STATE OF MINNESOTA
IN COURT OF APPEALS
A10-490

Corey David Anderson, petitioner,
Appellant,

vs.

Cathy Kirigo Kimondo,
Respondent.

Filed November 9, 2010
Affirmed
Collins, Judge[*]

Hennepin County District Court
File No. 27-FA-08-5755

Corey D. Anderson, Winona, Minnesota (pro se appellant)

Cathy K. Kimondo, Bloomington, Minnesota (pro se respondent)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Collins, Judge.

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

COLLINS, Judge

Appellant challenges the district court's posttrial orders that decided such issues as child custody, parenting time, and child support. Because the district court did not abuse its discretion by determining that (1) appellant did not establish a proper basis for

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

posttrial amendment or modification the child custody decision; (2) an award to appellant of less than 25% of parenting time with the parties' child was justified under the facts presented; (3) respondent shall pay appellant $150 for monthly transportation expenses to facilitate the exercise of parenting time, with that amount to be reduced once appellant received more parenting time; and (4) respondent, rather than appellant, shall continue to maintain health-care coverage for the child, we affirm.

FACTS

Appellant Corey Anderson and respondent Catherine Kimondo are the parents of M.A., born August 20, 2008. The parties were never married. Appellant resides in Winona, where he is employed as a skilled technician for a plastics-engineering company. Respondent, a Kenyan national who has held a visa to reside in the United States since 2001, holds a degree in accounting and works in Minneapolis for a major accounting firm.

Following a trial, the district court issued an order on October 29, 2009, finalizing its determinations of custody, parenting time, and child support. The court awarded the parties joint legal custody of M.A., granted respondent sole physical custody, and awarded appellant parenting time on Tuesdays and Fridays from 4:00 p.m. to 7:00 p.m., and alternating weekend days from 10:00 a.m. to 4:00 p.m.

On December 1, 2009, appellant moved to (1) restrict respondent's travel with M.A. outside of the United States; (2) grant appellant sole physical custody of M.A. or "more equal access" in the parenting time schedule; (3) share transportation of M.A. to facilitate appellant's parenting time; and (4) alter the child's holiday schedule. In a

responsive motion, respondent sought (1) sole legal custody of M.A.; (2) modification of the parenting time order to be consistent with the custody evaluator's recommendations; (3) an order requiring appellant to provide transportation for his parenting time, subject to respondent paying appellant $150 per month toward the transportation expenses; and (4) an award of costs and attorney fees.

Following a hearing, although the district court found that the parties' requests to modify custody were premature, the court nonetheless addressed the issues on the merits. The court granted appellant overnight parenting time commencing in February 2010, from Saturday at 10:00 a.m. to Sunday at 4:00 p.m. on alternating weekends, in addition to the previously ordered weekday parenting time; in August 2010, appellant's weekend parenting time was to be extended to begin on Fridays at 4:00 p.m.

The district court also continued appellant's obligation to provide M.A.'s transportation for parenting time and ordered respondent to pay appellant $150 per month as her share of parenting time transportation expenses. Once appellant began his overnight visits, this amount was to decrease to $75 per month, and respondent was to transport M.A. every other Sunday. The court also ordered that respondent, rather than appellant, shall continue to maintain health-care coverage for the child. Respondent was awarded $500 in attorney fees.

This appeal followed, and both parties are pro se.

D E C I S I O N

1. *Custody and parenting time*

The issues of custody and parenting time are matters for the district court to decide as an application of its discretion, and this court will not alter the district court's decision on such matters unless the district court abused its discretion. *SooHoo v. Johnson*, 731 N.W.2d 815, 825 (Minn. 2007) (stating that "[t]he district court enjoys broad discretion in determining visitation"); *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995) (stating that appellate court reviews parenting-time issues under abuse of discretion standard of review); *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985) (stating that appellate court reviews custody decisions for abuse of discretion). In determining whether the district court abused its discretion, the reviewing court must assess whether the district court made findings unsupported by the evidence or improperly applied the law. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996) (limiting appellate review to assessment of whether district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law).

a. *Travel to Kenya*

Appellant asserts the district court abused its discretion by permitting respondent to travel with M.A. to Kenya biannually. The district court's findings indicate that it did not find credible appellant's allegations that respondent intended to flee to Kenya with M.A. or that Kenya is an unsafe place. Respondent testified that (1) she intends to become a United States citizen; (2) she has a valid work visa; (3) she has family living in the United States; and (4) Kenya is a safe place for M.A. to visit. The court rejected

appellant's allegations as speculative and concluded that there was no appropriate basis to deny respondent opportunities to travel to her country of origin with M.A. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (providing that appellate court defers to the district court's credibility determinations and resolution of conflicting evidence); *see also Al-Zouhayli v. Al-Zouhayli*, 486 N.W.2d 10, 12-13 (Minn. App. 1992) (ruling that district court did not abuse its discretion by awarding father unsupervised parenting time, despite mother's allegation that father might abduct their child, when district court had the opportunity to observe father's demeanor and credibility). Appellant's contention that the district court failed to consider the evidence proffered by him is unfounded; rather, the record reflects that the court fully considered the evidence before rendering its decision on this issue. We conclude that the district court did not abuse its discretion in ruling that respondent should be permitted to visit Kenya with M.A.

b. *Award of sole physical custody to respondent*

Appellant argues that the district court abused its discretion by granting respondent sole physical custody of M.A. without proper consideration of the evidence. In particular, appellant argues that the district court gave inordinate credence to the evidence offered by the custody evaluator. In reaching its custody decision, the district court was required to consider the statutory factors enumerated in Minn. Stat. § 518.17, subds. 1, 2 (2008). The district court's findings summarize these factors and show that it carefully considered each factor in light of the evidence presented. The court rejected the custody evaluator's recommendation that respondent be granted sole legal and physical custody and the evaluator's conclusion that the parties could not cooperate in raising

M.A. The court granted respondent sole physical custody but also granted appellant parenting time scheduled to increase over time. The district court's custody decision was balanced and shows that the court did not adopt the views of the custody evaluator without due consideration.

Appellant argues that the court should have given greater weight to the evidence provided by two psychologists retained on his behalf. Appellant fails to acknowledge, however, that the evidence offered by the two psychologists was somewhat unfavorable to his request for sole or joint physical custody of M.A. Both psychologists indicated that appellant has psychological issues that could inhibit him from cooperating with respondent or from being an effective parent. Further, the custody evaluator was charged with the task of evaluating each of the parties, not just appellant, in arriving at her custody recommendation, while the psychologists only evaluated appellant for purposes of determining his mental health as it related to his fitness to parent. Contrary to appellant's contention that the district court ignored the evidence offered by the psychologists to show that the custody evaluator was biased and that her report was flawed,[1] it is clear from the record that the district court objectively evaluated all of the evidence presented by the parties and made findings that contradicted in part the custody

[1] Appellant argues that the district court should not have credited the custody evaluator's report because the evaluator was unaware of respondent's "immigration problems." As the district court found that there was no evidence that respondent had immigration problems, this cannot serve as a basis for challenging the custody evaluator's report. Further, the report shows that the custody evaluator was apprised of respondent's then-current immigration status, and includes the following: "[Respondent] stated that her visa and passport are up-to-date. She plans to stay and work in this country. She was sponsored by her employer, whom she described as having a large immigration department."

evaluator's observations and conclusions. Thus, we conclude that the district court's custody decision was reached through a proper exercise of its discretion. *See Rutanen v. Olson*, 475 N.W.2d 100, 104 (Minn. App. 1991) (stating that courts have discretion to decline to follow all or part of a custody evaluator's recommendations).

Appellant also challenges the district court's determination that respondent is M.A.'s primary caretaker. *See* Minn. Stat. 518.17, subd. 1(a) (3) (enumerating child's primary caretaker as factor for consideration in custody determination). Appellant asserts that (1) he was "effectively cut off from his daughter just shortly after her birth;" (2) he was unable to fully demonstrate his preparedness to offer M.A. a home; and (3) the district court should have considered the temporary nature of respondent's residency in the United States in determining custody. But contrary to appellant's arguments, the district court's findings show that it did not consider the primary caretaker factor to the exclusion of the other statutory factors and that it did take into account the evidence offered by both parties. Again, in weighing that evidence, the district court did not fully accept appellant's assertions; in particular, the court rejected appellant's repeated allegation that respondent intends to abscond with the child to Kenya or that respondent does not intend to reside long-term in the United States. Inasmuch as the evidence and findings support the district court's custody decision, appellant's arguments do not provide a compelling reason for us to alter the custody decision.

c. Modification of custody

Appellant argues that the district court abused its discretion by rejecting his motion to modify custody based on a posttrial opinion letter he obtained from an attorney

regarding respondent's immigration status. Under Minn. Stat. § 518.18(a)(c) (2008), no motion to modify a custody order may be made sooner than one year after the date of the original custody decision, unless, among other reasons, "the child's present environment may endanger the child's physical or emotional health or impair the child's emotional development." A significant move can amount to a change of circumstances for purposes of Minn. Stat. § 518.18. *Pfeiffer v. Pfeiffer*, 364 N.W.2d 866, 868 (Minn. App. 1985) (finding change of circumstances supporting modification of custody prompted by mother's relocation 200 miles away from community in which parties and child had previously resided). But a prima facie case of custody modification due to endangerment is shown first by a change in circumstances. *In re Weber*, 653 N.W.2d 804, 809 (Minn. App. 2002); Minn. Stat. § 518.18(d) (2008) (requiring "change . . . in the circumstances of the child" to support modification of custody). Appellant has failed to show any change in circumstances, such as, for example, that respondent is subject to deportation or other immigration proceedings which will necessitate a move for M.A., or that respondent has requested to move the residence of the child to another country. Thus, appellant has failed to establish a prima facie case, and the district court properly rejected as premature his request for custody modification.

2. ***Parenting-time presumption***

Appellant next argues that the district court abused its discretion by failing to award him at least 25% of parenting time with M.A. The parties calculate that appellant was awarded parenting time of between 14% and 17%. Under Minn. Stat. § 518.175, subd. 1(e) (2008), "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." The district court did not make explicit findings on this issue, and the parties disagree about whether the issue was raised to or considered by the district court. *See Hagen v. Schirmers*, 783 N.W.2d 212, 217 (Minn. App. 2010) (remanding for consideration of the 25%-parenting-time presumption but noting that prior case law "directs district courts to demonstrate an awareness and application of the 25% presumption when the issue is appropriately raised"); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating appellate court will not consider issues not raised to or considered by the district court).

Electing to consider the issue, and having carefully reviewed the record, we conclude that the absence of explicit findings on this statutory issue does not amount to an abuse of discretion on the part of the district court. The record establishes that the parties live in different cities, that the driving time between these cities is approximately 2-1/2 hours, and that respondent breastfed M.A. The district court's findings reveal that it was aware of these facts. Given these circumstances, and because of M.A.'s young age, a decision to depart from the 25% presumption finds ample support in the record. *See Hagen*, 783 N.W.2d at 218 (noting that "parenting-time allocations that merely fall below the 25% presumption can be justified by reasons related to the child's best interests and considerations of what is feasible given the circumstances of the parties").

3. *Parenting-time transportation expenses*

Appellant asserts the district court erred in prospectively adjusting respondent's monthly payment to him for her share of expenses for transporting M.A. for appellant's

parenting time. Initially, respondent paid the amount as calculated by appellant. Respondent requested that the court order a fixed amount per month, to be reduced over time as she participated in transporting M.A. and as M.A. was able to stay with appellant for longer periods of time. At trial, respondent testified that appellant had been sending her "many e-mails" regarding these transportation expenses, suggested that his expenses were slightly inflated, and suggested that respondent pay a fixed amount of $125 per month toward appellant's transportation expenses. Appellant contended that this amount should be $160 per month. Because there was evidence to support a determination that respondent pay $150 per month for her share of M.A.'s transportation expenses, we conclude that the district court did not abuse its discretion in ordering respondent to pay this amount.

4. ***Health-care coverage***

Finally, appellant contends that the district court abused its discretion in applying Minn. Stat. § 518A.41, subd. 4(d) (2008) (requiring order of health-care coverage if both parents have appropriate coverage), to deny him reimbursement for medical and dental costs he pays for M.A. In the district court's January 14, 2010 posttrial order, the court denied appellant's request and ordered respondent to continue to maintain health-care coverage for the child. The court's decision on this issue is supported by the evidence. Appellant claimed that he maintained health insurance for M.A. at $78 per month. However, respondent challenged this claimed amount because it included costs for appellant's own coverage and because respondent's policy provided better coverage. The district court's determination on this issue shows that it found respondent's testimony

credible. We therefore conclude that the district court did not abuse its discretion by rejecting appellant's claim for insurance reimbursement and by ordering respondent to maintain the child's health-care coverage.

Affirmed.