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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1067**

In re the Custody of: J. K. L.
Peter Romero Lockhart, petitioner,
Appellant,

vs.

Quintiny Luenelle Flakes,
Respondent.

**Filed July 30, 2018
Affirmed in part, reversed in part, and remanded
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-FA-15-8114

Bridget R. Landry, Cordell & Cordell, P.C., Edina, Minnesota (for appellant)

Timothy D. Lees, Lees Family Law, Ltd., Edina, Minnesota (for respondent)

John Brad Kearns, Minneapolis, Minnesota (guardian ad litem)

Considered and decided by Jesson, Presiding Judge; Cleary, Chief Judge; and
Halbrooks, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this child-related dispute, appellant-father argues that the district court: (1) made findings regarding the child's best interests that are not supported by the record, and should

have adopted the guardian ad litem's recommendations regarding parenting time; (2) overstated father's child-support obligation by (a) overstating father's income by erroneously including father's overtime income, and (b) failing to adequately consider father's nonjoint children; and (3) failed to credit father for his prior overpayment of child-care support. We affirm in part, reverse in part, and remand.

FACTS

J.K.L. was born in 2013. J.K.L.'s parents, appellant-father and respondent-mother, are not married. On November 23, 2015, father petitioned the district court to establish custody and parenting time. Shortly thereafter, mother moved with J.K.L. to Florida without consulting father and without his consent.¹ Mother returned to Minnesota with J.K.L. in January 2017.

A guardian ad litem was appointed in April 2016. Later that year, the guardian ad litem produced reports which included conclusions and recommendations. The guardian ad litem updated his reports after mother moved back to Minnesota.

The district court heard arguments in November 2016 and February 2017 on the issues of Monday overnight parenting time, Father's Day overnight parenting time, to whom to award child support, and the tax dependency exemption. In his reports, the guardian ad litem recommended an equal parenting-time schedule, with mother and father

¹ The exact timing of mother's move in relation to father's filing is unclear. The district court noted that mother moved "after being served" with father's pleadings. But the guardian ad litem's report indicates that mother had been planning to move prior to father's filing, and was served on the day mother had planned to and did move.

alternating parenting time on Monday overnights. Parenting time and child support are the only issues on appeal.

On May 11, 2017, the district court issued its findings of fact, conclusions of law, and order for custody, parenting time, and child support. The district court: (1) granted mother parenting time every Monday overnight; (2) modified father's basic child-support obligation from \$506 to \$737 per month; and (3) modified father's child-care-support obligation from \$400 to \$357 per month. Father appeals.

D E C I S I O N

District courts have “broad discretion to decide parenting-time questions,” and an appellate court “will not reverse a parenting-time decision unless the district court abused its discretion by misapplying the law or by relying on findings of fact that are not supported by the record.” *Suleski v. Rupe*, 855 N.W.2d 330, 334 (Minn. App. 2014).

“On appeal, findings of fact are accepted unless they are clearly erroneous.” *Id.* When determining whether findings are clearly erroneous, we view “the record in the light most favorable to the [district] court’s findings.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (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.* at 474. 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.” *Id.*

Whether to modify child support is also within the broad discretion of the district court. *Shearer v. Shearer*, 891 N.W.2d 72, 77 (Minn. App. 2017). “A district court abuses its discretion when it sets child support in a manner that is against logic and the facts on record or it misapplies the law.” *Id.*

I. The district court did not err in its application of the best-interest factors or in declining to adopt the guardian ad litem’s recommendations.

Father argues that the district court erred in its application of the best-interest factors and by failing to adopt the guardian ad litem’s recommendations. Father contends that the record does not support the district court’s best-interest-factor findings.

In considering a petition for parenting time between unmarried parents, a district court “shall consider and evaluate all relevant factors in section 518.17, subdivision 1, to determine the best interests of the child.” Minn. Stat. § 257.025(a) (2016). Section 518.17 provides:

In evaluating the best interests of the child for purposes of determining issues of custody and parenting time, the court must consider and evaluate all relevant factors, including:

(1) a child’s physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child’s needs and development;

(2) any special medical, mental health, or educational needs that the child may have that may require special parenting arrangements or access to recommended services;

(3) the reasonable preference of the child, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference;

(4) whether domestic abuse, as defined in section 518B.01, has occurred in the parents’ or either parent’s household or relationship; the nature and context of the domestic abuse; and the implications of the domestic abuse for parenting and for the child’s safety, well-being, and developmental needs;

(5) any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs;

(6) the history and nature of each parent's participation in providing care for the child;

(7) the willingness and ability of each parent to provide ongoing care for the child; to meet the child's ongoing developmental, emotional, spiritual, and cultural needs; and to maintain consistency and follow through with parenting time;

(8) the effect on the child's well-being and development of changes to home, school, and community;

(9) the effect of the proposed arrangements on the ongoing relationships between the child and each parent, siblings, and other significant persons in the child's life;

(10) the benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent;

(11) except in cases in which domestic abuse as described in clause (4) has occurred, the disposition of each parent to support the child's relationship with the other parent and to encourage and permit frequent and continuing contact between the child and the other parent; and

(12) the willingness and ability of parents to cooperate in the rearing of their child; to maximize sharing information and minimize exposure of the child to parental conflict; and to utilize methods for resolving disputes regarding any major decision concerning the life of the child.

Minn. Stat. § 518.17, subd. 1(a) (2016).

In applying the best-interest factors, a district court

must make detailed findings on each of the factors . . . based on the evidence presented and explain how each factor led to its conclusions and to the determination of custody and parenting time. The court may not use one factor to the exclusion of all others, and the court shall consider that the factors may be interrelated.

Minn. Stat. § 518.17, subd. 1(b)(1) (2016). The district court must additionally “consider that it is in the best interests of the child to promote the child's healthy growth and

development through safe, stable, nurturing relationships between a child and both parents.” *Id.*, subd. 1(b)(2) (2016).

Father challenges each best-interest factor that the district court concluded weighed in mother’s favor regarding Monday overnights by arguing that the record does not support the district court’s findings or conclusions. Father first challenges factor 1 by arguing that the “district court adopted nearly verbatim [mother]’s proposed findings on this factor.”

As an initial matter, we note that

[a] district court’s verbatim adoption of a party’s proposed findings and conclusions of law is not reversible error per se. Adoption of a party’s proposed findings by a district court is generally an accepted practice. But if a court adopts a proposed order, it raises the question of whether the court independently evaluated the evidence.

Schallinger v. Schallinger, 699 N.W.2d 15, 23 (Minn. App. 2005) (citations omitted), *review denied* (Minn. Sept. 28, 2005). Further, it is the complaining party’s duty to show that the district court erred: “[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it.” *Waters v. Fiebelkorn*, 216 Minn. 489, 495, 13 N.W.2d 461, 464-65 (1944); *see Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (quoting *Waters* in a family-law appeal); *Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999) (applying *Loth* in a family-law appeal).

More specifically, because we do not presume error by the district court, the complaining party has the obligation to provide the appellate court with a record sufficient to show any alleged error. *See Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530,

531 (1968) (dismissing appeal for an inadequate record, stating both that “[e]rror cannot be presumed” and that the appellant has the burden to provide an adequate record on appeal). Here, the proposed findings of fact, which father contends the district court adopted verbatim, are not in the record. *See* Minn. R. Civ. App. P. 110.01 (defining record on appeal). Therefore, the record is insufficient for this court to conclude that the district court erred.

The district court’s analysis of factor 1 spans over four pages, and the district court ultimately found that while it did “not believe that an equal access parenting schedule . . . will adversely affect the minor child’s emotional stability, an extended schedule with his father may disrupt some of the stability that [J.K.L.] has established with his mother.” The district court further found that awarding equal parenting time would relegate mother “to weekend parenting time only” and she “would not be able to participate in getting the child ready for school, returning home from school, working on the child’s homework and preparing for the next school day.” It concluded that factor 1 weighed “in favor of mother’s proposed parenting time schedule . . . so that both parents have an opportunity to have weekday parenting time with the minor child.” The district court made detailed findings and explained how the factor led to its conclusions. The district court’s findings as to factor 1 are not clearly erroneous.

Next, father challenges factor 4 and argues that the district court should not have considered an alleged domestic incident that occurred over three years prior to J.K.L.’s birth and for which the charges were subsequently dismissed. The district court mentioned an incident noted by the guardian ad litem involving father and the mother of father’s

nonjoint daughter. It noted that the order for protection was voluntarily dismissed by the complainant, and the related charges (felony domestic assault by strangulation and gross misdemeanor interference with an emergency call) were dismissed prior to J.K.L.'s birth after father met his conditions for a continuance without prosecution. The district court did "not believe that [father] or [mother] present[ed] a danger of domestic abuse to [J.K.L.]," but nonetheless concluded that the incident was "highly concerning to the court."

The district court did not use this factor "to the exclusion of all others," *see* Minn. Stat. § 518.17, subd. 1(b)(1), but rather concluded that the seriousness of the alleged domestic incident weighed in favor of mother's proposed schedule, even though the charges were ultimately dismissed. This finding is not clearly erroneous.

Next, father challenges factor 6, arguing that mother necessarily had a larger role in caring for J.K.L. due to her unilateral move to Florida which prevented father from seeing J.K.L. for a period of time. The district court noted that father "has consistently made efforts and requests to see the child" and concluded:

While [father] has been a consistent caregiver for the minor child, the court finds that it is [mother] who has been the minor child's primary caregiver. . . . While some of this is due to [mother]'s own actions in unilaterally enrolling the minor child in full time daycare and then moving to Florida, it cannot be denied that [mother] has been the minor child's primary caregiver for much of his life.

Again, the district court did not use this factor "to the exclusion of all others," *see* Minn. Stat. § 518.17, subd. 1(b)(1), but rather concluded that mother's role as primary caregiver outweighed father's role as a consistent caregiver. This finding is not clearly erroneous.

Father next challenges factor 8, arguing that the record is devoid of evidence supporting the district court's conclusion that an equal parenting-time schedule would disrupt J.K.L.'s stability. The district court noted that "the minor child's primary residence has always been primarily with [mother]." The district court concluded that an equal parenting-time schedule would not give mother "any school week parenting time. . . . This would be disruptive to the minor child's stability, as he has consistently relied on his mother as his primary caretaker." The court's conclusion that school-week parenting time exclusively with father would disrupt J.K.L.'s stability when he had formerly spent school weeks with mother is not clearly erroneous.

Father also challenges factor 9, arguing that an equal parenting-time schedule "would allow each parent and [J.K.L.]'s half-siblings to have equal time with [him], promoting and fostering those relationships." The district court noted that father "has a loving and strong support system" for J.K.L. But it concluded that J.K.L. "should be able to experience before and after school time with his mother and brother . . . just as he will be able to do in his father's home on Tuesdays through Fridays." The district court concluded that spending school nights with his mother and half-brother was important to J.K.L.'s relationship with them. This finding is not clearly erroneous.

Father next challenges factor 10, arguing that the district court's parenting-time schedule does not maximize J.K.L.'s time with father because mother's weekend parenting days are not interrupted by school. The district court concluded that the equal parenting-time schedule proposed by the guardian ad litem "could be detrimental to the child's health and well-being" because the guardian ad litem concluded that children J.K.L.'s age tend to

do best with one primary home. It further concluded that the equal parenting-time schedule would result in mother “not being adequately involved with [J.K.L.]’s education.” The court explained why maximizing parenting time with father and not allowing mother to be adequately involved in J.K.L.’s schooling could be detrimental to his well-being. These findings are not clearly erroneous.

After providing detailed findings on each of the 12 best-interest factors, the district court found six factors weighed in favor of granting mother every Monday overnight, five factors were neutral, and one factor weighed in favor of granting father every other Monday overnight in accordance with the guardian ad litem’s recommendation. The district court concluded that the best-interest factors demonstrated that awarding mother every Monday overnight was in J.K.L.’s best interests. The district court’s findings and conclusions are not erroneous or contrary to the statute.

A guardian ad litem must advocate for a child’s best interests, and must “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(2), (5) (2016). While a guardian ad litem must present recommendations, a district court is not required to adopt those recommendations. Minn. Stat. § 518.17, subd. 1 (2016); Minn. Stat. § 257.025(a). Instead, Minn. Stat. § 518.17, subd. 1(b), provides guidelines for district courts to follow in applying the best-interest factors.

Father does not provide any additional support for his argument. While the district court could have adopted the guardian ad litem’s recommendation regarding Monday overnights, it was not required to do so and it did not abuse its discretion by ordering against

that recommendation. The district court did not abuse its discretion in awarding mother every Monday overnight.

II. The district court improperly applied Minn. Stat. § 518A.29 (2016) in calculating father's income.

Father argues that the district court used the wrong statute to modify his child-support obligation, and as a result included his overtime income that began after the filing of the support petition. Mother concedes that the district court erred, but argues that the mistake was harmless error. After conducting an analysis under Minn. Stat. § 518A.29(b), the district court concluded that father's overtime income should be included in his gross monthly income for purposes of calculating child support.

"A court's determination of income must be based in fact and will stand unless clearly erroneous." *Newstrand v. Arend*, 869 N.W.2d 681, 685 (Minn. App. 2015) (quotation omitted), *review denied* (Minn. Dec. 15, 2015). Minn. Stat. § 518A.29 governs the calculation of gross income for purposes of child support. In calculating income, a district court cannot include overtime income if several factors are met. *Id.* (b). But in calculating income for purposes of *modifying* child support, a district court must use Minn. Stat. § 518A.39, subd. 2 (2016). The factors governing the inclusion of overtime income in gross income differ between section 518A.29 and section 518A.39. *Compare* Minn. Stat. § 518A.29(b)(2)(i) (excluding overtime that began after the filing of the petition for parenting time and support), *with* Minn. Stat. § 518A.39, subd. 2(e)(2)(i) (excluding overtime that began after the entry of the existing child-support order).

Here, the district court applied section 518A.29 in finding that father's overtime income did not begin after the filing of the November 2015 petition, and accordingly did not perform the proper analysis under section 518A.39. The district court thus abused its discretion in calculating father's income. We remand for the proper calculation of father's gross income.

III. The district court improperly calculated father's child-support obligation for his nonjoint children.

Father next argues that the district court failed to include cost-of-living adjustments when deducting obligations for his nonjoint children in calculating child support. Mother concedes that the district court erred. In calculating father's gross income, the district court deducted \$1,235 for father's support obligations to his nonjoint children.

In calculating gross income for purposes of child support, "payments ordered by a court for a nonjoint child . . . are deducted from other periodic payments received by a party." Minn. Stat. § 518A.29(g) (2016). Orders establishing child support furthermore must provide for biennial cost-of-living adjustments. Minn. Stat. § 518A.75, subd. 1(a) (2016).

At the hearing, father introduced the child-support orders for his two nonjoint children. Child support for father's first nonjoint child was set at \$461 per month in October 2006 and the order provided for cost-of-living adjustments according to the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for urban consumers. Child support for father's second nonjoint child was set at \$774 per month in August 2010 and the order similarly provided for cost-of-living adjustments according to

the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for urban consumers. By the time of the support order for father's second nonjoint child, his support obligation for his first nonjoint child had increased to \$472 per month. At the time the district court filed the support order for J.K.L., father's support obligations for his two nonjoint children had increased to a total of \$1,335 per month.

Because the district court deducted only \$1,235, the original total amount of father's child-support obligation for his two nonjoint children, the district court erred. We remand for the district court to properly calculate father's adjusted support obligations for his nonjoint children.

IV. The district court did not err when it did not credit father for overpayment of child-care support.

Finally, father argues that he is entitled to reimbursement for child-care support paid in excess of actual child-care costs from November 2014 through May 2017. Mother argues that this issue was not properly before the district court. The district court modified father's child-care support obligation but did not reimburse him for overpayment prior to the modification.

In modifying child support, a district court must order child-care support based on the actual child-care expenses. Minn. Stat. § 518A.39, subd. 7 (2016). Additionally, "[t]he [district] court may provide that a decrease in the amount of the child care based on a decrease in the actual child care expenses is effective as of the date the expense is decreased." *Id.*

Even if the district court properly considered the child-care support reimbursement issue, it had discretion to make father's decreased child-care obligation effective as of the date of decrease. *See* Minn. Stat. § 518A.39, subd. 7 (“[t]he court *may* provide . . .” (emphasis added)). The district court's decision not to do so was not an abuse of its discretion.

Affirmed in part, reversed in part, and remanded.