**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-2303**

In re the Marriage of:
Jeffrey Craig Arnholt, petitioner,
Appellant,

vs.

Hieu Nguyen Arnholt,
Respondent.

**Filed September 28, 2010**
**Affirmed**
**Hudson, Judge**

Nicollet County District Court
File No. 52-FA-08-31

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota; and

Mary Anne Wray, Farrish Johnson Law Office, Chtd., Mankato, Minnesota (for appellant)

Richard A. Stebbins, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

**HUDSON**, Judge

In this dissolution action, appellant-father challenges the district court's grant of sole legal and physical custody of the parties' children to respondent-mother, arguing that the district court abused its discretion by rejecting the report of a neutral custody evaluator. Appellant also argues that the district court abused its discretion by granting respondent a disproportionate share of the parties' property and an award of maintenance that is unsupported by the record. Because the district court did not abuse its discretion: (1) in rejecting the custody report when it made detailed findings on the best interests of the children; (2) in its property division; or (3) in its grant of maintenance, we affirm.

## FACTS

After a trial, the district court dissolved the ten-year marriage of appellant Jeffrey Craig Arnholt and respondent Hieu Nguyen Arnholt. The parties have five minor children, who were ages nine, seven, five, three, and one at the time of the judgment. Appellant works as a radiologist at the Marshfield Clinic in Eau Claire, Wisconsin, earning approximately $500,000 per year at the time of judgment. Respondent has training and a work history as an occupational therapist, but she did not work outside the home during the parties' marriage. Respondent is originally from Vietnam and moved to Minnesota with her family when she was eight years old. The parties moved frequently during the marriage for appellant's work opportunities; at the time of trial, respondent lived in Mankato with the children, and appellant had relocated to Eau Claire, a community where the parties had previously lived.

Both parties sought sole legal and physical custody of their children. The parties agreed to a custody evaluation, and the custody evaluator, Mindy Mitnick, recommended that appellant receive sole legal and physical custody of the children. Mitnick based this recommendation on her observation of the children interacting with each parent over several hours at the Mankato home, during a period when respondent was home-schooling the older children. Mitnick also administered psychological tests, including the MMPI, to both parents. She noted social and cognitive isolation of the children and certain skill deficits of respondent, which, she reported, caused harm to the children. She observed that the oldest child was affected by respondent's negative view of appellant and recommended counseling to change her perspective on her father.

During a four-day trial, the district court heard testimony on the custody issue from Mitnick and three additional experts: Mary Mullenbach, a psychologist who provided therapy to respondent; Michael Shea, a psychologist hired by respondent to examine the custody report; and Daniel Lynch, a therapist who provided the parties with marital counseling. Mullenbach testified that Mitnick's report did not present a balanced assessment and was biased and significantly flawed because it did not take respondent's cultural background into account. Mullenbach testified that, despite respondent's presence in the United States for a number of years, she had continuing problems with communication because of her English-language skills; that the use of tests such as the MMPI can be flawed with people of Vietnamese origin; and that a custody report would need to examine these cultural issues more closely. Mullenbach also testified that

respondent had been receptive to advice on parenting issues and had enrolled the older children in school by the time of the judgment.

Shea opined that Mitnick's report did not show adequate consideration for the changes that were occurring quickly for the children. He testified that for a recommendation like Mitnick's, he would expect to see that respondent had "highly deficient" parenting skills and the children were not doing well cognitively, which was not occurring. He testified that Mitnick's report assumed alienation based on behavior that could be "complex." He testified that he was concerned with whether cultural factors were being considered, based on his experience that ethnic and cultural factors were important in a contentious dissolution. He opined that the use of the MMPI in a different cultural situation presents language problems with idioms, and that, if used, it should be given in consultation with a person who knows the subject's culture.

Lynch testified that he found respondent to be a nurturing and attentive parent who was devoted to her children. Lynch testified that respondent appeared to have situational depression, based on her family situation, and that appellant showed defensiveness, tending to blame respondent for his concerns. Lynch testified that he was concerned about a recommendation that respondent would not be the children's primary caretaker.

The district court rejected Mitnick's custody recommendation and ordered that respondent receive sole legal and physical custody of the children. The court made findings on all of the custody factors listed in Minn. Stat. § 518.17 (2008). The court found that Mitnick's report did not address the cultural differences of respondent's Vietnamese background and that the additional experts discredited the report's

conclusions and voiced concern with Mitnick's handling of the cultural issues. The court also noted its own observation of respondent's ability to respond to questions during trial testimony as support for its decision to reject the custody recommendation. The court made no findings on the additional report of Donna Cairncross, a psychologist who had seen the parties' oldest child at Mitnick's suggestion and had recommended additional therapy to address the child's relationship with appellant. Based on respondent's willingness to return to Eau Claire, the court ordered that the children be enrolled in school in that city.

The district court also ordered a property division granting to appellant 11 of 12 educational accounts, including section-529 accounts, which were held by the parties for the benefit of the children. The court based its award of the 11 accounts to appellant on the fact that respondent testified that she might consider draining those accounts if she encountered financial difficulties, while appellant would be less likely to do so. The district court awarded the other account held for the children's benefit to respondent. The district court also ordered appellant to pay respondent maintenance of $6,000 per month for a period of ten years.

Appellant moved for amended findings or a new trial. After a hearing, the district court amended the judgment to add more specific findings on maintenance, including that: respondent was unable to provide adequate self-support, considering the standard of living during the marriage; respondent was without financial resources to meet her needs independently, based on her estimated monthly expenses; respondent was presently licensed as an occupational therapist but, pursuant to the parties' agreement during the

marriage, she had not worked at that profession for ten years; and appellant had the ability to pay respondent substantial support while meeting his own needs, based on his gross income of $41,000 per month. This appeal follows.

## D E C I S I O N

### I

This court's review of the district court's custody determination "is limited to whether the [district] court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (quotation omitted). This court gives deference to the district court's opportunity to assess witness credibility and will sustain the district court's findings unless they are clearly erroneous. *Id*.; Minn. R. Civ. P. 52.01. In determining whether findings are clearly erroneous, this court views the record in the light most favorable to the district court's findings. *Ayers v. Ayers*, 508 N.W.2d 515, 521 (Minn. 1993).

In making a custody determination, the district court must consider the best interests of the child, to be evaluated with regard to all relevant factors. Minn. Stat. § 518.17 (2008). Those factors include: (1) the wishes of each parent; (2) the reasonable preference of a child who is of an age to express a preference; (3) the child's primary caretaker; (4) the intimacy of the child's relationship with each parent; (5) the child's interaction and interrelationship with each parent; (6) the child's adjustment to home, community, and school; (7) the length of time the child has lived in a stable environment and the desirability of preserving continuity; (8) the permanence of a custodial home as a family unit; (9) the physical and mental health of all persons involved; (10) the

disposition and capacity of the parties to supply love and affection, and to continue raising and educating the child in the child's religion and culture; and (11) the cultural background of the child. *Id.*, subd. 1.

Appellant argues that the district court abused its discretion by rejecting the recommendation of the custody report and granting custody to respondent. Appellant specifically challenges the district court's finding that no parental alienation had occurred, arguing that Mitnick's report, as well as appellant's videotaped evidence of parenting transfers and phone conversations with the children, support a finding of alienation. Appellant also argues that the district court improperly failed to make findings on the report of Cairncross.

We disagree. A district court is not bound by an expert's recommendation and may choose to reject it. *Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991). In so doing, the district court must provide explicit reasons for rejecting the recommendation or make detailed findings examining the factors considered by the expert. *Rogge v. Rogge*, 509 N.W.2d 163, 166 (Minn. App. 1993), *review denied* (Minn. Jan. 28, 1994). Here, the district court made specific, detailed findings in which it rejected Mitnick's custody recommendation. *See Rutanen*, 475 N.W.2d at 104 (finding no error when district court rejected custody recommendation but provided detailed findings that reflected complete analysis of same best-interests factors used in custody recommendation). The district court found that, although Mitnick opined that the children's poor relationship with appellant was due to respondent's attempts to alienate the children from appellant, the district court had listened to tapes made by appellant of

parenting exchanges and phone conversations and was not convinced that alienation was occurring. The district court also found that Mitnick's evaluation did not adequately address respondent's cultural differences. The district court found, for example, that, although appellant had expressed concern with respondent speaking Vietnamese to the children in his presence, it was normal, given respondent's culture, for her to speak Vietnamese with the children.

The district court also found that three other experts—Shea, Mullenbach, and Lynch—all discredited Mitnick's conclusions to some extent. The district court found that Mullenbach confirmed that respondent has difficulties with the subtleties of the English language, especially when stressed, which may have led to communication difficulties during the evaluation. The district court found that both Shea and Mullenbach testified that the MMPI, which Mitnick administered to both parties, is inappropriate for an immigrant because it evaluates conditions that do not apply across a cultural divide. The district court also noted its own observations of respondent's ability to answer questions during the trial as a basis to reject the custody report. The district court also made findings on the additional best-interests factors. *See* Minn. Stat. § 518.17.

The district court appropriately weighed appellant's recorded evidence and did not clearly err by finding that it did not demonstrate alienation. *See Sefkow*, 427 N.W.2d at 210 (stating that this court defers to the district court's credibility determinations and does not reassess those determinations). And because Cairncross stated that her report was not intended to evaluate either parent, the district court did not err by failing to make findings based on that report. Moreover, Cairncross's recommendation of additional

therapy for the parties' child is not inconsistent with the district court's custody determination. We further note that because the paramount consideration in determining custody remains the best interests of the children, even a finding of alienation would not have precluded a custody decision in favor of respondent. *See Petersen v. Petersen*, 296 Minn. 147, 148, 206 N.W.2d 658, 659 (1973) (stating that child's best interests are paramount consideration in custody determination); *Lemcke v. Lemcke*, 623 N.W.2d 916, 920 (Minn. App. 2001) (stating that finding of parental alienation does not preclude award of custody to offending parent because "[c]hildren are not responsible for their parents' misconduct, and their best interests should not be sacrificed merely to punish a misguided parent"), *review denied* (Minn. June 19, 2001).

Appellant argues that the district court improperly based its rejection of the custody recommendation and its cultural-background findings on an unsupported view of respondent's Vietnamese culture. Appellant asserts that the district court's findings reflected respondent's culture, not that of the children, and points out that none of respondent's experts were experts on Vietnamese culture. But in rejecting the custody recommendation, the district court did not base its findings on any purported expert testimony of Vietnamese culture. Rather, the district court relied on the opinions of psychological experts who simply asserted that it did not adequately address the possible ramifications of Vietnamese culture. Given respondent's reported difficulties in processing subtleties in English, it is reasonable that her cultural background would be relevant in assessing her parenting skills, especially if that evaluation was based on tests administered in and requiring responses in the English language. The district court did

not err by making findings that addressed a deficit in the custody recommendation relating to Vietnamese culture.

In making its custody determination, the district court conducted a four-day trial and heard testimony from twelve witnesses, including the custody evaluator and three other experts. The court issued detailed findings relating to the statutory best-interests factors. *See* Minn. Stat. § 518.17. Based on this record, we cannot conclude that these findings, including the district court's rejection of the custody recommendation, are clearly erroneous. The district court did not abuse its discretion by granting sole legal and physical custody to respondent.

**II**

Appellant also challenges the district court's property division. The district court has broad discretion to evaluate and divide property in a dissolution action, and this court will not overturn the district court's decision absent an abuse of that discretion. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). This court defers to the district court's factual findings and will not overturn them unless they are clearly erroneous. *Id.* But we review legal issues de novo. *Id.* This court will affirm the district court's property division if it has "an acceptable basis in fact and principle," even if we might have addressed the issue differently. *Id.*

The district court included in its property division 12 investment accounts, which included section-529 educational accounts, held by the parties for the benefit of their children. The district court awarded 11 of these accounts to appellant and one to respondent. Appellant argues for the first time on appeal that, because the district court

improperly included these accounts in the marital estate before performing its property division, the division was inequitable. *See* Minn. Stat. § 518.58 (2008) (requiring "just and equitable division of the marital property of the parties"); *cf. Hartley v. Hartley*, 862 N.E.2d 274, 282 (Ind. Ct. App. 2007) (concluding that district court did not err by deducting children's college-education fund from marital estate before dividing balance of estate equally between parties). Because appellant failed to raise this issue before the district court, we decline to consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate court need not consider issue not raised before, and addressed by, district court).

We note, however, that the district court did not clearly err by finding that appellant would be less likely to dissipate these accounts than respondent. Consequently, the district court did not abuse its discretion by granting 11 of the 12 educational accounts to appellant, and appellant has failed to carry his burden of showing error in the district court's property division. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1976) (stating that error on appeal is not presumed, and burden of showing error rests on party asserting it).

**III**

Appellant argues that the district court abused its discretion in the amount of maintenance granted to respondent. This court reviews a district court's grant of maintenance for abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). An abuse of discretion occurs if the district court's findings of fact are clearly

erroneous. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

The district court's discretion in granting maintenance is examined in light of the controlling statutory factors. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). Spousal maintenance is appropriate when a party lacks sufficient property or is otherwise unable to provide adequate support for reasonable needs in light of the standard of living established during the marriage. Minn. Stat. § 518.552, subd. 1 (2008). In determining the amount and duration of maintenance, the court considers a number of factors, including the petitioning spouse's ability to meet needs, the time necessary to acquire sufficient education or training to find appropriate employment, the duration of the marriage, and the ability of the party from whom maintenance is requested to meet needs while providing maintenance. *Id.*, subd. 2. No single factor is determinative, and the district court weighs the facts of each case to decide whether maintenance is appropriate. *Kampf*, 732 N.W.2d at 634.

The district court granted respondent $6,000 of monthly maintenance for a period of ten years. The district court found that: (1) respondent is unable to be self-supporting, given the standard of living in the parties' marriage; (2) because of the necessity of caring for the parties' children, respondent is unable to engage in significant paid employment for some time; (3) respondent submitted a budget of $7,574 for herself and would be receiving child support; (5) even if some of respondent's expenses were not strictly necessary, she needs $6,000 to maintain herself and the children in the parties' accustomed style of living; (6) the parties' standard of living was "comfortably middle-

class, not lavish or extravagant"; (7) respondent has not worked outside the home in her profession for ten years, based on the parties' agreement; (8) respondent lost seniority, earnings, and retirement benefits during that period; (9) appellant has the ability to provide respondent with substantial support while meeting his own needs, based on his income of $41,000 per month as a radiologist, and (10) appellant agreed that he is capable of paying maintenance of $5,000 per month.

Appellant argues that the district court erred by awarding maintenance to respondent in an amount exceeding her reasonable need. But the district court did not clearly err by finding that respondent had a reasonable monthly need of $6,000, which was approximately $1,500 less than her submitted monthly budget. And in ordering maintenance, the district court properly balanced respondent's reasonable need with appellant's ability to pay. *See* Minn. Stat. § 518.552, subd. 2 (stating factors considered in awarding maintenance); *see also Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009) (stating that in awarding maintenance, "[i]n essence, the district court balances the recipient's needs against the obligor's ability to pay").

Appellant also argues that the district court improperly considered the speculative tax consequences of the grant of maintenance to respondent. But the district court made only a general comment that spousal maintenance is considered taxable income to the recipient. And the consideration of respondent's move to Eau Claire, when that move was specifically addressed in the judgment, does not render the district court's findings on respondent's reasonable needs clearly erroneous.

Finally, appellant argues that because respondent is well-educated and capable of present employment, the district court erred by failing to recognize her ability for self-support. But the district court's findings directly address respondent's present ability to earn income and her lack of employment during the parties' marriage. The district court's findings on maintenance are not clearly erroneous, and the court did not abuse its discretion in its award of maintenance.

**Affirmed.**