommended joint legal and joint physical custody with equal parenting time in an evaluation that was submitted to the district court on February 1, 2007.

¹ In appeal A08-538, appellant sought review of orders filed November 19, 2007, and February 5, 2008. Only the February 5 order was appealable, so the appeal of the November 19 order was dismissed because judgment had not been entered. In appeal A08-955, appellant appropriately appealed from the judgment entered on June 6, 2008, and the appeals were consolidated by this court's order dated June 10, 2008.

The pretrial order memorialized the August 6, 2007 deadline agreed to by the parties for exchanging and filing of witness and exhibit lists. The order stated that “[a]ny witness or document not provided within the time ordered herein shall not be allowed at the [trial].” The parties timely exchanged witness and exhibit lists but neither party filed the documents with the district court by the deadline—father filed the information late and mother failed to file. Neither party requested sanctions for these violations, and mother’s counsel took full responsibility for failing to file the lists with the district court. Nonetheless, at the beginning of the trial, the referee (district court) sanctioned the violation by excluding all exhibits except the previously agreed to RCDR custody evaluation and collateral documents that constituted the RCDR file, and excluded all witnesses except rebuttal witnesses.

At trial, mother, who sought sole physical custody, testified that she had moved to Chicago two weeks before trial for what she alleged were sound business reasons. She testified that her parents, who routinely provided daycare for the child, were also moving to Chicago and would continue to provide daycare. Mother was not permitted to call her certified public accountant (CPA) to corroborate that her move was for sound business reasons. The district court found that mother’s move was primarily calculated to sabotage father’s request, and RCDR’s recommendation, for joint legal and joint physical custody, rather than for legitimate business reasons.

Psychological and chemical-health evaluations of both parties were admitted into evidence at trial as part of the stipulated RCDR file. The psychological evaluation for father stated that “overall [father] has the potential for being a good parent.” Mother’s

psychological evaluation noted that mother met several diagnostic criteria for a diagnosis of Narcissistic Personality Disorder and stated that mother's personality "may, at times, interfere with her ability to function effectively as a parent." The chemical-health evaluation for both parties noted "potential signs and symptoms to substantiate a potential chemical dependency problem." Because of the discovery sanction, mother was precluded from calling a psychologist with whom she had consulted.²

In its findings of fact, conclusions of law, order for judgment and judgment, the district court addressed each of the statutory best-interest factors set out in Minn. Stat. § 518.17, subd. 1 (2006), and the joint-custody factors contained in Minn. Stat. § 518.17, subd. 2 (2006). The district court evaluated mother's request to move the child to Chicago under the multifactor test contained in Minn. Stat. § 518.175, subd. 3 (2006). The district court concluded that awarding mother sole custody would not be in the best interests of the child, noting, "[mother] has shown a willingness to exclude [father] from parenting participation and to make decisions which are not in the child's best interests." The district court ordered joint physical and legal custody and designated father's residence as child's primary residence.

Mother moved for a new trial, or alternatively, amended findings to change child's primary residence to her residence in Chicago, arguing that she was prejudiced and denied a fair trial by the exclusion of witnesses and exhibits at trial. The district court denied the motions, finding no prejudice, no denial of due process, no injustice to mother

² Mother had not disclosed the existence of or any information from her psychologist during the RCDR evaluation.

and that the designation of father's residence as the child's primary residence was "fully supported by the record." Judgment was entered, and this appeal followed.

D E C I S I O N

I. Effect of mother's failure to make an offer of proof.

As a preliminary matter, we address father's argument that mother's failure to make an offer of proof about the excluded evidence precludes her assignment of error to the exclusion on appeal. Minn. R. Evid. 103(a) provides that "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, *and* . . . (2) . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." (Emphasis added.) Without an offer of proof a reviewing court cannot determine if the trial court's ruling was prejudicial. *Kenko, Inc. v. Lowry Hill Constr. Co.*, 392 N.W.2d 18, 20 (Minn. App. 1986).

In this case, despite mother's failure to make an offer of proof, the district court addressed mother's claim of prejudice in its order denying her motion for a new trial or amended findings. The district court presumed that mother's psychologist's testimony would have been favorable to mother and that mother's CPA's testimony would have supported mother's testimony that her move to Chicago was reasonable for business purposes. In the interest of justice, we will address mother's argument under those same presumptions. *Cf.* Minn. R. Civ. App. P. 103.04. But we decline to address mother's argument that the district court's decision is not justified by the evidence because this

argument is premised only on an assumption that specific evidence, not made part of the record by offer of proof, should have been in the record.

II. Denial of new trial motion was not an abuse of discretion.

Mother argues that the exclusion of witnesses and exhibits entitles her to a new trial under Minn. R. Civ. P. 59.01, providing, in relevant part, that a new trial may be granted for

(a) Irregularity in the proceedings . . . whereby the moving party was deprived of a fair trial;

. . . .

(f) Errors of law occurring at the trial, and objected to at the time or, if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the notice of motion;

(g) The . . . decision . . . is not justified by the evidence, or is contrary to law

She also argues that a new trial is warranted because the exclusion of evidence deprived her fundamental fairness “which has Due Process implications,” and that she is entitled to a new trial under Minn. R. Civ. P. 60.02(a) or Minn. Stat. § 518.145, subd. 2(1) (2006), providing for relief from an order for excusable neglect.

A district court’s decision whether to order a new trial is generally reviewed for abuse of discretion. *Zander v. Zander*, 720 N.W.2d 360, 364-65 (Minn. App. 2006) (citing *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990)). Where the district court exercised no discretion and determined the motion based on an asserted error of law, review is de novo. *Halla Nursery, Inc.*, 454 N.W.2d at 910. “Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the

complaining party's ability to demonstrate prejudicial error." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997) (quotation omitted); see Minn. R. Civ. P. 61 (prescribing that no error in the exclusion of evidence is ground for granting a new trial unless the denial of a new trial would be "inconsistent with substantial justice").

In this case, the district court found that mother was not prejudiced by enforcement of the pretrial order's exclusion of witnesses and exhibits listed on documents not timely filed with the district court. The district court noted that, in her posttrial motions, mother challenged only the designation of father's home as the child's primary residence and did not challenge the award of joint physical custody. The district court stated that the psychological evaluation contained in the RCDR file "was of little import," and noted that its decision to award joint custody was made "in spite of, not because of," the evaluation. The district court declared that no matter how positive the testimony of mother's psychologist may have been "it would have had no impact on the ultimate award of joint custody and primary residence designation." The district court also stated that testimony from mother's CPA about the reasonableness of her move to Chicago "would have been of nominal value, at most," noting that mother had testified that decreasing income led to the move. The district court also noted that mother did not attempt to call her psychologist or CPA as rebuttal witnesses.

Minn. R. Civ. P. 37.02(b)(2) expressly permits exclusion of evidence as a sanction for violating a discovery order. Here, the pretrial order advised the parties that failure to serve and file witness and exhibit lists would result in exclusion of witnesses and exhibits. Enforcement of the order was not contrary to law. We agree that, generally, a

sanction of excluding witnesses and exhibits based only on the parties' failure to file witness and exhibit lists with the district court, absent prejudice to either party or the district court, appears to be disproportionate to the violation. But because the record supports the district court's finding that mother was not prejudiced by the sanction, we conclude that even if imposition of the sanction constituted an abuse of discretion, neither a new trial nor reversal of the child's primary residence designation is warranted in this case. *See* Minn. R. Civ. P. 61 (stating that harmless errors are to be ignored).

Minn. Stat. § 518.145, subd. 2(1), permits a district court to order a new trial in dissolution cases on terms "as may be just" if mistake or excusable neglect occurred. But even if mother's counsel's failure to file documents that were specifically ordered to be filed is excusable neglect, the district court still has discretion in deciding whether to grant a new trial for such neglect. We conclude that the district court did not abuse its discretion here. We find no merit in mother's due-process argument.

[T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). Mother asserts that the private interest involved in this case is her parent-child relationship, but mother was awarded joint physical custody and does not challenge that award on appeal. We decline to hold that having her residence designated as the child's primary residence is a fundamental liberty interest. And, as previously discussed, because mother has failed to

demonstrate prejudice, there is no value in requiring a new trial in this case. Although mother asserts that the government's interest is "slight," we conclude that the district court has a substantial interest in enforcing its orders.

The district court's original and posttrial findings demonstrate that it declined to designate mother's residence in Chicago as the child's primary residence because it concluded that the move was primarily a strategy to defeat father's ability to have equal parenting time. Evidence in the record supports this finding. Because mother has failed to demonstrate that she was prejudiced by enforcement of the pretrial order, we conclude that the district court did not abuse its discretion by denying mother's motion for a new trial.

III. The district court did not abuse its discretion in designating the child's primary residence.

The district court has broad discretion in making child-custody and parenting-time determinations. *Matson v. Matson*, 638 N.W.2d 462, 465 (Minn. App. 2002). Appellate review of custody determinations is limited to determining 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).

Mother asserts that designation of father's residence as the child's primary residence was based on the psychological evaluation of her contained in RCDR's file and on her move to Chicago. She argues that the psychological evaluation was condemning, subjective, unsubstantiated, and should have been subject to impeachment or refutation. She argues that the district court's view of her move to Chicago was "clearly erroneous,"

and tainted the court's assessment of the factors contained in Minn. Stat. § 518.175.

Mother argues that the judgment should be amended to provide that her residence is the child's primary residence and that the parenting schedule and child-support determination should be amended consistent with this change.

The district court credited father's testimony that custody only became a contested issue when the parties began to discuss property division. The district court found mother's denial of this linkage not credible. The district court found that mother rented a condominium in Chicago at about the same time that RCDR issued its recommendation for joint and legal custody and moved to Chicago "on the eve of trial." The district court found that mother's "professed reasons for the move are singularly unpersuasive" and that the move appears "calculated to sabotage [father's] request and the [RCDR] recommendation for joint legal and joint physical custody." These factual findings are supported by evidence in the record, and we defer to the credibility determinations of the district court. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

The district court found that equal parenting time constituted the child's "best circumstances," and mother's move deprives the child of the opportunity to spend approximately equal time with each parent. The district court found that mother failed to show that moving the child to Chicago "will enhance the quality of life for the child either financially or emotionally." The district court found that mother has stopped communicating and cooperating with father; that father encourages the child's relationship with mother, that father is more likely than mother to encourage and foster a healthy relationship between the child and the other parent; and that mother has "shown a

willingness to exclude [father] from parenting participation and to make decisions which are not in the child's best interests.”

Because the record supports the district court's findings and the district court acted within its broad discretion in designating father's residence as the child's primary residence, we conclude that the district court did not abuse its discretion by denying mother's motion to amend the findings of fact and conclusions of law as mother requested.

Affirmed.