STATE OF MINNESOTA
IN COURT OF APPEALS
A09-588

In re the Marriage of: Brenda Sue Loewen, petitioner,
Appellant,

vs.

Robert David Loewen, Jr.,
Respondent.

Filed March 9, 2010
Affirmed
Stauber, Judge

Goodhue County District Court
File No. 25FA072117

Brenda Loewen, Red Wing, Minnesota (pro se appellant)

Robert Loewen, Red Wing, Minnesota (pro se respondent)

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

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

STAUBER, Judge

After the denial of her motion for a new trial, appellant challenges the district court's custody determination and division of the parties' property. We affirm.

FACTS

The district court dissolved the marriage of pro se appellant Brenda Sue Loewen and pro se respondent Robert David Loewen Jr., granted sole legal and physical custody of the parties' minor children to respondent, and divided the parties' property. This appeal follows the district court's denial of appellant's motion for a new trial. We affirm.

D E C I S I O N

I.

Appellant's main contention is that she is entitled to sole physical and joint legal custody of the parties' minor children. "Appellate review of custody determinations is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). We review the district court's denial of a motion for a new trial for abuse of discretion. *Melius v. Melius*, 765 N.W.2d 411, 417 (Minn. App. 2009).

Appellant argues that a new trial should be granted on the ground of newly discovered material evidence; specifically, the hospitalization of one of the minor children after the trial. Whether to grant a new trial because of newly discovered evidence "is addressed to the sound discretion of the [district] court and [such] discretion is to be exercised sparingly." *Wurdemann v. Hjelm*, 257 Minn. 450, 465, 102 N.W.2d 811, 821 (1960) (quotation and footnote omitted).

In denying appellant's motion for a new trial, the district court erroneously stated the law regarding newly discovered material evidence. Caselaw, though urging caution,

does not prohibit the grant of a new trial based on facts arising after the original trial. *See Swanson v. Williams*, 303 Minn. 433, 436, 228 N.W.2d 860, 862 (1975) (stating that newly discovered evidence "[g]enerally . . . must have been in existence at the time of trial"); *Gau v. J. Borgerding & Co.*, 177 Minn. 276, 278, 225 N.W. 22, 22 (1929) (stating that there is "special need for caution" where "new evidence consists solely of happenings subsequent to the trial"); *State v. Watrous*, 177 Minn. 25, 26, 224 N.W. 257, 257 (1929) (acknowledging "that a motion for a new trial upon the ground of newly discovered evidence may be supported by facts arising after the trial").

Despite erroneously stating the law regarding newly discovered material evidence, the district court did not abuse its discretion by denying appellant's motion for a new trial. As noted by the district court, extensive evidence was presented at trial as to the emotional turmoil, depression, and suicidal ideation of the child in question. Appellant has therefore failed to show that the new evidence would lead to a different result in a new trial. *See Bruno v. Belmonte*, 252 Minn. 497, 503, 90 N.W.2d 899, 903 (1958) (stating that moving party must show that evidence "probably will lead to a different result in a new trial" for a new trial to be granted on the ground of newly discovered evidence).

Appellant also argues that the district court abused its discretion by excluding the report of one of her psychological evaluations as hearsay. "A district court's ruling on the admissibility of evidence will only be reversed if the [district] court abused its discretion and the abuse of discretion prejudiced the objecting party." *Melius*, 765 N.W.2d at 417. The psychological-evaluation report, completed by a therapist who did

not testify at trial, is hearsay. *See* Minn. R. Evid. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial[,] . . . offered in evidence to prove the truth of the matter asserted"). Hearsay is not admissible unless an exception applies, Minn. R. Evid. 802, and appellant does not specify an applicable exception. We conclude that the district court did not abuse its discretion by excluding the report of the psychological evaluation, which appears to have been created to persuade the district court to conduct a custody evaluation. *See* Minn. R. Evid. 803(6) (stating that a report "prepared for litigation" is inadmissible under the business-records hearsay exception); *In re Child of Simon*, 662 N.W.2d 155, 161 (Minn. App. 2003) (concluding that a letter from child's therapist, expressly updating the district court on the child's progress in therapy and offering a recommendation for the child's placement, was inadmissible under the business-records hearsay exception).

Appellant asserts that the children were psychologically unable to state a preference as to which parent they preferred to live with. But the district court, in making findings as to the reasonable preferences of the children that are consistent with the custody evaluator's report, determined that the custody evaluator's opinions were more credible than appellant's. We defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Appellant suggests that the district court was biased against her. But a judge "who has presided at a motion or other proceeding . . . may not be removed except upon an affirmative showing of prejudice on the part of the judge." Minn. R. Civ. P. 63.03. Appellant's mere allegations are insufficient to demonstrate judicial bias. *See State v.*

Laughlin, 508 N.W.2d 545, 548 (Minn. App. 1993) ("[A] judge should not . . be removed simply because a litigant subjectively believes that the judge is biased.").

Because appellant has failed to show that the district court's findings are unsupported by the evidence or that the district court improperly applied the law, we affirm the district court's custody determination. We do not reach the merits of appellant's other custody-related arguments because these arguments were not raised in her motion for a new trial, *see Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986) ("[T]he general rule [is] that matters such as trial procedure, evidentiary rulings and jury instructions are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error."), and/or have not been adequately briefed, *see State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that assignment of error in brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

II.

Appellant asserts that the district court abused its discretion in dividing the parties' property. *See Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002) (stating that a district court's evaluation and division of property in a marital dissolution is reviewed for abuse of discretion). Appellant has waived review of this issue by inadequately briefing it on appeal. *See Modern Recycling*, 558 N.W.2d at 772; *see also White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997) (stating that error is never presumed on appeal), *review denied* (Minn. Oct. 31, 1997).

Affirmed.