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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-94

In re the Matter of:
Tara Lynn Gantter, petitioner,
Respondent,

vs.

Justin Michael Higgins,
Appellant.

Filed October 27, 2009
Affirmed as modified
Schellhas, Judge

Anoka County District Court
File No. 02-F5-05-004659

John G. Westrick, Marsha McDowall-Nix, Westrick & McDowall-Nix, PLLP, 450 Degree of Honor Building, 325 Cedar Street, St. Paul, MN 55101 (for respondent)

Michael Ormond, Christopher Zewiske, Ormond & Zewiske, 510 First Avenue North, Suite 303, Minneapolis, MN 55403 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Worke, Judge; and Ross, Judge.

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

SCHELLHAS, Judge

Appellant father challenges a paternity judgment granting respondent mother sole legal and sole physical custody of the parties' minor child. Father argues that the district court abused its discretion by (1) concluding that the child's best interests are served if he

is placed in the custody of mother, (2) ordering that father's wife not be present at any parenting-time exchange, and (3) ordering father to attend and successfully complete the Compassion Workshop as referred by Anoka County Court Services. We affirm, as modified.

FACTS

Appellant-father Justin Michael Higgins and respondent-mother Tara Lynn Gantter are the parents of one minor son, G.G.H., who was born November 8, 2002. Father signed a recognition-of-parentage form on the day of G.G.H.'s birth. Except during periods of father's active duty, military deployment, the parties resided together until April 2005. During most of the time from December 2003 until April 2005, the parties resided in the Big Lake home owned by father, where father and his wife, R.H., continue to reside. In February 2006, the district court granted the parties joint legal custody of G.G.H., mother sole physical custody, and father parenting time.

In April 2006, mother moved the district court to vacate and reopen the paternity judgment based on excusable neglect. In June 2006, father also moved the district court to vacate and reopen the paternity judgment, except as to the judgment's attorney-fee award to him from mother. Both parties requested mediation or a custody evaluation. The district court vacated the paternity judgment except for the attorney-fee award to father and ordered the completion of a custody evaluation, which Susan St. Clair of Anoka County completed. Father then moved for a second custody evaluation to be completed by Dr. James Gilbertson; the district court granted father's motion, and Dr. Gilbertson completed a custody evaluation.

A trial on the issues of child custody and child support was held March 4 through 7, 2008. Both parties sought sole legal and sole physical custody of G.G.H. St. Clair's custody evaluation was admitted as Exhibit 3, and Dr. Gilbertson's custody evaluation and supplement were admitted as Exhibits 15 and 16. St. Clair recommended that (1) mother be granted permanent sole legal and permanent sole physical custody, (2) parenting-time exchanges take place at a police station in Elk River and that R.H. not accompany father for exchanges, (3) both parties seek individual counseling, and (4) father complete "the Compassion Workshop as referred by Court Services." Dr. Gilbertson did not opine as to which parent should have custody but stated:

> At this point, I have concerns regarding [mother] having sole authority over [G.G.H.]. I have concerns that her parenting style and her relationship with [father] will be largely mood determined.
>
> I am concerned about erratic decision-making or overtly or subtly abandoning co-parenting participation when she feels wronged or believes that someone is taking advantage of her. I view her as having litigious features. I have concerns about her ability to consistently facilitate [G.G.H.'s] relationship with his father.

But Dr. Gilbertson also stated that the parenting-time schedule recommended by St. Clair "could reasonably form the parenting schedule for whatever parent may gain sole physical custody," and added several additional recommendations and clarifications, including that parenting-time exchanges not take place at a site other than the parents' homes.

By judgment entered in June 2008, the district court, among other things, granted mother sole legal and sole physical custody of the minor child, ordered father to "attend

and successfully complete the Compassion Workshop as referred by Anoka County Court Services to help him address his abusive behavior to help him develop empathy and respect for [mother] and [G.G.H.]," and ordered that R.H. "not be present at any parenting time exchange." Both parties moved for amended findings, and the district court granted mother's motion related to her satisfaction of the attorney-fee award to father but denied all other motions. This appeal follows.

D E C I S I O N

Father argues that the district court abused its discretion by (1) making best-interests findings that are not supported by the evidence, (2) ordering that R.H. not be present at any parenting-time exchange, and (3) ordering father to complete the Compassion Workshop.

Best-Interests Findings

"Appellate review of custody determinations is limited to whether the trial 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). Findings of fact are reviewed for clear error, and "[d]eference must be given to the opportunity of the trial court to assess the credibility of the witnesses." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (citing Minn. R. Civ. P. 52.01). The record is viewed in the light most favorable to the district court's findings, and a finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

"A child's best interests are the fundamental focus of custody decisions." *Vangsness*, 607 N.W.2d at 476. Under Minn. Stat. § 518.17, subd. 1 (2008), the best interests of the child "means all relevant factors to be considered and evaluated by the court," and includes 13 factors listed in the statute. "The court may not use one factor to the exclusion of all others" and "must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child." Minn. Stat. § 518.17, subd. 1. Temporary orders do not prejudice rights to be adjudicated at subsequent hearings. Minn. Stat. § 518.131, subd. 9(a) (2008). And while the general rule is that the child's primary caretaker is determined as of the time of separation, *Pikula*, 374 N.W.2d at 714 n.3, this rule applies only if the separation date is "reasonably close to the actual trial," *Sefkow*, 427 N.W.2d at 212. A district court must also "look at present circumstances to determine the limited issue of the proposed custodian's fitness." *Pikula*, 374 N.W.2d at 714 n.3. "If there is lengthy litigation over custody, the events since the separation 'are not only relevant, but indeed are crucial in determining the child's best interests.'" *LaValle v. LaValle*, 430 N.W.2d 224, 228 (Minn. App. 1988) (quoting *Sefkow*, 427 N.W.2d at 212).

Father challenges certain findings of the district court regarding the best-interests factors and the court's ultimate conclusion that the best-interests factors overall favor mother. We consider the district court's findings on each statutory factor.

1. Wishes of parents as to custody

The district court found that both parents requested sole legal and sole physical custody and that this factor did not favor either party. Father does not dispute this finding.

2. The child's preference

The district court found that G.G.H. was not old enough to express a preference and that this factor was not relevant to the best-interests assessment. Father does not dispute this finding.

3. The child's primary caretaker

The district court found that "[i]t is clear that [mother] has been the primary caretaker." St. Clair found that mother was the primary caretaker of G.G.H., and Dr. Gilbertson found that mother had been the primary parent from a task-time analysis, which Dr. Gilbertson described as "an attempt to identify the parent who has spent the most time with a particular child across the child's developmental life venues." In addition to the task-time analysis, Dr. Gilbertson opined that "the primacy of parenting can be inferred from the relationship, i.e., the attachment, comfort and communication that the child evidences toward a parent." Based on this analysis, Dr. Gilbertson found that "both parents appear a primary parent source of [G.G.H.]'s affection, attention, comfort and communication." But the district court stated that the primary caretaker is "the person who provides the child with daily nurturance, care, and support" and that the factors of affection, attention, comfort and communication are more relevant to the

intimacy of the relationship between the parent and child than to assessing the child's primary caretaker.

Father disputes the district court's primary-caretaker analysis, arguing that Dr. Gilbertson was correct in "combining two statutory factors (primary caretaker and intimacy of relationship)" and concluding that the combined factors favored neither parent. Father argues that the district court relied "upon an outdated bifurcation of the primary parent and intimacy factors." In support of his argument that the two statutory factors should be combined, father relies on *Vangsness*, 607 N.W.2d at 476-77. But father's reliance on *Vangsness* is misplaced. In *Vangsness*, although we discussed caselaw precedent and analyzed changes over time in the treatment of the primary-caretaker factor, 607 N.W.2d at 476, we did not address combining the primary-caretaker factor with any other statutory best-interests factor.

Father also argues that an emotional-bonding analysis should be used instead of an analysis that includes consideration of caretaking tasks. But *Pikula* set a standard for assessing primary-caretaker status that includes consideration of caretaking tasks, a standard that has not be been overruled or abandoned. *See Pikula*, 374 N.W.2d at 713 (listing primary-caretaker considerations). And this court has continued to apply *Pikula* to identify the primary caretaker as "the person who provides the child with daily nurturance, care and support" and to look to each parent's involvement in caretaking tasks. *See, e.g., Williams v. Carlson*, 701 N.W.2d 274, 280 (Minn. App. 2005) (quoting and citing *Pikula*, 374 N.W.2d at 711, 713-14).

Father's argument that the district court's analysis of the primary-caretaker factor was flawed is unpersuasive. The district court's primary-caretaker finding is supported by evidence in the record, and both custody evaluators concluded that when caretaking activities were considered, mother was the primary caretaker. Because the district court did not err by its approach to finding that mother was the primary caretaker and its finding is supported by the evidence, we will not disturb the finding.

4. The intimacy of the relationship between the parent and child

The district court found this factor did not favor either parent. Father does not challenge the court's finding regarding this factor.

5. The interaction and interrelationship of child with the parents, siblings, and others who may affect the child's best interests

The district court found that this factor did not favor either parent, noting that both evaluators found that both parents manifested appropriate parenting skills and that G.G.H. was comfortable and happy with both parents. Father does not challenge this finding.

6. The child's adjustment to home, school, and community

The district court found that this factor favored mother. The court noted that G.G.H. lived with mother and that Dr. Gilbertson observed no persuasive evidence that G.G.H. had serious adjustment problems at home, school, or in the community. The court also noted that Dr. Gilbertson had concerns about both parents' involvement of G.G.H. in conflict and that both Dr. Gilbertson and St. Clair had concerns about mother continuing to sleep with the child. The district court's finding is adequately supported by

the record, particularly St. Clair's custody evaluation, and is not clearly erroneous. Although evidence in the record may support a different finding than that made by the district court, there is evidentiary support for the district court's finding. Because this court views the evidence in the light most favorable to the findings, we conclude that the district court's finding on this factor is not clearly erroneous. *See Vangsness*, 607 N.W.2d at 472, 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.").

7. The length of time the child lived a stable, satisfactory environment and the desirability of maintaining continuity

The district court found that this factor favored mother. The court acknowledged that at different times, mother had stated different plans about moving and found that mother's plans "regarding [G.G.H.]'s residence and school enrollment are not settled." The district court also found that father had "the more stable home since he has lived in the Big Lake Home for a number of years" and that G.G.H. had friends in father's neighborhood. But the district court noted that G.G.H. had not resided in father's home in "recent times" and that the alternative was that G.G.H. would continue to live in the home of mother's parents until mother establishes a separate home.

The district court's finding is adequately supported by the evidence. Dr. Gilbertson opined that each of G.G.H.'s residences had "proved satisfactory," which includes his home with his maternal grandfather for the three years prior to trial. St. Clair also opined that mother seemed to provide G.G.H. with a satisfactory home environment, had always been G.G.H.'s primary caretaker, and that remaining in mother's care would

provide G.G.H. “stability and continuity of care.” Although the evidence would support a different finding, because there is evidentiary support for the district court’s finding, we will not disturb it.

8. The permanency of the family unit and existing or proposed custodial home

The district court found that this factor favored mother, focusing on its “discussion of the above factors.” Father challenges this finding, arguing that the evidence is “more supportive of [father].” But the district court’s finding is supported by the evidence. For example, St. Clair opined that mother could provide greater continuity of care for G.G.H. and, although mother testified that she intends to move at some point, she had no fixed plans or certain timeline. Because the district court’s finding is supported by evidence in the record and is not clearly erroneous, we will not disturb it.

9. The mental and physical health of all individuals involved

The district court found that this factor favors father. Father does not challenge this finding on appeal. The court noted that Dr. Gilbertson’s review of mother’s therapy records “confirm[s] [mother’s] troubled mental health history.” Dr. Gilbertson diagnosed mother with depressive disorder by history, in current remission, panic disorder by history, self-reported history of marijuana abuse in current remission, post traumatic stress disorder by history, and personality disorder not otherwise specified.

10. The capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating the child in the child's current culture and religion

The district court found that this factor was neutral and did not favor either parent. Father does not challenge this finding.

11. The child's cultural background

The district court found that the evidence did not suggest that there was any significant disagreement between the parties regarding education, religion, or cultural heritage and that this factor did not favor either parent. Father does not challenge this finding.

12. The effect on the child of the actions of an abuser

The district court found that this factor "favors placing custody with [father]." Father does not challenge this finding. The court noted that "domestic abuse [and] unacceptable behavior occurred during parenting-time exchanges, including an event during which [mother] was arrested." The court stated, in part,

> [G.G.H.] was present during the exchanges and was anxious, crying, and upset. Without assigning blame, the incident[s] were traumatic for [G.G.H.][.] The parties engaged in a course of conduct which was detrimental to [G.G.H.] and the parties demonstrated poor judgment and behavior which could be described as provocative. Both parties have indicated a plan to engage in provocative behavior which is ultimately not in the best interest of [G.G.H.].

The district court found that "during the parenting time exchanges, [father] and [R.H.] had a[n] agenda to create an incident," but that mother was "primarily responsible for her own lack of impulse control in the presence of [G.G.H.]."

13. The disposition of each parent to encourage and permit frequent and continuing contact by the other parent

The district court found that this factor did not favor either parent, noting that the court had "no confidence that either party will follow the orders of the Court." The court found that both parties had not complied with court orders, noting that mother failed to appear for a temporary hearing and for trial and that father had taken G.G.H. from daycare when he was not authorized to do so.

Father argues that this factor should favor him and that he was authorized to remove G.G.H. from daycare under a "right of first refusal" granted in a temporary order. This argument reflects the parties' longstanding dispute over the meaning of the "right of first refusal" that the district court granted both parties in February and August 2006 orders. The parties disputed the meaning of the right of first refusal until a court-appointed parenting-time expeditor concluded that the right of first refusal did not include regular daycare. After the district court discharged the expeditor, the parties had a telephone conference with the district court, after which the court issued a November 2007 order stating that the district court had "indicated" that the expeditor's report no longer had any effect. After this telephone conference, the parties continued to dispute the meaning of the right of first refusal. Father maintains that the November 2007 order authorized him to remove G.G.H. from daycare. In the June 2008 judgment challenged

on appeal, the district court resolved the parties' dispute about the right of first refusal against father by finding that father took G.G.H. from daycare without authorization.

A district court's construction of an ambiguous judgment or order is a factual matter reviewed for clear error and a district court's construction of its own judgment is given great weight on appeal. *See Stieler v. Stieler*, 244 Minn. 312, 319, 70 N.W.2d 127, 131 (1955) (stating that a district court may clarify an ambiguous judgment); *Gray v. Farmland Indus., Inc.*, 529 N.W.2d 514, 516 (Minn. App. 1995) (stating that *Stieler* is the "leading case on a court's inherent authority to interpret or clarify an order"), *review denied* (Minn. June 14, 1995); *see also Tarlan v. Sorensen*, 702 N.W.2d 915, 919 (Minn. App. 2005) (stating that interpretation of an ambiguous judgment is a finding of fact). Because neither the August 2006 temporary order nor the November 2007 order unambiguously authorized father to remove G.G.H. from daycare, we conclude that the district court's finding that father took G.G.H. without authorization is not clearly erroneous.

The district court's finding that this factor favored neither party is supported by the evidence, which shows that neither parent's behavior has been exemplary and that neither parent has been able to diffuse the conflict. Because the evidence supports the

district court's finding that this factor favors neither party, and because the district court's finding is not clearly erroneous, we will not disturb it.[1]

Father also argues that the district court erred in concluding that the best-interests factors as a whole favored granting custody to mother. "The trial court's determination of the ultimate best-interests issue will be affirmed unless it constitutes an abuse of the trial court's discretion or the trial court rationale suggests an erroneous application of the law." *Vangsness*, 607 N.W.2d at 475. "[C]urrent law leaves scant if any room for an appellate court to question the trial court's balancing of best-interests considerations." *Id.* at 477. The district court made findings adequately supported by the evidence and concluded that some best-interests factors favored mother, others favored father, and the remaining were either not relevant or neutral. The district court's balancing of the factors is something to which we defer, and we will not disturb the court's balancing in this case.

Parenting-Time Exchanges

The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995); *see also Manthei v. Manthei*, 268 N.W.2d 45, 45 (Minn. 1978) (stating, in a case addressing an order requiring that visitation take place at the custodial parent's house, that "the discretion of the trial court in deciding questions relating to visitation is extensive").

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[1] We note our pleasure that the parties do not have a right of first refusal under any current order or judgment because we are persuaded that the disputes surrounding its meaning are not amenable to lasting resolution even with court intervention.

Father argues that the district court abused its discretion in ordering that R.H. not be present at any parenting-time exchange, arguing that the decision is not supported by the record. The district court's order is adequately supported by the evidence in the record, and the ruling does not reflect an abuse of discretion.

Compassion Workshop

An order requiring one party to go to counseling is reviewed for an abuse of discretion. *See SooHoo v. Johnson*, 731 N.W.2d at 815, 818, 826 (Minn. 2007) (concluding that district court abused its discretion in ordering a parent to go to counseling when the court did not find that the parent's counseling would be in the best interests of the children, as opposed to the best interests of the parent). Father argues that the district court abused its discretion in ordering him to complete the Compassion Workshop because (1) the record and findings do not support the order and (2) the Compassion Workshop does not exist.

As acknowledged by father's counsel during oral argument, father's primary objection to the district court's order that he attend and complete the Compassion Workshop is the court's reference to father's "abusive behavior." The court ordered father to "attend and successfully complete the Compassion Workshop as referred by Anoka County Court Services to help him address his abusive behavior to help him develop empathy and respect for [mother] and [G.G.H.]." But the court did not find that father committed any of the acts of domestic abuse; rather, the court found that mother had committed acts of domestic abuse. We agree with father that the district court's reference to abusive behavior is unsupported by the district court's findings, and we

modify the district court's order to remove the reference to abusive behavior in connection with its order that father attend and complete the Compassion Workshop. Because the court also justified its order by noting that the Compassion Workshop would "help [father] develop empathy and respect for [mother] and [G.G.H.]," we leave intact the order that father complete the workshop, assuming it exists. Father's argument that the workshop does not exist is problematic. Father did not present in district court facts to support his assertion that the workshop does not exist and therefore the facts are not part of the record on appeal. *See* Minn. R. Civ. P. App. 110.01 (stating that record on appeal consists of papers filed in district court, exhibits, and transcripts of proceedings). Because an appellate court may not base its decision on matters outside the record, *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988), father's assertion regarding the existence of the program does not provide a basis for reversing the district court's order. We trust that if the compassion workshop does not exist, the district court will adjust its order appropriately.

Affirmed as modified.