STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1927

Aaron James Salzer, petitioner,
Appellant,

vs.

Erin Stacy Gibbs,
Respondent.

Filed August 17, 2010
Affirmed
Willis, Judge[*]

Stearns County District Court
File No. 73-F3-05-050712

Tifanne E.E. Wolter, Butler & Allen, P.A., St. Paul, Minnesota (for appellant)

Gerald W. Von Korff, Pamela A. Steckman, Rinke Noonan, St. Cloud, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Connolly, Judge; and Willis, Judge.

[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

WILLIS, Judge

Appellant challenges the district court's denial, in part, of his motion for modification of a stipulated parenting-time order and resolution of school issues. Because the district court did not abuse its discretion, we affirm.

FACTS

Appellant Aaron Salzer and respondent Erin Gibbs are the unmarried biological parents of one minor child, JDSG, born in June 2004. In 2006, the district court issued an order, based on the parties' stipulation, establishing Salzer's paternity of JDSG and providing that Gibbs and Salzer would share joint legal and physical custody of JDSG, with the child's primary residence being with Gibbs during the school year. Salzer is a member of the United States Army Reserve. At the time of the stipulated order, Salzer had recently been deployed to Kosovo and was, therefore, only beginning to form a relationship with JDSG. The order provides for a graduated parenting-time schedule, giving Salzer more parenting time with JDSG as his relationship with the child develops over time. Under the stipulated order, until JDSG reaches the age of ten in 2014, Salzer has parenting time with JDSG during the school year on alternating weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m.; one weekday from 5:00 p.m. to 7:30 p.m.; and an additional weekday from 5:00 p.m. to 7:30 p.m. during the week when Salzer does not have weekend parenting time. Under the order, when JDSG was old enough to begin school, Salzer would share equal parenting time with Gibbs during the summer and other school breaks.

In 2008, Salzer moved the district court for an order altering the parties' parenting time in several respects and addressing school issues. Gibbs responded with a motion seeking alternatives to Salzer's proposals. The evidence that the parties presented to the district court on their motions consisted of each party's affidavit and an affidavit of the pastor of the church with which JDSG's preschool is affiliated.

Following a hearing on the motions, the parties stipulated to a number of items, and the district court resolved the remaining issues, ordering that: (1) the parties' parenting-time schedule during the school year will remain the same as in the 2006 stipulated order and that the parties will continue to share equal parenting time during the summer and other school breaks; (2) when Salzer is unavailable due to military service, Salzer's family shall have visitation with JDSG every other Monday and every Wednesday from 5:00 p.m. until 7:30 p.m., and every other Saturday from 9:00 a.m. until 6:00 p.m.; (3) JDSG shall continue to attend Prince of Peace preschool and, unless the parties agree otherwise, JDSG may attend Prince of Peace elementary school; (4) parenting-time exchanges may occur at JDSG's daycare or school for weekday visitations, but any exchanges before weekend visitations must take place at Gibbs's home; (5) Salzer's spouse may pick up JDSG only from daycare or school—never from Gibbs's home—and shall notify JDSG's daycare or school 24 hours in advance; and (6) for purposes of parenting time, the New Year's holiday shall begin at 6:00 p.m. on New Year's Eve, and Memorial Day and Labor Day weekends shall begin at 6:00 p.m. on Friday and conclude at 6:00 p.m. on Monday.

Salzer appeals.

D E C I S I O N

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). Likewise, we review custodial decisions, including where a child may attend school, under an abuse-of-discretion standard. *See Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996); *Novak v. Novak*, 446 N.W.2d 422, 424 (Minn. App. 1989), *review denied* (Minn. Dec. 1, 1989). A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). Appellate courts review the record in the light most favorable to the district court's decision. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). And we must defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). A district court's findings of fact underlying a parenting-time decision will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978). Factual findings are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. *Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 726 (Minn. 1985).

I. The district court did not abuse its discretion by not modifying the school-year parenting-time schedule.

The district court denied Salzer's request to modify the parenting-time schedule so that Salzer and Gibbs would share year-round parenting time equally, finding that it is "in [JDSG]'s best interest to have a primary residence during the academic year." Salzer

argues that the district court abused its discretion by failing to make adequate findings to explain why Salzer's proposed school-year parenting-time schedule modification is not in JDSG's best interests because the findings do not explicitly address any of the best-interests factors in Minn. Stat. § 518.17 (2008).

"It is well established that the ultimate question in all disputes over [parenting time] is what is in the best interest of the child." *Clark v. Clark*, 346 N.W.2d 383, 385 (Minn. App. 1984), *review denied* (Minn. June 12, 1984). Minn. Stat. § 518.175, subd. 5 (2008)—the statute governing this case—states, in relevant part, that "[i]f modification would serve the best interests of the child, the [district] court shall modify the decision-making provisions of a parenting plan or an order granting or denying parenting time, if the modification would not change the child's primary residence." But contrary to Salzer's argument, a district court's parenting-time modification decision—particularly one rejecting a proposed modification—need not be supported with particularized findings on the best-interests factors in Minn. Stat. § 518.17. *See* Minn. Stat. § 518.175, subds. 1(a), 5 (2008) (providing for the establishment and modification of parenting time); *Funari v. Funari*, 388 N.W.2d 751, 753 (Minn. App. 1986) ("Mere clarifications or insubstantial modifications of a visitation schedule are within a [district] court's discretion and need not be supported by findings that such modification is in the children's best interests.").

Salzer argues that the district court's finding that it is in JDSG's best interests to have a primary residence during the school year is not supported by the record. But the original 2006 stipulated parenting-time plan supports the district court's finding because

it specifically provides that "the primary residence of [JDSG shall be] in [Gibbs's home] during the education year." Accordingly, the plan provided Salzer with no overnight parenting time during the school year, with the exception of holidays, school breaks, and alternating weekends. Gibbs and Salzer agreed that that schedule was in the best interests of JDSG, even given the fact that Salzer's relationship with JDSG would grow, which Salzer now argues has happened. The party seeking modification of a previous order granting or denying parenting time has the burden of establishing that the proposed modification is in the child's best interests. *Griffin*, 267 N.W.2d at 735. Salzer has not met his burden.

II. The district court did not abuse its discretion by denying Salzer's request that his infant daughter be allowed to exercise all of his parenting time when he is unable to do so because of military service.

Salzer sought a modification that would allow his infant daughter—JDSG's half-sister—to exercise all of Salzer's parenting time when he is unable to do so because of military obligations. Gibbs requested an order that Salzer's parenting time may be exercised by his daughter only every other Monday and every Wednesday from 5:00 p.m. until 7:30 p.m., and every other Saturday from 9:00 a.m. until 6:00 p.m. The district court granted Gibbs's request, but ordered that Salzer's family—not just his infant daughter—may exercise parenting time.

Salzer's only legal argument is that the district court failed to consider the fifth best-interests factor in Minn. Stat. § 518.17, subd. 1 (2008): "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." But again, a district court's decision

to reject a proposed parenting-time modification need not be supported with particularized findings on the best-interests factors in Minn. Stat. § 518.17. Salzer acknowledges the district court's finding that Gibbs's proposed schedule includes enough visitation to preserve JDSG's relationship with his half-sister. And Salzer has not explained how allowing his daughter to exercise even more of his parenting time with JDSG is in JDSG's best interests. Therefore, Salzer has not met his burden in seeking further modification of his parenting time.

III. The district court did not abuse its discretion by allowing JDSG to attend Prince of Peace elementary school.

Salzer requested that the district order that JDSG be enrolled in a public preschool and that the parties must mutually choose an elementary school for JDSG. Gibbs requested an order allowing JDSG to attend elementary school at Prince of Peace, a parochial school where he was already enrolled in a preschool program. The district court ordered that JDSG will continue to attend Prince of Peace preschool and that, unless the parties agree otherwise, JDSG may attend Prince of Peace elementary school.

When parents share joint legal custody of a child, both parents have the right to participate in major custodial decisions that affect the child's upbringing, including education. *Novak*, 446 N.W.2d at 424. But when, as here, joint legal custodians cannot agree on which school their child should attend, the district court must resolve the dispute consistent with the child's best interests. *Id.*

On appeal, Salzer disputes only the elementary-school determination, arguing that the district court abused its discretion by failing to consider any of the best-interests

factors in Minn. Stat. § 518.17. But the list of best-interests factors assumes that the determination being made by the district court is an award of custody. *In re Paternity of B.J.H.*, 573 N.W.2d 99, 102 (Minn. App. 1998). Here, the custody of JDSG is not an issue. The parties were previously awarded joint legal custody of JDSG. And in any event, the district court's order and memorandum demonstrate that it considered the best interests of JDSG generally: Salzer concedes that "[t]he [district] court's findings indicate that the order for attendance at Prince of Peace School was based[, in part,] on [JDSG] doing well at pre-school."

Salzer argues that the district court abused its discretion by summarily dismissing several of his concerns about Prince of Peace elementary school, asserting that he would like JDSG to attend a foreign-language immersion program through a larger public school where JDSG also could meet more children. And Salzer expresses his concern that Prince of Peace elementary school does not have special rooms for science classes or many opportunities for extracurricular activities that would be available to JDSG at a public elementary school. But Salzer has identified no particular public schools that JDSG could attend that have foreign-language immersion programs, larger student bodies, better science classrooms, or more extracurricular activities than Prince of Peace elementary school has.

The district court's decision to allow JDSG to attend Prince of Peace elementary school, or whatever other school Gibbs and Salzer can agree on, is well within the court's discretion and is supported by logic and the evidence in the record. Gibbs states in her affidavit that JDSG loves attending Prince of Peace preschool and that he has adapted

well to and is comfortable with the students and staff because he sees many of them at church and Sunday school. Salzer does not dispute that JDSG appears to be thriving at Prince of Peace preschool, and he has presented no evidence that JDSG will not continue to thrive at Prince of Peace elementary school.

IV. The district court did not abuse its discretion by ordering that exchanges before weekend parenting time take place at Gibbs's residence.

Salzer requested that to alleviate conflict all parenting-time exchanges should occur at daycare or school. Gibbs asked that the weekend exchanges occur "as usual" from the parties' homes to avoid unnecessary "shuffling" for JDSG. The district court ordered that, although Salzer may pick up JDSG from daycare or school on weekdays, exchanges before weekend parenting time will continue to occur at Gibbs's home so that JDSG will not need to "carry his weekend bag to daycare or school."

Salzer argues that the district court "relied on evidence not in the record to make findings regarding weekend parenting-time exchanges." Specifically, Salzer argues that there is no evidence in the record that JDSG has a "weekend bag" that he would need to bring to Salzer's home. But Gibbs testified in her affidavit that Salzer's proposal would have "[JDSG] hauling overnight bags, school bag[s], etc. everywhere he goes." And Salzer presented no evidence to the contrary.

Salzer asserts that the district court recognized that conflict between Salzer's spouse and Gibbs occurs at parenting-time exchanges and, nevertheless, found the possible conflict to be preferable to having JDSG take a weekend bag to school. But the court's reasoning was consistent with JDSG's best interests—the most important

consideration here—and therefore the district court's decision was within its discretion. *See* Minn. Stat. § 518.175, subd. 5 (providing, in relevant part, that "[i]f modification would serve the best interests of the child, the [district] court shall modify the decision-making provisions of a parenting plan or an order granting or denying parenting time").

V. The district court did not abuse its discretion by ordering that Salzer's spouse must give 24 hours' advance notice to JDSG's daycare or school before picking up JDSG.

Salzer concedes that the district court's order prohibiting his spouse from transporting JDSG to or from Gibbs's home, including for parenting-time exchanges, was appropriate under the circumstances because there is an ongoing conflict between Gibbs and Salzer's spouse. But he argues that the district court abused its discretion by ordering that, in the event that his spouse picks up JDSG from daycare or school, she provide the daycare or school with 24 hours' notice that she will be doing so.

Salzer's argument is unpersuasive. The original parenting-time plan agreed to by the parties in the 2006 stipulated order—which presumably was what the parties both believed at the time to be in JDSG's best interests—provided that only Salzer could pick up JDSG from daycare for parenting exchanges and that Salzer was required to notify the daycare provider[1] "at least 24 hours in advance" of the pick-up. In seeking to modify the stipulated parenting-time terms and conditions, Salzer has not disputed the 24-hour-notice provision as it applies to him. Applying the 24-hour-notice requirement to Salzer's spouse when she picks up JDSG from daycare or school is consistent with the

[1]At the time of the 2006 stipulated order, JDSG was enrolled in daycare but not yet enrolled in preschool or school.

parties' original agreement regarding JDSG's best interests. Under these circumstances, it was not an abuse of discretion for the district court to order that Salzer's spouse must give JDSG's daycare provider or school 24 hours' notice before picking up JDSG.

VI. The district court did not abuse its discretion in ordering that the New Year's holiday shall begin at 6:00 p.m. on New Year's Eve.

Gibbs and Salzer agreed to combine the New Year's Eve and New Year's Day holidays provided for under the original stipulated order into a single holiday, with each parent having parenting time on the holiday in alternating years. But Gibbs and Salzer could not agree to the time at which the New Year's holiday would begin on New Year's Eve. Salzer requested that the holiday begin at 9:00 a.m., like all other holidays for which Gibbs and Salzer had agreed-on parenting-time exchange times, that is, all other holidays except the Memorial Day and Labor Day weekends. Gibbs requested that the holiday begin at 6:00 p.m., which is the agreed-on time that Salzer's usual bimonthly weekend parenting-time begins. The district court resolved the issue by ordering that, for "continuity" in the parenting-time schedule, "[the New Year's holiday, Memorial Day weekend, and Labor Day weekend,] parenting time shall begin at 6:00 p.m. . . . as if it was the same as a weekend visitation."

Salzer argues that the district court abused its discretion, contending that continuity actually dictates that the New Year's holiday begin at 9:00 a.m. because 9:00 a.m. is the start time for every other agreed-on holiday. We disagree. There is substantial logic to the district court's determination that the New Year's holiday begin at

6:00 p.m. This start time creates continuity in the parenting-time schedule by providing that each multiple-day holiday, like Salzer's weekend parenting time, start at 6:00 p.m.

Affirmed.