STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1895

In re the Marriage of:
Beau Taylor Hellam, petitioner,
Appellant,

vs.

Crystal Elaine Hellam,
Respondent.

Filed October 12, 2010
Affirmed
Johnson, Judge

Scott County District Court
File No. 70-FA-08-20155

Beau Taylor Hellam, Shakopee, Minnesota (pro se appellant)

Crystal Elaine Hellam, West St. Paul, Minnesota (pro se respondent)

Considered and decided by Minge, Presiding Judge; Ross, Judge; and Johnson, Judge.

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

JOHNSON, Judge

This appeal arises from the dissolution of the marriage of Beau Taylor Hellam and Crystal Elaine Hellam. Mr. Hellam argues that the district court erred in two respects: first, by awarding Ms. Hellam sole legal custody and joint physical custody of the parties'

two young children and, second, by awarding him parenting time in an insufficient amount and at inconvenient times. We affirm.

FACTS

The parties were married in 2003. During their marriage, they had two children -- a son born in May 2005 and a daughter born in April 2008. In August 2008, Mr. Hellam petitioned to dissolve the marriage. He sought joint legal custody and joint physical custody of the children, and he sought parenting time of between 10 and 45 percent of each week. In her answer and counter-petition, Ms. Hellam sought sole legal custody and sole physical custody of the children and a reservation of the issue of Mr. Hellam's parenting time.

In mid-November 2008, Ms. Hellam and the children moved out of the family home without notice to Mr. Hellam. Mr. Hellam had no contact with the children until February 2009 and limited contact with them thereafter. In April 2009, the parties' son was diagnosed with Autism Spectrum Disorder (ASD).

In January 2009, the district court appointed Linda Gerr to be guardian *ad litem* for the children. Later, the district court directed Gerr to consider the children's best interests regarding custody and parenting time and to submit a report to the court.[1] In April 2009, Gerr submitted her report to the district court. She recommended joint legal

[1]A guardian *ad litem* "shall" advise the district court with respect to custody and parenting time. Minn. Stat. § 518.165, subds. 1, 2 (2008); *see also* Minn. Stat. § 518.165, subd. 2a (2008) (addressing responsibilities of a guardian *ad litem*). But a guardian *ad litem* is precluded from serving as a custody evaluator pursuant to Minn. Stat. § 518.167 or as a parenting-time evaluator. Minn. R. Gen. Pract. 903.04, subd. 1(a), (b). Neither party made any objection to Gerr's role at any stage of this case.

custody, sole physical custody in Ms. Hellam, and parenting time for Mr. Hellam on alternating weekends, to be increased as the children become accustomed to being away from Ms. Hellam.

At trial, the issues primarily in dispute were custody and parenting time. In July 2009, the district court issued an order for judgment. The district court stated that it was adopting most of Gerr's report and recommendations regarding custody and parenting time. The district court awarded the parties joint legal custody and awarded Ms. Hellam sole physical custody. The district court awarded Mr. Hellam parenting time on alternating weekends, from 9:00 a.m. to 6:00 p.m., as well as half of holidays and other special days. The district court reserved the issue of child support. The district court entered judgment in August 2009. Mr. Hellam appeals.

D E C I S I O N

I. Custody

Mr. Hellam first argues that the district court erred by awarding Ms. Hellam sole physical custody and joint legal custody of the parties' two young children. More specifically, he argues, first, that the district court erroneously applied the best-interests test and, second, that the district court should not have relied on Gerr's report.

A. Best Interests

Mr. Hellam argues that the district court erred in its custody award because it failed to properly analyze the best-interests factors. We review a district court's custody award by analyzing whether the findings are supported by the evidence and whether the district court properly applied the law. *Ayers v. Ayers*, 508 N.W.2d 515, 518 (Minn.

1993). We apply a clearly erroneous standard of review to a district court's findings of fact and a *de novo* standard of review to questions of law. *Id.*

A district court's custody award must be determined by the child's best interests. Minn. Stat. § 518.17, subd. 1 (2008). When making a custody determination, a district court must consider "all relevant factors," including 13 statutory factors relevant to a child's best interests:

> (1) the wishes of the child's parent or parents as to custody;
>
> (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
>
> (3) the child's primary caretaker;
>
> (4) the intimacy of the relationship between each parent and the child;
>
> (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
>
> (6) the child's adjustment to home, school, and community;
>
> (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
>
> (8) the permanence, as a family unit, of the existing or proposed custodial home;
>
> (9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;

> (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
>
> (11) the child's cultural background;
>
> (12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and
>
> (13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

Minn. Stat. § 518.17, subd. 1(a) (2008).

In this case, Mr. Hellam challenges the district court's findings and reasoning on nearly all of the 13 statutory factors. With respect to the first factor, the district court found that "[b]oth parents want sole physical custody." Mr. Hellam contends that the district court erred by failing to explain the reasons why each parent wants sole physical custody. The district court did not err with respect to this factor because there is no requirement in the statute or the caselaw that a district court must make a finding as to why a party seeks custody.

With respect to the second factor, the district court found that "the children are too young to be able to express a preference." Mr. Hellam contends that the district court erred because Gerr did not ask the four-year-old son about his preferences. The district court did not err with respect to this factor by determining that the children are too young

to express a preference. *See, e.g.*, *Speltz v. Speltz*, 386 N.W.2d 264, 267 (Minn. App. 1986) (stating that children aged six and four were too young to express custodial preferences), *review denied* (Minn. June 30, 1986).

With respect to the third factor, the district court found that Ms. Hellam has been the primary caretaker. The district court did not err with respect to this factor because the evidence amply supports the district court's finding.

With respect to the fourth and fifth factors, the district court found that, although Mr. Hellam's interaction with the children was "comfortable," Ms. Hellam's interaction with the children was "more intimate." Mr. Hellam contends that this finding is erroneous because it is based solely on the fact that Ms. Hellam was still breastfeeding the parties' daughter when Gerr made her observations. The district court did not err with respect to this factor because the finding is supported by, among other things, Mr. Hellam's testimony about his work schedule before the separation, which left him with limited time to spend with the children during their waking hours.

With respect to the sixth, seventh, and eighth factors, the district court found that the children are "accustomed" to their current home with Ms. Hellam and that "it is in their best interests that the continuity of that home be maintained." Mr. Hellam contends that the district court failed to acknowledge that he bought the family home in 2007 and that the children lived there until the parties separated. But Gerr's report, which the district court adopted, notes that the family lived together from the birth of the first child in May 2005 until the parties' November 2008 separation. Thus, the district court was aware of the amount of time the parties resided together before their separation. Mr.

Hellam also points out that Ms. Hellam has moved twice since he petitioned to dissolve the marriage. But the district court's finding is consistent with Ms. Hellam's testimony concerning her reasons for making those moves.

With respect to the ninth factor, Mr. Hellam contends that the district court erred by not making a finding concerning the mental and physical health of the parties. The district court's findings referred to the son's ASD diagnosis and his special needs but not to the parties' health. The district court did not err with respect to this factor because neither party introduced any evidence concerning the mental and physical health of either Mr. Hellam or Ms. Hellam. Without such evidence, the district court lacked an evidentiary basis on which to make such findings. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (reasoning that district court did not err because appellant "failed to provide . . . the evidence that would allow the district court to fully address the question"), *review denied* (Minn. Nov. 25, 2003). Mr. Hellam also contends that the evidence concerning Ms. Hellam's conduct allows an adverse inference about her mental health. But Mr. Hellam did not ask the district court to draw that adverse inference, so we decline to address the matter. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

With respect to the tenth and eleventh factors, the district court found that Mr. Hellam "fared well in [Gerr's] report and deserves sufficient parenting time to establish and nurture the parent-child relationship with his children." Mr. Hellam contends that the district court ignored the parties' disagreements about religion, schooling, and medical decisions. Gerr's testimony suggests that the parties' disagreements are attributable to

the acrimony of their dissolution. The district court did not err with respect to these factors because the record supports its decision to give limited weight to the parties' current disagreements. *See Berthiaume v. Berthiaume*, 368 N.W.2d 328, 332-33 (Minn. App. 1985) (affirming award of joint custody to parties who were uncooperative during dissolution action but were deemed able to cooperate in reaching major parenting decisions).

With respect to the twelfth factor, Mr. Hellam contends that the district court did not give adequate consideration to his allegations that Ms. Hellam abused their son by using certain disciplinary and motivational techniques. The district court did not err with respect to this factor because its decision is supported by Gerr's report, which states that a social worker who was familiar with Mr. Hellam's allegations considered them not worthy of follow-up. Ms. Hellam also testified that she changed her disciplinary techniques because they did not work and because of the son's ASD diagnosis.

With respect to the last factor, the district court found that Mr. Hellam had "negative expressions and attitudes towards [Ms. Hellam's] care of the children." Mr. Hellam contends that there is no support in the record for this finding. The district court did not err with respect to this factor because its finding is supported by Gerr's report. Mr. Hellam testified that his statements were taken out of context. The district court apparently was convinced by other evidence in the record.

In sum, the district court's best-interests findings are not clearly erroneous, and the district court did not misapply the law.

B. Gerr Report

Mr. Hellam also argues that the district court erred by relying on Gerr's report. He contends that Gerr's report is "unreliable" because it does not address all 13 best-interests factors and because Gerr "improperly documented inaccurate information and omitted significant information." More specifically, he contends that Gerr "failed to document" seven types of information, "erroneously documented" two types of information, and testified erroneously on one topic.

Mr. Hellam's challenges to the Gerr report do not reflect inadequacies in Gerr's processes and procedures as much as Mr. Hellam's disagreements with Gerr's conclusions. After reviewing the record, we are not convinced that Gerr's report contains material omissions or misstatements. Some of the alleged omissions and misstatements are statements that could not possibly have misled the district court. Furthermore, Mr. Hellam's trial counsel cross-examined Gerr, without restriction, on the matters that he asserts are omitted or misrepresented. And Mr. Hellam introduced his own evidence on the same subjects. By adopting Gerr's report, the district court implicitly found Gerr's report to be credible despite Mr. Hellam's testimony. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (noting that district court's findings "implicitly indicate[d]" that it found certain evidence credible). We generally defer to district court credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). The district court was vested with considerable discretion in determining how much weight to place on Gerr's report. *See Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996).

Based on our review of the record, we conclude that Mr. Hellam has not demonstrated that the district court abused its discretion by relying on Gerr's report and testimony.

In sum, the district court did not err in its analysis of the best-interests factors or in relying on Gerr's report. Accordingly, we affirm its award of joint legal custody and sole physical custody in Ms. Hellam.

II. Parenting Time

Mr. Hellam also argues that the district court erred by awarding him parenting time in an insufficient amount and at inconvenient times.

A. Amount

Mr. Hellam argues that the district court erred by awarding him parenting time in an amount less than the presumptive amount of 25 percent. Mr. Hellam asserts that his share of parenting time is only approximately 10 percent. Mr. Hellam's assertion is accurate if Mr. Hellam's parenting time in alternating weeks (35 hours) is divided by the amount of time in a two-week period (336 hours).

The relevant statute provides, "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." Minn. Stat. § 518.175, subd. 1(e) (2008). A district court should "demonstrate an awareness and application of the 25% presumption *when the issue is appropriately raised* and the court awards less than 25% parenting time." *Hagen v. Schirmers*, 783 N.W.2d 212, 217 (Minn. App. 2010) (emphasis added). Mr. Hellam was represented by counsel in the district court, but he did not bring section 518.175, subdivision 1(e), to the district court's attention. He was on notice that a parenting-time

award of less than 25 percent was possible because Ms. Hellam's answer and counter-petition sought to reserve Mr. Hellam's parenting time or to establish Mr. Hellam's parenting time in an amount less than 10 percent. Furthermore, Mr. Hellam's own petition sought parenting time of between 10 and 45 percent. Moreover, Mr. Hellam did not raise this issue in a posttrial motion for amended findings or a new trial. *See* Minn. R. Civ. P. 52.02, 59.01-.03. Thus, the district court did not err by not making express reference to the 25% statutory presumption. We note that the district court issued its order before this court issued its opinion in *Hagen*.

In addition, the district court did not err by awarding parenting time in an amount less than the statutory presumption. A district court has "broad discretion in deciding parenting-time questions." *Hagen*, 783 N.W.2d at 215. Furthermore, a district court "may consider the age of the child in determining whether a child is with a parent for a significant period of time." Minn. Stat. § 518.175, subd. 1(e) (2008). In this case, it appears that the district court set Mr. Hellam's parenting time below the 25-percent presumption in part because the daughter was only an infant and because the son had recently been diagnosed with ASD. In her report, Gerr recommended that Mr. Hellam's parenting time be "expanded as the children adjust to being away from their mother and based on the needs of" the son. Gerr's report states that she was "unable to recommend a transition plan at this time due to [the son's] recent diagnosis." At trial, Gerr testified that, because of the recency of the son's ASD diagnosis, she did not have adequate information to design a complete parenting schedule. Gerr's report also states her "hope . . . that the transition plan will continue to increase the children's time with their father

until he has every other weekend and several hours during the week." The district court adopted Gerr's report and recommendations in substantial part.

We conclude that the evidence is sufficient to rebut the 25-percent presumption. *See* Minn. Stat. § 518.175, subd. 1(e). We note that Mr. Hellam is not precluded from seeking future increases in his parenting time, subject to the district court's requirement that parenting-time disputes be submitted to a mediator or parenting-time expeditor before being presented to the district court.

B. Weekend Schedule

Mr. Hellam also argues that the district court erred by setting a parenting-time schedule that is inconvenient for him because it is likely to conflict with his work schedule.

The goal of parenting time is to allow children to maintain a parent-child relationship that is in the child's best interests. Minn. Stat. § 518.175, subd. 1(a) (2008). The district court awarded Mr. Hellam parenting time on alternating weekends. Mr. Hellam states in his brief that the award of parenting time often conflicts with his work schedule. At trial, Mr. Hellam testified that his job requires him to work every third weekend. Thus, on one-third of the weekends for which Mr. Hellam is entitled to parenting time, he may be unable to take advantage of all of the parenting time to which he is entitled.

It does not appear that the district court intended Mr. Hellam to miss significant portions of one-third of his parenting time. We interpret the district court's award of parenting time to be somewhat provisional in light of the parties' fluid situation and, thus,

unlikely to unduly limit Mr. Hellam's exercise of parenting time in the present or the future. Gerr recommended that Mr. Hellam's parenting time be increased over time until he has additional time on both weekends and weekdays. Mr. Hellam had only limited availability for parenting time on weekdays, which limited the district court's options. Mr. Hellam testified that he had been "working very hard on getting a day job with day hours" but that he had not done so because he was waiting for the court's custody decision. Mr. Hellam's testimony indicates that he intended to alter his work schedule to fit his parenting-time schedule after the district court's ruling. Since his testimony, the district court has issued its decision. We expect that the parties are discussing, or plan to discuss, an alternative parenting-time schedule that will provide Mr. Hellam with additional time. Without additional information on Mr. Hellam's current work schedule and the children's current needs, we can only speculate as to whether the current court-ordered parenting-time schedule is efficacious. *See Al-Zouhayli v. Al-Zouhayli*, 486 N.W.2d 10, 12-13 (Minn. App. 1992) (rejecting speculation as basis for reversing award of supervised visitation).

Thus, in light of the district court's "broad discretion in deciding parenting-time questions," *Hagen*, 783 N.W.2d at 215, we conclude that the district court did not commit reversible error by awarding parenting time to Mr. Hellam on alternating weekends. As noted above, Mr. Hellam retains the right to move to modify his parenting-time schedule, *see* Minn. Stat. § 518.175, subd. 5 (2008), so long as he first submits the dispute to a mediator or parenting-time expeditor.

Affirmed.