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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1176**

In re the Matter of:
Colleen Jea'ne Olson, petitioner,
Appellant,

vs.

Jeremy Michael Olson,
Respondent.

**Filed May 21, 2018
Affirmed in part and reversed in part
Peterson, Judge**

Olmsted County District Court
File No. 55-FA-16-7431

David L. Liebow, Godwin Dold, Rochester, Minnesota (for appellant)

Jeremy Michael Olson, St. Charles, Minnesota (pro se respondent)

Michelle Frohrip, Rochester, Minnesota (guardian ad litem)

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

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

PETERSON, Judge

In this appeal from a district court order that continues and amends an order for protection (OFP), appellant mother argues that the district court erred by (1) making findings of fact that are not supported by the record; (2) granting respondent father more

parenting time than he was granted under the parties' dissolution judgment; and (3) requiring the parties to engage in alternative dispute resolution. We affirm in part and reverse in part.

FACTS

Appellant Colleen Jea'ne Olson (mother) and respondent Jeremy Michael Olson (father) are the parents of a child born in September 2012. Their six-year marriage was dissolved in August 2016 by a stipulated judgment and decree. Under the terms of the stipulated judgment, the parties share joint legal custody, and mother has sole physical custody of the child subject to father's reasonable and liberal parenting time. The stipulated judgment also states that no OFP affecting the parties or the child had been issued.

In October 2016, after the dissolution judgment was entered, mother petitioned on behalf of herself and the child for an OFP against father. The district court granted an ex parte OFP and appointed a guardian ad litem (GAL). After a hearing in October 2016, the district court issued an OFP for mother and child against father. A review hearing was held in March 2017. In June 2017, the district court issued an order continuing the OFP for mother but dismissing it as to the child. Finding of fact number 15 in the district court's order states that "the parties have stipulated to dismiss the child from the Order for Protection and that the continuing Order for Protection would only cover Mother."

The district court also found that there was a pending criminal case in Dodge County in which father was charged with rape against mother. The court found:

The rape case involves an incident that allegedly occurred in 2013; the parties remained married after it and no report was made until 2015 when the parties separated and custody

became an issue. Father signed and served the dissolution summons & petition on Mother on October 1, 2017,^[1] filed it with the court on November 2, 2015 . . . and Mother's initial report to law enforcement was made on November 7, 2015. The Court is aware that rapes are not always reported immediately, but looking back at Mother's actions before, during [and] since the finalization of the dissolution, the Court questions whether Mother's reporting was in good faith or a retaliatory action.

The June 2017 order also states that the charge against father was not resolved before the OFP hearing, and, in a separate matter in 2014, father was convicted of third-degree assault against mother.

Mother brought an appeal from the June 2017 order in this court and filed a motion in the district court under Minn. R. Civ. App. P. 108.02, asking the district court to stay the effect of the June 2017 order pending the appeal and to reinstate the district court's November 2016 OFP.² Mother contended that she did not stipulate to dismissing the child from the OFP.

Following a hearing on mother's motion for a stay pending appeal, the district court acknowledged in a September 12, 2017 order that it mistakenly found that the parties stipulated to dismissal of the OFP as to the child. The district court also found that this error

doesn't change that the facts of the case that after hearing all of the evidence, the recommendations of the guardian ad litem, and the credibility of the testimony of the witnesses the Court made no finding of domestic abuse by father toward the minor

¹ It is apparent that 2017 is a typographical error, and the district court meant 2015.

² Mother also filed an ex parte motion in the district court seeking a stay of the June 2017 order pending a hearing on her motion for a stay pending the appeal. The district court denied the motion for ex parte relief.

child and dismissed the minor child from the order for protection.

The district court denied the motion for a stay pending appeal and amended finding of fact number 15 in the June 2017 order to state, “Prior to the hearing, [father] stipulated to the entry of an order for protection against him on behalf of Mother without a finding that any domestic abuse had occurred.”

DECISION

I.

Mother challenges certain district court findings. We will not set aside a district court’s findings of fact unless they are clearly erroneous. *Maiers v. Maiers*, 775 N.W.2d 666, 668 (Minn. App. 2009). “A finding of fact is clearly erroneous if it is manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *O’Brien v. Dombeck*, 823 N.W.2d 895, 900 (Minn. App. 2012) (quotation omitted). “When determining whether findings are clearly erroneous, [an] appellate court views 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.

Finding that parties stipulated to dismiss child from OFP

Mother challenges the district court’s authority to amend the June 2017 order to correct finding of fact number 15 while her appeal was pending before this court. We review “[q]uestions concerning the authority and jurisdiction of [district] courts” de novo.

State v. Pflepsen, 590 N.W.2d 759, 763 (Minn. 1999). Generally, “the filing of a timely and proper appeal suspends the [district] court’s authority to make any order that affects the order or judgment appealed from.” Minn. R. Civ. App. P. 108.01, subd. 2. “The purpose of this rule is to avoid the confusion and waste of time potentially arising from having the same issue before two courts at the same time.” *State v. Dwire*, 409 N.W.2d 498, 502 (Minn. 1987) (quotation omitted). But

[p]ending a duly executed appeal, the jurisdiction of a [district] court is [s]uspended only as to those matters necessarily involved in the appeal, not as to those matters which are independent of, or which are supplemental to, the appeal or collateral to the proceeding in which the appealed order or judgment was rendered. Among the matters over which the [district] court retains jurisdiction pending an appeal are those which are ancillary or supplemental to the appeal as in aid of its proper presentation, such as orders to correct the record, to make and certify a settled case or bill of exceptions.

State v. Barnes, 249 Minn. 301, 302–03, 81 N.W.2d 864, 866 (1957) (footnotes omitted); see Minn. R. Civ. App. P. 108.01, subd. 2 (“[T]he [district] court retains jurisdiction as to matters independent of, supplemental to, or collateral to the order or judgment appealed from.”).

Mother specifically challenges finding of fact number 15 in her appeal. Whether the finding is clearly erroneous is not a matter that is independent of, supplemental to, or collateral to the June 2017 order. Therefore, mother’s appeal suspended the district court’s authority to amend the finding. Based on our review of the record, we conclude that the finding is clearly erroneous because we have not found a stipulation in which the parties stipulated to dismissal of the OFP as to the child.

Mother contends that this erroneous finding is significant because it demonstrates that the district court was under a fundamental misapprehension of the posture of the case when it decided whether to continue the OFP with respect to the child. But the district court's order to dismiss the OFP as to the child was not based only on the erroneous finding that there was a stipulation. The district court found that the parties' parenting-time consultant credibly testified that he observed three visits between father and the child and, during the visits, the child was very happy, engaged, and attended to father, acted very normally, and had a strong bond. There were no signs of abuse, the child showed no signs of fear of father, and the parenting-time consultant had no concerns regarding father's parenting. Also, the guardian ad litem recommended that father have unsupervised parenting time that increases on a gradual basis.

Most significantly, the district court stated that "[the child's] safety was taken into consideration in setting the parenting time schedule." The court then found that parenting time with father is not likely to endanger the child's physical or emotional health or impair his emotional development and will enable father and the child to maintain a parent-child relationship that is in the child's best interests. These findings support the district court's decision to dismiss the OFP as to the child even without a stipulation.

Finding that mother delayed reporting sexual assault

Mother argues that the district court's finding that she did not promptly report father's sexual assault in 2013 is clearly erroneous. Citing the court file in the criminal case in Dodge County, the district court found that mother did not initially report the alleged 2013 incident until November 7, 2015. But the statement of probable cause in the

complaint in the Dodge County file states that mother reported the incident on November 7, 2013. The finding that mother initially reported the incident on November 7, 2015 is clearly erroneous.

Finding regarding third-degree assault

Mother argues that the district court's finding that father's 2014 conviction of third-degree assault was not a "domestic abuse" charge is clearly erroneous. The district court did not find that the third-degree-assault conviction was not a "domestic abuse" charge; the court found that "Father pled guilty to a third degree assault charge against Mother. The charge is a qualified domestic violence related offense; however, Father was not convicted of the two domestic abuse charges that the State also charged him with." We find no error in this finding. Third-degree assault under Minn. Stat. § 609.223 (2016) and domestic assault under Minn. Stat. § 609.2242 (2016) are different offenses. The district court's finding indicates that mother was the victim of the third-degree assault, but that does not convert the conviction under Minn. Stat. § 609.223 into a conviction under Minn. Stat. § 609.2242.

Effect of erroneous findings

Mother contends that the district court would have viewed the parties' credibility very differently if it had not made the erroneous findings of fact. But the court's conclusion that mother was not credible is supported by other evidence in the record that casts doubt on mother's credibility. For example, mother made a report of child abuse against father with the St. Charles Police Department on October 25, 2016. The district court found:

The officer who initially investigated the complaint found no evidence of child abuse and no merit to go forward with the case following the investigation. Mother was upset and sent several emails from her Rochester Police Department employee email address to the St. Charles Chief of Police, Ken Frank, claiming their investigation had been inadequate and requesting they reopen it. Chief Frank followed up on the investigation and again concluded no child abuse had occurred.

The court also found that “Chief Frank raised the issue of Mother’s improper use of her Rochester Police Department employee email address to send him several dozen emails regarding reopening the investigation which he saw as an attempt to intimidate him.”

The district court found that Chief Frank’s testimony was credible and, with respect to his testimony, found:

The Court agrees with Chief Frank that Mother’s use of her Rochester Police Department email address, number, nature of complaints about and increasing intensity of contacts regarding her child abuse allegations are troubling. It appears to the Court as though Mother was trying to use her position with the Rochester Police Department to pressure Chief Frank into conducting further investigation(s), a forensic interview of the child, and siding with her so a different determination would be made.

In light of these findings, we are not persuaded that the district court would have found mother credible if it had not made the two erroneous findings. We also note that the district court extended the OFP for mother, which indicates that the court did not disregard mother’s testimony.

II.

Mother argues that the district court lacked authority to increase father’s parenting time beyond the time awarded in the parties’ dissolution judgment. The dissolution

judgment granted father parenting time alternating weekends from Friday at 4:00 p.m. until Sunday at 6:00 p.m. The dissolution judgment also granted father alternating Sunday evenings from “4:00 p.m. until 7:00 p.m. from approximately May through October so long as he is unable to exercise mid-week parenting time due to his long hours.” The dissolution judgment did not set a mid-week parenting time but stated that when father’s schedule permitted it, he would be “entitled to one weekday evening of parenting time from 4:00 p.m. until 7:00 p.m. every week, the specific day of which shall be agreed upon by the parties based upon each part[y]’s work schedule and the child’s activity schedule.” The dissolution judgment specified that when father’s schedule permitted him to exercise mid-week parenting time, the Sunday schedule would be eliminated.

The only increase in parenting time that mother cites is that the June 2017 order grants father parenting time on alternating weekends from Friday at 4:00 p.m. until Sunday at 7:00 p.m., instead of until Sunday at 6:00 p.m. We decline to address this de minimus one-hour change in parenting time every two weeks. See *Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (holding that a technical error that would provide party with additional \$120 was de minimus and did not require remand).

III.

Mother argues that the district court erred in requiring the parties to attend mediation if they have difficulty communicating or agreeing on parenting time and to use some form of alternative dispute resolution (ADR) to attempt to resolve parenting-time disputes before applying to the district court for relief. Minn. R. Gen. Pract. 310.01(b) states:

The court shall not require parties to participate in any facilitative process if one of the parties claims to be the victim of domestic abuse by the other party or if the court determines there is probable cause that one of the parties or a child of the parties has been physically abused or threatened with physical abuse by the other party. In circumstances when the court is satisfied that the parties have been advised by counsel and have agreed to an ADR process established in Rule 114 that will not require face-to-face meeting of the parties, the court may direct that the ADR process be used.

The parties agreed in the dissolution judgment to use mediation, and a mediator was appointed to assist the parties. But the order continuing the OFP does not specify whether the parties have been advised by counsel and have agreed to an ADR process that will not require face-to-face meetings of the parties. Because father pleaded guilty to committing third-degree assault against mother and mother was granted a continuing OFP against him, the district court erred in ordering ADR when the requirements of Minn. R. Gen. Pract. 310.01(b) were not met. *See Mechtel v. Mechtel*, 528 N.W.2d 916, 918-19 (Minn. App. 1995) (concluding that court erred by requiring parties to participate in mediation after issuance of ex parte OFP). We, therefore, reverse the district court's order requiring the parties to participate in ADR.

Affirmed in part and reversed in part.