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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1588**

In re the Marriage of:
Jennifer Ann Peterson n/k/a Jennifer Ann Hirschey, petitioner,
Respondent,

vs.

Kevin John Peterson,
Appellant.

**Filed September 5, 2017
Affirmed in part, reversed in part, and remanded
Kirk, Judge**

Aitkin County District Court
File No. 01-FA-14-803

Shari L. Frey, Frey Law Office Ltd., Brainerd, Minnesota (for respondent)

Andrew T. Meyer, Clausen & Hassan, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Ross, Judge.

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

KIRK, Judge

Appellant-father challenges the district court's award of sole physical and sole legal custody, and more than 50% of the parenting time, to respondent-mother, arguing that the court abused its discretion when it relied on unsupported findings regarding his mental health, and that mother failed to rebut the presumption in favor of joint legal custody. Father also challenges the constitutionality of a social media provision in the parties' marital dissolution

decree. Because the district court did not abuse its discretion in its custody or parenting-time awards, we affirm in part. But because the social media provision is an unconstitutional prior restraint on speech, we reverse in part and remand.

FACTS

The following evidence was presented to the district court during the parties' four-day dissolution trial:

Appellant-father Kevin Peterson and respondent-mother Jennifer Hirschey were married in 2004 and have three minor children. The parties separated on December 29, 2014. Father has a B.A. in chemistry and is pursuing a teaching license and working as a bus driver, substitute teacher, and township supervisor. He also does volunteer grant writing. Father was a stay-at-home parent during most of the parties' marriage. Mother is a pharmacist and is employed as the Director of Outpatient Services at a hospital where she has worked during most of the parties' marriage.

Father was diagnosed with reading and writing disabilities when he was in college in 1997. Father testified that he does not comprehend what he reads and needs books and tests read out loud to him. Results from the entrance testing that father took for his teacher-licensing program indicate that he scored in the average or high-average range in various reading and writing skills. Father testified that he was given accommodations during those exams. The children's paternal grandfather testified that father did not seem to struggle academically in high school and maintained a B-average.

The parties' eldest child began receiving counseling through his school before the parties' separation because of issues with the child's teacher. Father arranged for counseling

despite mother's opinion that it was premature. The counselor continues to see the child, who appears to be adjusting well, but opines that the child does not meet criteria that would require counseling.

Father has a history of making unfounded accusations of child abuse against mother. After mother initiated divorce proceedings, father made clandestine audio recordings of her interacting with the children. Father played three of the recordings at trial and alleged that they document mother abusing the children.

In 2013, the parties sought counseling from licensed marriage and family therapist Jodi Olson. During an individual session, father accused mother of physically abusing the children, triggering a mandated report to social services. Olson informed father that she was required to make the report, and he indicated that he was okay with it. Father's abuse allegations were not consistent with Olson's observations of the parties' joint sessions. When the child-abuse claim was investigated by social services, father recanted and claimed that Olson misunderstood his statements.

Olson diagnosed father with narcissistic personality disorder, but he denies any narcissistic traits and claims that his disabilities were not accommodated during his intake testing, which affected the results. Olson did not believe that father was truthful about the extent of his learning disabilities and did not see evidence of impairment in his test responses. Olson testified that narcissists may have a hard time putting their children's needs first, may attend community events to appear like a good parent rather than for the children's benefit, and that they like to be admired, which is not something children always do.

Mother testified that she tries not to influence the children or speak negatively about father, but that father tries to influence the children by undermining and disparaging her. Mother testified that she supports the children's relationship with father, but she does not believe that he supports her relationship with them. Mother also testified that she is willing to facilitate father's parenting time, but that she would like it to be limited so the children have more stability and less exposure to father's mental health issues. Father testified that the eldest child has heard mother speak negatively about the children's treatment in his home and continued to claim that mother physically abuses the children.

Mother further testified that she and father cannot communicate well to effectively co-parent, and portrayed him as uncooperative. Since their separation, the parties have disagreed about one of the children attending church camp and father has requested separate parent-teacher conferences. The parties communicate in writing using Our Family Wizard, and mother testified that father's posts seem to be antagonistic and that their disagreements do not get resolved.

Beginning in February 2015, and continuing until the dissolution decree, the parties followed a temporary parenting-time schedule of alternating weeks. During one of mother's weeks, one of the children had pink-eye. Mother took the child to an after-hours provider and got a prescription to treat the condition. Upon learning about the appointment and treatment, father was angry that he did not get to select the treating doctor and that mother did not get his approval before treating the child. Father later demanded that the child be taken back to the doctor so he could attend the appointment.

At the second appointment, father got into a dispute with the doctor about whether the child's medication was appropriate and alleged that the child was allergic to the medication. The doctor disagreed with father's assessment. A week or two later, father took the child to a regularly scheduled eye exam and the resultant records state that the child has an allergy to the pink-eye medication. Mother is concerned that because of father's insistence, the child's medical records now reflect an unsubstantiated allergy that may lead professionals to unnecessarily avoid using the medication to treat the child in the future. At trial, father appeared to back off of his claim that the child is allergic to the medication, but insisted that it was not working and should have been discontinued.

For a period of time before the temporary parenting-time order was filed, the children were not spending time alone with father. Upon resuming his parenting time, father took the children to their primary-care doctor to be evaluated for signs of abuse. Father claimed that mother was physically abusing the children and not feeding them while they were in her care. His abuse allegations were unsubstantiated.

The parties also had a conflict in October 2015 when father wanted to take the children, then ages 3, 6, and 8, to a police officer's funeral during mother's parenting time. Mother did not think it was appropriate for the children to attend due to their young ages and because they did not know the officer or his family. Father responded to mother's concerns by stating that he had asked to take the children, not for her opinion.

Prior to trial, the district court appointed Melanie Dotty to complete a custody evaluation. During Dotty's investigation, father claimed that mother abused drugs, worked very long hours, and was a poor parent. Father's allegations were unsubstantiated. Father

provided his audio recordings to Dotty, and she concluded that they did not evidence abuse by mother. Dotty expressed her concern that father was placing undue influence on the children regarding mother and the divorce. Dotty requested psychological evaluations of the parties and incorporated the results into her custody evaluation.

For their psychological evaluations, the parties sat for clinical interviews with licensed independent clinical social worker Philip Tange, then completed psychological testing. Mother's interview occurred on March 31, 2015, and her testing was completed on April 8. Tange diagnosed mother with an adjustment disorder with mixed anxiety and depressed mood. Tange opined that mother did not have any mental health issues that would affect her ability to parent. During her interview, mother expressed a desire to co-parent effectively with father.

Father's interview occurred on April 9, 2015, and his testing was completed on May 20. Father was diagnosed with an anxiety disorder and a personality disorder with obsessive-compulsive and narcissistic traits. Tange found that father had difficulty managing his anger and resolving conflict. Tange indicated that father paints himself as the victim and feigns mistreatment. Tange concluded that father can parent adequately, but that his stubborn and inflexible personality traits may cause problems with co-parenting. Tange was especially concerned that father's inflexibility would become more problematic as the children get older and begin to assert independence. During his interview, father said that he did not believe joint custody would work because he cannot trust mother. Tange concluded that joint custody was unlikely to work because of the level of discord between the parties.

Father indicated to Tange that he has difficulty reading and that he disputes his previous diagnosis of narcissistic personality disorder. Tange noted that father did not appear to need assistance with his psychological testing and that his test results do not indicate that he struggled with comprehension during the test. Tange testified that father was asked the same question in a number of ways throughout the test and that someone who struggled to comprehend the questions would likely have answered them inconsistently, but father's responses were consistent with each other.

Based on her investigation and on the parties' psychological evaluations, Dotty testified that she doubted the parties could co-parent effectively because of father's chronic pattern of lies, manipulations, and false allegations. Ultimately, Dotty concluded that mother was more accurately detailing events and that father was being dishonest or fabricating events. Dotty noted that she had concerns regarding father's mental health, his anger issues, his difficulty resolving conflict, and his chronic ongoing resentments. Father also continues to make false allegations against mother to professionals and in the community. Dotty testified that the parties have not had a sustained period of time when they were able to work together.

After analyzing the best-interests factors in her custody evaluation report and in her testimony at trial, Dotty recommended that mother be awarded sole legal custody because father is unable to cooperate with mother, tends to need complete control, and wants to micromanage his children's lives.¹ Dotty noted that if the parties were awarded joint legal

¹ Dotty completed the custody evaluation on June 25, 2015, before the 2015 changes to Minn. Stat. § 518.17, subd. 1(a), took effect. She testified that the change in the law did not affect her conclusions and recommendations. The district court also recognized the change in the law and stated that its conclusions would be the same under either analysis.

custody, she anticipates years of struggle, conflict, arguing, chaos, confusion, and anxiety for the children. If awarded joint legal custody, Dotty did not believe that the parties would be able to communicate effectively without involving attorneys or other professionals. She also opined that if father was awarded sole legal custody, or more parenting time than mother, that he would use it to cut mother out of the children's lives, to withhold information from mother, and to control mother and the children.

The district court awarded mother sole legal and sole physical custody of the children, with parenting time to father so that the children are in father's care approximately 30% of the time during the school year and 50% of the time during the summer months.

Father appeals.

D E C I S I O N

I. The district court did not abuse its discretion when it awarded sole legal and sole physical custody to mother.

The district court has broad discretion in making custody decisions. *Matson v. Matson*, 638 N.W.2d 462, 465 (Minn. App. 2002). In reviewing custody awards, this court determines “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). This court will defer to the district court's findings of fact, unless they are clearly erroneous, and will defer to the district court's credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). In order to successfully challenge a district court's findings of fact, “the party challenging the findings must show that despite viewing that evidence in the light most favorable to the [district] court's findings . . . , the record still requires the definite and firm conviction that a mistake was made.” *Vangsness v. Vangsness*,

607 N.W.2d 468, 474 (Minn. App. 2000). “That the record might support findings other than those made by the [district] court does not show that the court’s findings are defective.” *Id.*

In determining custody, the district court must consider and evaluate all relevant factors, including the best-interests factors set forth in Minn. Stat. § 518.17, subd. 1(a) (2016). Here, the district court conducted an analysis of the best-interests factors and concluded that the following factors favored an award of sole legal and sole physical custody to mother: (1) the emotional needs and development of the minor children; (2) the effect of father’s mental health issues on the children’s safety and developmental needs; (3) “the disposition of each [party] to support the child[ren’s] relationship with the other parent and to encourage and permit frequent and continuing contact between the child[ren] and the other parent”; and (4) the parties’ inability to cooperate, minimize exposure of the children to parental conflict, and resolve disputes regarding the children. *Id.*, subd. 1(a)(1), (5), (11), (12). The district court determined that the remaining best-interests factors were neutral.

In support of its determination that the factors listed above favored an award of sole legal and physical custody to mother, the court found that father has significant and ongoing mental health issues that impact his perception of mother and his ability to co-parent. The court found that father’s mental health issues may impact his ability to be flexible with the children as they get older, and that he has placed the children in the middle of parental disputes. The court also found that an award of sole custody was supported by the parties’ inability to cooperate, minimize exposure of the children to parental conflict, and resolve disputes. The court concluded that the parties lack the ability to co-parent and that the evidence overcame the rebuttable presumption in favor of joint legal custody. The court also

concluded that it is in the children's best interests for mother to have sole legal and sole physical custody.

A. Sole legal custody.

When a party requests joint legal custody, as father did here, the court must use a rebuttable presumption that joint legal custody is in the best interests of the children. Minn. Stat. § 518.17, subd. 1(b)(9) (2016).² This court has held that joint legal custody is inappropriate “[w]here the evidence indicates that the parties lack the ability to cooperate and communicate.” *Wopata v. Wopata*, 498 N.W.2d 478, 482 (Minn. App. 1993); see *Chapman v. Chapman*, 352 N.W.2d 437, 441 (Minn. App. 1984) (stating that “joint legal custody should not be used as a ‘legal baseball bat’ to coerce cooperation”).

Father argues that the district court erred when it concluded that the rebuttable presumption in favor of joint legal custody was overcome and that it abused its discretion when it awarded sole legal custody to mother. Father argues that the record supports the conclusion that the parents co-parented very well for the seven months leading up to the dissolution trial, and that the psychological evaluations the court relied on were stale, deeply flawed, and invalid because father did not receive appropriate testing accommodations.³ Father lists various communications between the parties as evidence of

² This presumption is reversed in cases involving domestic abuse between the parties as defined in Minn. Stat. § 518B.01 (2016). Despite allegations of spousal abuse by both parties, the district court determined that the credible allegations did not constitute domestic abuse as defined in Minn. Stat. § 518B.01. The parties do not dispute this determination.

³ Father's assertion that his psychological evaluation was stale is not supported by the record. The report indicates that its results and recommendations are valid for one year. The dissolution trial occurred, and the initial dissolution decree was issued, within one year of his psychological testing.

cooperation. Father asserts that one of the only disagreements the parties have had regarding issues of legal custody concerned the best way to treat a pink-eye infection. Father also asserts that mother is largely responsible for any conflict and inability of the parties to cooperate and that she did not make a good faith effort to co-parent effectively.

Father compares the award of sole legal custody here to the award in *Barrett v. Barrett*, 394 N.W.2d 274 (Minn. App. 1986). But the award of sole legal custody in *Barrett* was reversed on significantly different facts. Unlike the district court here, the district court in *Barrett* failed to make findings on the factors relevant to joint legal custody and based its award of sole legal custody on “numerous disagreements” between the parties that did not “relate to those major decisions in the life of their children such as religion, education, and health.” 394 N.W.2d at 278. The *Barrett* court also did not conclude, as the district court did here, that either parent had significant mental health issues that negatively impacted their ability to parent. *See id.* Furthermore, in *Barrett*, unlike in this case, neither parent claimed that the parents could not cooperate to raise their children. *See id.* There was also no demonstration in *Barrett* that an award of joint legal custody would result in harm to the children. *Id.*

Mother argues that the record supports the district court’s award of sole legal custody and that the record reflects the parties’ inability to cooperate and communicate. Mother concludes that the district court’s award of sole legal custody was not an abuse of discretion and asks this court to affirm.

A review of the trial record indicates that the district court’s factual findings are not clearly erroneous and that the court properly applied the law:

1. *The children’s emotional needs and development would best be served by sole custody to mother. Minn. Stat. § 518.17, subd. 1(a)(1).*

The district court found that father’s “need to control will impact his ability to parent and the children’s emotional development.” The court relied heavily on Dotty’s custody evaluation and Tange’s opinion. Evidence of father’s need to control is also found in Dotty’s and Olson’s testimony. Based on this record, it was not clearly erroneous for the district court to conclude that father’s need to control will impact his ability to parent and the children’s emotional development in the future. The district court did not err when it determined that this factor favored an award of sole custody to mother.

2. *Father’s significant mental health issues may affect the children’s safety or developmental needs. Minn. Stat. § 518.17, subd. 1(a)(5).*

The district court found that Tange’s opinion that joint custody would not work for these parties because of father’s obsessive-compulsive personality and narcissistic traits, as well as his struggle with anger, stubbornness, and inflexibility, was credible and weighed significantly in favor of mother. Father’s psychological evaluation, the custody evaluation, and Olson’s testimony regarding father’s diagnosis of narcissistic personality disorder also support the court’s finding that father has significant mental health issues and a history of problematic behaviors consistent with his diagnoses. Father insists that the diagnoses given to him by Olson and Tange are inaccurate because his disabilities were not properly accommodated during the testing processes. But father’s documented behavior in the presence of these professionals comports with the diagnoses they reached and with the court’s findings.

It was not clearly erroneous for the district court to conclude that father's significant mental health issues and associated behaviors may affect the children's safety and development. Even though father was not given testing accommodations during his psychological examination, Tange explained in his testimony the validity of father's test results, and it was not clearly erroneous for the district court to rely in part on Tange's results and testimony. The record supports the district court's conclusion that father's mental health issues and associated behaviors will continue to affect the children's safety and development. The district court did not err when it determined that this factor favored an award of sole custody to mother.

3. ***Mother is likely to support and encourage the children's relationship with father, but father is not likely to do the same for mother. Minn. Stat. § 518.17, subd. 1(a)(11).***

The district court found that father is uncooperative and significantly misperceives mother, which makes it unlikely that he will be able to support her relationship with the children. The district court also reviewed the audio tapes father created and agreed with the professional witnesses that they did not document abuse. These findings are supported by evidence in the record and are not clearly erroneous. The district court did not err when it determined that this factor favored an award of sole custody to mother.

4. ***The parties are not able to cooperate, minimize exposure of the children to parental conflict, and resolve disputes regarding major life decisions concerning the children. Minn. Stat. § 518.17, subd. 1(a)(12).***

The district court found that the parties have significant issues cooperating and resolving disputes, and that the children have been exposed to parental conflict. The record contains ample evidence of contentious exchanges between the parties that either were left

unresolved or were resolved by the parent in possession of the children acting unilaterally. Father's choice on more than one occasion to seek unnecessary medical opinions placed the children squarely in the middle of such parental disputes. These health-related conflicts, along with conflicts regarding church camp, funeral attendance, and parent-teacher conferences support the district court's award of sole legal custody.

The district court did not clearly err or abuse its discretion when it concluded that the parties lack the ability to co-parent. Further, the court did not abuse its discretion in concluding that it was in the best interests of the children to award mother sole legal custody. There is sufficient evidence in the record to support the district court's determination that the presumption in favor of joint legal custody was overcome.

B. Sole physical custody.

The same analysis of whether the district court's factual findings and legal conclusions are clearly erroneous applies to the court's award of sole physical custody as it did in the context of legal custody, except that there is no presumption in favor of joint physical custody to overcome. *See* Minn. Stat. § 518.17, subd. 1 (2016). As analyzed above, the district court's findings and conclusions are not clearly erroneous, and therefore the court did not abuse its discretion when it awarded mother sole physical custody.

II. The district court did not abuse its discretion in its parenting-time award.

The district court has broad discretion in awarding parenting time. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995); *Crosby v. Crosby*, 587 N.W.2d 292, 295 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). We will not overturn a parenting-time award absent an abuse of discretion. *Olson*, 534 N.W.2d at 550; *Crosby*, 587 N.W.2d at 295.

Findings of fact will be upheld if they are not clearly erroneous. *Crosby*, 587 N.W.2d at 295 (citing Minn. R. Civ. P. 52.01).

In dissolution proceedings, the district court must “grant such parenting time . . . as will enable the child[ren] and the parent to maintain a child to parent relationship that will be in the best interests of the child[ren].” Minn. Stat. § 518.175, subd. 1(a) (2016). “[T]here is a rebuttable presumption that a parent is entitled to receive a minimum of 25 percent of the parenting time for the child[ren].” *Id.*, subd. 1(g) (2016). If “parenting time with a parent is likely to . . . impair the child[ren’s] emotional development, the court shall restrict parenting time . . . as the circumstances warrant.” *Id.*, subd. 1(b) (2016). The mental health issues of a parent can only be considered if they “affect[] the [children’s] safety or developmental needs.” Minn. Stat. § 518.17, subd. 1(a)(5).

Father argues that the district court abused its discretion by decreasing his parenting time. Father notes that he was undisputedly the children’s primary care taker until the parties separated, and argues that the parties successfully split parenting time 50/50 for a year prior to the dissolution decree. Father also argues that the new parenting-time award was based on unsupported concerns about his mental health. Father requests that this court reverse and remand with instructions for the district court to award him at least 50% of the parenting time year-round. Mother contends that the same considerations and best-interests analysis that supported the district court’s award of sole legal and sole physical custody also support the court’s parenting-time award.

The district court incorporated its best-interests analysis regarding the award of sole legal and physical custody to mother into its parenting-time determination and concluded that

it was in the best interests of the children to have regular parenting time with father as set forth in the dissolution decree. We previously concluded that the district court's factual findings and legal conclusions regarding custody were not clearly erroneous, and we apply the same analysis to the court's parenting-time determination. Father was awarded more parenting time than mandated by statute, and the district court did not err in considering father's mental health or in finding that his mental health issues affect the emotional development of the children. The district court's findings and conclusions were not clearly erroneous, and the court did not abuse its discretion in its parenting-time award.

III. The social media provision in the parties' marital dissolution decree is an unconstitutional prior restraint on speech.

"Any prior restraint of speech is reviewed bearing a heavy presumption against its constitutional validity." *Minneapolis Star & Tribune Co. v. Schmidt*, 360 N.W.2d 433, 435 (Minn. App. 1985) (quotation omitted). "Any exception to this fundamental principle must be necessitated by a compelling state interest, and narrowly tailored to serve that interest." *Id.* (quotation omitted). The best interests of a minor child is a compelling state interest that may justify infringement of a fundamental right. *See, e.g., LaChapelle v. Mitten*, 607 N.W.2d 151, 163-64 (Minn. App. 2000) (holding that the best interests of a child was a compelling state interest justifying infringement on a mother's fundamental right to travel), *review denied* (Minn. May 16, 2000); *Sina v. Sina*, 402 N.W.2d 573, 576 (Minn. App. 1987) (holding that the best interests of the children took precedence over a father's First Amendment right to freedom of religion).

In *Geske v. Marcolina*, 642 N.W.2d 62 (Minn. App. 2002), this court concluded that where a father published his children's names and images in the media to their detriment, the

best interests of those children justified the district court restricting the father's future publication of such information. 642 N.W.2d at 69-70. In reaching that conclusion, this court emphasized that the district court made clear findings of specific harm to the children caused by the father's past speech. *Id.* The district court's clear findings in *Geske* were in contrast to other cases where this court has concluded that the best interests of a child did not justify a prior restraint on speech. *See, e.g., Minneapolis Star & Tribune Co. v. Lee*, 353 N.W.2d 213, 215 (Minn. App. 1984). In addition to making clear findings of harm to the child, in order to be constitutional, any prior restraint on speech must be narrowly tailored and must "only prohibit[] as much speech as necessary to serve the compelling state interest." *Geske*, 642 N.W.2d at 69.

Here, the district court included the following provision in the parties' marital dissolution decree: "That the parties shall be prohibited from posting photographs or information about the minor children on any social media, except if the children participate in extracurricular activities for which social media is used for scheduling." The district court did not make related findings. Father argues that this provision is unconstitutional and requests that it be vacated. Mother acknowledges that she did not present evidence in support of the provision, but argues that the record supports it nonetheless.

We need not determine whether the social media provision is narrowly tailored so as to be constitutional because the district court did not find that either party engaged in social media posting to the detriment of the children, and because there is no evidence in the record that such harm occurred. Here, the social media provision is an unconstitutional prior restraint

on speech. We reverse and remand to the district court to remove the social media provision from the parties' dissolution decree.

Affirmed in part, reversed in part, and remanded.