

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1825**

In re the Custody of A.M.W.
Kelly James Wadsen, petitioner,
Respondent,

vs.

Jennifer Maggie Rosenthal,
Appellant.

**Filed October 2, 2017
Affirmed
Peterson, Judge**

Anoka County District Court
File No. 02-FA-12-566

Gretchen R. Severin, Anoka, Minnesota (for respondent)

Jennifer Maggie Rosenthal, Blaine, Minnesota (pro se appellant)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Smith,
Tracy M., Judge.

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

PETERSON, Judge

In this custody-modification dispute, pro se appellant-mother argues that the district court erred by (1) expanding the guardian ad litem's authority beyond that permitted by statute, (2) denying mother's new-trial motion, (3) failing to properly apply the rebuttable presumption against joint legal custody when domestic abuse has occurred between the

parties and awarding father sole legal custody of their child, and (4) improperly applying the best-interests factors. We affirm.

FACTS

The parties, who were never married, are the parents of one child, a daughter born in 2012. A stipulated order for custody, parenting time, and child support was filed in December 2013. The December 2013 order was amended in July 2014 to require (1) respondent-father Kelly James Wadsen to continue counseling, (2) appellant-mother Jennifer Maggie Rosenthal to complete dialectical behavioral therapy (DBT), and (3) the parties to conduct parenting-time exchanges at the police department and to use Our Family Wizard (OFW) for all communication with each other.

In December 2014, father filed an ex parte motion seeking sole legal and sole physical custody of daughter and suspension of mother's parenting time because mother had denied him parenting time since October 30, 2014, and had reported to the police that he placed temporary tattoos on daughter's genital area. Father alleged that mother placed the tattoos on daughter in an attempt to interfere with his parenting time. Mother filed an opposing motion, requesting that the parties be required to participate in mediation and that she be excused from completing DBT. The district court reappointed the guardian ad litem (GAL), who had been discharged, and, following a January 22, 2015 hearing, the district court directed the GAL to conduct an independent investigation and prepare a written report, ordered the parties to cooperate with the GAL, granted father parenting time every other weekend and every Wednesday overnight, authorized the GAL to increase or decrease either party's parenting time, took all other issues under advisement, and

scheduled a review hearing on February 19, 2015. In a separate order, the district court determined that father had established a prima facie case of endangerment and ordered the parties to be prepared to schedule an evidentiary hearing at the February 19 review hearing.

After reviewing medical records, a police report, affidavits of the parties, and OFW exchanges between the parties, the GAL believed that mother had placed the tattoos on daughter in an effort to interfere with father's parenting time. In a report filed on January 26, 2015, the GAL noted that there were many discrepancies in mother's story and that the information the GAL had gathered indicated that daughter was with mother when the tattoos were placed on daughter. The GAL expressed concerns about other allegations mother had made against father and about the fact that mother did not bring daughter to Midwest Children's Resource Center until one and a half months after the tattoos were placed. The GAL also expressed concern about mother's mental health and her failure to follow through with court-ordered DBT.

The GAL observed daughter with father and two of her siblings on January 24, 2015.

The GAL stated:

[I]t was clear to this writer that [daughter] has a close, positive relationship with her father and is comfortable in his home. The meeting happened in the children's area of the library, and [daughter] repeatedly returned to her father's side to ask for water, candy, or to provide [father] with toys from the play kitchen in the library.

The GAL expressed concern about father's aggressive behavior, anger issues, alcohol use, and criminal history. In June 2014, a police officer was dispatched to father's residence in response to a fireworks complaint. The officer arrested father because he was

uncooperative. In the squad car, father, who had been drinking, made several threatening comments to the officer. Father pleaded guilty to a felony terroristic-threats charge. The GAL noted that father can be emotionally aggressive toward mother. But the GAL did not have concerns about father's interaction with daughter. The GAL's report states that father admitted making a comment about a pedophile but explained that he said it in the context of telling mother to watch daughter so that daughter would not wander away from mother's home unsupervised.

The GAL recommended that father "have parenting time at all times, subject to [mother's] supervised parenting time" up to two times each week for three hours each time; father abstain from all nonprescribed mood-altering chemicals, including alcohol, and submit to urinalyses or breath analyses at the GAL's request; both parties complete updated psychological assessments; and both parties submit to lie-detector tests about the temporary tattoos. Following a hearing with counsel and the GAL on February 13, 2015, the district court adopted the GAL's recommendations, with the exception of the recommendation that father have temporary sole legal and physical custody. At a March 2015 review hearing, the parties agreed about who should be appointed as the custody evaluator.

Both parties underwent psychological evaluations by Dr. James Gilbertson. Regarding father,

Dr. Gilbertson noted that Father had a history of antisocial behavior dating back to adolescence, including suspensions from school and other behavioral issues, and use of drugs and alcohol beginning around age thirteen. Father reported to Dr. Gilbertson that his delinquencies were related to alcohol and drugs, and indicated that he "turns into someone else" when drinking hard liquor. Dr. Gilbertson found that

Father met criteria for Antisocial Personality Disorder, without psychopathic features, which he did not consider to be a major mental illness but rather an underlying disorder. He noted that it appeared Father may be showing some maturation and willingness at looking at his behavior patterns and their consequences, especially with regard to alcohol. Dr. Gilbertson recommended that Father continue in therapy . . . and abstain from all alcohol.

Regarding mother,

Dr. Gilbertson concluded that Mother does not suffer from a major mental illness of thought, mood, perception, judgment, or orientation and does not have a personality disorder of type to impact parenting presence or capacity. He noted she appeared somewhat immature generally, leading to poor boundaries, lapses in judgment, being too trusting and having difficulty asserting herself. He used an Unspecified Personality Disorder diagnosis for what he viewed as passive-aggressive maneuvering and a history of immature decision-making. He noted that her psychological profile is not consistent with a mother who would typically be abusive to her children and that if she were to err in child rearing it would be primarily related to poor judgment in the face of particular stressful events. He also found that she did not meet diagnostic criteria for PTSD, even though Mother's treating therapist at the time . . . had diagnosed Mother with PTSD.

Between October 13, 2015, and April 1, 2016, the district court conducted nine days of evidentiary hearings on father's motion, at which 22 witnesses testified. The district court then issued a 72-page order granting father sole legal custody and the parties joint physical custody of daughter. The district court found that there had been a substantial change in circumstances and that modification of custody was in daughter's best interests. The court granted the parties almost equal parenting time with daughter.

The district court made more than 15 pages of findings regarding the temporary-tattoo incident. The court found:

74. The parties' accounts of what happened after October 31, 2014 diverge widely. Father denies any parenting time with [daughter] after October 30, 2014 until January 23, 2015 pursuant to court order, a claim supported by his wife, Ms. Wadsen. Mother testified that Father had unscheduled parenting time with [daughter] from November 2 at 6:30 p.m. to November 3, 2014, at 6:30 p.m., which was arranged by a telephone call to Mother's work and is therefore not reflected in OFW. Mother testified she permitted this additional time because she felt bad about Father missing Halloween with [daughter], and that she discovered the tattoos when [daughter] returned home.

....

77. The Court finds that the parties more likely than not did occasionally communicate outside OFW. However, it does not necessarily mean Father contacted Mother at work at Pearle Vision on November 1, 2014 to arrange parenting time on November 2-3, 2014.

78. Ms. Loney testified that on November 1, 2014, she answered the phone and recognized Father's voice asking to speak with Mother. The caller did not identify himself. There are no records to indicate that Father called Pearle Vision. Father and Ms. Wadsen's cell phone records contain no contacts with Mother's home or Pearle Vision. Mother argues that Father could have easily called from another telephone, but apart from her testimony and that of Ms. Loney, there is simply no evidence Father made such a call, and it seems unlikely given the parenting time made through OFW. It is also unclear how Father could have known Mother was at work, as Ms. Loney testified that Mother had been called in that morning outside of her usual schedule due to high customer volume.

....

83. While Mother's mother and friends provided testimony somewhat supporting that Father could have had parenting time from November 2-3, 2014, there is no record of the phone call Mother claims Father made to arrange the parenting time. It is odd that he would have chosen to contact

Mother at work by telephone, especially when she was not even scheduled to be there, particularly as the parties were actively communicating on OFW. It is even more of a stretch of the imagination that Mother would have permitted that parenting time despite their ongoing conflict, which continued to escalate while Mother claimed father had [daughter]. None of the OFW messages mention this parenting time and in fact strongly suggest that it did not occur.

The district court made specific findings on the OFW messages exchanged between the parties from October 28, 2014, through November 7, 2014. On October 28, 2014, father notified mother that he would be starting a new job on November 3, 2014, and that his wife would exchange daughter by 5:00 p.m. in his place. On October 30, 2014, mother replied that there was no need to exchange daughter if father would not be present and that father should contact her attorney. The parties exchanged messages about Halloween on October 31, 2014. In the morning on November 2, 2014, mother suggested that father take daughter that Friday after work until Sunday, November 7-9, 2014, and again indicated that father should not have parenting time on Tuesday, November 4 if he would not be there. Father responded that mother should be prepared to exchange daughter on November 4. On November 2, 2014, mother notified father that she did not think daughter should ever be with father, stating that daughter did not want to go with father and always wanted to stay home with mother. Also on November 2, before she claims to have discovered the tattoos, mother sent father a message about them. On November 4, 2014, mother continued to insist that father should not have parenting time when he was working, and mother did not show up at the exchange location where father's wife was waiting.

The district court found that mother's polygraph test indicated deception and that father's polygraph test did not. The court also found that the results of an earlier polygraph test arranged for and taken by mother on her own were inconclusive. But the court stated that it "place[d] little, if any[,] weight on the results of any polygraph tests."

The district court found that mother had motivation to place the temporary tattoos on daughter to interfere with father's parenting time and that she placed or caused the temporary tattoos to be placed on daughter. The court noted that mother did not want father's wife caring for daughter when father was working, that mother may have been alarmed by father's threat to move for a custody change, that mother's reports about the tattoos and whether or not she had other concerns were inconsistent, and that reports about other concerns were supported by only vague allegations.

The district court also cited Detective Patterson's testimony.

126. . . . Detective Patterson noted inconsistencies in Mother's report of the timeline, which he testified is important in such investigations and found it suspicious that she did not report the tattoos until at least three days after discovering them. . . . Detective Patterson also noted that temporary tattoos generally do not last very long, particularly if the area is washed. He viewed the photos of the temporary tattoos taken November 7, 2014, in which the temporary tattoos still appeared vibrant despite Mother's claim she originally discovered them November 3, 2014, four days earlier.

The court stated:

148. Although Mother claims Father had parenting time November 2-3, 2014, there is no documentary evidence indicating that he did despite the flurry of OFW messages. Mother's friend Bill Walsh testified he witnessed an exchange of [daughter] on November 2, 2014, but was unable to identify the man present at the exchange any more specifically than as

a male, even with Father in the courtroom. Ms. Jackson testified that she did not see [daughter] in Mother's home November 3, 2014, but also believed that R.R. was with his Father, which Mr. Rosenthal testified credibly that he was not. This reduces the credibility of Ms. Jackson's testimony. Ms. Odland-Thielen, Ms. Burchard, and Z.R. did see the tattoos in Mother's home on November 3, 2014. While Ms. Burchard believed [daughter] had returned from parenting time, there appears to be no basis for her belief apart from Mother's claim.

....

152. By contrast, Father has consistently maintained that he did not have parenting time after October 30, 2014, had no parenting time November 2-3, and was not responsible for the temporary tattoos. When the detective initially contacted him, he asked Father only generally about tattoos on [daughter]. Father responded regarding the May 2014 tattoos, strongly suggesting they were the only temporary tattoos he was aware of.

The court also found that the OFW messages, "which unlike memory cannot fade or be influenced," were "the most reliable evidence" and that they contained no suggestion that father had parenting time on November 2-3, 2014.

The GAL recommended that father be granted sole legal and sole physical custody of daughter. The custody evaluator recommended that father be granted sole legal and sole physical custody of daughter. The custody evaluator did not believe that placing the temporary tattoos on daughter alone justified a custody change but that mother's decision to place them "with the specific intent to interfere with father's parenting time rose to the level of endangerment." The custody evaluator "found that both parents were able to meet [daughter's] needs under the best interest factors, the most important of which were the history of domestic abuse between the parties, the parties' mental health, sibling

relationships, and Father's criminal history." The custody evaluator "observed that Father was open to contact between [daughter] and her siblings on Mother's side." "She also observed that Father did not make excuses about his faults or past." On the other hand, "Mother communicated a great deal but gave little information and failed to directly answer questions, which resulted in [the custody evaluator] feeling that she had little information about Mother's potential issues and that Mother was not effectively addressing those issues."

The district court awarded the parties joint physical custody of daughter and awarded father sole legal custody. The district court denied mother's new-trial motion. Mother appealed. Father did not file a brief, and this court directed the appeal to proceed under Minn. R. Civ. App. P. 142.03.

D E C I S I O N

I.

Mother argues that the district court erred by expanding the GAL's authority beyond that permitted by statute. The statute states:

A guardian ad litem shall carry out the following responsibilities:

(1) conduct an independent investigation to determine the facts relevant to the situation of the child and the family, which must include, unless specifically excluded by the court, reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, as appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case;

(2) advocate for the child's best interests by participating in appropriate aspects of the case and advocating for appropriate community services when necessary;

(3) maintain the confidentiality of information related to a case, with the exception of sharing information as permitted by law to promote cooperative solutions that are in the best interests of the child;

(4) monitor the child's best interests throughout the judicial proceeding; and

(5) present written reports on the child's best interests that include conclusions and recommendations and the facts upon which they are based.

Minn. Stat. § 518.165, subd. 2a (2016).

Mother argues that the GAL exceeded her authority by unilaterally modifying mother's parenting time while father's motion was pending, directing father to change daughter's doctor and enroll her in a different preschool, weighing in on financial matters, and directing the parties to obtain polygraphs. The only time that the GAL went beyond making recommendations was when she modified mother's parenting time. That issue, however, is now moot because the district court decided father's motion and granted mother parenting time. *See Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011) (stating that an issue is "moot when an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible" (quotation omitted)).

Mother also argues that "[t]he expansive authority that the GAL displayed . . . prejudiced the case against [mother] with long-lasting effects." The district court made six pages of detailed findings on the GAL's role in this proceeding. The district court then found:

183. The Court finds that the GAL has conducted herself in an appropriate and professional manner in a very difficult proceeding that has undoubtedly consumed a great deal of her time and energy. The GAL's reports and testimony reflect a careful consideration of the facts and an adherence to

her responsibility to advocate for the best interests of [daughter] and Mother's concerns about bias are unfounded.

This finding is supported by record evidence and is not clearly erroneous. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (explaining procedure for determining whether factual findings are clearly erroneous).

II.

Mother argues that the district court should have granted her motion for a new trial because polygraph-test results are not admissible in Minnesota. *See State v. Opsahl*, 513 N.W.2d 249, 253 (Minn. 1994) (“Results of polygraph tests . . . are not admissible in Minnesota in either criminal or civil trials.”). A proceeding to modify custody is a “special proceeding,” and a motion for a new trial in a post-decree modification proceeding is not authorized. *Huso v. Huso*, 465 N.W.2d 719, 720-21 (Minn. App. 1991). Also, because the district court specifically stated that it “place[d] little, if any[,] weight on the results of any polygraph tests,” any error in admitting the results was not prejudicial. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, a party must show that the district court erred and that the error was prejudicial).

III.

Mother argues that the district court erred by failing to properly apply the rebuttable presumption against joint legal custody when domestic abuse has occurred between the parties and by awarding sole legal custody to father. A district court has broad discretion in determining custody matters. *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn.

2008). Our review of custody determinations is limited to whether the district court abused its discretion by making findings that are not supported by the evidence or by improperly applying the law. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996). When determining whether findings are clearly erroneous, an appellate court views the record in the light most favorable to the district court’s findings and defers to the district court’s credibility determinations. *Vangness*, 607 N.W.2d at 472. “We cannot reweigh the evidence presented to the [district] court.” *Id.* at 475.

When domestic abuse has occurred between the parents, a court shall use a rebuttable presumption that joint legal or joint physical custody is not in the child’s best interests. Minn. Stat. § 518.17, subd. 1(b)(9) (2016). To determine whether the presumption is rebutted, a court must consider (1) “the nature and context of the domestic abuse” and (2) “the implications of the domestic abuse for parenting and for the child’s safety, well-being, and developmental needs.” *Id.*

The district court found that father was convicted of misdemeanor domestic assault against mother in 2011 when mother was pregnant with daughter. Father denied physically assaulting mother but admitted that he probably caused her fear. The district court found that father and his current wife testified credibly that no domestic abuse has occurred in their relationship; both incidents of domestic abuse reported by mother occurred before daughter was born, but “the history of domestic abuse between the parties continues to affect their relationship and could thereby affect Father’s relationship with [daughter]”; alcohol was involved in the domestic-abuse incidents and “[f]ather’s continued abstinence is a significant factor in the management of the risk that [daughter] will be negatively

affected by the conflict and history of domestic abuse between the parties”; and a potential exists that daughter could be negatively affected by the domestic abuse, but there is no evidence that she has been affected by it and, therefore, the domestic-abuse factor did not weigh in favor of either party.

Mother argues that the district court did not properly consider father’s mental health. The district court made three-and-a-half pages of findings on father’s mental health, his progress in therapy, his chemical-dependency issues, his criminal history, and his prescription medications. The district court did not err in applying the rebuttable presumption or abuse its discretion in awarding father sole legal custody of daughter.

IV.

Mother’s challenge to the district court’s findings on the best-interests factors asks this court to disregard the district court’s credibility determinations. This court defers to the district court’s credibility determinations. *Vangsness*, 607 N.W.2d at 472. This court will not “disturb findings of fact based on conflicting evidence . . . unless [the findings are] manifestly and palpably contrary to the evidence as a whole.” *In re S.G.*, 828 N.W.2d 118, 127 (Minn. 2013) (quotation omitted). The district court made more than 22 pages of detailed findings on daughter’s best interests, which are supported by record evidence and are not manifestly and palpably contrary to the evidence as a whole.

Affirmed.